



## Packaged food safety in urban area: An observation from the Malaysian law of tort on negligence

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### Abstract

The law of tort on negligence plays an important role in protecting individual from contaminated food. The use of the law of negligence in the area of an individual protection is largely in reply to the necessity of each individual to protect his rights and interests in consuming food, including packaged food. Therefore, the aim of this paper was to examine the use of the law of tort on negligence in relation to the individual protection on the packaged food safety in urban area from Malaysian legal perspectives, identify actions and cases which deal with individual protection on contaminated packaged food from the Malaysian legal perspectives and lastly, discuss the law of tort on negligence as a means to protect individuals from contaminated packaged food in Malaysia in order to achieve sustainable development.

**Key words:** Malaysian law of tort on negligence, packaged food, safety.

### Introduction

Packaged food is a popular source of food nowadays as most people perceived that they strive better on it. For most people especially in the urban areas, packaged food is considered healthier, free of contaminants and convenience or fashion even though the price is high. Packaged food also is very valuable during emergencies or outbreak of illness especially when food supplies can be contaminated due to certain natural disasters. Having accepted as a part of modern life today in urban area <sup>8,9</sup>, the increased in sales of packaged food worldwide especially in urban area has attracted many small-scale entrepreneurs to participate in the packaged food industry <sup>10,11</sup>. However, without proper control in laws and regulations from the authority, this condition may compromise health of consumers <sup>7</sup>. Commonly, there are many laws that ensure the safety of packaged food.

Law governs the relationship of the individual with the state and also between one another. An easy approach to examine how it operates in the legal system is to classify it in the light of its relationships <sup>1,5</sup>. Law may be classified into three parts. There are "Public Law", "Private Law" and "International Law". Public law governs the relationship between the state and the individual and as for private law, also known as civil law, governs the relationship between an individual and another individual <sup>2</sup>. Meanwhile, international law governs the relationship between the state and another state <sup>3</sup>.

These above-mentioned laws play an important role in relation

to individual protection on packaged food safety in urban area. The development of the law on individual protection of packaged food safety in urban area is not solely based on public law alone; anyway, private law has also made contribution to serve similar function in protecting the individual on packaged food safety in urban area. Private law, essentially law of tort, serves as a mechanism to protect individual on packaged food safety in urban area <sup>5,7,9</sup>.

Law of tort may be subdivided into areas of law dealing with different types of matters affecting the actions, rights and remedies of the injured parties. There are law of tort on nuisance, trespass and negligence. As for this paper, the discussion will focus on the law of tort on negligence in relation to individual protection on the packaged food safety in urban area from Malaysian legal perspectives.

### The Safety of Packaged Food in Urban Area Based on the Malaysian Law of Tort on Negligence

There is no specific statute that governs the law of tort on negligence in Malaysia. In the event where there is no specific statute governs a particular private law, therefore, Civil Law Act, 1956 will come into the picture. Therefore, we will refer to the section 3 of the Civil Law Act, 1956 <sup>5</sup>.

Section 3 of the Civil Law Act, 1956 lays down that:

"3 (1) Save so far as other provision has been made or may hereafter

be made by any written law in force in Malaysia, the Court shall: (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7<sup>th</sup> day of April, 1956; (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1<sup>st</sup> day of December, 1951; (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12<sup>th</sup> day of December, 1949.

Provided that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of State of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.”

Based on the above-mentioned section 3 of the Civil Law Act, 1956, therefore, law of tort on negligence in Malaysia is based and referred to the English law of tort on negligence.

### **Negligence from Legal Perspectives**

According to the definition given by Lord Wright in the case of *Loughelly Iron & Coal v MMullan* [1934] AC 1, 25<sup>12-14</sup>: “Negligence means more than heedless or careless conduct...it properly connotes the complex concepts of duty, breach and damage thereby suffered by person to whom the duty owed.”

Therefore, based on the above-mentioned definition, it is clear that under the law of negligence, the essential elements are as the following:

- (i) duty of care is owed by an individual who caused damage (a defendant) to another individual who suffered the damage (a plaintiff);
- (ii) there is a breach of the above-said duty;
- (iii) there is damage which is caused by the above-said breach of duty; and
- (iv) a reasonable close connection between the damage and the breach of duty<sup>13</sup>.

**Duty of care:** The first essential element under the law of negligence is duty of care. The plaintiff is required to prove the existence of duty of care in his legal action against the defendant who caused the damage.

What is “duty of care”? In the case of *Donoghue v Stevenson* [1932] AC 562<sup>12-14</sup>, Lord Atkin has introduced and established the “neighbour principle” as duty for every individual or in other words, “neighbour principle” is an obligation imposed by law to every individual.

Based on this “neighbour principle,” an individual is required to take reasonable care to avoid acts or omissions, which the individual can reasonably foresee that would be likely to injure the individual’s neighbour<sup>12</sup>. The neighbour refers to persons who are so closely and directly affected by the individual’s act, which the individual ought reasonably to have them in contemplation as being so affected when the individual is directing his mind to acts or omissions that are being called into question<sup>12</sup>.

According to the case of *Donoghue v Stevenson* [1932] AC 562<sup>12-14</sup>: Parties involved: Plaintiff/appellant Donoghue and

defendant/respondent Stevenson. The facts of the case:

The Defendant/Respondent was a manufacturer of ginger beer. The ginger beer had been bottled in an opaque bottle. After that the ginger beer had been delivered and sold to a retailer. Later on, a friend of the Plaintiff/Appellant purchased the ginger beer from the above-mentioned retailer for the Plaintiff/Appellant as a gift. When the Plaintiff/Appellant had drunk some of the ginger beer, then, she poured out of the balance of the said drink, at that moment she was shocked when a decomposed snail came out. Subsequently, she fell seriously ill.

The Plaintiffs/Appellants Argument: The defendant/respondent as a manufacturer failed to ensure the safety of the consumer, which consumed the product. As the result, the Plaintiff/Appellant suffered injuries. The defendants/ respondents Argument: The Plaintiff/Appellant was not a contracting party; therefore, the plaintiff/appellant doesn’t own the privity of the contract. As a result, the plaintiff/appellant has no right to commence her action in the said contract. In addition, under the law of contract, in order for the plaintiff to take action against the defendant in the court, the plaintiff is required to prove to the court that all the essential elements of a contract have been fulfilled<sup>4,6</sup>.

The House of Lords held that the appellant was entitled for the compensation even though there was no privity of contract between the respondent and the appellant but the respondent owed duty of care towards the appellant based on the “Neighbour Principle,” where the respondent must ensure his neighbours i.e. the consumer will not suffer injuries when the consumer consumed his product.

**Breach of duty of care:** Upon the establishment of the duty of care, next, the plaintiff is required to prove that the defendant has breach the duty of care. How is the plaintiff able to determine whether the defendant has been in breach the duty of care? The test of “a reasonable man” is the answer. At this stage, the plaintiff is required to prove to the court of law that the defendant’s acts or omissions falls below the standard of care of “a reasonable man.”

In the case of *Glasgow Corporation v Muir* [1943] AC 448<sup>12-14</sup>, Lord Macmillan defined “a reasonable man” as “an ordinary competent man exercising that particular act. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if conforms to one of these proper standards, then he is not negligence.”

**Causation:** The third essential element under the law of negligence is that, there is damage caused by the defendant and it is due to the defendant’s breach of duty. Federal Court Judge, the Honourable Raja Azlan Shah declared in the case of *Government of Malaysia & Ors v Jumaat Mahmud & Anor* [1977] 2 MLJ 103<sup>13</sup>: “...must be commensurate with her opportunity and ability to protect the pupil from dangers that are known... It is not a duty of insurance against harm but only a duty to take reasonable care for safety of the pupil... The sole question... is a question of causation... the injury... in fact caused by wrongful act of the teacher... it cannot be said that it was reasonably foreseeable.”

It is clear from Raja Azlan Shah FCJ judgment that:- the plaintiff is required to prove that the damage, injury and/or risk was foreseeable; the plaintiff is also required to prove that the defendant has failed to take reasonable approaches to prevent plaintiffs injury and/or damage; and if the plaintiff is able to prove the above-mentioned matters, he has established the existence of the essential element under the law of negligence, i.e. there is damage caused by the defendant and it is due to the defendants breach of duty.

In addition, the court of law in general will use a test that is known as “but for” test, in order to determine whether the damage was caused by the defendants breach of duty. In the case of JEB Fasteners Ltd. v Marks Bloom & Co. [1983] 1 All ER 538<sup>12, 13</sup>. Parties involved as follows: Plaintiff JEB Fasteners Ltd and defendant Marks Bloom & Co. The facts of the case: In this case, where the plaintiffs took legal action against the defendants on the ground that the defendants were negligently in preparing a report on a company that caused damage and loss to the plaintiffs, who had planned to take over the above-mentioned company. The court had used the “but for” test in the case. The court held that, it was clearly shown that the plaintiffs were going to take over the above-said company anyway; therefore, the defendants negligence, even if proven, it did not cause of plaintiffs any damage and loss.

***A reasonably close connection between the damage and the breach of duty:*** A reasonably close connection between the damage and the breach of duty is the final element under the law of negligence. The test for the above-said element is based on The “Wagon Mound” (No. 1) [1961] AC 388. In this case, where the defendant used a vessel, on which the defendant had negligently spilled a quantity of oil while stopping at the Sydney Harbour and subsequently, the oil flowed to the docks where ships were under repairs. Only after 60 hours from the spill, it caused fire and subsequently the fire caused damage to the docks where the ships were under repairs. At the Supreme Court of New South Wales, the Court gave decision in favour of the plaintiff (the owner of the dock) on the ground that the damage was the direct result of the defendants action. On appeal to the Privy Council, it was held that the plaintiff must produce the evidences to the court that the type or kind of damage that he suffered must be foreseeable, in order to recover damages. Unfortunately, the plaintiff failed to prove that the damage by fire was not foreseeable because only after 60 hours from the spill, it caused fire. Therefore, the Privy Council gave decision in favour of the defendant.

### **The Legal Actions Under the Law of Tort on Negligence: Focusing on the Individual Protection on Packaged Food Safety**

There are a number of cases that has been brought forward to the court on packaged food safety for individual protection under the law of tort on negligence. Among the leading cases are, firstly the case of Donoghue v Stevenson [1932] AC 562<sup>12-14</sup>, and the case of Daniels and Daniels v R White & Sons Ltd and Tabbard [1934] 4 All ER 258<sup>12, 13</sup>.

In the case of Daniels and Daniels v R White & Sons Ltd and Tabbard [1934] 4 All ER 258<sup>12, 13</sup>: Parties involved are as follows: Plaintiffs Daniels and Daniels and defendants R White & Sons

Ltd and Tabbard. The facts of the case: In this case, where the plaintiffs took legal action against the defendants on the ground that that the defendant negligently produced lemonade that containing carbolic acid. The court held that, in order for the plaintiff to take action under the law of negligence on drinking water safety, the individual is required to prove to the court of law that the existence of duty of care in his legal action, in which, there is a breach of the above-said duty and there is damage which caused by the above-said breach of duty; and lastly, there is a reasonable close connection between the damage and the breach of duty. In addition, the courts have shown reluctance and refusal to award based on pure economic loss. Therefore, it must be on personal injury or damage, and secondly, under the law of negligence, the burden of proof is great which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendants actions and the damage suffered by the plaintiff, and further to further prove that a duty of care is owed by the defendant, which the defendant has breached the duty and in the end caused the damage.

### **Conclusions**

Based on the above discussion, in order for an individual to take action under the law of tort on negligence in relation to the protection on the packaged food safety in urban area from Malaysian legal perspectives, the individual is required to prove to the court of law the existence of duty of care in his legal action. He must also prove that there is a breach of the above-said duty and damage caused by the above-said breach of duty; and lastly, there is a reasonably close connection between the damage and the breach of duty.

In addition, there are advantages and disadvantages associated with an action under law of tort on negligence. The advantages are, firstly, there is no need to prove that the injured party (the plaintiff) and the party that caused the injury (the defendant) have a privity of contract, and secondly, there is no requirement to demonstrate loss by other members of the public<sup>14</sup>. As for the disadvantages, firstly, the courts have shown reluctance and refusal to award damages based on pure economic loss. Therefore, must be on personal injury or damage. Secondly, under the law of negligence, the burden of proof is great, which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendants actions and damage suffered by the plaintiff<sup>14</sup>.

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