

The Safety of Drinking Bottled Water Based on the Law of Negligence: Malaysian Perspectives

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Abstract: The law of negligence plays an important role in protecting individual from polluted and contaminated drinking water. The use of the law of negligence in the area of an individual's protection is largely in reply to the necessity of each individual to protect his rights and interests in consuming drinking water. Therefore, this study will examine the use of the law of negligence in relation to the individual protection on the drinking water safety from Malaysian legal perspectives, identify actions and cases, which deal with individual protection on polluted and contaminated drinking water from the Malaysian legal perspectives and lastly, discuss the law of negligence as a means to protect individuals from polluted and contaminated drinking water in Malaysia.

Key words: Safety, drinking bottled water, law of negligence

INTRODUCTION

Bottled water is a popular source of water nowadays as most people perceived that they strive better on it. For most people especially in the urban areas, bottled water is considered healthier, contaminants free, good taste and convenience or fashion even though the price is high. There are several varieties of bottled water in the market depending on the different source and processes applied; spring water, purified water, mineral water, sparkling water and artesian water.

Statistically, most people in developed countries are the top in rank, who consume most of bottled water in the world. Italy was ranked first, followed by United Arab Emirates, Mexico, France, Belgium, Germany, Spain, Switzerland and US as reported in National Geographic Magazine, July 2007. Being a better alternative to sweetened drink, drinking bottled plain water is advantageous especially, in order to reduce extra caloric intake of an individual. Bottled water also is very valuable during emergencies or outbreak of illness especially, when water supplies can be contaminated due to certain natural disasters. Having accepted as a part of modern life today, bottled water is being sold at a very high price, comparable to petrol and at the same price with milk. The increased in sales of bottled water worldwide has

attracted many small scale entrepreneurs to participate in the bottled water industry. However, without proper control in laws and regulations from the authority, this condition may compromise health of consumers. Commonly, there are many laws that ensure the safety and purity of bottled water.

Law governs the relationship of the individual with the state and also between one another. An easy approach to examine how it operates in the legal system is to classify it in the light of its relationships (Vohrah and Aun, 1995). Law may be classified into three parts. There are Public Law, Private Law and International Law. Public law governs the relationship between the State and the individual and as for private law, also known as civil law, it governs the relationship between an individual and another individual (Pheng, 1997). Meanwhile, international law governs the relationship between the State and another State (Razman and Shukor, 2001a).

These above-mentioned laws play an important role in relation to individual protection on drinking bottled water safety. The development of the law on individual protection on drinking bottled water safety is not solely based on public law alone; anyway, private law has also, made contribution to serve similar function in protecting the individual on drinking bottled water safety. Private law, essentially law of tort, serves as a mechanism to protect individual on drinking bottled water safety.

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

THE SAFETY OF DRINKING BOTTLED WATER BASED ON THE LAW OF NEGLIGENCE IN MALAYSIA

There is no specific statute that governs the law of negligence in Malaysia. In the event where there is no specific statute governs a particular private law, therefore, Civil Law Act, 1956 will come into the picture. Therefore, we will refer to the section 3 of the Civil Law Act, 1956. Section 3 of the Civil Law Act, 1956 lays down that:

3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

- In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.
- In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951.
- In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949.

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

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

NEGLIGENCE FROM LEGAL PERSPECTIVES

According to, the definition given by Lord Wright in the case of *Loghelly Iron and Coal and M'Mullan* (1934) AC 1, 25:

Negligence means more than heedless or careless conduct.....it properly connotes the complex concepts of duty, breach and damage thereby suffered by person to whom the duty owed.

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

- Duty of care is owed by an individual who caused damage (a defendant) to another individual who suffered the damage (a plaintiff).
- There is a breach of the above-said duty.
- There is damage, which is caused by the above-said breach of duty.
- A reasonable close connection between the damage and the breach of duty (Buang, 1993).

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

What is duty of care? In the case of *Donoghue and Stevenson* (1932) AC 562, Lord Atkin has introduced and established the neighbour principle as duty for every individual or in other words, neighbour principle is an obligation imposed by law to every individual.

Based on this neighbour principle, an individual is required to take reasonable care to avoid acts or omissions, which the individual can reasonably foresee that would be likely to injure the individual's neighbour (Rogers, 2006). The neighbour refers to persons who are so closely and directly affected by the individual's act, which the individual ought reasonably to have them in contemplation as being so affected when the individual is directing his mind to acts or omissions that are being called into question (Rogers 2006).

According to, the case of *Donoghue and Stevenson* (1932) AC 562.

Parties involved:

- Plaintiff/appellant-Donoghue.
- Defendant/respondent-Stevenson.

The facts of the case: The Defendant/Respondent was a manufacturer of ginger beer. The ginger beer had been bottled in an opaque bottle. After that the ginger beer had been delivered and sold to a retailer. Later on, a friend of the Plaintiff/Appellant purchased the ginger beer from the above-mentioned retailer for the

Plaintiff/Appellant as a gift. When the Plaintiff/Appellant had drank some of the ginger beer, then, she poured out of the balance of the said drink, at that moment she was shocked when a decomposed snail came out. Subsequently, she fell seriously ill.

- The plaintiff's/appellant's argument: The defendant/respondent as a manufacturer failed to ensure the safety of the consumer, which consumed the product. As the result, the Plaintiff/Appellant suffered injuries.
- The defendant's/ respondent's argument: The Plaintiff/ Appellant was not a contracting party; therefore, the plaintiff/appellant doesn't own the privity of the contract. As a result, the plaintiff/appellant has no right to commence her action in the said contract.
- In addition, under the law of contract, in order for the plaintiff to take action against the defendant in the court, the plaintiff is required to prove to the court that all the essential elements of a contract have been fulfilled (Razman and Shukor, 2001b).
- The House of Lords held that the appellant was entitled for the compensation even though there was no privity of contract between the respondent and the appellant but the respondent owed duty of care towards the appellant based on the Neighbour Principle, where the respondent must ensure his neighbours i.e. the consumer will not suffer injuries when the consumer consumed his product.

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

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

CAUSATION

The third essential element under the law of negligence is that there is damage caused by the defendant and it is due to the defendant's breach of duty. Federal Court Judge, the Honourable Raja Azlan Shah

declared in the case of *Government of Malaysia and Ors and Jumaat Mahmud and Anor* (1977) 2 MLJ 103:-

.....must be commensurate with her opportunity and ability to protect the pupil from dangers that are known.....It is not a duty of insurance against harm but only a duty to take reasonable care for safety of the pupil.....The sole question.....is a question of causation.....the injury.....in fact caused by wrongful act of the teacher.....it cannot be said that it was reasonably foreseeable.

It is clear from Raja Azlan Shah FCJ judgment that:

- The plaintiff is required to prove that the damage, injury and/or risk was foreseeable.
- The plaintiff is also required to prove that the defendant has failed to take reasonable approaches to prevent plaintiff's injury and/or damage.
- If the plaintiff is able to prove the above-mentioned matters, he has established the existence of the essential element under the law of negligence i.e., there is damage caused by the defendant and it is due to the defendant's breach of duty.

In addition, the court of law in general will use a test that is known as but for test, in order to determine whether the damage was caused by the defendant's breach of duty.

In the case of *JEB Fasteners Ltd. v Marks Bloom and Co.* (1983) 1 All ER 538.

Parties involved as follows:

- Plaintiffs-JEB Fasteners Ltd.
- Defendants-Marks Bloom and Co.

The facts of the case: In this case, where the plaintiffs took legal action against the defendants on the ground that the defendants were negligently in preparing a report on a company that caused damage and loss to the plaintiffs, who had planned to take over the above-mentioned company.

The court had used the but for test in the case. The court held that, it was clearly shown that the plaintiffs were going to take over the above-said company anyway; therefore, the defendants' negligence, even if proven, it did not cause of plaintiffs any damage and loss.

A reasonably close connection between the damage and the breach of duty: A reasonably close connection between the damage and the breach of duty is the final

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

THE LEGAL ACTIONS UNDER THE LAW OF NEGLIGENCE ON THE INDIVIDUAL PROTECTION ON DRINKING BOTTLED WATER SAFETY

There are a number of cases that has been brought forward to the court on drinking bottled water safety for individual protection under the law of negligence. Among the leading cases are, firstly the case of *Donoghue and Stevenson* (1932) AC 562 and the case of *Daniels and Daniels and R White and Sons Ltd and Tabbard* (1934) 4 All ER 258.

In the case of *Daniels and Daniels and White and Sons Ltd and Tabbard* (1934) 4 All ER 258.

Parties involved are as follow:

- Plaintiffs-Daniels and Daniels.
- Defendants-R White and Sons Ltd and Tabbard.

The facts of the case: In this case, where the plaintiffs took legal action against the defendants on the ground that that the defendant negligently produced lemonade that containing carbolic acid.

- The court held that in order for the plaintiff to take action under the law of negligence on drinking water safety, the individual is required to prove to the court of law that the existence of duty of care in his legal action, in which, there is a breach of the above-said duty and there is damage, which caused by the

above-said breach of duty; and lastly, there is a reasonable close connection between the damage and the breach of duty. In addition, the courts have shown reluctance and refusal to award based on pure economic loss. Therefore, it is must be on personal injury or damage and secondly, under the law of negligence, the burden of proof is great, which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendant's actions and the damage suffered by the plaintiff and further to further prove that a duty of care is owed by the defendant, which the defendant has breached the duty and in the end caused the damage.

CONCLUSION

Based on the above discussion, in order for an individual to take action under the law of negligence on drinking water safety, the individual is required to prove to the court of law the existence of duty of care in his legal action. He must also prove that there is a breach of the above-said duty and damage caused by the above-said breach of duty and lastly, there is a reasonably close connection between the damage and the breach of duty.

In addition, there are advantages and disadvantages associated with an action under law of negligence. The advantages are, firstly, there is no need to prove that the injured party (the plaintiff) and the party that caused the injury (the defendant) have a privity of contract and secondly, there is no requirement to demonstrate loss by other members of the public (Wolf and White, 1995).

As for the disadvantages, firstly, the courts have shown reluctance and refusal to award damages based on pure economic loss. Therefore, must be on personal injury or damage. Secondly, under the law of negligence, the burden of proof is great, which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendant's actions and damage suffered by the plaintiff (Wolf and White, 1995).

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