Consumer Rights to Safe Products:
Some Discussions on the Important Characteristics of
the Theoretical Aspects of Regulation

Zalina Zakaria*

Abstract

There is a large body of academic work that has addressed the theoretical
justification for product safety regulation; mostly covering economic and
sociological justification. The most cited reasons for product safety regulation
are the market failures that occur in conjunction with private law failures.
Product safety regulation is a government’s attempt to ensure that only safe
products are produced and sold to consumers. Although such a role is also
being performed by private law through the imposition of product liability,
an area that has developed over time to protect consumers, however, the main
objective of product liability is compensation, as the law seeks to provide
redress for damage suffered by the victim of defective products. This article
is concerned with the theory surrounding product safety regulation. It begins
with commentary on the limitations of private law in safety regulation, before
going on to consider the need for safety regulation. Finally it investigates the
existing legal mechanisms in the product safety framework to determine
whether they are adequate and efficient in protecting the safety of consumers.

1.0 Introduction

The need for product safety regulation is no longer a source of debate. It
should be the primary aim in any consumer protection policy. This is due to
the fact that there are a lot of consumer goods that are heterogeneous and more
technologically advanced that are continually being introduced to consumers.
Today, the innovation of new products coupled with the massive demand for
them offers a great opportunity for those who aim for profit from the mass
production of such products. This is in line with the principle of freedom of
choice1 that ensures that consumers have a wide range of products to choose
from. The most crucial consideration, however, is that the products available
to be consumed are safe and are not a danger to the health of consumers.
Accidents can happen as a result of unsafe products.

* LLB (Hons), MCL, PhD (Law); Lecturer, Department of Shariah and Laws, Academy of
Islamic Studies, University of Malaya.

Modern product safety law came about to minimise preventable home accidents. Product safety regulations are aimed at preventing dangerous products from reaching the market or the consumer, as well as informing the user how to use the products safely, as intended. Producers of consumer products should also be responsible for withdrawing or notifying users of products that are recognised as being unsafe. It is not sufficient for the producers merely to design, create and sell products that are intended to be safe. The way the product is used may also affect the safety of those who use it or are affected by it. As part of the product development, it is also very important to inform the consumers about the instructions for use and the warnings associated with the products, as well as to pay attention to the product’s packaging. What also important is the product monitoring system after they are sold on the market. With the rise of home accidents happening these days relating to consumer products, the issue then arises as to whether such incidents could be safeguarded by a regulatory mechanism, i.e. by ensuring only safe products reach the market. Here, product safety regulations play a fundamental role. Product safety refers to the regulatory control by governmental authorities of the marketing of products by means of criminal and/or administrative law. It functions as a preventive measure, particularly when consumers are not able to anticipate risks, and when so many new products are being introduced that are only supported by the claims of the manufacturers concerning their safety and effectiveness.

2.0 Product safety or product liability in protecting consumer?

By comparing product safety and product liability, it is possible to see that product liability is a more popular research topic in terms of law research especially in the USA and the European systems. It is understandable because, as Howells sees it, it is easy and interesting to track how legal systems have,

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3 In the USA, product liability is a course in its own right. For example, product liability has its own courses in the law school curriculum, its own textbooks and treaties, and numerous American lawyers make their living from product liability litigation. See G. Howells, Consumer Product Safety, Aldershot, Ashgate, 1998, pp 3-5.

4 In contrast, in the EU, product liability is only taught as part of torts/obligation courses or as a topic in consumer law courses and it only remained a minor area of practice: ibid.

within a relatively short space of time, reacted to the new topic of product liability. However, it can be said that product liability suffers some limitations in that it does not provide adequate protection to ensure that only safe products are placed on the market. The potential risk of a product, in other words, is not solely guarded by reliance on product liability.

Cartwright establishes four limitations of private law. The first is that private law depends for its enforcement on the injured party taking action; however, the enforcement costs of bringing an action often mean that many breaches of the law will go uncorrected. The possibility to bring civil actions will not satisfactorily prevent the manufacture and supply of dangerous products. Therefore, this is hardly a deterrent to those manufacturers as usually the amounts claimed are relatively small. Secondly, private law focuses primarily upon correcting harm that has already taken place by way of providing compensation. It is important that where a product is of potential hazard to consumers, preventative measures are taken to prevent such products from reaching the public. Private law only addresses the problem after the harm has occurred. It does not directly prevent dangerous products reaching the market and preventing the harm from occurring. Although it may seem that there are some deterrent effects in the future for wrongdoers, however if the person “hopes to avoid any sanction and is probably little worried by the prospect of having to make reimbursement or an effective payment”, it might seem that such a deterrent effect might not deter the people as it is supposed to. It must be remembered that consumer protection should not ideally be left in the hands of individual consumers taking action after the harm has already been done. In other words, prevention is always better than reparation.

Thirdly, according to Cartwright, sometimes there can be problems of external costs that might be suffered by third parties in private law transactions. This is known as externalities. Ogus is of the opinion that often externalities are present in private law transactions. Persons other than the purchaser may consume or use the product; but some of the consequences of the unsafe or dangerous products may be borne by other third parties. Even though the law of tort can provide some limit of protection, it is still inadequate in the sense that it allows dangerous products to be sold on the condition that compensation is paid in the event that they cause injury.

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6 Ibid, at 306.  
8 Cartwright, Peter, supra, n 7, p 698.  
Fourthly, although some rectification can be made through the law of contract, as far as the law of contract is concerned, such law is hindered by the rule of *privity*. This rule means that nobody outside the contractual agreement is allowed to bring an action against the party to the contract, even if she/he is injured because of that contract. Even though this imperfect doctrine has been strongly criticised for being unfair and some developments have taken place to make it easier for a third party to sue in limited circumstances, this doctrine is still available and largely applicable.

Some argue for the use of tort law to provide some amount of safety, as is evident in the USA where ease of access to justice in personal injury cases combines with high damage awards including punitive damage to make manufacturers produce safer products. However it is also an *ex post* mechanism, and apart from being considered the most expensive method, (because of high transactions and administrative costs, including legal fees) it is not efficient if damages are imposed on large numbers of people and where a person/company that caused injuries is too poor to pay for the harm they have caused. If the company can get insurance then the risk of people going uncompensated is removed, but it also means the deterrent effect is reduced. Also, although there have been debates about the appropriateness of using criminal law in consumer protection and there are administrative rules as an alternative, criminal sanctions have a role in controlling dangerous products. Furthermore, it could be argued that the criminal laws which prohibit the sale of dangerous products are examples of regulatory offences and that such crimes are “not criminal in any real sense”.

Based on the above reasons and limitations, private law has not produced a perfect solution. Although it can be argued that civil cases concerning consumer products are more likely to be successful than criminal actions (as the legislation imposes strict liability), and in criminal law there is a higher

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12 Treitel explains the doctrine as “a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it”. See Treitel, G H, *The Law of Contract*, 10th edn (London: Sweet and Maxwell, 1999).
13 It is a traditional doctrine which is considered unfair as it allows only parties to a contract to enforce it. In other words, no one except a party to a contract can acquire rights under it, and similarly no one except a party to that contract can be subjected to liabilities under it.
17 Ibid.
18 Instead of negligence on the part of the producer, it is only necessary to show that “… the safety of the product is not such as persons generally are entitled to expect”. See Hayward, G, “Helping Judges Judge Safety,” *Solicitors Journal*, EW Supp, December 11, 1998, 22–26.
burden of proof and the supplier may be able to make a defence of “due diligence” which is particularly relevant when the issue is one of quality control rather than product design, the consumers should not be expected to rely upon private law for their protection.

Therefore, an additional regulatory control which is based on regulation of public law should be in place. In addition, even though it is the producer or manufacturer who may suffer financially, ultimately it is the injured consumer who suffers the physical harm. A special regime is needed in order to provide specific control for the protection of consumer safety that prevents harmful goods from reaching the market as well as providing post-marketing functions such as surveillance and monitoring. Such protection is provided under the regulation of product safety.

3.0 The need for product safety regulation

It is often argued by consumer advocates that consumers have inadequate information concerning the characteristics and efficacy of a product offered and that sellers will generally have superior information regarding these matters. This covers potentially many issues, but can include safety and related matters such as reliability and durability. This is called information asymmetry and can sometimes mean that consumers have difficulties in making decisions that reflect their true preferences. In addition, an insight provided by behavioural economics indicates that consumers may not always respond to information provided as reasonably as the economic models sometimes suggest. It has been argued that, if consumers have the correct information concerning the characteristics and efficacy of a certain product offered on the market, regulatory intervention, through the regulation of product safety, might not be required. This is on the proviso that such transactions do not give rise to “spill over” effects which adversely affect individuals who are third parties to the transaction. These effects are also known as externalities. However, the more frequent predicament in the use of many products sold on the market is that their safety and quality can only be ascertained through long-term consumption, as the effects of poor quality products may take a considerable time to emerge.


20 Furthermore, although the consumers can obtain information from ingredients labelled on the packaging provided by the producer/manufacturer, it is still possible that they might have problems in absorbing the disclosed information effectively. See further discussions in the next section.


22 Externalities are also known as “spill over effects” as termed by Ogus, supra, n 19, pp 4, 21, 33–38. It refers to a consequence of economic activity/cost that is experienced by unrelated third parties.

23 Ogus, supra, n 19, p 190.
In these cases, consumers are usually unable to establish the level of safety of goods or the quality of goods of particular products before purchase. This is due to the fact that in many consumer products, their safety aspects are determined through experience. This is known as ‘experience goods’ whereas another category of products is ‘search goods.’ The search goods products are the products whose safety and quality can be determined prior to purchase, whereas those of experience goods can only be established during consumption. They are technically complex, and consumers are not usually able to examine the products to assess their claimed efficiency simply by inspecting them. It was argued that the potential danger of many consumer products was sometimes underestimated and rarely appreciated by the public.

4.0 Characteristics considered for product safety regulation

Earlier it was mentioned that government intervention, through product regulation, is necessary and justified as consumers should not have to trust to private decisions to guarantee the safety of the market place. However, product regulation does not mean the production of risk free products; it is about ensuring products only represent acceptable risks. Also, product regulation cannot be expected to regulate for risks which are unknowable at the time of marketing. Product regulation will still lead to products being marketed which will pose dangers to consumers; however consideration of some characteristics could help make the risks acceptable. As new products are brought out every day, the fact that they are very sophisticated and complex makes it difficult for consumers to gauge their safety, quality and efficiency. This section will discuss the purpose and nature of each characteristic that are considered key points in the general product safety mechanism: they are the information regulation, the assessment of risk, the responsibility placed on the manufacturer and producer of a product and lastly the precautionary principle.

4.1 Information regulation

In product safety regulations, information regulation is regarded as one of the most essential elements. Cartwright describes information regulation as one

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of the most commonly used regulatory techniques in the consumer protection area. It is regarded as “less interventionist” in character compared to many other forms of regulation. As explained previously, regulatory intervention through information regulation would not be necessary if consumers had the full information on the characteristics of products offered in the market and if externalities did not exist in their purchasing decision. However, as with many consumer products, conditions of information deficit and externalities do exist. Insisting that information be disclosed in some cases can be a solution to product safety problems. For example, if someone is allergic to nuts, then harm can be avoided if a product containing nuts is labelled conspicuously. Similarly, warnings of product risks are important if they are deemed to be an acceptable characteristic of the product. This is based on the fact that a warning can help consumers take steps to avoid potential danger—as without any information being provided to them, it is difficult for the consumer to know and understand which products contain what ingredients, and how they can be used so as not to cause them harm. Asch contends that consumers are usually assumed to know the characteristics of the goods they buy; however what must be noted is that it is not equivalent to knowing with certainty how a particular product will perform, and how safe it is. Where there is a lack of information either because it is unavailable or available but costly, decisions often become more complicated. Also, the consumer might get the answer from ingredients labelled on the packaging but it is still possible that the consumer might have problems in absorbing the disclosed information.

Consumers normally have less information than traders; therefore often they have difficulty in making decisions that reflect their preferences. This is what is called information asymmetry, as explained earlier. Akerlof, among others, has pointed out that asymmetries in information are likely to impede efficiency and may even preclude the existence of viable markets in extreme instances. While information asymmetries are cited somewhat as a hindrance for a “perfect market”, Howells emphasises the insights provided by behavioural economics which suggest that consumers may not always respond to information provided as reasonably as traditional economic models sometimes believe. Since there are not sufficient incentives for traders to volunteer information, the law needs to require that the information is provided. Once the information is provided, consumers can protect their

29 As discussed earlier.
31 Ibid.
33 One of the illustrations given by Akerlof of asymmetric information is the market for used cars, where sellers have a far better idea than buyers of whether a used car is good or a “lemon” with the expected result that lemons dominate the market.
34 See Howells, supra, n 21, at 349–370.
own interests by selecting goods and services closest to their preferences. Ensuring choices are made based on reliable information can help reduce potential harm.

In general, under the safety regime, manufacturers have a responsibility\(^{35}\) to ensure the safety of the products they develop and sell to consumers and to make sure that relevant information reaches the consumer together with the products. Producers must provide consumers with relevant information, for example, warnings labels and instructions which will help consumers make their own risk assessments and choose products accordingly.\(^{36}\) Also, it should be remembered that for the consumer to make the best decision, the information provided must also be presented in such a way that he can recognise and take notice of it. Otherwise if the information is not suitably supplied, it has the tendency to be ignored.

Even though it can be argued that manufacturers and producers have no incentive to produce harmful products because of product liability regulation\(^{37}\) and adverse publicity,\(^{38}\) if an unregulated market does not produce an optimal\(^ {39}\) amount of information, consumers may sustain a welfare loss. Therefore, forcing the seller to supply that amount of information may eliminate the loss. This information requirement does, to an extent, restrict the freedom of the traders in so far as they are required to disclose information they may have preferred not to have revealed.

However, it can also be questioned whether the manufacturer or supplier of potentially hazardous products will be “brave” enough to tell the consumers about the potential hazards the products posed? Hodges argues\(^{40}\) that a private market economy provides too little information about hazards. Other literature contends that a firm has no incentive to advertise the potential danger of its own products, especially when its competitors do not.\(^{41}\) Clearly it cannot make most manufacturers happy to tell consumers that their products may harm them.

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35 Will be dealt further in the next section.
36 Cartwright, supra, n 28, at 529.
37 As discussed in earlier section.
39 Optimal amount of information according to Ogus is where the marginal benefit arising from that amount of information is approximately equal to the marginal costs of producing and communicating it—see Ogus, supra, n 19, at 121.
40 C. Hodges, European Regulation of Consumer Product Safety, 2005, Oxford University Press, p 29
4.2 Warning and instructions

Many products are unsafe unless operated safely. Kessler\(^{42}\) points out although a product is not inherently harmful or defective, however it will be treated as defective if its use could cause harm because of improper directions or inadequate warnings. Dickerson\(^{43}\) is of the same view pointing out that if it is not feasible to improve the product’s performance or provide safety advice for a situations in which the consumers to be undesirably vulnerable, the answer may lie in requiring appropriate warning or instructions for use. Consumers can sometimes be persuaded to follow instructions if they are warned of the consequences of failing to do so. Appropriate rules on instructions for use are therefore a legitimate part of any regulatory regime. Warning and instructions are therefore needed. While “instruction for use” is a direction given by the manufacturer on the proper use of a product, the warning is a cautionary statement or advice by the product’s manufacturer to the people who would otherwise not be aware of a potential or impending danger in a product or who might fail to follow the instruction or any other additional safety statement.\(^{44}\)

Warnings have, according to Cartwright, played an important part in product safety law.\(^{45}\) He further states that warnings are considered efficient, as they are a relatively cheap and simple way of bringing risks to the attention of the consumer.\(^{46}\) In other words, warnings favour consumers as according to Trebilcock, “simple warnings, unlike bans, actually retain consumer choice, but do not have the information costs associated with more sophisticated disclosure devices”.\(^{47}\) Howells suggests that this approach will have a greater impact on consumer behaviour than pre-purchase information, “which goes over the heads of many consumers who are more interested in the benefits than the risks posed by products”.\(^{48}\) Improved information flows as suggested by Ogus can also generate indirect welfare gains for consumers by rendering the market more competitive.\(^{49}\) However, in some situations the information requirement is not adequate, as the efficiencies of warning in relation to product safety have been contested; Lucas\(^{50}\) and Hodges,\(^{51}\) both

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45 Cartwright, supra, n 28, at 528.
46 Ibid, at 529.
48 Ibid, at pp 40–41.
49 Ogus, supra, n 19, at 122.
51 Hodges, 2005, supra, n 40, Chapter 10.
argue that changes to product design are likely to be far more effective than instructions and warnings.

4.3 Risk assessment

In order to be specific about the level of safety that is required to be achieved, concepts of risk are used, as Lowrance has said “a thing is safe if its attendant risks are judged to be acceptable”.\textendash{}\textsuperscript{52} Every product safety regulatory regime must take into consideration the assessment of risk. Betton\textsuperscript{53} states that “risk is a product of the intrinsic properties of a material and degree of exposure”. In fact, measuring risks is regarded as a science in itself. Risk, according to Hodges, is a concept based on quantification, and therefore, it is necessary to make a judgement on whether risk is present in any product as well as what level of risk in a product is acceptable.\textendash{}\textsuperscript{54}

There are different risks for different products.\textendash{}\textsuperscript{55} Hood, Rothstein and Baldwin\textendash{}\textsuperscript{56} argue that a workable control system must include certain mechanisms, for example the collection of information, the setting of standards, and the modification of behaviour, not forgetting that there must be a clear relationship between these. Hodges argues that achieving coherent integration between design and operation of regulatory systems is often lacking.\textendash{}\textsuperscript{57} Determining risk is not easy especially when each and every product carries a different or distinct risk. The acceptability of risk might be based on the fact that it is doubted whether an admitted risk is likely to cause consumers more harm.\textendash{}\textsuperscript{58} Hodges maintains that risk is implied in the marketing and use of every product.\textendash{}\textsuperscript{59} Howells alleges that consumers may not attain their preferred balance of risk, because their decisions are frequently based on misconceptions about risk.\textendash{}\textsuperscript{60} Risk should be differentiated from hazard; however it has been used in common parlance with hazard and danger.

However, if we were to ensure safety based on carrying out product safety assessments alone, is it going to be enough? What about some consumers who are careless or reckless or easily distracted by something, who always find the easy alternative, or who do not pay attention to warnings or instructions for example? It must be remembered that consumers can also be involved in

\textsuperscript{54} Hodges, 2005, supra, n 40, Chapter 18.
\textsuperscript{56} Hood and Rothstein, supra, n 54.
\textsuperscript{57} Hodges, 2005, supra, n 40, p 1.
\textsuperscript{58} Howells, 1998, supra, n 19, at 1.
\textsuperscript{59} Ibid, at 22.
\textsuperscript{60} Ibid, at 2.
contributory negligence if accidents ever happen. Joerges is of the opinion that safety assessment procedures should be flexible, due to the fact that the danger and risks to be assessed vary greatly in nature and intensity. He therefore concluded that risk and measurement of risk is not supposed to be done by measuring the product and its involvement in accidents alone, but also must include conclusions as to causes and responsibilities.

4.4 The importance of channelling responsibility for safety of products to the manufacturer

It has been accepted practice to refer to the producer or manufacturer as the party principally responsible for the safety of products. Although there can be “no absolute safety”, putting the responsibility of safety on the producer or manufacturer of the product is very important. According to Howells, it is an obvious “cardinal principle when they manufacture the product”. Apart from the producer or manufacturer, there are also other parties that assume responsibility for safety, such as the retailer. In the case where retailers present themselves as producers by selling goods under their own brand, or someone attaches the brand name to goods, then there is a tendency to also treat them as the producer. Such a responsibility is seen to be necessary not only because of the impression they create on consumers showing that they are in fact responsible for producing the goods, but also because “very often these parties will indeed have had a good deal of influence over the production of the products”.

However, it must be remembered that safety does not only concern when the products are made, it is also important that other intermediary parties in the chain must address safety before it reaches consumers. Suppliers, retailers and distributors should also be involved to assist compliance with the law/ regulation. The question then extends to, if a product is an imported product, then who should be held responsible? For imported products, the person/company importing the products should also be responsible for the safety of their imported products because they are responsible for the introduction of such products into the country. They should check first if the products they import are safe for use, or if there are any safety related issues in the products prior to their importation.

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62 Ibid, at 122.
63 See for example the wording in the ISO/IEC Guide 51 on the Guidelines for the Inclusion of Safety Aspects in Standards which says “… even at the highest level of safety, a product, process or service can only be relatively safe”.
65 Ibid.
5.0 Conclusion

In conclusion, there was a discussion of the general aspects of product safety regulation, the inadequacies of the role played by product liability remedies, and there was also a discussion about the characteristics considered important for product safety regulations. This discussion is very imperative as in the market where consumer goods are increasing in complexity and sophistication, consumers are unable to anticipate risks and safeguard themselves. This means that there is an urgent need for government intervention in the marketplace for consumers who need protection. There has also been a discussion on theory on what makes a good safety regime. Since many consumer products are now flooding the market, the safety of these products is very important. Here, although the manufacturer of a consumer product has sole authority and responsibility to decide to market a product, his freedom of action must be circumscribed by certain requirements. One of the examples is the requirement to use only safe ingredients listed as approved by a relevant scientific panel. It appears that a good safety regime requires a uniform regulatory framework, where safety is the direct responsibility of the manufacturer, and where authorities are in charge of not only through pre-market control but also of post marketing surveillance activities. In addition, standardised labelling and providing full transparency of information to the consumers is essential for the majority of products, in the light of providing better safety standards for consumers.