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Consumer Right to Safe Product: The Application of Strict Criminal Liability in Product Safety Legislations in Malaysia

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ABSTRACT

Consumer right to safety is one of the earliest rights that has been recognised by the late President John F Kennedy in 1962, when he presented a speech to the American Congress. Later, this right had been recognised by the International Consumer Unions (presently known as the Consumers International). Presently, the consumer right to safety is one of the basic rights of the consumers that has been recognised universally, together with other basic rights, namely, the right to basic needs, the right to information, the right to choice, the right to redress, the right to be heard, the right to consumer education and the right to live in a clean environment. The objective of this article is to analyse the application of criminal liability in product safety legislations. This article will adopt the content analysis method by analysing the provisions of certain legislations to see the extent of the application of criminal liability in those adopted legislations. The findings of the research show that all of the studied legislations have adopted the strict criminal liability. The strict criminal liability offence is widely used as a means of deterring traders and producers from engaging in certain types of trading abuse which operate to the detriment of consumers. It is believed that the strict criminal liability can protect the consumers from unsafe products and uphold the consumer right to safe products.

Keywords: Consumer, consumer rights, product safety, strict criminal liability

INTRODUCTION

The consumer right to safety in relation to products means that the products they purchase must be safe for their intended use, must include thorough and explicit directions for proper use, and must be tested by the manufacturer to ensure product quality and reliability. The consumers must be protected from products that could endanger them in any manner. Product safety must be one of the priority areas that should be attended by every country (Rahmah, 2000). President John F Kennedy considered unsafe products as a threat not only to the consumers' safety and health, but also a threat to the nation's harmony. This concern was manifested in his special message speech to the US Congress on protecting the consumers' interest on 15 March 1962:

> *If a consumer is offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if*

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a consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened and national interest suffers.

Product safety issues have been addressed by various organisations at international and national levels. Since 1930's, the consumer movements at international level have been addressing these issues through their product testing to identify the dangers associated with the products. According to F. Josie (unpublished), at this stage, product testing has been done on breakfast cereals, soap, tooth brush and milk. Product safety issues have also become the attention of the Organisation for Economics, Cooperation and Development (OECD) since its inception in 1960. Their efforts in product safety were manifested in the establishment of Consumer Policy Committee to facilitate information exchange in product safety, and in 1972, OECD formed the Working Party on Product Safety. The United Nations also plays a vital role in promoting product safety. In 1982, it passed a resolution on the Protection against Products Harmful to Health and the Environment, followed by its Guidelines for Consumer Protection in 1985. Furthermore, various networks have also been established internationally to tackle the product safety issues, such as, Codex Alimentarius Commission, Pesticides Action Network (PAN) and Health Action International (HAI). The significant contribution of the United Nations can be seen in its issue of the Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Withdrawn, Severely Restricted or Not Approved by Governments. This list was part of the United Nations' effort to disseminate information at the international level relating

TABLE 1
List of parent legislations on product safety

No.	Legislation	Objective
1.	Poison Act 1952	To control the importation, possession, manufacturing, storage, transportation and use of poison.
2.	Sale of Drugs Act 1952	To control and make regulations on the importation, exportation, production, sale and use of opium and other dangerous drugs.
3.	Medicine (Advertisement and Sales) Act 1956	To prohibit certain advertisement relating to medical matters and to regulate the sale of substances recommended as a medicine.
4.	Trade Descriptions Act 2011	To promote good trade practices by prohibiting false trade descriptions and false or misleading statements, conduct and practices in relation to the supply of goods and services and to provide for matters connected therewith or incidental thereto.
5.	Pesticides Act 1974	To control the importation, production, sale and storage of pesticides through registration of import and export permits.
6.	Food Act 1985	To protect the public against health hazards and fraud in the preparation, sale and use of food, and for matters incidental thereto or connected therewith.
7.	Standards of Malaysia Act 1996	To formulate policies, programs, scheme, projects and activities on standardization.
8.	Consumer Protection Act 1999	To provide for consumer protection, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims and for matters connected therewith.

to unsafe products to health and environment (Sothi, 1994).

At the national level, since 1970's, various consumer associations, such as the Consumer Association of Penang (CAP) and the Federation of Malaysian Consumer Associations (FOMCA), have initiated product testing on food, drinks, cosmetics, vehicles and other products. The results of the testing are disseminated to the public through the consumer bulletins (Mohd Hamdan, 1990). Besides the effort taken by the Malaysian consumer associations, the government has also taken legal measures to protect the consumers. Before 1999, there were seven parent legislations which regulated product safety in various goods, and these legislations are still in force. In 1999, Malaysia had enacted the Consumer Protection Act 1999, which brought significant changes to product safety. Table 1 shows the list of these legislations.

LITERATURE REVIEW

Laws have been used to protect consumers for centuries (Peter, 2004). These laws have drawn on a variety of legal norms, including criminal laws, torts and contracts to achieve their objectives. In relation to product safety, safety legal measures are seen as an important instrument to safeguard consumer safety from unsafe products. According to Miller and Brian (1985), a considerable number of statutes and regulations are concerned with consumer safety. Many are concerned with specific types of products, for example, food, drugs, medicines and poisons. Meanwhile, others are of general applications. Brian and Deborah (2000) analysed various goods safety legislations in the United Kingdom in relation to specific types of products, such as, the Pharmacy and Poisons Act 1933, Poisons Act 1972, Medicine Act 1968 and others. All these acts impose criminal law sanctions to safe guard consumer safety from unsafe products. Likewise, Christoper, Mark and Howard (1996) analysed product safety provisions in the United Kingdom Consumer Protection Act 1987 and the General Product Safety Regulations 1994. Notably, the Consumer Protection Act 1987 and the General Product Safety Regulations 1994 apply the similar sanction, which has been adopted by the Pharmacy and Poisons Act 1933, Poisons Act 1972, Medicine Act 1968 and other acts. In addition, Geraint and Thomas (1997) in their book also paid a particular attention to General Product Safety Regulations 1994.

Conversely, David and John (1997) divided their discussion on product safety into two parts, namely, product safety under the civil law and product safety under the criminal law. Product safety under the civil law gives the right to the consumer to bring a personal action against the wrongdoer when the consumer suffers physical harm to his person or his property. This personal action is called product liability action. Product liability is generally the liability of persons for damages caused by defective products (Curzon, 1998). The physical harm is compensated through the operation of the law of tort, an action under the consumer protection legislation or an action for breach of contract (David & John, 1997). On the other hand, product safety under the criminal law, which is the focus of this paper, involves the intervention of the government or state to enforce the product safety legislations.

Meanwhile, Wu Min Aun (2000) analysed the product safety provisions in the Malaysian Consumer Protection Act 1999. Part III of the Consumer Protection Act 1999 deals with products or goods safety.[1] Part III is of general applications, in which it applies to all products except for health care goods and food. The study on product safety legislations in Malaysia is needed in order to see the legal measures taken by the government through the criminal law instrument under various legislations.

RESEARCH METHODOLOGY

The research method used in this study is the content analysis. According to Valerine (1995), content analysis is a research method which is

[1] Part III of the Consumer Protection Act 1999 also deals with services safety.

adopted to analyse legal provisions, ministries' decisions, academic books, contracts and decided cases. This method is chosen because the objective of this research is to examine the provisions of the product safety legislations to see the application of strict criminal liability in product safety legislations in Malaysia. This research is pure legal research. Mahdi Zaharaa (1998) also agreed that legal research is done to review and improve the concepts, theories, principles and applications of the law. Notably, legal research refers to any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Anwarul Yaqin, 2007). Having mentioned that, the legal research of this article is a study of legal rules, decided cases and the underlying concepts pertaining to product safety legislations. According to Anwarul Yaqin, a term of legal rules refers to rules recognised and enforceable under any legal system, or rules declared under any constitutional document, or statutory provisions framed by law-making bodies or authorities, or subsidiary legislation framed by administrative bodies or authorities. Further, Anwarul Yaqin explained that the term concepts, theories or doctrines are ordinarily used to refer to ideas, notions, perceptions or abstract principles that represent a particular view or explain the nature, purpose or function of law.

THE APPLICATION OF STRICT CRIMINAL LIABILITY

As mentioned above, the Malaysian government has taken a legal measure to protect the consumers from unsafe products through various parent legislations as shown in Table 1. In all of these legislations, the legal measure taken is the application of criminal liability on those who contravene the provisions of the laws. This approach has a significant advantage for the consumers, which states that the expensive and time-consuming process of regulating the rogue is entrusted to public officials, who in recent legislation usually have a duty to enforce its provisions (Robert & Geoffrey, 2004). Criminal law is widely used as a means of deterring traders and producers from engaging in certain types of trading abuse, which operates to the detriment of consumers (David & John, 1997). In other words, the criminal law is used as a means of protecting the consumers' interest. The principal means of control is strict criminal liability, which is employed as a means of encouraging the business community to achieve high standards of trading conduct (David & John, 1997). Strict criminal liability offence requires no blameworthiness on the part of the accused (Rusell, 2001). The prosecution is relieved from the responsibility of proving that the alleged offence has the necessary *mens rea* (which means the state of mind) as to one of the elements in criminal law offence. What the prosecution needs to prove is *actus reus*, which means the guilty act or forbidden conduct. The normal criminal offences require the proof of *actus reus* (the forbidden conduct) and *mens rea* (the state of mind).

The idea of strict liability took hold in the nineteenth century with the development of social legislation regulating certain activities affecting the public's health, safety or welfare, such as food and drugs, liquor and health, as well as safety in factories and other places of work. It is largely confined to statutory offences and is possible where statutory definition of an offence fails to include and express *mens rea* or negligent requirement (Russell, 2001).

Strict criminal liability is used as an instrument by governments to protect consumers against the strength of producers (Sornarajah, 1985). Besides that, it is also used to enforce statutory standards (Michael, 1996) and able to prevent the offender and other people from committing the same offence. Yong Pung How J. in the case of *MC Strata Title No 641 v Public Prosecutor*[2] had made the following statement

[2] [1993] 2 SLR 650.

in relation to the creation and objective of strict criminal liability:

> *The creation of strict liability offences would be vital in promoting the objects of the statute and encouraging greater vigilance to prevent the commission of the offences.*

The justification for imposing strict criminal liability can also be seen in the judgment of Lord Diplock in the case of *Tesco Supermarket Ltd v Nattrass*[3], whereby Lord Diplock had said that:

> *Consumer protection is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer from the loss he would sustain if the offence were committed…The loss to the consumer is the same whether the acts or omissions, which result in his being given inaccurate or inadequate information, are intended to mislead him, or are due to carelessness or inadvertence. So is the corresponding gain to the other party to the business transaction with the consumer…Where, in the way that the business is now conducted, they are likely to be acts or omissions of employees of that party and subject to his orders, the most effective method of deterrence is to prove upon the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence. This I apprehend is the rationale and moral justification for creating in the field of consumer protection…offences of 'strict liability'.*

Based on the opinions of the above writers, strict criminal liability is imposed on activities affecting the public's health, safety or welfare. Since public's health, safety or welfare is very important for the stability of a country, it is submitted that the use of strict criminal liability is justified and must be supported. The use of strict criminal liability to protect the public's health and safety can be seen in the case of *Hobbs v Winchester Corp*.[4] In *Hobbs*, the Court had to consider section 117 of the Public Health Act 1875, which provides that where any meat unfit for the food of man was exposed for sale, the person to whom the meat belonged or in whose possession, it shall be liable to a penalty. The question that arose for consideration was whether the offence under section 117 was complete by the mere fact of exposing for sale and selling meat unfit for human consumption or whether it was necessary to prove in addition that the butcher knew it was unfit. Cozens-Hardy MR in his judgment said that:

> *In my opinion the offence was complete when the unsound meat was exposed for sale and sold, and I think it is not relevant for the butcher to say 'I did not know and my men did not know and neither I nor they with such knowledge as we had having regard to our positions in life could have ascertained that the meat was unsound, although experts have subsequently given evidence which has satisfied the arbitrator that such was the case.*

Cozens-Hardy MR held that a person in possession of meat intended for human food is liable to conviction whether he knew or did not know that the meat was unfit for human food. In rejecting the argument of the accused that as the disease could not reasonably be discovered except by an expert, strict liability should not be imposed, Kennedy L J further said:

[3] [1972] AC 153.
[4] [1910] 2 KB 471.

> *...To say that the difficulty of discovering the disease is sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take risk of purchasing an article of food which may turn out to be dangerous to life and health.*

In *Public Prosecutor v Teo Kwang Kiang*,[5] the High Court of Singapore agreed that the imposition of strict liability was necessary for the protection of the public. The respondent in this case was charged with an offence under section 40(1) of the Singapore Environmental Public Health Act 1987 for having in possession snow peas (a type of vegetable) which were unfit for human consumption. The prosecuting officer argued that section 40(1) of the Act is an absolute liability provision and the words importing *mens rea* are not present in section 40(1). The vegetables were in his possession, and therefore, he was guilty of an offence under the Act. Section 40(1) of the Environmental Public Health Act 1987 reads:

> *No person shall, without lawful excuse, have in his possession any article of food intended for human consumption which is unsound or unfit for human consumption.*

Furthermore, S. Rajendran J., who delivered the judgment of the Court, agreed with the contention of the prosecutor. According to the learned judge, since the respondent had the snow peas in his possession, he had imported them for the purpose of human consumption and the snow peas had a very high quantity of carbon disulphide in them that they were unfit for human consumption, the respondent was guilty of the offence charged. The decision in *Public Prosecutor v Teo Kwang Kiang* shows the willingness of the Court to impose strict criminal liability when the public's health or safety is at stake.

There is an argument which says that whenever a statute is silent as to *mens rea*, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*, and this was decided in the case of *Sweet v Parsley*.[6] House of Lords in *Sweet v Parsley* further said:

> *The fact that other sections of the Act expressly required mens rea, for example, because they contain the word "knowingly", is not in itself sufficiently to justify a decision that a section which is silent as to mens rea creates a strict liability offence.*

Later in 1985, the case of *Gammon (Hong Kong) Ltd v Attorney-General*[7] states that the presumption that *mens rea* is required for criminal offence can be rebutted if the words of a statute suggest that strict liability is intended. In *Gammon*, it was stated that the presumption that *mens rea* is required was less strong for regulatory offences than truly criminal offences. *Gammon* is an example of a regulatory offence. The defendants in *Gammon* were involved in building works in Hong Kong. Part of the building they were constructing fell down, and it was found that the collapse had occurred because the builders had failed to follow the original plans exactly. The Hong Kong building regulations prohibited deviation of any substantial way from such plan, and thus, the defendants were charged with breaching the regulations and were convicted in the lower court. On appeal, they argued that they were not liable because they did not know that the

[5] [1992] 1 CLJ 318.
[6] [1969] 1 All ER 347.
[7] [1985] AC 1.

changes they made were substantial ones. Nevertheless, the Privy Council held that the relevant regulations created offences of strict liability and the conviction was upheld.

The reason why the House of Lords was reluctant to treat the offence in *Sweet v Parsley* as strict liability offence was because, the offence in *Sweet v Parsley* was regarded as being a 'true crime', and not merely a breach of regulatory provisions. In *Sweet v Parsley* case, Ms Sweet, who was a teacher, took a sublease of a farmhouse outside Oxford. She rented the house to the tenants and rarely spent any time there. Unknown to her, the tenants were smoking cannabis on the premise. When they were caught, she was found guilty of being concerned in the management of the premise, which was being used for the purpose of smoking cannabis, contrary to the Dangerous Drugs Act 1965. Ms Sweet appealed on the ground that she knew nothing about what the tenants were doing, and could not reasonably have been expected to have known. Lord Reid in this case acknowledged that strict liability is appropriate for regulatory offences or quasi-crimes, which are not criminal in any real sense. However, their Lordships regarded the offence, which Ms Sweet was being charged, as a true crime - the stigma had, for example, caused Ms Sweet to lose her job. Their Lordships held that it was not a strict liability offence, and since Ms Sweet did not have the necessary *mens rea*, her conviction was overturned.

The reluctance of the courts to treat an offence as strict liability offence when a statute is silent as to *mens rea* can further be seen in the case of *B (a minor) v DPP*.[8] In this case, a 15-year-old boy had sex with a 13-year-old girl. The boy was charged with inciting a child under the age of 14 to commit an act of gross indecency. Both the trial judge and the Court of Appeal ruled that this was a strict liability offence and that there was therefore no defence available that the boy believed the girl to be over 14. The House of Lords confirmed that there was a presumption that *mens rea* was required, and ruled that the relevant offence was not actually one of strict liability. The House stated that in order to rebut the presumption that the offence required *mens rea*, there needed to be a 'compellingly clear implication' that the Parliament intended the offence to be one of strict liability. Since the offence carried a serious social stigma and a heavy sentence, the House of Lords decided that the Parliament did not have this intention.

In Malaysia, the product safety legislations deal with regulatory offences. A regulatory offence is one in which no moral issue is involved, and usually (though not always) one for which the maximum penalty is small (Catherine & Frances: 2008). According to Cobuild Dictionary (1997), the term 'moral' refers to principles and beliefs concerning right and wrong behaviours. In addition, the product safety legislations in Malaysia are enacted to protect the public's health and safety. All the product safety legislations discuss below aim at protecting consumers from unsafe products. It is submitted that since the offences in the legislations are regulatory offences aiming at protecting the public's interest, the strict criminal liability must be imposed when the words of the provisions are silent as to *mens rea*.

Sale of Drugs Act 1952

The Sale of Drugs Act 1952 is under the jurisdiction of the Ministry of Health. This Act protects consumers from adulterated drugs, false or misleading statements on drugs and others. Section 2 of the Sale of Drugs Act 1952 defines drug as:

> *any substance, product or article intended to be used or capable, or purported or claimed to be capable, of being used on humans or any animals, whether internally or externally, for a medicinal purpose.*

[8] [2000] AC 428.

According to this section, drugs intended to be regulated under this Act are drugs used for medicinal purposes on humans and animals. The Sale of Drugs Act 1952 allows the public to have any drug analysed. This can be done through any medical officer or inspector appointed under section 3 of the Act. Section 6 of the Act provides that:

> *Any person, other than the seller, may, on payment of the prescribed fee together with the cost of the sample, require any officer of inspector to purchase a sample of any drug and submit the same for analysis.*

The application of strict criminal liability is found in section 10 of the Act. Section 10 stipulates that:

(i) any person commits an offence who sells -

- any adulterated drug without fully informing the purchaser at the time of the sale of the nature of the adulteration;
- any drug in any package which bears or has attached thereto any false or misleading statement, word, brand, label or mark purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age or proportion of the article contained in the package or of any ingredient thereof;
- any drug containing any substance addition of which is prohibited;
- any drug containing a greater proportion of any substance than is permitted;
- any drug for internal use which contains methyl alcohol, isopropyl alcohol or denatured alcohol; or
- any drug which is not of the nature or not of the substance or not of the quality of the drug demanded by the purchaser to the prejudice of the purchaser.

The provision in section 10(1)(a) is quite misleading. The provision will have the implication that adulterated drug can be sold if the seller informs the purchaser at the time of the sale of the nature of the adulteration. Anything which is adulterated is dangerous and must be prevented from selling. It is submitted that this provision needs to be reviewed.

The section creates a regulatory offence, in which no moral issue is involved. The section makes it an offence if anybody sells adulterated drug, or drug which contains prohibited substance, or drug which is prejudiced to the purchaser. The offence is committed by the act of selling the prohibited drug. It is submitted that, to presume that the offence requires *mens rea* as decided in the case of *Sweet v Parsley* is not appropriate because it does not involve a moral issue

Medicines (Advertisement and Sale) Act 1956

The Medicines (Advertisement and Sale) Act 1956 regulates advertisements and sales relating to medicines, which is under the purview of the Ministry of Health. The Act regulates medicinal advertisements by prohibiting certain advertisements and imposing the requirement that all advertisements relating to medicines must obtain the approval from the Medicine Advertisements Board as stipulated in section 4B of the Act. The imposition of this requirement is to ensure that there is no false or misleading information in the advertisements and also to safeguard the safety of the consumers.

Section 3(1)(a) of the Medicines (Advertisement and Sale) Act 1956 prohibits advertisements relating to certain diseases specified in the Schedule to the Act. The Act has listed twenty diseases whereby the advertisements relating to these diseases are prohibited. Some of these diseases are defects of the kidney, defects of the heart, diabetes, asthma, and tuberculosis. Despite the fact that the advertisements relating to these diseases are prohibited, nevertheless, we can still see many medicines which claim that they can cure these diseases. To substantiate these claims, they produce testimonials from people who have used the medicines. This normally occurs in

traditional medicines. There is a difficulty to charge them under this Act because the Act does not cover advertisements in relation to traditional medicines. Nevertheless, the Ministry of Health is now in the process of coming up with an act to regulate these traditional medicines.

The Act also prohibits advertisements relating to medicines for the purpose of practising contraception among human beings, improving the condition or function of the human kidney or heart, or improving the sexual function or sexual performance of human beings, as stipulated in section 3(1)(b) & (c). Besides that, according to section 4 of the Act, advertisements relating to any medicines that can procure miscarriages among women are also prohibited. Thus, any person who contravenes all these prohibitions is committing an offence under section 5 of the Medicines (Advertisement and Sale) Act 1956.

Again, section 5 is silent as to the element of *mens rea*. Is it justified to presume that *mens rea* is needed? If one looks at the objective of the Act, which is to prohibit certain advertisements relating to medical matters and to regulate the sale of substances recommended as a medicine, the Act is merely creating regulatory offences. Therefore, it is submitted that the offences created under section 5 are strict liability offences.

Trade Descriptions Act 2011

The Trade Descriptions Act 2011 is a new Act which replaces the Trade Description Act 1972. It is under the jurisdiction of the Ministry of Domestic Trade, Co-operatives and Consumerism and is more comprehensive than the 1972 Act.

Trade descriptions are defined in section 6(1) of the Act. This Act is used, amongst others, to monitor false trade descriptions to products by making it an offence in section 5(1) of the Act to apply false trade descriptions to any goods or products. Through this mechanism, the consumers are protected from imitation products, which may cause dangers to them. In relation to product monitoring, a power is given to the Assistant Controller of Trade Descriptions in section 30 of the Act. This monitoring power is related to the control of false trade descriptions to goods or products. Goods in the context of this Act include all kinds of moveable property regardless whether they are food, health care, pharmaceuticals and others.

The Trade Descriptions Act 2011 is also the manifestation of the application of strict criminal liability. In section 5(1), it provides that any person who does any of the following commits an offence:

- applies a false trade description to any goods; or
- supplies or offers to supply any goods to which a false trade description is applied, or
- exposes for supply or has in his possession, custody or control for supply any goods to which a false trade description is applied.

In the case of *Ang Seng Ho v Public Prosecutor*,[9] it was held that the offence in section 3 (under the Trade Descriptions Act 1972, which has no significant difference from section 5(1) of the 2011 Act, except that section 5(1) of the 2011 includes one more offence, that is the offence of exposing for supply or has in his possession, custody or control for the supply of any goods to which a false trade description is applied) was a strict liability offence. In this case, the appellant was charged under section 3(1)(b) of the Trade Descriptions Act 1972 for supplying groundnuts, which falsely bore the brand name of Thumb Brand Ngan Yin Groundnut Factory. The appellant contented that he had no knowledge that the groundnuts were an imitation and relied on the defence in section 24(1) of the same Act, which allowed the defence of mistake or the reliance of information supplied to the accused person or the act or default of another person or an accident or some other cause beyond the accused's control.

[9] [1991] 2 CLJ Rep 265.

Section 24(3) provides that the accused must prove that he did not know and could not with reasonable diligence have ascertained that the good did not conform to the description or that the description had been applied to the good. James Foong CJ held that under section 24 of the Trade Descriptions Act 1972, the word used therein 'is for the person charged to prove' the relevant stated defences. This implies that the offences under the Act are strict liability. It is for the accused person to prove his mental state at the time of the offence in order to avail himself of one of the defences.

In the case of *PP v Intrakota Consolidated Bhd*,[10] the High Court ruled that the existence of due diligence defence dispelled the suggestion that the offence was a strict liability. The respondent in this case was charged with an offence under section 22(1) of the Environmental Quality Act 1974 for the emission of excess smoke. The section was silent as to the requirement of *mens rea*. However, the defence in section 43(2) of the Act provided for due diligence. Contrary to what had been decided by James Foong C J, Abdul Wahab Patai J. decided that the offence was not a strict liability offence due to the existence of this defence.

It is in the opinion of the writer that the decision arrived by James Foong C J should be the correct decision. The existence of statutory defences, particularly the due diligence defence, do not alter the nature of strict liability offence. These statutory defences are to help the innocent offender to escape liability if he can show that one of the statutory defences provided for applies to him (David & John: 1997). What the prosecution needs to prove is the commission of the offence, and then it is the duty of the person charged to prove the defences if he wants to rely on any of the defences. If he fails to prove any of the defences, then the offence is committed.

Pesticides Act 1974

The Pesticides Act 1974 is under the purview of the Ministry of Agriculture and Agro-based Industry. Section 2 of the Pesticides Act 1974 defines pesticides as follows:

- any substance that contains an active ingredient; or
- any preparation, mixture or material that contains any one or more of the active ingredients as one of its constituents.

However, this does not include contaminated food or any article listed in the Second Schedule.

Section 7 of the Act makes it mandatory to any person who desires to import or manufacture a pesticide to apply to the Pesticide Board to have the pesticide registered. One of the conditions to enable the pesticide to be registered is specified in section 8(1)(c) of the Act. It stipulates that the applicant must satisfy the Pesticides Board that the pesticide, if used or handled according to the instructions contained in its proposed label, would be efficacious and safe to human beings and animals, or constitutes a risk to human beings and animals of such a minimal extent or degree as to be outweighed by the necessity or advantages of using the pesticide.

Pesticides are normally used in food, particularly, vegetables and fruits. Therefore, in order to protect consumers from food contaminated with pesticides, section 21(1) of the Act empowers the Ministry concerned, after consulting the Pesticides Board and the Ministry responsible for health services, to make regulations to prohibit:-

> *the addition to or the use or presence in food or any specified kind thereof, or the treatment of food or any specified kind thereof, or with any specified pesticide or more than the specified quantity, proportion, strength, or concentration thereof.*

Contaminated food is defined in section 2 of the Pesticides Act 1974 to mean:-

[10] [1999] 4 CLJ 714.

food in which there is present a pesticide, or a quantity, proportion, strength, or concentration of a pesticide, in contravention of regulations made under section 21; and a reference to the use or presence of a pesticide in food includes a reference to its use or presence on food.

Section 24 of the Pesticides Act 1974 gives the right to food analysis to the public. This can be done in two methods. The first method is provided in section 24(1), which provides:

A person who has bought any food shall, on payment of the prescribed fees, be entitled to have a sample of the food analysed by an analyst in order to determine whether the food is contaminated, and to receive from him a certificate of analysis.

Under this provision, the buyer of food may give the sample of the food to the food analyst together with the prescribed fees to have the food analysed to determine whether the food is contaminated. The other method is specified in section 24(2) of the Act, which states:

A person, other than the seller of the food, may, on payment of the prescribed fees and the cost of the sample, require an authorized officer to purchase a sample of any food and submit it for analysis by an analyst in order to determine whether the food is contaminated.

In the second method, the applicant needs to pay the prescribed fees and the cost for the food sample to the authorised officer. The authorised officer will arrange for the food analysis by giving the sample to an analyst.

Besides the right given to the public to have the food analysed, the power of entry, inspection and seizure is given to the authorised officer. Such power is codified in section 22 of the Pesticides Act 1974. Section 22 codifies that an authorised officer may:-

- at all reasonable times enter into and inspect any place where he has reason to believe that there is any food intended for sale;
- inspect any food, wherever found, that he has reason to believe to be intended for sale;
- seize, detain, or remove any such food that is or appears or is believed to be contaminated food, and any mark, seal, or otherwise secure the food in order to affect seizure, detention, or removal thereof.

The application of strict criminal liability can be found in section 25 of the Pesticides Act 1974, whereby it provides that a person who sells any contaminated food commits an offence. It is sufficient for the offence to be committed by the act of selling contaminated food only. Whether the accused has the knowledge or not, is irrelevant.

Food Act 1983 and Food Regulations 1985

Food Act 1983 is the primary Act which regulates food. This Act is supported by the Food Regulations 1985. Food Regulations 1985 prescribes compositional standards, standards for additives and nutrient supplement, standards for food packages and standards for labelling of particular food. All these standards are mandatory standards which must be complied with by the food manufacturers. Both of these legislations are under the jurisdiction of the Ministry of Health. In addition, food is defined under section 2 of the Food Act 1983 to include:

Every article manufactured, sold or represented for use as food or drink for human consumption or which enters into or is used in the composition, preparation and preservation of any food or drink and includes confectionary, chewing substances and any ingredient of such food, drink, confectionery or chewing substances.

Hence, from the definition of food above, it gathers that food includes anything manufactured, sold or presented for use as food or drink for human consumption and any ingredients used in any food or drink including confectionery and chewing substances. However, live animals, which also can be used as human consumption, are not considered as food under section 2 of the Food Act 1983. This was held in *Chuang Hock Meng @ Chung Hock Meng v Pegawai Kesihatan Daerah Hulu Langat Kajang, Selangor Darul Ehsan & Anor.*[11] It was decided that live pigs which had been seisured could not be accepted as an article that could be used in the composition, preparation or preservation of any food as defined under section 2 of the Act.

In order to ensure that only safe food is supplied to the consumers, the Food Act 1983 has created various criminal offences. The offences are as follows:

- selling food containing substances injurious to health, as stipulated in section 13;
- selling food unfit for human consumption, as stipulated in section 13A;
- selling adulterated food, as stipulated in section 13B;
- selling food not of the nature, substance or quality demanded, as stipulated in section14;
- selling food whose label does not comply with the prescribed standard, as stipulated in section 15; and
- selling food which has a false label, as stipulated in section 16.

The wordings in sections 13, 13A, 13B, 14, 15 and 16 are silent as to *mens rea*. The question here is - do all these sections create strict liability offences? According to Barry (2000), modern food legislation has been of strict liability since its inception generally. To relieve the harshness of strict liability offences, the Parliament has customarily added provisions which enable the liability to be passed on the person truly responsible for the contravention and afford honest traders statutory defences (Barry: 2000).

In the Food Act 1983, the defence of 'all reasonable steps' is provided in section 23 of the Act. In the case of *Public Prosecutor v Pengurus, Rich Food Products Sdn. Bhd*,[12] the respondent was charged under section 11(1)(b) of the Sale of Food and Drug Ordinance 1952, which is equivalent to section 15 of the Food Act 1983. The respondent was relying on a defence in section 21 of the Sale of Food and Drug Act 1952, which is equivalent to section 23 of the Food Act 1983. The defence in section 21 of the Sale of Food and Drug Act 1952 stated that:

> *...it shall be no defence that the defendant did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance.*

Mohd Yusoff Muhamed J. held that with this defence, the offence in section 11(1)(b) of the Sale of Food and Drug Act 1952 was not a strict liability offence. The writer would like to differ from the decision of the Learned Judge. The defence in section 21 did not alter the burden of the prosecution in proving the offence in section 11(1)(b) of the Sale of Food and Drug Act 1952. The provisions in section 11(1)(b) is silent as to *mens rea*. Therefore, the prosecution only had to prove the *actus reus*. If the defendant or accused would like to rely on section 21 of the Sale of Food and Drug Act 1952, the defendant had to prove that he did not act wilfully by proving to the court that he had taken all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance. It is for the defendant to prove the state of his mind, not the prosecution.

[11] [2002] 4 MLJ 27.
[12] [1981] CLJ Rep 257.

Standards of Malaysia Act 1996

This Act is under the jurisdiction of the Ministry of Science, Technology and Innovation (MOSTI). It regulates the Department of Standards Malaysia in exercising its function as the standard development agency. 'Standard' is defined in section 2 of the Act as:

> *a document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory; and which may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

Although the Department of Standards is entrusted with standard development, in carrying out this function, it has appointed the Standard of Industrial Research Institute of Malaysia (SIRIM) for standard development activities. All standard development activities are done by SIRIM.

Section 15 of the Standards of Malaysia Act 1996 empowers the Ministry of Science, Technology and Innovation to declare any specification, which has been adopted with or without modification to be a standard specification or a provisional standard specification. However, this provision does not make this standard as a mandatory to be complied with by manufacturers. The standards will only become a mandatory when they are prescribed as mandatory by the relevant Ministry in regulations. In 2009, the Ministry of Domestic Trade, Cooperatives and Consumerism had enacted two regulations to impose safety standards on toys. The regulations are the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2009 and the Consumer Protection (Safety Standards for Toys) Regulations 2009. In 2010, the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2009 was replaced by the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2010. The Consumer Protection (Safety Standards for Toys) Regulations 2009 was also amended in 2010 to include the standard for safety of electric toys. In addition, there are other regulations, orders and rules, which have imposed standards on various goods before the enforcement of the Consumer Protection Act 1999, such as the Electrical Supply Regulations 1990 and the Electrical Regulations 1994 which impose standards on electrical goods, the Motor Vehicles (Safety Belt) Rules 1978 which imposes standards on safety belts, the Motorcycles Order (Safety Helmet) Rules 1973 which imposes standards on safety helmets, and the Trade Descriptions (Marking of Non-Pressure Kerosene Stove) Order 1991 which imposes standards on kerosene stoves.

The strict criminal liability offences created under section 18 of the Standards of Malaysia Act 1996 are geared towards ensuring no false representation in relation to accreditation, standard specification and standard conformity. These false representations may be done on commodities, processes, practices or services. Notably, the word 'commodity' is defined in section 2 of the Act to mean any article, product or thing that is a subject of trade or commerce.

Consumer Protection Act 1999

The Consumer Protection Act 1999 came into force on 15 November 1999 and under the jurisdiction of the Ministry of Domestic Trade, Co-operatives and Consumerism. In relation to products/goods safety, it is codified in Part III of the Act. Section 19(6) of the Act limits the application of Part III, which does not apply to healthcare goods and food. Nevertheless, it applies to imported goods as provided in section 24 of the Consumer Protection Act 1999.

The Act has brought certain important changes in product safety, such as power vested to the Ministry of Domestic Trade, Co-operatives and Consumerism to monitor product safety

and imposition of safety standards for products or goods. In relation to the monitoring power vested to the Ministry, the monitoring is done at two stages, namely, at pre-marketing stage and at marketing stage. Monitoring at pre-marketing stage can be seen in section 19(1), which empowers the Ministry to prescribe safety standards for goods or class of goods. According to Wu Min Aun, the purpose of prescribing safety standards is to prevent risks of injury (Wu Min Aun: 2000). On the other hand, monitoring at marketing stage is seen in section 23(1), which empowers the Ministry to declare unsafe goods as prohibited goodsThe power of the Ministry to prescribe safety standards for products or goods will be able to overcome many unsafe consumer goods in the market. It is the hope of the consumers that the Ministry will utilize this power as many consumer products in the market do not have safety standards. However, only in 2009, the Ministry of Domestic Trade, Co-operatives and Consumerism utilised the power given in section 19(1) by prescribing safety standards for toys. Two regulations were enacted to enforce the standards, namely, the Consumer Protection (Safety Standards for Toys) Regulations 2009 which contains the list of safety standards for toys, and the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2009 which was later replaced by the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2010.

In order to help the businesses that supply toys in Malaysia to comply with the legislations and requirements imposed by the Ministry of Domestic Trade, Co-operatives and Consumerism, the Ministry concerned has issued the Guideline on Mandatory Standards for Toys 2010. This Guideline will assist the industry to understand the main features of the legislations and the requirements in order to confirm to the prescribed safety standards.

Based on these two regulations, any person or business that supplies, or offers to or advertises for supply toys must ensure that:

- the toys comply with the prescribed safety standards;
- the Certificate of Conformance (COC) is issued by the product owner;
- a copy of the COC is to be kept for record and enforcement purposes;
- the toys are marked or affixed with the conformity mark (MC) together with the registration number determined by the Ministry of Trade, Co-operatives and Consumerism;
- the toys are marked and affixed with the name and address of the manufacturer, importer or distributor; and
- the toys must be accompanied by warnings and information on precautions where necessary. These must be either in the Malay language or/and the English language. As an addition, other languages may also be used.

When there is a safety standard determined by the Ministry of Domestic Trade, Co-operatives and Consumerism, section 20 provides that no person shall supply, or offer to or advertise for supply any goods which do not comply with the safety standards determined under section 19(1). In the situation where no safety standard has been determined, section 19(4) provides that the person supplies or offers to supply the goods shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods concerned. According to Wu Min Aun, this provision can act as a safety net to catch goods which are not safe (Wu Min Aun: 2000).[13] On the other hand, section 21 imposes general safety requirement for goods. It provides that, in addition and without prejudice to section 20,

[13] Wu Min Aun, *Consumer Protection Act 1999: Supply of Goods and Services*, Pearson Education Malaysia Sdn Bhd, 2000, p 32.

no person shall supply, or offer to or advertise for supply any goods which are not reasonably safe having regard to all the circumstances, including:-

- the manner in which, and the purpose for which, the goods are being or will be marketed;
- the get-up of the goods;
- the use of any mark in relation to the goods; and
- the instructions or warnings in respect of the keeping, use or consumption of the goods.

This general safety requirement will impose on the supplier a duty to trade safely. It does not impose a duty to supply goods which are absolutely safe as the cost of achieving this will be very costly and this will make consumer goods to be so expensive that they fall out of the reach of poorer consumers.

The penalty for contravening the provisions in Part III is provided in Part IV of the Consumer Protection Act 1999, particularly section 25. Section 25 provides that any person who contravenes Part II and III commits an offence. The section is silent as to *mens rea* The writer would like to suggest that there is no necessity to presume *mens rea* in section 25 because this section is creating a regulatory offence. Although section 22 allows the person charged to put up a defence of no knowledge and had no reasonable ground to believe that the goods or services failed to comply with the requirement of section 20 or 21, the duty to prove the state of knowledge in section 22 is burdened on the person charged, not on the prosecution. The duty of the prosecution is to prove the commission of the crime by way of contravening any provisions in Part III without the necessity to prove the state of mind of the person charged. It is submitted that the existence of the defence of no knowledge does not alter the nature of strict liability offence in section 25.

CONCLUSION

Criminal law performs a number of important functions in society, but chief among these is that of protecting the consumer from harm. The above discussion reveals that all the studied legislations employ criminal liability offences. However, the question that arises is that - do all the studied legislations impose a strict liability offence? This question needs to be addressed because the relevant provisions are silent as to *mens rea*. Although it is difficult to decide whether the statutory provisions impose strict criminal liability, the decided cases show that the courts are willing to impose a strict criminal liability when the provisions create regulatory offences. The defendants in regulatory offences usually, although not necessarily, be those acting in the course of a trade or business. Such defendants may be particularly suitable candidates for the imposition of strict criminal liability. They are suitable candidates because they are very often well placed to pay the penalty, which usually be a fine; they participate in a potentially hazardous activity by choice; and they take the benefit of that activity, and ought therefore to bear the loss when mistakes are made. In Malaysia, product safety legislations regulate offences that affect the public's health and safety. The use of criminal law is believed to be one of the methods that can control the offences of product safety. The offences created by the relevant provisions are not 'true crime' and they do not involve moral issues, though this statement on moral issues is not always right when we define crime as morally wrong. The words moral issues must be given strict interpretation, which involves bad behaviour. Therefore, the writer would like to suggest that strict criminal liability is imposed in product safety legislations when the relevant provisions are silent as to *mens rea*. It is further submitted that the creation of strict criminal liability offences will be able to protect consumers from unsafe products.

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