

**For discussion on
6 December 1999**

Legislative Council Panel on Trade and Industry

Civil Liability for Unsafe Products

Introduction

This paper consults Members on the proposal to introduce a Bill on Civil Liability for Unsafe Products.

Background and Argument

General Background

2. We are committed to safeguarding the legitimate interests of consumers. One of our commitments is to provide a clear legal basis for consumers to seek compensation from producers, retailers, etc. for loss or injury arising from the use of unsafe products.

3. At present, we have a number of pieces of legislation that provide for criminal liability to ensure that products provided to consumers are reasonably safe. These include, for instance, -

- (a) Sales of Goods Ordinance (Cap. 26);
- (b) Gas Safety Ordinance (Cap. 51);
- (c) Pharmacy and Poisons Ordinance (Cap. 138);
- (d) Electricity Ordinance (Cap. 406);
- (e) Toys and Children's Products Safety Ordinance (Cap. 424); and
- (f) Consumer Goods Safety Ordinance (Cap. 456).

4. These Ordinances do not automatically enable consumers adversely affected by unsafe or defective products under their ambit to claim compensation: consumers will have to sue for breach of contract or for negligence. However, there are limitations in the latter approach -

- (a) under contract law, a consumer is entitled to claim for damages if and only if he has a direct contractual relationship with the seller. Thus only the immediate contracting party (i.e. the buyer himself) and not others would be protected by the law of contract;
- (b) it is common in a chain of distribution that there are more than one intermediate distributor between a retailer and a manufacturer. Thus a claim by a consumer may lead to a multiplicity of litigation. Besides, the contractual recourse will be lost if any of the parties involved is insolvent, untraceable or has closed down its business; and
- (c) under negligence law, the onus is on the claimant to prove all the elements of negligence. Proving negligence can be a formidable and expensive task given the increased complexities of today's products and the legal technicalities involved.

5. In view of the above limitations, we recommended in 1993 that the Law Reform Commission (LRC) should review this subject. The LRC published an interim report for public consultation in February 1997 and issued a final report in February 1998. A copy of the LRC's final report is at the Annex.

Argument

6. We have accepted the LRC's recommendations to legislate on civil liability on unsafe products (details at paragraphs 7 to 20 below) for the following reasons -

- (a) with the economic progress made in the past few decades, there is a higher public expectation in respect of product safety and legal protection in Hong Kong. Given that our current legislation already imposes a criminal liability on unsafe or defective products and in view of the higher public expectation, it is logical that consumers should also be afforded the protection of civil liability to help them claim compensation in a practical manner;
- (b) by facilitating the compensation claim procedure, we will make it unprofitable to produce or sell unsafe products, thereby encouraging the production of safer products for consumers;
- (c) the proposed defect approach (see paragraph 7 below) has been tested for many years in other jurisdictions, for example, the

European Union, Japan, Australia and the United Kingdom. It is an emerging international standard for product liability. By following the international standard, we would not be unnecessarily increasing the production cost; and

- (d) the fact that retailers are subject to strict liability under contract law whilst manufacturers will only be liable if it can be proved that they are negligent under negligence law appears to impose a heavier burden on retailers than manufacturers. This situation is unfair as it does not sufficiently reflect the fact that manufacturers are usually the party having more direct control on the quality of products.

The Proposal

Approach

7. The proposed legislation adopts the defect approach of strict product liability, enabling any injured person or his personal representative to sue for injuries, death or damage to personal property caused by a defect in a product. A product is considered defective when it does not provide the safety which the general public is entitled to expect, taking into account all circumstances including the manner in which, and purposes for which, the product has been marketed, its packaging, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product. The onus of proof is on the claimant.

8. This proposed legislation would exist side by side with the laws of negligence and contract. This approach is in line with that taken by our major trading partners such as the European Union, the United Kingdom, Japan and Australia.

Scope of coverage

9. In accordance with the LRC's recommendations, the proposed legislation is intended to be comprehensive in its coverage – essentially all goods, substances (natural or artificial, including for example water and gas), electricity, processed agricultural produce and game, and products which are comprised in another product will be caught. “Services” as opposed to “products” are, however, not covered by the proposed legislation.

10. The application of the proposed legislation will not be limited to products supplied to Hong Kong. To do so will send a wrong message to other

countries. Thus goods manufactured in Hong Kong and exported to other places will also be covered.

Unprocessed agricultural products

11. There are divided views internationally as to whether unprocessed agricultural products should also be subject to the product liability law. In the context of Hong Kong, the arguments in favour of not regulating unprocessed agricultural products are as follows -

- (a) unprocessed agricultural products are mainly products of the nature for which the condition of production is beyond the control of producers. Thus, for example, fishermen do not have control over the quality and safety of their catch;
- (b) unlike manufactured products, it might be difficult to identify the party that creates the defect in the case of unprocessed agricultural products. For example, unprocessed agricultural products are perishable, making it difficult to identify as to when the defect occurs and who causes the defect; and
- (c) the enforceability of the proposed legislation would hinge very much on the implementation of a reliable labelling and tracing system. At present, however, there is no labelling and tracing system for “unprocessed agricultural products” in Hong Kong except for live pigs, poultry and live capture fish. It is also difficult to differentiate products from different sources as they are usually mixed together for sale.

12. The LRC is, however, in favour of covering unprocessed agricultural products in the proposed legislation for the following reasons -

- (a) unprocessed agricultural produce is consumed by almost every member of the public. As such, an area of general public concern should not be left unregulated;
- (b) Hong Kong and neighbouring countries have had recurrent problems of contaminated vegetables and seafood. The inclusion of such products in the proposed legislation would encourage producers and importer to take an extra effort to ensure that their products are safe;
- (c) given the serious threat to health that unsafe natural foodstuff may cause, any increase in product price that may be brought about will still be justifiable;

- (d) if unprocessed natural products are excluded, it will lead to anomalies. For instance, if one consignment of infected live cattle is imported and half of it is sold as fresh meat whereas the other half of it is sold as frozen meat, people who suffer illness from the frozen meat can be compensated whereas people who suffer illness from the fresh meat cannot; and
- (e) excluding unprocessed natural products will necessitate a definition of industrial process to distinguish what is processed and what is unprocessed. Any distinction is likely to be artificial and may lead to uncertainty.

13. Members may wish to comment on this issue given the divided views involved.

Persons liable

14. We propose to impose the liability on the party which is best able to control the quality and safety of the product. Four groups of people will have principal liability under the proposed law -

- (a) the manufacturer of the finished product or a component part;
- (b) the producer of processed natural product;
- (c) the own-branding (a person who puts his name or trade mark on the product and holds himself out to be the producer); and
- (d) the importer.

15. Wholesalers, distributors and retailers bear subsidiary liability in that they would only be liable if they fail to identify within a reasonable time the person who supplies the products to them.

Compensation

16. Given the diverse possible claims, any limit will be arbitrarily set and unable to satisfy the needs of all sectors. The proposed legislation will therefore not carry any maximum or minimum limits to compensation claims.

Defences

17. The proposed legislation will provide defences similar to those in other jurisdictions -

- (a) the defendant did not at any time supply the product to another person;
- (b) the supply of the product by the defendant was otherwise than in the course of business, and otherwise than with a view to profit;
- (c) the defect did not exist in the product when the defendant supplied the product to another person;
- (d) where the defect in a subsequent product was wholly attributable to the design of the subsequent product or to compliance by the producer of the component with instructions given by the producer of the subsequent product, the producer of a component part will not be liable;
- (e) where the damage is caused partly by the fault of the claimant, the person liable has a partial defence; and
- (f) the state of scientific and technical knowledge at the time when the product is put into circulation is not such as to enable the existence of the defect to be discovered. This development risks defence ceases to be available to the defendant if he has failed to comply with any statutory recall order.

It should be noted that disclaimer clauses are not allowed to limit or avoid any liability under the proposed legislation.

Time Limitation

18. To absolve producers from facing the strict liability indefinitely, we propose that actions may only be brought within ten years from the date of supply (ten-year cut-off period) and three years from the date of knowledge of certain material facts including the injury, defect and identity of the producer (three-year limitation period). The ten-year cut-off period is the overriding period.

Way Forward

19. Subject to Members' views on the approach, we intend to introduce the Unsafe Products Civil Liability Bill into the Legislative Council in early 2000. Notwithstanding that LRC had already conducted a public consultation exercise in 1997, we intend to consult the major business associations on the proposed legislation. We also propose to provide in the Bill a grace period of six months to allow businessmen to seek necessary legal advice on the implications of the legislation and to secure the necessary insurance if they so desire.

Advice Sought

20. Members' advice is sought on the proposals as outlined above.

Trade and Industry Bureau
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