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Liability of the Manufacturer under Tort of Negligence on the Issue of Halal

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ABSTRACT

The tort of negligence provides a legal remedy. A consumer who suffers injury due to the negligence of a manufacturer will be able to bring a suit under the tort of negligence. This is because a person owes a duty of care to anybody who is directly and closely affected by the action or omission of another person. The effect of this application is that a person is liable for every injury that results from his carelessness. Therefore, the aim of this article is to examine the extent to which the tort of negligence is capable of imposing liability on manufacturers and protecting consumers on the issue of halal. Whether the tort of negligence is available and applicable in providing protection to the consumer on the issue of halal. By applying a doctrinal approach based on the qualitative methodology of legal research, this research involved an analysis of the tort of negligence as well as court cases. This article demonstrates that the tort of deceit has various problems and is not a viable option for consumers in seeking protection on the issue of halal.

Contribution/Originality: This research contributes to the existing literature concerning the protection of consumer on the issue of halal under the tort of negligence.

1. Introduction

Halal food is a popular source of food nowadays as most people perceived that they strive better on it. For most people, halal food is considered healthier, free of contaminants and convenience even though the price is high. Being a Muslim, the consumption of halal food is an essential part of the Islamic faith. Thus, Muslims want a guarantee that the food they consume adheres to Shariah principles together with wholesome and good characteristics (tayyib) (Tieman, 2013). The word 'halal' in whatever form, when displayed on a product has a special attraction to Muslim

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consumers in Malaysia. They believe that the halal issue is not just about the logo that is being used by the food manufacturers but gives the perception that the foods are manufactured according to Shariah principles. Nonetheless, there are a few unethical business owners, particularly in the manufacturing industry, who have misused the halal certification by forging its logo or label. These unethical businesses have misled and deceived the consumers in order to achieve a profit.

The main law that specifically governs halal issues is the Trade Descriptions Act 2011. However, the Trade Descriptions Act 2011 does not provide compensation for wrongly labelled halal and non-halal products for the victims (Naemah & Norazlina, 2015). Therefore, it is necessary to review the other laws that allow victims to seek compensation. One of the laws is tort law. The primary aim of tort law is to punish the offender and at the same time to compensate the victim for injuries or losses sustained due to the actions of others. The scope of tort law is extensive. It can be divided into diverse areas of law that deal with various types of issues that affect the acts, rights, and remedies of the aggrieved party. However, the focus of this article will be on the tort of negligence. The aim of this article is to examine whether the tort of negligence is capable of imposing liability on the manufacturers on the issue of halal.

2. Methodology

The study adopts a qualitative approach. This research, which adopts a doctrinal approach, involves an analysis of the tort of negligence as well as relevant judicial decisions. The materials relevant to the study have been collected in the form of cases, books and journals. The collected data was then analysed using content analysis methods to determine if the tort of negligence is capable of imposing liability on manufacturers while protecting consumers on the issue of halal.

3. Results and Discussions: Legal Overview on Negligence

Negligence is a form of conduct that can give rise to liability under the common law based on the tort, or civil wrong, of negligence (Cavico et al., 2018). Negligence was defined by Lord Wright in the case of Lochgelly Iron & Coal v M Mullan [1934] AC 1: 25 as follows:

> "Negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

Based on the definition given, there are three important elements used in the law of negligence that the claimant (consumer) needs to prove in order to succeed in a negligence claim against the defendant (manufacturer). The essential elements are as the follows: (i) the defendant owed claimant a duty of care; (ii) the defendant breached that duty of care, and (iii) the claimant suffered loss or damage as a direct consequence of the breach.

3.1. Duty of care

The duty of care exists in normal circumstances whereby if a person does not take the usual degree of precaution, another person or his property may be injured, as stated in

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the case of Heaven v Pender [1883] 11 QBD 503. The element of duty of care was first established in the case of Donoghue v Stevenson [1932] AC 562, Lord Atkin stated that:

> "…. persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question".

This case laid down the foundation for the 'neighbourhood' principle that a person owes a duty of care to anybody who is so closely and directly affected by the action or omission of another person (Abdul Majid & Krishnan Arjunan, 2014). Under the 'neighbourhood' principle, a person should be able to sue another who caused them loss or damage even if there is no contractual relationship. This case set aside what is known as the doctrine of privity by establishing that the cause of action in tort of negligence does not depend on the contractual relationship. It is not bound by rules of privity, which restricts contractual remedies (Michael, 2007). Therefore, the action may be against anybody in the chain of distribution including the manufacturer. There is no issue and doubt that a manufacturer of products owes a duty of care towards the consumer.

The neighbourhood principle formulated by Lord Atkin have been adopted in the case of Bhamra v Dubb t/a Lucky Caterers [2010] EWCA Civ 13. In this case, Mr. Dubb was a caterer in a Sikh wedding, where Mr.Bhamra has attended the wedding and has eaten the food served. As a result of eating the food, he died due to anaphylactic shock caused by an allergic to the egg. Sikh religion forbids the consumption of meat, fish or eggs. In this case, it was accepted that Mr. Dubb owed a duty of care. According to the court, anyone who prepares food for business purposes for the use of others is responsible for ensuring that the food does not contain harmful substances and suitable for human consumption. In the case of Goh Sze Ching v Pizza Hut Restaurant Sdn Bhd [2011] 5 LNS 33, a leg of cockroach was found in the pizza served to the plaintiff and caused the plaintiff to suffer food poisoning. The issue arises in this case is whether the defendant (restaurant owner) has a duty of care to ensure that the food served is clean. The court held that the defendant had a duty of care to ensure that the food served was clean.

In the context of the relationship between manufacturer and consumer, a consumer is deemed to be the manufacturer's neighbour because whatever careless act the manufacturer does will injure the consumer, although there is no contract between them. Manufacturers are responsible for ensuring the interests and safety of consumers in all actions related to their products (Peel, & Goudkamp, 2020). In the issue of halal, manufacturers have a duty of care in ensuring that his products follow the halal standards that have been set. When this standard is not followed, this shows that the manufacturer does not perform the duty of care. Something more than ordinary care is demanded from the manufacturer of halal products. However, the question arises, do manufacturers have a responsibility in ensuring that their products are halal as stated? According to the decisions in the cases of Bhamra v Dubb and Goh Sze Ching v Pizza Hut Restaurant Sdn Bhd, the manufacturer has a duty of care to take appropriate steps to ensure that its products do not contain any hazardous substances that may cause harm to consumers, and this demonstrates that this case is related to consumer safety factors. However, in the issue of halal regarding the use of a fake halal logo or non-halal products will not cause any physical injury or harm to the consumer in a short period of time, and as a result, the consumer will be unable to file a claim.

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3.2 Breach of Duty of Care

In many cases brought before the courts it is evident that a duty of care exists between the defendant and the claimant. Breach of duty occurs when the defendant fails to take precautionary measures in his or her actions. The real issue is whether the actions of the defendant were sufficient to meet their duty. In this situation, the court will set the standard of care that they should have met. This standard consists of the actions which the court considers a 'reasonable man' would have taken in that circumstances. The 'reasonable man' test was formulated by Baron Alderson in the case of Blyth v Birmingham Waterworks Co (1856) 11 Ex Ch 781 as follows:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

While Lord Macmillan in the case of Glasgow Corporation v Muir (1943) AC 448 has described the definition of 'a reasonable man' as "… standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question …". In determining a reasonable person, the personnel characteristics of the defendant will not be considered, but the usual norms and activities in a particular society or a particular profession will be considered in determining the reasonableness of the defendant conduct (Norchaya, 2011).

In the context of the relationship between manufacturer and consumer, the failure of the manufacturer to take precautionary measures to prevent possible injuries and/or damage is a breach of duty and this can be the basis of liability (Abdul Majid & Krishnan Arjunan, 2014). A manufacturer commits a breach of duty when it fails to take precautionary and reasonable steps. Through this test, the manufacturer should avoid committing injuries and/or predictable damage (Rahmah, 2007). For example, if the preparation of the food product is not done according to the set standards, the victim may experience diarrhea, vomiting and so on. In the issue of halal, to predict that such fake halal logo or non-halal products cause injury and/or physical damage is something that is difficult to prove. Consuming fake halal logo products or non-halal products is something that usually does not cause injury and/or physical damage to the consumer. Often the loss suffered by the consumer in the case of fake halal logo or non-halal products is more to mental, spiritual and emotional injuries such as frustration and discomfort. The question, therefore, arises as to whether the court is willing to allow claims for cases involving mental, spiritual and emotional injury.

3.3 Causation and Remoteness of Damage

The final element under the tort of negligence is that there is damage caused by the defendant and it is due to the defendant's breach of duty. Proving the damage due to the breach of duty are important to succeed in an action in negligence (Vos, 2001). The plaintiff is responsible for proving that the injury and/or damage occurred as a result of the defendant's breach of duty. However, to prove causation is often difficult. If the injury would not have occurred without the defendant's act, then the element of causation is missing because the connection between an act and injury is not strong

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enough to justify imposing liability (Steel, 2015). This places a burden on the plaintiff i.e. the consumer. The burden of proof is an obstacle to the plaintiff because it is difficult for the plaintiff to prove that the injury and/or damage he suffered was due to a breach of duty by the defendant (Heuston & Buckley, 1996). The difficulty of the burden of proof can be seen in the case of Woon Tan Kan & 7 Ors v Asian Rare Earth Sendirian Berhad [1992] 3 CLJ 786, when the court dismissed the claim of negligence by the plaintiff because there was no solid evidence to show that the injury and/or damage suffered by plaintiff due to breach of duty of caution by defendant. Judge Peh Swee Chin ruled that:

> "As there was no evidence of actual loss or damage which were directly attributed to the negligence of ARE before 1985, the claim based on negligence was dismissed as actual damage must co-exist with negligence."

However, in most cases, the application of the 'but for' test will solve the causation problem in tort law. This test determines whether the plaintiff will suffer injury and/or damage if the defendant does not act negligently. In applying this test, the question is whether "but for the defendant's negligent act or omission would the injury or damage have occurred?" If the answer is in the affirmative, then causation is said to be established. 'But for' test is performed to ensure that the injury and/or damage suffered by the plaintiff is due to a breach of the defendant's duty of care.

The application of the 'but for' test is explained in the case of Barnett v Chelsea Kensington Hospital Management [1967] 1 QB 428. The issue that arises in this case is whether Mr Barnett's death was due to the negligence of a doctor who failed to treat and examine him. The court held that the doctor's failure to treat Mr Barnett was a breach of duty but that the breach was not the cause of Mr Barnett's death because even if Mr Barnett was given treatment, the hospital still could not save his life. Nield J states in this case that:

> ".. that the plaintiff, Mrs. Bessie Irene Barnett, has failed to establish, on the balance of probabilities, that the death of the deceased, William Patrick Barnett, resulted from the negligence of the defendants, the Chelsea and Kensington Hospital Management Committee, my view being that had all care been taken, still the deceased must have died.."

It is clear from the case of Barnett v Chelsea Kensington Hospital Management, that it is not easy to prove a case if the "but for" test is used in proving the causation between the plaintiff's injury and/or damage and the defendant's breach of duty. The application of the "but for" test makes it difficult for the plaintiff to prove the connection between the two. If the connection between the two cannot be proved, then the plaintiff will not succeed in his claim. This will lead to unfair results especially when the exact cause of the injury and/or damage is unknown. It can be seen in the case of Fairchild v Glenhaven Funeral Services [2002] 3 All ER 305. In this case, two hunters using rifles had inadvertently shot and injured people. Unfortunately, the plaintiff was unable to prove which hunter had shot him and this had caused him to fail the "but for" test.

In the context of the relationship between manufacturer and consumer, if the negligence of the manufacturer is not the cause of injury and/or damage to the consumer then the manufacturer will not be liable for the consumer's claim (David,1991). Similarly, in the case of fake halal logo products, the use of such products will not cause any physical

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injury as a result of consuming them. In fact, it is difficult to prove that the substance contained in the product is the cause of injury or harm to the consumer due to the possibility that such injury or harm may develop naturally in the future without the existence of negligence.

According to the decision in Donoghue v Stevenson, the principle of negligence that was underlined only allows claims for physical injury and/or property damage to be brought against the defendant (David,1991). This means damages for damage to non-harmful products are outside the scope of the Donoghue v Stevenson case (Rahmah, 2007). If the product is unsafe or defective, but does not cause any injury and/or damage, then the consumer cannot take action and make any claim under the tort of negligence (Loganathan, 2006). Product defects that do not involve physical injury and/or property damage are referred to as 'pure economic loss' and such claims are not allowed in the event of negligence (Elliott & Quinn, 2007). It is therefore difficult to prove the effect of product use. Therefore, in the case of fake halal logo or non-halal products, the use of the product may not cause any injury as a result of consuming it, and the effect may not lead to serious injury to the consumer. In addition, tort of negligence is not relevant for cases of intentional act of fake halal logo or misuse of halal logo and other forms of false halal claims (Naemah & Norazlina, 2015). Thus, it is impossible for consumers to take action against manufacturer in the case of fake halal logo products because the use of such products may not cause any physical injury or harm to consumers in a short time.

4. Conclusion

Based on the foregoing discussion, it can be concluded that there are hurdles for consumers in making claims under the tort of negligence. Consumers must establish the three elements of the tort of negligence before they may be successful in their claims and establishing those elements is not a simple process. The major hurdles for the consumer can be seen in terms of the burden of proof. The burden of proving the fault of the manufacturers and the causation is not an easy task for the consumers. The task is difficult and sometimes involves high costs to implement. In fact, a negligence claim that does not involve any physical injury or death will not succeed even if the product is unsafe or defective. Therefore, there is doubt about the effectiveness of the tort of negligence in imposing liability on manufacturers and protecting consumers on the issue of halal.

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Conflict of Interests

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