

Product Liability Law: Producer's Liability for Harmful Cosmetic Products

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ABSTRACT

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Under relevant Malaysian laws, manufacturers or distributors who falsely claim that their cosmetics are safe are subject to criminal penalties. The question arises as to whether the producers can be responsible for physical as well as emotional injury caused to the consumers of such products. This paper seeks to investigate the potential liability of the manufacturer and distributor of defective cosmetics under the product liability law, which generally aims to protect consumers from unsafe products. The paper concentrates on the provisions of strict liability for defective products under Section X of the Consumer Protection Act 1999. The main issues to be resolved are whether cosmetics containing harmful substances can be considered as 'defective' and what kind of injury can be recovered by the victims. This study's findings provide producers and suppliers with information regarding their civil liability for supplying presumably safe cosmetics and the consumer's ability to obtain redress for harm caused by cosmetics comprising harmful ingredients.

Contribution/Originality: The research on producer liability for harmful cosmetics is valuable to the field's new literature. Our study broadens the knowledge base by exploring the legal aspects, consequences, and measures for prevention of harmful cosmetics and their intricate connection with producers, consumers, and public health.

1. Introduction

Cosmetics have been used by humans for centuries, beginning in the nineteenth century. Cosmetic products were used not only for beauty but also for health maintenance at the time. Cosmetology is believed to have originated in ancient Egypt and India; however, the earliest records of cosmetic substances and their application date back to the Indus

Valley civilization between 2500 and 1500 B.C. (Gupta et al., 2023). The Western cosmetics industry began to grow in the late 1800s as a result of an increase in "visual self-awareness," a shift in the perception of colour cosmetics, and product safety improvements. Several innovations in technology in the latter half of the twentieth century, such as the invention of mirrors, commercial photography, marketing, and electricity in the home and public places, raised awareness of one's appearance and created a demand for cosmetic products that improved the way a person appeared (Jones, 2010). Cosmetics are now produced not only for personal use but also for domestic and international business. There have been many developments made in the production of cosmetic products for the community to attract customers through the promotion of skin beauty, skincare, whitening, and other similar practices.

According to Azmi Hassali and AL-Tamimi (2015), the Malaysian cosmetics and toiletries market is worth around RM3 billion, with a 13% annual growth rate. Even though the cosmetic industry is doing exceptionally well, it is becoming increasingly difficult to ignore the endless complaints in the mainstream media and on social media. The issue has grown in importance because of numerous reports and complaints about the ingredients in cosmetic products that cause several health issues (Hussain et al., 2017).

Take for example in 2022, four cosmetic products containing mercury, hydroquinone, and tretinoin have been banned by the Ministry of Health of Malaysia (NST, 2022). Apart from banning the product, another measure which could be taken by the Ministry is a product recall. A drug recall is the best way to keep people safe from a bad or possibly hazardous product. A recall is something that a company does on its own to take an unsafe drug product off the market. A company can recall a drug on its own or at the request of the Ministry of Health in Malaysia. NPRA's job during a recall is to keep an eye on the company's strategy, decide if the recall is enough, and put the recall into a category.

Cosmetics must be registered with the government before they could be sold. The Control of Drugs and Cosmetic Regulations (CDCR) 1984, promulgated under the Sale of Drugs Act 1952, governs cosmetic products in Malaysia. These regulations will take into account the safety, quality, and cosmetic product claims to assure that all cosmetic product claims can be supported by adequate data, which can assist in protecting and promoting public health (Othman et al., 2020). Before the implementation of the new method, cosmetic products were governed through a prior approval system by the regulatory authority before they could be released for public use.

The earlier approval system has been replaced by a notification scheme, and the cosmetic registration system is no longer applicable, thereby encompassing cosmetic safety and quality more efficiently. Before the manufacture, sale, supply, import, or possession of any cosmetic product, the Guidelines for Control of Cosmetic Products in Malaysia under Section 2 make it obligatory for the cosmetic notification holder (CNH) to notify the Director of Pharmaceutical Services (DPS). Notification of cosmetic products is done through the Quest 3+ system, which is accessed online, and CNH must complete the notification form in the Quest system for each cosmetic product and variant, if any, and proceed with the payment to the NPRA. It is also essential to place the responsibility for consumer safety on the producer or manufacturer of the product.

Pre-market control approaches mean that products are controlled before being placed on the market. Taking, for example, the current position in Malaysia, CNH, through the Quest 3+ system, is under obligation to notify DPS before the cosmetic is sold to the public. However, the producer's responsibility does not stop when the product is placed on the market but rather continues. Through its Post-Market Surveillance (PMS) programme, the NPRA will monitor the conformity of cosmetic products. The PMS activities for cosmetics consist of a screening of product formulation and information to ensure that cosmetics do not contain any prohibited or harmful substances and that all restricted ingredients are used within the permissible limits and usage conditions. In addition to the product's name and purported benefits, other screening criteria include sample collection and testing, label compliance monitoring, and handling of product complaints.

[Sofiana et al. \(2021\)](#) believe that consumer protection is steadily becoming recognised as a feature of modern law. In Malaysia, for instance, the government sees to it that all laws and rules are strictly enforced, and if there are any violations, the law is reviewed and possibly changed. This will ensure an effective and efficient set of regulations, maximising safety for consumers. This demonstrates that the right to consumer protection has already been taken seriously by society and law enforcement agencies, who are now more aware of consumers' protection needs in the cosmetic products market.

[Arlina \(2019\)](#) suggests that product responsibility under consumer protection law essentially refers to the producer's responsibility. Product liability refers to the manufacturer's responsibility for the goods that it distributes if they cause loss due to defects in the goods in question. A product liability claim can be made if there was a breach of warranty, negligence, or absolute responsibility (strict liability).

Through using a content analysis approach, the purpose of this paper is to examine the possible liability of the manufacturer and supplier of harmful cosmetics under the product liability law, which is generally concerned with protecting consumers from unsafe products. The paper focuses on Part X of the [Consumer Protection Act of 1999](#), which discusses strict liability for faulty products. The paper begins with an introduction to the concept of harmful cosmetic products for consumers. This background information is crucial for understanding the potential harm that may be caused to consumers by the distribution of defective cosmetics. The discussion subsequently discusses the requirements required to successfully establish a case under the strict product liability law.

Before producers can be held liable for a defective product, it must be demonstrated that the product is defective. The purpose of the discussion on the concept of defectiveness is to determine whether or not hazardous cosmetics can be considered defective. Additionally, the study identified parties that can be held responsible for producing and supplying the goods in question, thus determining the extent of each participant's liability along the supply chain. This paper concludes by discussing the nature of the harm that may be caused to consumers who are supplied with defective cosmetics. The conclusion summarises the theoretical and practical challenges to a successful product liability claim based on defective cosmetic products, thereby limiting the legal liability of the manufacturer.

2. Finding and Discussions

2.1. Defective Cosmetical Product: An Overview

Cosmetics now appeal to a much larger market. They were once almost exclusively associated with women, but they are now significant for both genders and all age groups. Cosmetics are currently produced on a larger scale, and their sales are phenomenal (Betton, 2007; Novoveská et al., 2019). As the global sales of cosmetics increase, concerns about the safety of such products have also become a worldwide problem (Morais et al., 2021).

Cosmetic products can contain a variety of harmful or toxic chemicals that could harm the skin. Cosmetic product manufacturers use natural ingredients, such as shea butter, rose extract, and cane sugar, which are sustainable, cost-effective, and less harmful to the consumer (Rinaldi, 2008; Panico et al., 2019). Perfumes, make-up, and nail polish, for example, stay on the skin for a longer period and can lead to negative consequences such as allergic reactions (Dooms-Goosens, 1993; Mahajan, 2022). Moisturizers, particularly when used in high concentrations, increase the moisture properties of the skin, potentially causing irritation and exfoliation (Khan & Alam, 2019).

Gupta et al. (2023) suggests that hydroquinone (HQ), a skin-lightening agent, has been identified as one of the most dangerous substances, where potential mutagenicity has been reported. Sunscreens on the other hand can cause irritant, allergic, phototoxic, or photoallergic reactions. Khan and Alam (2019) claim that DEA (diethanolamine) is used to make cosmetics creamy or sudsy, or as a pH adjuster to reduce the acidity of other ingredients, but experiments in the laboratory have demonstrated that high doses of DEA-related ingredients cause liver cancers and precancerous changes in the skin and thyroid. They can be found in shampoos, soaps, and cleaning products. These chemicals may also irritate the skin and eyes in mild to moderate amounts (Altiokka & Üner, 2022). Darbre et al. (2004), Kamel and Ahmed (2022) proposed that preservatives are used to protect cosmetics from microbial contamination and parabens are the most commonly used preservative in cosmetics. Nonetheless, numerous studies indicate that methylparaben could react with other chemicals on the skin, causing skin ageing and DNA damage.

Perfumes can also be found in cosmetics. The fragrance is a key component of perfumes, deodorants, and colognes. Perfumes are found in almost all cosmetic products. Fragrances can enter the body through the skin (adsorption), lungs, airways, ingestion, and pathways from the nose directly to the brain, causing headaches, dizziness, fatigue, eye, nose, and throat irritation, forgetfulness, and other symptoms (Naveed, 2014; Khan & Alam, 2019). Many unlisted fragrance ingredients are irritants that can cause allergies, severe headaches, and asthma symptoms. Perfume can aggravate asthma and possibly contribute to its development in children. It is the second most common cause of allergic reactions in patients (Park et al., 2014; Pastor-Nieto & Gatica-Ortega, 2021).

There is not going to be an end to the discussion over the potentially dangerous ingredients used in cosmetics. The ingredients listed above are just the tip of the iceberg. But one thing can be said for certain, cosmetics ingredients have the possibility of causing serious health problems. According to Hassali et al. (2015), there are four different types of cosmetics brands in Malaysia: local brands owned by local companies, local brands owned by local manufacturers but manufactured abroad, foreign brands

owned by international firms but locally manufactured, and foreign brands owned by international firms and manufactured abroad. In the study, the first two groups produced the majority of non-compliant cosmetics.

It can be concluded that cosmetics currently appeal to all ages and genders. Cosmetics sales have increased, but safety concerns remain prevalent worldwide. Natural ingredients are used in cosmetics because harmful chemicals might harm the skin. Perfumes, makeup, and moisturisers may trigger allergies and skin irritation. Hydroquinone and DEA are, in fact, harmful chemicals. Cosmetic preservatives like parabens and fragrance ingredients can also cause skin ageing, DNA damage, headaches, and irritations. Fragrances, in particular, can cause multiple health issues through multiple pathways. Hence, cosmetic safety and the use of potentially harmful ingredients remain ongoing topics of discussion.

2.2. Supplying Harmful Cosmetic Products: Consumer Protection Act 1999 Perspective

In terms of the law governing the sale of goods, cosmetics are comparable to other products. Therefore, the sale or supply of a harmful cosmetic is subject to implied conditions under the [Sale of Goods Act of 1957](#) and implied warranties under the [Consumer Protection Act of 1999](#). In general, the sale of a cosmetic with a label, representation, or other indication that the product is safe would have breached the terms of the contract between the seller and the purchaser. Under Section 15 of the [Sale of Goods Act 1957](#) and Section 34 of the [Consumer Protection Act 1999](#), liability may be imposed for breach of the implied condition that the goods do not correspond to the description. As description relates directly to words that identify the cosmetic's ingredients, the acknowledgement that it is safe should be regarded as a significant component of the cosmetic's description.

Correspondingly, it might be argued that cosmetic products containing harmful substances do not conform with the contract because they are unfit for consumer use (Section 16(1)(a) & Section 16(1)(b) [Sale of Goods Act 1957](#) and Section 33 [Consumer Protection Act 1999](#)). In addition, Section 32 of the [1999 Consumer Protection Act](#) requires the supplier to provide goods of acceptable quality. Supplier, according to Section 3 of the [Consumer Protection Act 1999](#), means a person who supplies goods to a consumer by transferring ownership or possession of the goods under a contract of sale to which that person is a party, and can also include a person who is acting as agent for another person when that other person is not supplying in trade.

Acceptable quality goods are those that are suitable for their intended use, free of minor defectives, acceptable in appearance and finish, safe, and long-lasting (Section 32(2) of the [Consumer Protection Act of 1999](#)). These acceptable criteria must be balanced with consumer expectations about the product, taking into account the nature of the product, the price, any statements on the packaging or label, and any representations about the product. Thus, it can be asserted that the supply of harmful cosmetics is not following the sales contract and falls short of customer expectations ([Amin & Aziz, 2015](#)).

According to Section 41(2) of the [Consumer Protection Act of 1999](#), any other loss or injury that can be linked back to the product's failure can be claimed as a consequential loss. Since the contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension, or aggravation which his breach of contract may

cause to the innocent party, it is questionable whether mental distress or other emotional injury sustained as a result of using the said cosmetic can be claimed under this heading (*Watts v Morrow* 1993 1 WLR 1421).

Similarly, *McLoughlin v. O'Brian*, 1983 AC 410 held that a claim for mere mental distress is not permitted under the law of negligence unless it leads to a positive psychiatric illness. The prerequisites of the duty of care, breach of duty, and remoteness of damage further limit a potential claim under the tort of negligence. Manufacturers may be said to owe a duty of care to produce safe cosmetics for consumer use, but they may avoid liability by claiming that they took all reasonable steps to ensure compliance with Malaysian safety guidelines.

Consumer Protection Act of 1999 was enacted not only to protect consumer rights against the safety of a product in the marketplace but also to prevent the production of low-quality products that harm consumers. The provisions of this Act touch on the safety of goods and services in some sections of Part III, where a Minister is allowed to prescribe the safety standard through the regulations stipulated in it (Section 19, *Consumer Protection Act 1999*). As a consequence, producers and suppliers must follow the rules outlined under Section 19, which are both mandatory and enforceable.

Furthermore, *Othman et al. (2020)* explain that Section 20 of the same Act provides that no person shall supply, offer to, or advertise for supply, any goods or services which do not comply with the safety standards determined under Section 19. Suppliers and manufacturers of goods or products must follow the prescribed safety standard instructions. On top of that, the general requirement of safety for goods and services was highlighted under Section 21 *Consumer Protection Act 1999* and shall be adhered to by both suppliers and manufacturers.

The infringement of this safety standard is an offence that is punishable with a fine not exceeding two hundred and fifty thousand ringgit for body corporate, and a fine not exceeding one hundred thousand ringgit, or by imprisonment for a term not exceeding three years, or by both if the person is not a body corporate (Section 145 *Consumer Protection Act 1999*).

2.3. Liability under the Strict Liability Rule

The producer of the product, regarded as the dominant link in the market chain, is the central focus of the strict liability rule. The producer is responsible not only for production but also for creating consumer demand and expectations through labelling and sales promotion activities. The rule's primary objective is to deal with the problems that arise in contractual and negligence remedies (*The Law Commission, 1977*) where liability can be imposed in the absence of a contractual relationship and without proof of fault or negligence. Liability may be imposed solely based on the mere existence of a defect. For example, if a consumer is given a harmful cosmetic and it causes him harm, the manufacturer of the cosmetic will be kept strictly liable under Part X.

The principle of strict product liability is observed under Part X of the *Consumer Protection Act 1999*, which would be Malaysia's main consumer protection statute. *Othman et al. (2020)* claims that this act's origin is intended to fill gaps in product safety laws, and it provides the basis for government monitoring of product safety in Malaysia. Part X's strict liability scheme for defective products is based on Part 1 of the UK's

Consumer Protection Act 1987 (Amin & Aziz, 2015). The [Consumer Protection Act 1999](#), which became law on November 15, 1999, aims to protect consumers by setting up the National Consumer Advisory Council and the Tribunal for Consumer Claims. It mainly includes all of the substantial areas of consumer protection, such as the supply of goods, the supply of services, trade practices, unfair contract terms, product safety, liability, and redress mechanisms.

Part X sets up a strict liability rule for cases involving death, personal injury, and property damage caused by a product defect. The primary liability is imposed on the producer, brand owner, and importer under Section 68 of the [Consumer Protection Act of 1999](#). A producer is defined broadly as anyone involved in the manufacturing, pre-manufacturing, or processing of a natural product such as food. Besides this, a manufacturer of parts and raw materials can be sued separately or jointly with a manufacturer of finished goods. This is based on Section 66(1) of the [Consumer Protection Act of 1999](#), which identifies a "product" as "*any product that is comprised in another product, whether under being a part, raw material, or otherwise.*"

Amin and Aziz (2015) suggest that it is irrelevant how the cosmetic became tainted or whether a risk of contamination can be discovered or avoided. Furthermore, under Section 68(2) of the [Consumer Protection Act of 1999](#), a claim can be made by "*a person who suffered the damage,*" who is not necessarily the buyer. The right to file a lawsuit extends to mere consumers and bystanders as long they can establish the rule's essential requirements, namely the damage or injury, the defect in the product, and the causal link between the injury and the defect.

2.4. Is Harmful Cosmetic Product Defective?

The key concept of the strict liability rule is defectiveness; thus the product must be demonstrated to be defective before liability can be imposed on the producer. Thus, according to Section 67(1) of the [Consumer Protection Act of 1999](#), "*a product has a defect for this Part if the safety of the product is not such as a person is generally entitled to expect.*" It is evident that the definition of "defect" is founded on the concept of safety.

According to Section 67(4) of the [Consumer Protection Act of 1999](#), safety concerning a product involves (a) safety concerning the products contained therein; (b) safety in the context of risk of property damage; and (c) safety in the context of risk of death or personal injury. Mislabeling or false labelling by itself will not render a product defective if it causes no physical injury. As was previously mentioned, a customer could suffer serious harm from using a cosmetic containing harmful substances, such as those that cause allergic reactions, liver cancer, asthma symptoms, and so on.

2.5. Recoverable Injury and Damage

The proof of injury would be another requirement of the strict liability rule. The injury must be demonstrated to have been caused entirely or partially by the product defect, as discussed in Section 68 of the [Consumer Protection Act of 1999](#). Part X of the [Consumer Protection Act of 1999](#) restricts the power of an aggrieved consumer to seek compensation under three main categories: death, personal injury, and damage to property, including land.

Regrettably, the term "personal injury" is not defined in the [Consumer Protection Act of 1999](#). However, reference could be made under Section 45(1) of the UK Consumer Protection Act 1987 which defines personal injury as "*any disease and any other impairment of a person's physical or mental conditions.*" Another comprehensive description of the damage in the context of product liability law can be found in Thailand's Liability for Damages Arising from Unsafe Product Act 2009, which defines damage as "*the damage arising from unsafe goods, whether to life, body, health, mind, or property, excluding damage to the unsafe goods themselves*" (Section 4, B.E 2551).

Another constraint to a successful claim under Part X is attempting to establish a causal link between the defect in the cosmetic product and the consumer's adverse health. In some instances, the adverse effect may take time to manifest because the impact on the body is not instantaneous. As a result, determining the immediate effect of using harmful cosmetic products is extremely difficult but the requirement of causation may still be met if a medical practitioner can prove that the consumer did suffer the injury after using the tainted cosmetic. However, other factors such as intervening health factors can obscure causation issues.

Product liability is associated with two consumer rights. First, the right to obtain goods in sufficient quantity and quality that are also safe. This usually implies that consumers must be protected to obtain goods in sufficient quantity and quality. Second, there is the right to be reimbursed. If the purchased goods are defective, damaged, or endanger the purchaser, he is entitled to appropriate compensation ([Arlina, 2019](#)).

In addition to the discussion above, it is important to note that our [Control of Drugs and Cosmetic Regulations \(CDCR\) 1984](#) also specifies penalties for cosmetic infringements. For any violations of the CDCR 1984, offenders can be fined up to RM25,000 or imprisoned for up to three years for the first offence, and fined up to RM50,000 or imprisoned for up to five years, or both, for a repeat offence. The cosmetics company associated faces a RM50,000 fine for the first offence and a RM100,000 fine for subsequent offences.

[Syaliza Mokhtar et al. \(2020\)](#) explain that the Poison Act 1952 and the Sale of Drugs Act 1952 govern medical beauty products, while the Drugs and Cosmetic Control Regulations 1984 govern cosmetic products. The authors however emphasize that in the event of any injury, these acts do not provide any form of compensation system to consumers as it is purely criminal liability. Existing regulations are unsatisfactory to shield consumers and ensure justice. With the expansion of the cosmetics industry, there should be a legislative intervention to ensure greater justice.

3. Conclusion

Injuries sustained by consumers are the responsibility of the manufacturer or seller who made false or negligent claims about the product's safety. Consumers who suffer harm because of using a potentially dangerous cosmetic in Malaysia can file a claim for damages for breach of warranties under the law of sale, for negligence-related damages, or under the strict liability provisions of the [Consumer Protection Act 1999](#). As a result, the manufacturer and supplier of the defective cosmetic are open to a broad spectrum of legal claims from consumers. However, it is reasonably clear that the requirements of defectiveness, damage or injury, and causation are major hurdles for the application of strict liability for supplying perilous cosmetic products. If victims of harmful cosmetic

products are to be protected under the strict liability rule, the mental injury should be recognized as a recoverable injury under Part X as well. Despite the regulations and limitations, the cosmetics manufacturer cannot disregard the potential of consumer lawsuits. Cases of safety deception should decrease because of the threat of civil liability serving as a strong deterrent function equivalent to criminal sanctions.

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