

## LIABILITY OF PRODUCERS OF GOODS AND PROVIDERS OF SERVICES TO E-CONSUMERS

Jawahitha Sarabdeen and Mohamed Ishak Mohamed Mazahir  
Centre for Cyberlaw, Faculty of Management  
Multimedia University, 63100 Cyberjaya, Selangor

*Abstract:* The Malaysian laws protecting the e-consumers are still in the infant stage. A claim against a retailer could be maintained under certain legislation like the Contracts Act or Sale of Goods Act. When an e-consumer elects to sue a manufacturer or service provider, the only option available for him to do so would be under negligence tort. The spectrum of protection, however, is very much limited. The paper will analyze the negligence tort in protecting the e-consumers in a claim against the manufacturers and the service providers. It will also address the limitation of application of negligence together with the deficiencies of fault-based liability in providing appropriate protection for injured e-consumer who is not actually at fault.

Keywords: Liability, E-consumers, E-contract, Negligence, ISP

### INTRODUCTION

When the businesses, contracted with the e-consumers for supply of goods and services, and subsequently supplied, do not correspond to the terms of contract, the e-consumers can bring an action against the infringer in contract provided the parties are privy to contract. However, if a Malaysian consumer decided to bring an action against a manufacturer or service provider as opposed to retailer for the injury or loss caused to him, he will not be able to claim much benefit under the Consumer Protection Act 1999 until it is amended since it excludes e-consumer from its ambit. Therefore, the consumers will have no option but to resort to other available remedy namely negligence tort. A negligence tort is simply an accident that occurs when someone fails to pay attention and therefore, harms another person or thing. The tortfeasor neither wishes nor believes that his action will cause the damage but in fact, it caused harm or injury. The duty in negligence against a manufacturer was first established in the case of *Donoghue v. Stevenson* ([1932] AC 526). In this case, the plaintiff and a friend visited a café and the friend bought a bottle of ginger beer from the café owner. The owner opened the bottle, which was made of dark opaque glass, and poured some of the ginger beer into tumbler. Unsuspecting, the plaintiff drank the contents, but when her friend refilled the tumbler, the remains of a decomposing snail floated out. The plaintiff suffered shock and severe gastro-enteritis as a result. As she cannot sue the retailer for compensation because she had not bought the ginger beer, she sued the manufacturer for her injury. The House of Lords held that she would be entitled to succeed if she could prove her allegation.

Lord Atkin in this case stated that a manufacture who produces items which reach the consumers without an intermediary needs to make sure the items are safe. The principle in this decision was later extended to others who ought to foresee that failure to take reasonable care might harm consumers regardless whether the consumers were offline or online. This coverage may include retailers, repairers, to those who hire out products, and those responsible for testing and certification of products (Scott C and Black J; 2000, p188) [4]. Manufacturer or producer liabilities generally occur due to his defective design or products, when those products cause damage or injury. Defective design happens when the engineering processes used by a company to design a product is faulty, resulting in a product that is unnecessarily dangerous. Defect in products occurs when a product is not manufactured as designed. In defective products, there is no wrong with the product's overall design but the manner in which it is assembled is flawed. Manufacturing defects problem is usually not common in all of the items that were assembled by the company but rather happens in few products only. In the context of products, the duty is extended to cover products from human consumption, pharmaceuticals, household appliances, and toys to other equipment.

As to the negligent liability of service providers including the professional advisers, the court extended the application of negligence beginning with the case of *Hedley Byrne v. Heller & Partners*. ([1964] AC 465) This case established that when the negligent statement of the defendant caused financial loss, the defendant was held liable in negligence.

The liability established in the case of *Donoghue v. Stevenson* and subsequent extension of this liability to cover others comprise part of English common law. The question would be, is this common law liability applicable in Malaysia to protect the e-consumers? The court in *Government of Perak v. Adam* ([1914] 2 FMSLR at 148-149) stated that: " in dealing cases of tort, the courts have always turned for guidance, as to the fundamental principles, to English decision" The Malaysian court applied the principle of *Donoghue v. Stevenson* in the case of *Sathu v. Hawthornden Rubber Estate Co. Ltd* ([1961] MLJ 318). In this case the plaintiff's herd of cattle grazed in defendant's sodium arsenate spered estate grass and died after few days. In action against negligence the court held that the defendant is not liable because he could not reasonably foresee that the plaintiff's cattle could stray onto his estate. In order to hold the defendant liable, it must be shown that the defendant is aware that just not only cattle, but the plaintiff's cattle were likely to stray onto their land.

The above case is not concerned with the liability of an e-manufacturer or e-service provider, however, the decision shows that in order to succeed the plaintiff must prove that the damage he is claiming is caused due to defendant's negligence together with other elements of negligence. The negligent claim could be brought to the court if the online products, tax and other advisory services, economic, financial and investment advice or medical advice rendered caused required damage or injury to the user.

## DISCUSSION

### *Elements Of Negligence*

If any of the victimized e-consumers would like to succeed in an action against a manufacturer or online service providers, the claimant must show the *existence of duty of care which was owed to him by the defendant; breach of such duty; resulting damage to the consumer and the foreseeability of the damage*. It is important to note that all the elements often overlap and when the court decides a case, the court does not always regard them as separate matters. Establishing duty of care of defendant towards plaintiff is the foremost. That is to say the plaintiff must show that the defendant had a responsibility to act in a certain manner. No matter what activity plaintiff involves in, he owes a duty to act as a reasonable and prudent person would act if that reasonable and prudent person were in such a position. The basic principle underlying the duty of care is that the people are expected to exercise a reasonable amount of care. In deciding whether a plaintiff had breached his duty, it is not necessary on the court to consider how a particular person would act. What is important is that the society's judgment on how an ordinary prudent person should act (Miller and Jentz; 2002, p86) [2].

Once the duty is established the plaintiff must show that the defendant in fact failed to act in a manner required. That is the *person breached the duty that he owed to he plaintiff* to act with the certain amount of responsibility and care; as a result the plaintiff or his property was harmed or damaged; and the damage was actually caused by the defendant and which is foreseeable. Since the law of negligence not only covers the buyer-consumer or immediate recipient, anybody will be able to bring an action if the person comes within the range of foreseeability provided that the plaintiff and the defendant had proximity of relationship and it is just, fair and reasonable to impose a duty of care. (*Caparo Industries v. Dickman and Others* [1990] 1 All ER 568). The liability arises when the defendant acted unreasonably, irresponsibly, or carelessly and therefore breached a duty owed to the plaintiff. It must be clearly shown that the defendant's behavior caused the injury or property damage. If someone caused the injury, the element of *causation* was not proven therefore, there is no liability on the part of the defendant. The following sections will discuss each of the elements and the problem that an e-consumer will face in proving them. In *Coastal States Trading v. Shell Pipeline Corp.*, Shell Corporation commenced a specified computerized procedure for submitting the written request of its customers. Due to data entry error by a Shell computer employee, the order of Coastal Company went

to another company and Coastal sued Shell for negligence. The court examined all the elements of negligence and found that the defendant owed duty of care to customers, and by not training the employees adequately, the plaintiff suffered damage and therefore, the defendant was asked to pay damages.

#### *Service Providers and Professional Advisors*

There are number of service providers and the professionals conducting businesses through the World Wide Web. There are certain types of companies or individuals who offer only services like financial services including banking and security, web hosting, travel, online tuition and other services. There are other types of companies and persons they sell product and provide installation and consultation services. A glance of Malaysian web sites like *skali.com.my* and *cari.com.my* will show that there are number of goods and services provided for ultimate consumers without even intermediaries. When such services and advice given were defective or wrong, the victimized consumer will be able to bring an action against the service provider or professional advisor as the duty owed to the consumers was not fulfilled. This can be possible irrespective of the fact that the service providers or professional advisors had used the end users through electronic medium. In the case of *Howard v. Furness Houlder Ltd*, the defendants had assembled a valve upside down in a boiler, were held liable for plaintiff who was scalded by escaping steam. The installers, according to the court, have duty to test or inspect the defects, if the defects are known prior to installation. The tort liability on service provider may occur when the negligence of the provider caused harm in the form of personal injury, death, or property damage. However, there will be problem in claiming compensation or succeeding in negligence against the service providers or professional advisors if the harm caused is only financial loss which bound to happen in case of negligent statements. Under general law of negligence pure economic loss will not be compensated. Economic loss is either loss of profit or the reduction in value of an item of property (Scott C and Black J, 2000, p204) [4]. Regardless, in certain exceptional cases, the court allows to recover the economic loss provided that the defendant knew that the recipient would rely on the negligence statement that he made and the reliance was detrimental to the plaintiff. In the case of *Hedley Byren & Co. v. Heller*, ([1964] AC 520) the House of Lords held that under limited circumstances a professional making statement might owe a duty of care. Further the court agreed that there could be liability for negligent misstatement causing financial loss, even in the absence of contractual relationship.

There are growing concerns among the computer software and database developers as well as the consumers and the users of the software about the developer's liability in negligence. The computer programmers like the other professionals owe a high standard of care because the clients rely heavily on their expertise and the repercussions from system failure often is greater than the burdens of thorough testing of software. The software can be considered as product or service. In case of customer-designed programs, it is argued that the programmer is providing the service of making a computer function as desired by the client. However, most of the software sold is standardized and it appears as product rather than service (Burgunder; 2001, p483) [1]. As regard to expert system, the system is generally used to manipulate simple data to the level of making reasoned judgement. The computer is programmed with judgement rules so that it can draw upon its enormous data banks of experience and apply logic, interference, and institution to reach a reasoned solution to a particular problem. The expert system is so complicated and it relies on highly qualified professional who can synthesize decision rules. The manufacturers, programmers and the expert cum the companies or institution utilizing the expert system owe duty of care to the consumers. However, the burden of proof that the damage or complication suffered by a respective consumer was due to system failure is on the consumer. However, Burgunder suggests that when the expert system is used for medical treatment and the system provides an inaccurate diagnosis or treatment that leads to detrimental medical complications, then it should be easy to prove that the expert system had a defect making it unreasonably dangerous.

However, it is to be noted that the consumers could not recover damages for pure economic loss unless: it was caused by a negligent misstatement as in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* or it was consequent upon foreseeable physical injury or damage to property. Therefore, if the product simply ceases to work due to manufacturing defects, the consumer will not be able to sue for cost of repair and replacement. However, in limited circumstances, it is possible to recover damages for economic or financial loss. In *Junior Books Ltd. v. Veitchi Co. Ltd.*, ([1983] AC 520) when the floor of the plaintiff's new factory was found defective, the plaintiff brought an action against the defendant.

The plaintiff claimed for the cost of re-laying the floor and consequential financial loss that the re-laying would cost. The House of Lords held that the relationship between the parties were so close that it gave rise to a duty to avoid careless work which would inevitably cause financial loss. In this case the parties had no contractual relationship since the plaintiff's architect had nominated the defendant for the work.

From the above case it is clear that if the relationship was very close which fell short of direct contractual relationship, negligence law can be used to compensate the plaintiff of his suffering. In *Muirhead v. Industrial Tank Specialties Ltd.*, ([1985] 3 All ER 705) the Court of Appeal stressed that the manufacturer could be liable in negligence for economic loss suffered by a consumer if there was a very close relationship between the parties, and the consumer had placed reliance on the manufacturer rather than on the retailer. (for further elaboration of economic or financial loss see the discussion on Duty of Care of Service Providers and Professional Advisors).

#### *Internet Service Provider's Liability For Third Party's Negligence*

Whoever goes online needs to be affiliated with an ISP who acts as a gatekeeper for accessing the web. An ISP can be a big company having millions of customers or it can be of a small Mom & Pop business. The liability of an ISP for content prepared and for communication sent by others will arise from the services, which the ISPs provide for its customers. Generally, the ISPs are being sued for the wrong or damage done by others because it is hard to sue someone if it is difficult to find him. The clients who post infringing materials may be mobile or otherwise, difficult to track down. Therefore, the victims have the tendency of initiating legal action against the ISPs, as many ISPs are corporate entities with fixed places of business. In addition, the third party who posted the infringing or negligent materials online may be lacking financial resources to pay a substantial liability judgment. Therefore, the attention is shifted from the individual clients who had wronged to ISPs who have financial capacity to bear financial liabilities, as they are well qualified as deep pockets.

In case of release of computer viruses like Melissa, ILOVEYOU, the question is can the ISP be held liable for the damage caused by the viruses as it had facilitated the communication of viruses? To date, it seems that applying negligent tort to virus caused damages has been difficult because it is not clear who should be held liable for the damages. Proving causation is also very difficult. In addition, the damage caused by the viruses is huge. For instance, the ILOVEYOU virus had caused \$10 billion damage around the globe. Similarly in August 7 [3], 1996 there was an online crash at American Online (AOL). Thousands of companies were left without e-mail capabilities and a host of other services. Many lost thousands of dollars as a result. Should these economic damages be recoverable by AOL users? In deciding the negligent liability the court need to look at the question of who is most capable of taking effective precautions to prevent the attaches? The person who is most capable of taking effective precautions are most likely those on whom the courts will impose liability if they do not take such precaution. In the event the ISP is going to be held liable for such an extensive liability they will go bankrupt (Miller and Jents; 2002, p93) [2]. Therefore, there is a high chance that the court for policy consideration may exempt the liability from negligent liability and the victimised consumers may not be able to recover any loss caused to him.

However, there is a possibility that the ISP as publisher of negligent statement may be held responsible if a reader of its publication is seriously injured, dies or suffers damage to their personal property after acting upon or using the content contained in the materials posted in its server. The publisher of *Soldier of Fortune* magazine was held liable for the death caused by a "hit man" following the magazine's publication of an advertisement for a professional mercenary, styled as a "gun for hire". The publisher ISP is duty bound to provide adequate instructions, advice or warning if the publication contains inherently danger, and the reader by using or acting upon the information got injured or harmed or died.

However, the ISP can escape liability if it is proven that the ISP had an editor experienced with negligent publication conduct an independent review of the contents of the publication or included adequate warning to the reader with regard to the content of the publication. The warning must advise the reader that his or her failure to follow instruction is dangerous or includes potential risks involved in following such instruction. They may show that the warning given is specific and it was placed in

the margin or apparent places of that section with an appropriate symbol to make the reader aware that this section contains information that could cause serious injury or death. The Malaysian e-consumer may not be able to bring an action against the Internet service providers under any of the existing law. This is because the Communication and Multimedia Act 1998, law regulating the ISP, in sections 211 and 233 states that the ISPs who knowingly enable or allow obscene, indecent or false menacing to harass another person, to be uploaded will be held liable. The provisions do not cover the liability of ISPs in negligence. Therefore, the consumers will only be able to bring an action under common law principle of negligent if they want to recover damages caused by the users of ISPs. In the event of bringing such an action, whether they will be able to succeed is an important question.

## CONCLUSION

The negligent tort provides remedies for the damage or injury done to the plaintiff if he can prove the principle elements. Proving these elements is not easy especially in case of e-commerce. There are number of parties involved in providing goods or services to the e-consumers. Determining who is the person owes duty or who in fact breached the duty and a causal link between the injury and the breach of duty by the defendant that eventually caused the injury are the most difficult task on the plaintiff. The concept of foreseeability of damage also will deprive the plaintiff from benefiting. In case of e-commerce activities, economic loss by the software, expert systems and computer viruses are common and the loss caused is great. In these cases, the negligent tort restricts the recovery of loss caused. It is only possible if it is due to negligent misrepresentation, if it is due to other cases, it may be impossible. Therefore, the victim of economic loss will be recovering nothing. In addition, the procedural delay and the insufficient compensation have created doubt as to the effective protection of e-consumers through negligent tort.

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