

TRADER'S LIABILITY FOR FALSE, MISLEADING AND DECEPTIVE FOOD LABELING UNDER THE MALAYSIAN LEGISLATIONS

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ABSTRACT

Labels are important to consumers. What more food labels. Labels are source of information of products. The food labels are one of the most important and direct means of communicating product information between buyers and sellers. The food labels will help to uphold the consumers' right to information and right to make an informed choice on whether to take the food or not. Food labels are very important to the consumers' safety when consuming food. It is the duty of a trader to provide accurate and truthful information to the consumers. In order to uphold the consumers' right to information and right to make an informed choice in relation food labels, the Malaysian Government has enacted the Food Act 1983, Consumer Protection Act 1999 and Trade Descriptions Act 2011. The objective of this article is to analyse the provision in those Acts to ascertain the regime adopted by those Acts. It is the finding of this research that all the legislations have adopted strict criminal law regime to ensure better consumer protection and to impose severe liability on the trader. However, the Food Act 1983 has no statutory definition for false, misleading and deceptive, unlike the Consumer Protection Act 1999 and Trade Descriptions Act 2011. As far as the penalty is concerned, the Food Act 1983 has less stringent penalty, compared to the Consumer Protection Act 1999 and Trade Descriptions Act 2011. It is proposed that the Food Act 1983 be amended to include the definition for false, misleading and deceptive and the penalty in the Food Act 1983 also has to be amended so that it is in line with the current trend.

Keywords: Consumer; False; Misleading and deceptive; Food Act 1983; Consumer Protection Act 1999; Trade Descriptions Act 2011

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1. INTRODUCTION

Food labels are very important to consumer safety when consuming food. The aim of food labels is to inform consumer of safety information and the nutrient content of the food, for example, whether it contains allergens, the level of salt or sugar and others. Information on food labels can provide consumers with relevant information on whether to take the food or not. The food labels are one of the most important and direct means of communicating product information between buyers and sellers. It is one of the primary means by which consumers differentiate between individual foods and brands to make informed purchasing choices. The representation or information on food labels are essential information which the consumers may be relied on when purchasing food since it provides information including product composition, quantity of the content, usage direction, expiry date, precautionary measures that need to be taken and warning about the risks associated with the food. Food labels can be useful mean to inform consumers about the food products and to provide an opportunity of choice for consumers. Food labels help consumers make informed choices about the products they purchase, by providing nutritional or consumer safety information. In America, the Food and Drug Administration recognizes the importance of food labelling as a vehicle for dietary messages and, thus, enforce stringent guidelines to maintain the integrity of the food label (Philipson, 2005).

The consumers have the right to receive accurate and truthful messages about the food they intent to buy. This right is related to the consumer right to information and will help the consumer to make an informed choice, which is another right of a consumer. In the case of *Neptune Distribution SNC v Ministre de l'Economie et des Finances* [2016] 2 C.M.L.R. 24, a case from France which was appealed to the European Court of Justice, the Court stated that the need to ensure that the consumer had the most accurate and transparent information concerning the characteristics of food was closely related to the protection of human health. The case was regarding a mineral water. One of the claims on the label was 'low in sodium/salt' where in fact the mineral water did not fulfill the requirement for 'low in sodium'. The court held that the label was misleading.

A food label serves three primary functions (<http://www.inspection.gc.ca/english/fssa/labeti/guide/ch1e.shtml>):

- a. it provides basic product information (including common name, list of ingredients, net quantity, durable life date, grade/quality, country of origin and name and address of manufacturer, dealer or importer);
- b. it provides health, safety, and nutrition information. This includes instructions for safe storage and handling, nutrition information such as the quantity of fats, proteins, carbohydrates, vitamins and minerals present per serving of stated size of the food (in the nutrition facts table), and specific information on products for special dietary use; and
- c. it acts as a vehicle for food marketing, promotion and advertising (via label vignettes, promotional information and label claims such as low fat, cholesterol-free, high source of fiber, product of Canada, natural, organic, no preservatives added, and so on).

Where the claim is false, there is no benefit to anyone except the errant trader who makes it (Peter, 2004). False claims distort the market, and where a market is filled with such claims, consumers may lose confidence in all traders within the market (Ramsay, 2007). False claims are viewed as immoral and the prohibition through legal prohibition can be justified on such ground. It is

important for traders to be honest in the food labels. Mislabelling of food products may deceive and even endanger consumers. In the past few years, the Food and Drug Administration of America has gone after more than a dozen food companies for deceptive labelling (<http://health.usnews.com/health-news/articles/2012/08/22/what-food-labels-really-mean>).

As consumers become increasingly concerned about what is exactly in the food they buy and eat, the way in which food is labelled and the nature of the information contained on the label has become increasingly important for the legislators and local producers alike (Dominique, 2001). Malaysian Government encourages the manufacturers to be honest in their business dealings with the consumers. For the purpose of ensuring accurate information in food labels, the Government has enacted Food Act 1983, Consumer Protection Act 1999 and Trade Descriptions Act 2011. These legislations have adopted strict criminal liability in imposing liability for false, misleading and deceptive information on the traders.

2. TRADER'S LIABILITY FOR FALSE, MISLEADING AND DECEPTIVE FOOD LABELING UNDER THE MALAYSIAN LEGISLATIONS

2.1. Food Act 1983

Food Act 1983 is the primary Act which regulates food. This Act is supported by the Food Regulations 1985. 'Food' is defined in section 2 of the Food Act 1983 to include:

Every article manufactured, sold or represented for use as food or drink for human consumption or which enters into or is used in the composition, preparation and preservation of any food or drink and includes confectionery, chewing substances and any ingredients of such food, drink, confectionery or chewing substances.

From the above definition, food includes anything manufactured, sold or presented for use as food or drink for human consumption and any ingredients used in any food or drink, including confectionery and chewing substances. Meanwhile, 'label' is also defined in section 2 to include:

Any tag, brand, mark, pictorial or other descriptive matter, written, printed, stenciled, marked, painted, embossed or impressed on, or attached to or included in, belonging to, or accompanying any food.

The definition of label above indicates that label would not include verbal statement. Label is something that can be seen and in permanent form. In the United Kingdom, food label must also be permanent, clear and easy to read, easy to understand, easily visible and not misleading (<https://.gov.uk/food-labelling-and-packaging/print>).

Section 15 of the Food Act 1983 provides that if a standard has been prescribed for labelling of any food, any person who prepares the label must comply with the standard prescribed. Failure to comply with the standard is an offence under section 15 of the Food Act 1983. Food Regulations 1985 which supports the Food Act 1983 has prescribed detailed standards for food labelling. Various labelling standards have been provided in the Food Regulations 1985 in Part IV. Part IV contains various aspects of labelling, amongst others are general requirements for labelling of food,

language to be used, particulars in labelling, form and manner of labelling, size and colour of letters, date marking, matter forbidden on any label and others. Besides that, the Food Regulations 1985 also regulates additional labelling for particular food, such as, milk and milk powder, confection, meat and meat products, egg, edible fat and edible oil, fruit juice, tea and spirit. All food traders have a duty to comply with the labelling standards prescribed under the Food Regulations 1985 to avoid liability and penalty under the Food Act 1983 and Food Regulations 1985.

Meanwhile section 16 of the Food Act 1983 regulates false, misleading and deceptive, *inter alia*, labelling. Section 16 provides that:

any person who, *inter alia*, labels any food in any manner that is false, misleading or deceptive, as regards to the character, nature, value, substance, quality, composition, merit or safety, strength, purity weight, origin, age or proposition or in contravention of any regulation made under this Act commits an offence.

What is false, misleading or deceptive depends on the interpretation of the court. There is no definition of false, misleading or deceptive given in the Food Act 1983. The word false, misleading or deceptive has been defined in the Consumer Protection Act 1999 in section 8 as to mean, in relation to conduct, representation or practice, is capable of leading a consumer into error. The Trade Description Act 2011 in section 13 defines false or misleading in relation to any conduct, representation, statement or practice which is capable of leading any person into error. It is unsure whether the courts will use the same definition as defined in the Consumer Protection Act 1999 and Trade Description Act 2011 for false, misleading or deceptive when deciding a case under section 16 of the Food Act 1983. To avoid confusion, the writers would like to suggest that the Food Act 1983 be amended to include the definition for false, misleading or deceptive. As far as the burden of proof is concerned, according to Barry (2000), the word 'false' is stronger and more difficult to prove. It is necessary to prove that a label is explicitly false, that is wholly untrue. Painter (1992) suggests that the offence of falseness should be used only when there is a misstatement of fact.

As for 'misleading' or 'deceptive', it can happen in a situation whereby the statements in the label is laterally true but practically false because of what is omitted. A label may be misleading even where it contains a factually correct statement of the composition of the food (Barry, 2000). In the case of *R v Lord Kylsant* [1932] 1 KB 442, the court held that the document as a whole may be false, not because of what it states, but because of what it does not state, because of what it implies. In this case, a prospectus was issued to encourage people to invest in the company. The prospectus was consisting of statements which in themselves were perfectly true, but it omitted information of the company's affairs, which the result of the prospectus, taken as a whole, gave a false impression of the position of the company. It was stated in the prospectus that the company made very large profits in 1918 until 1920. However it failed to state that the company made substantial trading losses from 1921 to 1927. The appellant, whom was as the chairman of the company, knew about this. It was admitted that every statement in this prospectus in itself, was true, but the prosecution alleged that the document as a whole was misleading and false within the meaning of section 84 of the Larceny Act 1861, under which the appellant was charged. Section 84 of the Larceny Act 1861 stated that:

Whosoever, being a director, manager, or public officer of anybody corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which shall know to be false in any material particular, with intent...to induce any person...to intrust or advance money any property? to such body corporate or public company....shall be guilty of a misdemeanour....

Since the appellant was the chairman of the company, the appellant was found guilty of the offence.

The case on section 84 of the Larceny Act 1861 was again discussed in the case of *R v Bishirgian* [1936] 1 All ER 586. In this case, a prospectus was issued to induce people to become shareholders in a company. It was stated in the prospectus that the company, James & Shakespeare Ltd would like to acquire shares in William Henry & Co. The prospectus, by purporting to set out the nature of the business and the assets and the liabilities of William Henry & Co, omitted to state that William Henry & Co had forwarded commitment at the date of the prospectus amounting in shellac to four hundred thousand pound and in pepper to nearly one million pound. If these liabilities failed to be met by William Henry & Co, James & Shakespeare would be acquiring valueless. The prospectus also stated that it was intended to acquire the valuable good-will and organization of the metal production department of Bishirgian & Co. As far as Bishirgian & Co was concerned, the prospectus failed to mention that Bishirgian & Co had acted as brokers for William Henry & Co in the purchase of shellac and pepper. Therefore, when James & Shakespeare Ltd acquired that part of business of Bishirgian & Co, James & Shakespeare Ltd would become brokers for William Henry & Co in any future purchases of shellac and pepper. The prosecution raised two points. First, the omission in the prospectus made it false in a material particular, second, the prospectus gave the impression to any member of the public reading it that he was being invited to invest in an old-established metal-dealers' and brokers' business which with a view to consolidating and enlarging its business and obtaining adequate capital desired to acquire two other businesses carrying on ordinary businesses in metal and commodities. In responding to the first point, the court argued that in order to ascertain the question whether this document was false in a particular or in all material particulars, one may ask one-selves this question: If the facts had been revealed or even clearly indicated, would any man of sense have put his money into it? The court held that, following the principle in *R v Lord Kylsant*, there was such a partial and fragmentary statement of fact in the prospectus that the withholding of that which was not stated made that which was stated false, and the publication of the prospectus was an offence within section 84 of the Larceny Act 1861. The appellant were found guilty under the Act.

Based on the above cases, it is submitted that the offence in section 16 of the Food Act 1983 may be committed if the label states corn as one of the ingredients, however, the manufacturer fails to state that the corn is from genetically modified organism (GMO). The statement is false, not because of what it states, but because of what it does not state, because of what it implies. It is literally true that corn is one of the ingredients, however it is practically false when the label does not disclose the type of corn used since, there are consumers who try to avoid GMO. The offence in section 16 could also be committed if one of the food ingredients in the label contains lard and it has halal logo on its label. Many people would know that lard is derived from pig. The existence of halal logo will mislead the consumer since halal means no source from pig. In this instance, the food trader can be prosecuted under section 16 of the Food Act 1983.

By scrutinizing sections 15 and 16, one should notice that both sections are adopting strict criminal liability. This is due to the fact that both sections are silent as to *mens rea*. The sections are emphasizing on the *actus rea*. According to Barry (2000), modern food legislation has been of strict liability since its inception is general. To relieve the harshness of strict liability, the Parliament has customarily added provisions which enable the liability to be passed on the person truly responsible for the contravention and accord ~~afford~~ honest traders statutory defences (Barry, 2000). The Food Act 1983 does provide statutory defence of not acting willfully and has not taken reasonable steps (section 23, Food Act 1983). However, the inclusion of the statutory defence does not make the offence not of strict liability.

In the case of *Public Prosecutor v Pengurus, Rich Food Products Sdn Bhd* [1981] CLJ Rep 257, Mohd Yusoff J. held that the offence in section 11(1) (b) of the Sale of Food and Drugs Ordinance 1952, which is equivalent to section 15 of the Food Act 1983, was not a strict liability offence. According to His Lordship, the inclusion of the statutory defence (section 21) made the offence in section 11(1) (b) of the Sale of Food and Drugs Ordinance 1952 not a strict liability. The writers would like to differ from the decision of the Learned Judge. The section was silent as to the requirement of *mens rea*. If the offence is not a strict liability, the prosecution has to prove *actus rea* and *mens rea*, whereas the section only provides for the *actus rea* to commit the offence. Both section 11(1) (b) of the Sale of Food and Drugs Ordinance 1952 and section 15 of the Food Act 1983 are silent as to the *mens rea*. If the accused would like to rely on the defence of not acting willfully and has taken reasonable steps to ascertain that the sale of food would not constitute an offence under the Food Act 1983 or Food Regulations 1985, the defendant has to prove that he did not act willfully by proving to the court that he had taken reasonable steps to ensure that the sale of food would not constitute an offence under the Act. The inclusion of the statutory defence does not increase the burden of the prosecution to prove *actus rea*. It is for the accused to prove the state of his mind. The prosecution only has to prove *mens rea*.

Nonetheless, there is an argument which states that whenever a statute is silent as to *mens rea*, there is a presumption that, in order to give effect to the will of the Parliament, we must read in words appropriate to require *mens rea*, and this was decided in the case of *Sweet v Parsley* [1969] 1 All ER 347. House of Lords in *Sweet v Parsley* further said that:

The fact that other sections of the Act expressly required *mens rea*, for example, because they contain the word 'knowingly', is not in itself sufficiently to justify a decision that a section which is silent as to *mens rea* creates a strict liability.

Later in 1985, the case of *Gammon (Hong Kong) Ltd v Attorney-General* [1985] AC 1, stated that the presumption that *mens rea* is required for criminal offence can be rebutted if the words of a statute suggest that strict liability is intended. In *Gammon*, it was stated that the presumption that *mens rea* is required was less strong for regulatory offences than truly criminal offences. *Gammon* is an example of a regulatory offence. The case of *Gammon* involved substantial changes to the original building plan. These changes had caused part of the building constructed fell down. There were regulations in Hong Kong which prohibited substantial changes to the original building plan and it was an offence if the original building plan was changed substantially.

Applying the principle of *Sweet v Parsley* to the Food Act 1983, it is submitted that all the offences in the Food Act 1983, such as offences in sections 13, 13A, 13B and 14 do not require *mens rea*.

Therefore, it is contended that sections 15 and 16 also do not require *mens rea*. It is contended that the decision of the House of Lords in *Sweet v Parsley* is not appropriate to be considered. Meanwhile, the case of *Gammon (Hong Kong) Ltd v Attorney-General* is more appropriate to be considered because the Food Act 1985 deals with regulatory offences. The Food Act 1985 stipulates conducts which are considered to be offences. The conducts regulated by the Food Act 1983 are not truly criminal offences, such as murder, theft, kidnapping and others. The reason why the House of Lords in *Sweet v Parsley* was reluctant to treat the offence as strict liability was because the offence in *Sweet v Parsley* was regarded as being a ‘true crime’ and not merely a breach of regulatory provisions. In *Sweet v Parsley*, Ms Sweet, who was a teacher, took sublease of a farm house outside Oxford. She rented the house to the tenants and rarely spent any time there. Unknown to her, the tenants were smoking cannabis on the premise. When the tenants were caught, she was found guilty of being concerned in the management of the premise, which was being used for the purpose of smoking cannabis, contrary to the United Kingdom Dangerous Drugs Act 1965. Ms Sweet appealed on the ground that she knew nothing about what the tenants were doing and could not reasonably have been expected to have known. Lord Reid in this case acknowledged that strict liability is appropriate for regulatory offences or quasi-crimes, which are not criminal in any real sense. However, their Lordships regarded the offence which Ms Sweet was being charged, as a true crime. Their Lordships held that it was not a strict liability offence, and since Ms Sweet did not have the necessary *mens rea*, her appeal was allowed.

Therefore to sum up, although in the case of *Public Prosecutor v Pengurus, Rich Food Products Sdn Bhd* it was held that when a section is silent as to *mens rea*, it did not automatically make the offence a strict liability offence. The court held further that the inclusion of statutory defence had made the offence not a strict liability. By analyzing the cases of *Sweet v Parsley* and *Gammon (Hong Kong) Ltd v Attorney-General*, the writers would like to come to a conclusion that the offences in sections 15 and 16 of the Food Act 1983 are strict liability offences.

2.2. *Consumer Protection Act 1999*

The application of the Consumer Protection Act 1999 to food depends on whether food can be considered as ‘goods’ as defined in section 3 of the Consumer Protection Act 1999. Section 3 defines ‘goods’ as:

- goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes-
- (a) goods attached to, or incorporate in, any real or personal property;
 - (b) animals, including fish;
 - (c) vessels and vehicles; utilities; and
 - (d) trees, plants and crops whether on, under or attached to land or not.

It is submitted that food can fall under the definition of goods provided that it is primarily purchased, used or consumed for personal, domestic or household purposes. False, misleading and deceptive representation is covered under Part II of the Consumer Protection Act 1999. Labels can be considered as representation for the purpose of Part II. Part II covers all types of consumer goods, services and land. Since Part II, unlike Part III of the Consumer Protection Act 1999, does

not exclude its application to food therefore, the provisions under Part II of the Consumer Protection Act 1999 as far as the representation is concerned, is applicable to food labels.

Section 8 defines 'false', 'misleading' or 'deceptive' to include conduct, representation or practice which is capable of leading a consumer into error. The word 'false' applied in accordance with its general usage means 'untrue', 'wrong' or 'incorrect'. The words 'misleading' and 'deceptive' are closer and are often used interchangeably or together (Aun, 2000).

Section 10 of the Consumer Protection Act 1999 deals with false or misleading representation of goods and services. Section 10 implies that there is a duty of traders not to make false or misleading representation in respect of goods and services, though this duty is drafted in a negative way. The following provisions in section 10 are applicable to food labels:

- (1) No person shall make a false or misleading representation that-
 - (a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model;
 - (b) ...;
 - (c) ...;
 - (d) ...;
 - (e) ...;
 - (f) ...;
 - (g) the goods were manufactured, produced, processed or reconditioned at a particular time;
 - (h) the goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits;
 - (i) the person has any sponsorship, approval, endorsement or affiliation;
 - (j) concerns the need for any goods or services;
 - (k) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or
 - (l) concerns the place of origin of the goods.

A statement which says that eggs are of Grade A quality, which are not of that grade clearly contravenes section 10(1) (a) in respect of grade. False representation that food comply with a food standard, such as *CODEX Alimentarius* standard would also amount to a contravention of section 10(1) (a) with regards to standard. The contravention in relation to composition can be referred to the case of *Peters v Oscar Mayer Pty Ltd* [1963] VR 390. In this case, the defendant company sold an unopened packet of sausages labelled 'contains no preservatives' and the sausages in fact did, which clearly amount to false representation as to the composition of the food. Another case which can be referred to is the case of *Adams v Eta Foods Ltd* (1987) ATPR 40-831. In this case, Eta sold pies under the description "Country Fair beef steak pies" when, in fact, the mince used in the pies contained sheep meat which was considerably cheaper than beef. The substance of the charge was that Eta falsely represented that the goods were of a particular quality or composition.

If the label of the food describes that it is manufactured at 3 pm on 31 December 2010, in fact it is not, is a false representation as to the manufacturing time under paragraph (g) of section 10(1). The manufacturing time is very important when it involves food because some food can only be consumed within specified time. For example a donut with durian filling must be consumed within

three hours after production. If the time is falsely mentioned on the label, this donut might be poisonous to be consumed by a consumer. If statement on the food label says that the food has a benefit to lower cholesterol level, in fact it is not or no scientific evidence to support the claim, this statement can amount to the contravention of paragraph (h) in regards to the benefits of the food. The food labels contravene paragraph (i) when the labels says that this milk has received an approval from the Ministry of Health of Malaysia where as in fact no such approval was obtained.

A contravention of paragraph (j) happens when there is a claim on the food labels which say that, for example, diabetics need this particular food, in fact diabetics do not need the food at all since it does not do any good to the diabetics. If there is a statement on the food labels which claim that this particular milk can cure or control diabetes, in fact it is not, this claim contravenes paragraph (k). A food labels contravene paragraph (l) if the place of origin of the food is wrongly described, such as United States of America is falsely described for China. For some consumers, the country of origin of certain goods can influence their product choice and the price that they are willing to pay (Crones & Philip, 1997). This preference may be due to a real or perceived superiority in the quality of a particular product made in a certain place. Therefore, if representations about the place of origin of goods are false or misleading or deceptive, the consumers are likely to be adversely affected. Besides that, if the goods bear false indication of origin of imported goods, the Minister of Domestic Trade, Cooperatives and Consumerism may make an order under section 26 of the Trade Descriptions Act 2011 prohibiting the importation of the goods into Malaysia.

Part II of the Consumer Protection Act 1999 also adopts strict criminal liability. Offences in Part II which include section 10, does not require *mens rea* to commit the offence.

2.3 Trade Descriptions Act 2011

Trade Descriptions Act 2011 replaces the Trade Descriptions Act 1972. It came into force on 1 November 2011. The word 'goods' is defined under section 2 to include ships, aircrafts, vehicles, animals, plants and crops and all kinds of movable property. Therefore, this definition is wide enough to cover food (Hassan, 2012).

If the Minister of Domestic Trade, Cooperatives and Consumerism has assigned certain meaning to any expression used in relation to the goods, it is understood that when this expression is used in relation to goods, it has the meaning assigned to the expression. This is provided under section 28(1) of the Trade Descriptions Act 2011. For example, when the expressions 'Halal', 'Ditanggung Halal' or 'Muslim Food' or any other expression indicating or likely to be understood as indicating that Muslims are permitted by their religion to consume such food, according to clause 3 of the Trade Descriptions (Use of Expression "Halal") Order 1975, such expressions must convey the following meaning:

- (a) neither is nor consist of or contains any part or matter of an animal that a Muslim is prohibited by Hukum Syarak to consume or that has not been slaughtered in accordance with Hukum Syarak;
- (b) does not contain anything which is considered to be impure according to Hukum Syarak;
- (c) has not been prepared, processed or manufactured using any instrument that was not free from anything impure according to Hukum Syarak; and

- (d) has not in the course of preparation, processing or storage been in contact with or close proximity to any food that fails to satisfy paragraph (a), (b) or (c) or anything that is considered to be impure according to Hukum Syarak.

Therefore, if food manufacturers or producers use 'Halal' or 'Ditanggung Halal' or 'Muslim Food' on the food labels, those expressions must convey the meanings spell out in paragraph (a) to (d) of clause 3 of the Trade Descriptions (Use of Expression "Halal") Order 1975. If the expressions do not convey those meanings, the expressions have been used in false or misleading or deceptive manner, which may attract criminal liability under section 28(2) of the Trade Descriptions Act 2011.

Section 29(1) of the Trade Descriptions Act 2011 empowers the Minister of Domestic Trade, Cooperatives and Consumerism to issue an order that the goods should be certified by a competent authority; or marked with a mark determined by the Minister; or accompanied by any information (whether amounting to or including a trade description) or instruction relating to the goods. For example, if it is in the opinion of the Minister that certain milk powders are not suitable for babies under 6 months old, the Minister can issue an order that that particular milk is accompanied by that warning or information. Another example is that the Minister may also order the food to be accompanied by any information, such as, 'not suitable for vegetarians'. These orders should be made in the interest of persons to whom the food is supplied. If there are such orders, any person to whom the orders are made must comply with the orders. The failure to comply with the order is an offence under section 29(2) of the Trade Descriptions Act 2011.

If the statements on food labels amount to trade descriptions, as defined in section 6 of the Trade Descriptions Act 2011, it is a duty of the traders not to apply false trade descriptions on the food labels. Applying false trade descriptions on goods is an offence under section 5(1) of the Act. Section 5(1) states that:

- (1) Any person who-
- (a) applies a false trade description to any goods;
 - (b) supplies or offers to supply any goods to which a false trade description is applied; or
 - (c) exposes for supply or has in his possession, custody or control for supply any goods to which a false trade description is applied, commits an offence.

In *Ang Seng Ho v PP* [1991] 3 MLJ 334, a case under the repealed Trade Descriptions Act 1972, the appellant was charged with an offence under section 3(1)(b), which is similar to section 5(1)(b) of the Trade Descriptions Act 2011 for supplying ground nuts with false trade description of Tumb Brand Wgan Yin Groundnut Factory. In fact the ground nuts were not from that brand. The appellant argued that he did not know that the ground nuts were not from that brand. He got the supply from a supplier. The appellant raised a defence of reliance on information supplied to him or to the act or default of another person, under section 24(1) of the Trade Descriptions Act 1972. The court held that the appellant was liable for supplying the ground nuts with false trade description. The offence under section 3(1) (b) was a strict liability offence. Whether the appellant knew the ground nuts had false trade description or not, was irrelevant. The appellant failed in his defence because the elements required in section 24(2) were not fulfilled by the appellant.

In *Tan Kee Chie v PP* [1987] 1 MLJ 430, the accused was charged for two offences under section 3(1) (a) and (b) of the Trade Descriptions Act 1972 which is similar to section 5(1) (a) and (b) of the Trade Descriptions Act 2011. The appellant had applied false trade description of AJI-NO-MOTO on food seasoning which was processed by himself, not a product of Ajinomoto (M) Sdn Bhd. The trial judge found the accused liable under both sections. The accused appealed. The accused's appeal for the first offence under section 3(1)(a) was dismissed. The accused's appeal for the second offence, which was under section 3(1)(b) was successful. According to the court, the essential element in section 3(1)(b) was 'offer to supply'. The facts did not show that the accused had offered to supply the food seasoning or exposed the food seasoning for supply as defined in section 8 of the Trade Descriptions Act 1972.

Alternatively, if the cases of *Ang Seng Ho v PP* and *Tan Kee Chie v PP* were instituted by the Ministry of Health, the accuseds in both cases could also be prosecuted under section 16 of the Food Act 1983 because the labels were false. However, in terms of deterrent effect of the fine, it is better to prosecute the accuseds under the Trade Descriptions Act 1972 since the fine penalty is heavier (not exceeding RM250,000 for the first offence) and clearly specified compared to the Food Act 1983. The fine penalty under section 16 of the Food Act 1983 depends on the discretion of the court.

Sections 5, 28 and 29 like sections 15 and 16 of the Food Act 1983 are silent about the *actus reas*. Therefore it is submitted that sections 5, 28 and 29 of the Trade Descriptions Act 2011 adopt strict criminal liability.

2.4 The Application of Strict Criminal Liability

The idea of strict liability took hold in the nineteenth century with the development of social legislation regulating certain activities affecting the public's health, safety or welfare, such as food and drugs, liquor and health and safety in factories and other places of work. It is largely confined to statutory offences and is possible where statutory definition of an offence fails to include and express *mens rea* or negligent requirement (Russell, 2001).

Strict criminal liability is used as an instrument by governments to protect consumers against the strength of producers (Sornarajah, 1985). Besides that, strict criminal liability is used to enforce statutory standards (Meng, 1996). Strict criminal liability is able to prevent the offender and other people from committing the same offence. Yong Pung How J. in the case *MC Strata Title No 641 v Public Prosecutor* [1993] 2 SLR 650 has made the following statement in relation to the creation and objection of strict criminal liability:

The creation of strict criminal liability offences would be vital in promoting the objects of the statute and encouraging greater vigilance to prevent the commission of the offences.

Besides that the strict criminal liability is used as a tool for the government to protect consumers from unethical conduct of the traders. It also signifies the seriousness of the government to protect the consumer. In false, misleading and deceptive conduct and representation, the basic objectives of these laws are to ensure the accuracy of product and service information available to consumers and to protect the economic interest of the consumers.

Based on the opinions of the above writers, strict criminal liability is imposed on activities affecting the public's health, safety or welfare. However, it does not follow that strict criminal liability should be imposed in every case, if a conviction might not serve any useful purpose (Oughton & Lowry, 2000). It is considered to be important that convicting an offender should assist in the overall enforcement of the statutory provision by promoting greater vigilance on the part of the traders. It is submitted that the imposition of strict criminal liability in offences regarding food labelling can assist in the overall enforcement of the statutory provisions and thus, promoting greater vigilance on the part of the traders. Information on food labels is very paramount to consumers' safety.

3. PENALTY FOR CONTRAVENING THE FOOD ACT 1983, CONSUMER PROTECTION ACT 1999 AND TRADE DESCRIPTIONS ACT 2011

3.1. *Food Act 1983*

Although sections 15 and 16 mention about fine, the sections do not prescribe the amount of fine that can be imposed by the courts. It is submitted that the amount of fine is in the discretion of the courts. Heavy fines should be imposed on the accused and a reference can be made to the fines imposed in the Consumer Protection Act 1999 and Trade Descriptions Act 2011. Both the Consumer Protection Act 1999 and Trade Descriptions Act 2011 impose heavier fines of not exceeding two hundred and fifty thousand ringgit (RM250, 000). In the case of contravening section 28 of the Trade Descriptions Act 2011, a maximum fine of five million ringgit can be imposed by the court on a body corporate. The amount of fines imposed under the Food Act 1983 and Food Regulations 1985 is outdated and is not in line with the current trend. Therefore, the Food Act 1983 and Food Regulations 1985 need to be amended to increase the amount of fines as to keep pace with the current trend.

Another point that is interesting to note is the imprisonment penalty. Both sections 15 and 16 provide for imprisonment penalty for a term not exceeding three years. Sub-regulation (2) of regulation 397 of the Food Regulations 1985 also stipulates for imprisonment penalty for a term not exceeding two years will be imposed upon conviction. The imprisonment penalty is possible if the offender is an individual. However, if the offender is a body corporate, the question may arise who will be sent to a prison. It is not possible to send a body corporate as an artificial legal person to a prison. Natural persons who manage the body corporate, such as chief executive officer, manager, assistant manager, secretary and employees have to be responsible to the offence. The difficulty may arise in determining the persons responsible. In this respect, section 33A of the Food Act 1983 does provide that any person who, at the time of the commission of the offence by the body corporate, was a director, manager, secretary or other similar officer of the body corporate or was purporting to act in such capacity could be charged severally or jointly in the same proceedings with the body corporate and when the body corporate is found guilty of the offence, these officers shall be deemed to be guilty of that offence unless he can prove that the offence is committed without his knowledge, consent or connivance and that he took all reasonable precaution and had exercised due diligence to prevent the commission of the offence. It is contended that this type of provision is outdated. It is the body corporate as an artificial person should be responsible for the offence. It is up to the body corporate to take legal actions against its officers who are involved in

committing the offence. Therefore sections 15 and 16 need to be amended to specify the different penalty for individual and body corporate. There should not be imprisonment penalty for the body corporate. The different penalty for the individual and body corporate is practiced in *inter alia*, the Hire-purchase Act 1967, Consumer Protection Act 1999 and Trade Description Act 2011.

3.2 Consumer Protection Act 1999

The penalties for contravening any provisions of Part II of the Consumer Protection Act 1999 are provided in Part IV of the Act. Part IV imposes criminal liability for the contravention. Section 25(1) provides that any person who contravenes any of the provisions of Part II commits an offence and shall on conviction be liable-

- (a) if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;
- (b) if such person is not a body corporate, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both, and for a second or subsequent offence, to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding six years or to both.

In the case of a continuing offence, subsection (2) of section 25 stipulates that the offender shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

3.3 Trade Description Act 2011

Trade Descriptions Act 2011 also imposes criminal liability for the contravention to any provisions of the Act. For the offence committed under section 5(1) regarding the application of false trade descriptions to goods, the following penalties will be imposed on the offenders upon conviction-

- (a) if the offender is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit; or
- (b) if the offender is not a body corporate, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both, and for a second or subsequent offence, to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Section 28(2) provides for penalties for using expressions which have an assigned meaning in a manner which misleads or confuses the person who wants to buy or obtain the goods, as if the goods were supplied according to the definition given to that expression. On conviction, the persons who commit the offence, shall be liable-

- (a) if such person is a body corporate, to a fine not exceeding five million ringgit, and for a second or subsequent offence, to a fine not exceeding ten million ringgit; or
- (b) if such person is not a body corporate, to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding three years or to both, and for a second or subsequent offence, to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

In respect of the offence for not complying with the orders of the Minister made under section 29(1) of the Trade Descriptions Act 2011, subsection (2) to section 29 provides the following penalties-

- (a) a maximum fine of two hundred thousand ringgit and a maximum fine of five hundred thousand ringgit for a second or subsequent offence, on a body corporate; or
- (b) a maximum fine of one hundred thousand ringgit or imprisonment for a term not exceeding three years or both and a maximum fine of two hundred and fifty thousand ringgit or imprisonment for a term not exceeding five years or both, on individual offender.

It is interesting to note that there is no much different in terms of fines under sections 5(1) and 29(2). However, section 28(2) provides for different amount of fine, which is very much higher than section 5(1) and section 29(2). Under section 28(2), the court may impose a maximum fine of five million ringgit for contravening section 28(1) on the errant traders. Whereas, the contravention to sections 5(1) and 29(1) will attract maximum fines of two hundred and fifty thousand ringgit and two hundred thousand ringgit, respectively. It is submitted that the Act considers that the contravention of section 28(1) has great implication on the public, especially when it involves the use of expression 'Halal' or 'Ditanggung Halal' or 'Muslim Food'. If these expressions are used falsely or misleadingly or deceptively, they have great impact on the Muslims. It is submitted that this is the rationale for imposing higher fine for the offence because the Act would like to protect the public and also the Act would like to promote the objective of the Act, which is to promote good trade practices.

4. CONCLUSION

The above discussion reveals that food labels are very important source of information. Information on labels is the first information will be relied on when consumers making choices to purchase any goods. The strict criminal liability is imposed on traders in relation to food labelling is to ensure that the safety of the consumers is given priority by the traders when label food. They have to ensure that the labels are truthful and not false, misleading or deceptive. It is not surprising that the Food Act 1983, Consumer Protection Act 1999 and Trade Descriptions Act 2011 impose strict criminal liability on the traders who give false, misleading and deceptive information in the labels. However the Food Act 1983 needs to be amended to include the definition for false, misleading and deceptive. Besides that, the fine in the Food Act 1983 also needs to be amended to keep pace with the current trend. The Food Act 1983 needs to have different penalty for an individual and body corporate. The Consumer Protection Act 1999 and Trade Descriptions Act 2011 which may also be used to prosecute errant traders engaging in false, misleading and deceptive food labels do provide better monetary penalty. The monetary penalty in the Consumer Protection Act 1999 and Trade Descriptions Act 2011 do serve as a deterrent function.

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