



Business Actors Liability to Consumers of Beverages and Food Containing Liquid Nitrogen

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Abstract

Technological advances that are developing at this time do not only occur in telecommunication equipment and transportation equipment, but also develop in the food and beverage sector. Where in the near future, food and drinks that can emit smoke have been circulating. Foods and drinks that emit smoke contain liquid nitrogen. However, it is very unfortunate that these food and beverage trends have not been accompanied by the knowledge of business actors and consumers whether these nitrogen-containing foods and beverages are safe for consumption or not. Based on the description of the background above, several problem formulations can be drawn as follows: What are the criteria for drinks and food containing liquid nitrogen consumed by consumers according to the Law on Food Safety and Food Standards? And what is the liability of business actors towards consumers who drink and food containing liquid nitrogen? The type of legal research used in this research is normative juridical (normative legal research method). Liquid nitrogen in food can actually be used as an auxiliary substance. However, if used without adhering to food safety standards, it may cause harm to consumers. This is in accordance with the regulations of the Food and Drug Supervisory Agency (BPOM RI) Number 20 of 2020, liquid nitrogen is used as a processing aid, not a food additive. Liquid nitrogen is used to speed up the process of freezing a product by lowering the very low temperature to minus -200, much lower when using a freezer (around -20 to -40) so that liquid nitrogen is very easy to freeze food. If the production process is complete, nitrogen should be removed as much as possible from a product, no residue left. Liability on a contractual basis and unlawful acts in BW, product liability in consumer law is regulated in Article 19 of the UUPK with the burden of proof reversed. The business actor accountability forum is subject to general civil proceedings with the exception of relative competency at the consumer's place of domicile, while compensation in this context is not only in the form of returning goods and demands for reductions or price discounts as in the contractual, or limited to compensation for economic losses as an unlawful act, but also includes compensation for actual damages.

Keywords: *Liability; Consumer Protection; Food Safety*

A. Introduction

Technological advances that are developing at this time do not only occur in telecommunication equipment and transportation equipment, but also develop in the food and beverage sector. Where in the near future, food and drinks that can emit smoke have been circulating. Foods and drinks that emit smoke contain liquid nitrogen. Usually, liquid nitrogen is used to carry out medical procedures, such as cryosurgery, science experiments, preservatives for food products to be transported, or food coolers.

Dragon's breath as the beginning of the emergence of food and beverage trends that contain liquid nitrogen in several countries, even in Indonesia. According to the Ministry of Health (Kemenkes), these snacks are in the form of cereal or cheese puffs which are covered in liquid nitrogen and emit a mist like smoke. Shortly after eating it, people can blow smoke out of their mouths, to make them look like dragons. -and-burns/

As a new trending food and drink, nitrogen-containing food and drink is in great demand by the public. Both from upper, middle and lower class economic consumers, old, young and even children. The use of liquid nitrogen in the development of the culinary world cannot be separated from the aim of business actors to attract the attention of consumers and increase sales turnover. It's not wrong if many consumers are interested in the concept and preparations that use this one ingredient.

However, it is very unfortunate that these food and beverage trends have not been accompanied by the knowledge of business actors and consumers whether these nitrogen-



containing foods and beverages are safe for consumption or not. This can be seen by several events experienced by some consumers recently. We can see this incident with a number of 28 children who were poisoned in West Java Province, including extreme stomach pain, nausea, vomiting, and an enlarged stomach. In November 2022 it occurred in the Tasikmalaya area, Bekasi city in December 2022.3 <https://www.jawapos.com/kesehatan/11/01/2023/kemenkes-nitrogen-cair-tak-suit-prosedur-pangan-bisa-picu-poisoning/> In addition, inhaling too much vapor produced by food or drinks processed using liquid nitrogen can also trigger severe breathing difficulties. This is because in 1 liter of liquid nitrogen will produce approximately 700 liters of gas. This will be even more dangerous if experienced by people with asthma. In addition, if you are not careful, consumers can get injured when touching and digesting it. <://www.liputan6.com/lifestyle/read/5013343/hak-ice-smoke-yang-bikin-dinding-bocah-ponorogo-terbakar-dianggap-berdang-dang-di-as> While in Jember, a 6-year-old child has to undergo surgery due to consuming snack chiki ngebul.

In the current era of free trade, having a negative impact with the circulation of drinks and food in circulation does not necessarily guarantee the security, safety and health of consumers. This is exacerbated by the attitude of consumers, most of whom are not careful, do not or do not yet know their rights as consumers and consumers are in a weak position compared to business actors.

Business actors who have the obligation as stipulated in article 7 letter d in the UUPK, namely that business actors guarantee the quality of the drinks and food they produce are traded based on the provisions of the applicable food and beverage quality standards. It is clear in this case, business actors should in developing food management technology apply the precautionary principle, in which, before food and beverages are circulated or consumed by consumers, clinical trials must first be carried out at the Food and Drug Supervisory Agency, and obtain a permit from the Drug Control Agency. and Food. However, it seems that this was not done, resulting in cases that harmed consumers as a result of consuming these drinks and foods.

In its development, problems regarding consumer protection, especially beverage and food consumers, have not been optimally resolved, but instead these problems are increasing. Food safety in Indonesia is still very far from being safe for consumers.

Based on the description of the background above, it can be drawn several problem formulations as follows:

1. What are the criteria for drinks and food containing liquid nitrogen consumed by consumers according to the Food Safety and Food Standards Act?
2. What is the liability of business actors towards consumers who drink and food containing liquid nitrogen?

B. Research Method

The type of legal research used in this research is normative juridical (normative legal research method). The normative legal research method is a scientific research procedure to



find the truth based on the scientific logic of law from its normative side.¹ According to Soerjono Soekanto, argues that normative legal research consists of:

- . Research on legal principles;
- . Research on legal systematics;
- . Research on the level of legal synchronization;
- . Legal history research; and
- . Legal comparative research.²

This research takes a statutory approach by examining all laws and regulations that are related to the legal issues being handled.³ Research conducted on real conditions that occur in society with the intention of finding out facts and data that are in accordance with reality, which is needed in research, after the required data is collected then towards problem identification which ultimately leads to resolution.

This research focuses on the liability of business actors to consumers of drinks and food containing liquid nitrogen, where consumers are the subject of study, based on the reality of the current situation associated with laws and regulations related to consumer protection.

The method used in this research is *library research*, papers, articles, internet, research results, laws and regulations and other supporting information. Literature study is carried out by collecting data through legal materials search. Among them by citing and studying from several sources that are relevant and related to this research.

The data analysis method is a method used to process the data that has been obtained. The purpose of data processing is to obtain answers to existing problems. Thus, a problem can be solved.

The author in this study used a descriptive analytical research method, the data analysis used was a qualitative approach to primary data and secondary data, which were obtained from literature studies and then made interpretations to obtain answers and conclusions related to problems, as well as determine the content or meaning of legal rules

¹ Johny Ibrahim, *Normative Law Research Theory & Methodology*, Malang: Bayumedia Publishing, 2005, H.57

² Bambang Sunggono, *Legal Research Methods*, Jakarta: Rajawali Press, 2009, H.42; quoted from Soerjono Soekanto and Sri Mamudji, *Normative Legal Research a brief review*, Jakarta: Rajawali Press, 1990, H.15

³ Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana, 2006, H.93



which is used as a reference in resolving legal issues that are the object of study.⁴ The data analyzed relates to the liability of business actors towards consumers of beverages and food containing liquid nitrogen, and is linked to the applicable laws and regulations.

C. Results and Discussion

Liquid nitrogen or liquid nitrogen (LN₂) is nitrogen in a liquid state at low temperatures. Liquid nitrogen is produced from a fractional distillation process (separating liquid molecules between two or more, from a liquid or solution based on differences in their boiling points).⁵ Liquid nitrogen in food can actually be used as an auxiliary material. However, if used without adhering to food safety standards, it may cause harm to consumers. This is in accordance with the regulations of the Food and Drug Supervisory Agency (BPOM RI) Number 20 of 2020, liquid nitrogen is used as a processing aid, not a food additive. Liquid nitrogen is used to speed up the process of freezing a product by lowering the very low temperature to minus -200, much lower when using a freezer (around -20 to -40) so that liquid nitrogen is very easy to freeze food. If the production process is complete, nitrogen should be removed as much as possible from a product, no residue left.

The Ministry of Health (Kemenkes) recommends that liquid nitrogen not be used for ready-to-eat food and this recommendation is issued as a response to cases of poisoning after consuming Chiki Ngebul in a number of areas in recent times. The Ministry of Health disclosed the effects of consuming foods containing liquid nitrogen as stated in Circular Letter KL.02.02/C/90/2023 concerning Supervision of the Use of Liquid Nitrogen in Ready to Serve Food Products.⁹
<https://jatim.antaranews.com/berita/672021/dinkes-jember-received-report-one-child-poisoning-liquid-nitrogen>

In the chain of sales of drinks and food containing liquid nitrogen, creativity generally arises from producers/business actors or sellers of drinks and food containing liquid nitrogen. Then, the seller/business actor buys liquid nitrogen at a chemical supply store, then the liquid nitrogen is processed into drinks and food. After being made into drinks and food, these products are sold either to retailers or directly to the wider consumer community.

⁴ Amiruddin Zainal Asikin, *Introduction to Legal Research Methods*, Jakarta: Rajawali Press, 2006, H.107

⁵ <https://www.medcom.id/dinding/tips-education/DkqApLek-apa-itu-nitrogen-cair-pada-ciki-ngebul-ini-pengertian-dan-bahaya-bagi-kesehatan>



Based on the description above, it can be concluded that from the sales chain of drinks and food which contains three parties (producers, retailers, sellers) of drinks and food, it turns out that those who are most responsible for all drinks and food containing liquid nitrogen that are sold and consumed by The general public of consumers are producers/retailers or sellers. Thus, on the issue of drinks and food containing liquid nitrogen, where liquid nitrogen is forbidden to be used as drinks and food. The party that is most responsible is the producer, and for that he must be legally responsible for all losses suffered by consumers.⁶

The case of beverages and foods containing liquid nitrogen can be described as follows: producers add liquid nitrogen as a food additive to lure and influence consumers to buy these beverages and foods. The addition of liquid nitrogen to beverages and food is carried out without going through regulated procedures. Promotion of drinks and food containing liquid nitrogen is carried out both through social media and brochures. On the basis of promotion through advertising, consumers are then lured and influenced to buy drinks and foods that contain nitrogen. However, what happens is that after consumers consume these drinks and foods, many experience pain and poisoning. In the above contractual relationship between producers/business actors and consumers, producers/business actors have violated norms, namely carrying out inappropriate performance by submitting products, in this case food and beverages containing liquid nitrogen which should not be a food additive when they should be provide good quality drinks and food. The issue of liability cannot be separated from the existence of articles 1243 and 1365 BW. The two articles each regulate default on an agreement (contractual) and unlawful acts which form the basis for enabling a victim or consumer to carry out litigation actions against the perpetrator of the act.

Default is a neglect of achievements such as members, doing or not doing something in accordance with the agreement that has been agreed (article 1234 BW). The form of neglect can be in the form of not doing, doing less or doing but exceeding the agreed time (article 1234 BW).

In the case of misleading drug advertisement consumers, contractual liability is subject to the clauses in the sale and purchase agreement and the provisions of the law governing buying and selling as stipulated in articles 1457-1540 BW. The buyer is obliged to pay the agreed price of the goods and at the same time has the right to own the goods purchased.

⁶ Ibid. h. 146.



Conversely, a seller will be declared in default if he is proven to have neglected his obligations as stipulated in Articles 1473 - 1512 BW.⁷ In article 1474 BW, the seller is obliged to deliver the goods (*leveraging*) and bear the goods. The guarantee that is the obligation of the seller to the buyer is to guarantee two things, namely:

First, proper mastery of the goods and guarantee free from possible third party lawsuits and secondly, against defects in goods that are hidden or in such a way as to issue reasons for cancellation of purchases (article 1491 BW).

Upon delivery of the goods, the seller is obliged to guarantee the quality of the product he will sell with *implied terms/warranty* as well as *express terms warranty* . *Implied terms* are a form of guarantee that must be made by the seller about the quality of the goods without having to say it explicitly. In this implied guarantee, the seller must bear that:

- a. Goods according to the explanation or description in the agreement;
- b. Goods are the same as the applicable industrial quality;
- c. Goods have been adapted to the intended use;
- d. Goods match advertised quality samples.⁸

While the express warranty is a guarantee that is expressly stated, both written and unwritten/oral regarding product quality. *express warranty* by the seller as:

- a. Affirmation of facts or promises made by the seller to the buyer to ensure that the goods being sold are in accordance with what was agreed;
- b. In the event that there is a description/information, EW is a statement of guarantee that the goods are as described;
- c. Guarantee of goods according to the model or sample that has been advertised.⁹

The responsibility of the seller to guarantee the quality of his goods is an obligation of the law/law which binds the seller to fulfill it (*implied terms/warranty*). or *express terms/warranty*). This is very logical, because in practice it is the producer who controls the technology and determines the nature and quality of the product. Conversely, the buyer can also make complaints and legal actions without the obligation to prove that the seller has really openly guaranteed the quality of the goods he bought at the time of delivery. The construction of sale and purchase agreements in Indonesia views guarantees (*terms*) as part of the obligations

⁷ A. Junaidi, *Settlement of Consumer Disputes for Losses Due to the Use of Processed Food Products* , Airlangga University, Surabaya, 2000, h. 95.

⁸ Christopher J Wright, op. cit., h. 12.

⁹ A. Junaidi, op. cit., h. 97.



in the agreement, especially the sale and purchase agreement. However, based on BW, the scope of the seller's coverage is limited to guaranteeing hidden defects of the goods and does not cover visible defects. This is due to the acceptance of "visible" defective goods by the buyer is seen as a form of willingness to bear all risks of losses that will occur as a result of the defects in the goods (1505 BW).

Defect in the meaning of article 1504 BW is a defect in an item being sold, which renders the item unusable or reduces its use for its intended use, so that if the buyer were aware of the existence of the defect, he would not be able to buy it or at least buy it at a low price. While the meaning of "hidden" in the term hidden defect is that the defect is not easily seen by a normal (ordinary) buyer and not an overly conscientious buyer who, because of his thoroughness, will find the defect.¹⁰ The "invisible" nature of this hidden defect causes, *a contrario*, the seller is not obligated to bear the liability if the defect in the goods is "visible" and can be identified by the buyer himself (1505 BW). In the case of misleading drug advertisements that intentionally give a wrong picture of the quality and properties of the drug, the producer actually knows that the true nature and quality of the drug is not as advertised. Even though the producer states in the agreement that he does not bear anything, he is still responsible for what is the result of an act committed by him (article 1494 BW). In addition, this Article confirms that all agreements contrary to this matter are null and void.

The producer's obligation to bear the hidden defects of this item is seen as part of a seller's obligation and is coercive in nature which may not necessarily be accompanied by an exoneration clause from the seller to avoid it. This exoneration clause limits the liability of the seller. Although in principle it is justified as part of the basis for freedom of contract as stipulated in article 1338 BW, because of the nature of the agreement, this clause can also be considered non-existent (prohibited) if it is proven to be contrary to decency, law and public order (article 1320 in conjunction with 1337 BW), made with abusing the situation/turned out to be not properly notified to the buyer.¹¹ Exoneration clauses such as: "Goods that have been purchased cannot be exchanged/returned", or "Hidden defects of the goods are borne by the buyer".

¹⁰ Subekti, *Various Agreements*, Cet.III, Alumni, Bandung, 1979, h. 31.

¹¹ Harry Duintjer Tebbens, *International Product Liability (A Study of Comparative and International Legal Aspect of Product Liability)*, Sijthoff & Noordhoff International Publisher, Netherlands, 1980, p. 99



Waiver of the above matters gives the buyer the right to

1. if the defect is known from the beginning by the seller, then in addition to returning the purchase price he has received, the seller is obliged to replace all costs, losses and interest (1246);¹², as an economic loss from the defects of the goods (1508);
2. if the defect is not known by the seller himself, he is only obliged to return the purchase price issued (1509);
3. If the goods are destroyed due to the hidden defects, then the seller still returns the selling price besides compensating for all losses caused by the destruction of the goods (article 1510).

It appears that consumer protection on the basis of buying and selling is limited to claims to return goods and/or demands for reductions/discounts on the basis of defects in goods purchased. There is no right for consumers who have been harmed to claim compensation for poisoning, accidents or physical harm to consumers from the use of goods that contain hidden defects.

Some important things from the provisions of the two articles above are:

- (1) Engagement based on coercion, oversight (misguidance) and fraud can be cancelled;
- (2) Producers are required to pay compensation, if there is reason for that.

The nature and quality of the product are the characteristics and conditions that are essential (essential) for consumers. Without a convincing picture of the product specifications submitted by the producer, it is certain that consumers will not accept the offer (to issue a contractual relationship) of the advertisements displayed. Here the producer is considered to recognize/know the nature and condition of the product which causes consumer misdirection to be decisive. The series of deceptions (required in article 1328) contained in misleading drug¹³ advertisements can be seen from producers who determine the nature and quality of goods by simply keeping silent (not making efforts to prevent

¹² Wirnjono Projodikoro, *Unlawful acts*, Well Bandung, 1960, h. 37

¹³ J.H Nievwenhuis, *op. cit.*, h. 18.



consumers from closing the agreement), even giving the impression that producers are deceiving consumers. with that ad

he made . So that the relationship between deception and fraud is very clear in this case, because without a misrepresentation of the nature and quality of the product (which is deliberately misled by the manufacturer) consumers will not decide to buy the product or at least buy it at a lower price.

According to Wiryono Prodjodikoro what is meant by an unlawful act is:

Actions that cause shocks in the balance sheet of society. This shock does not only occur when legal actions in a society are violated, but also when the rules of decency, religion and courtesy in society are violated.¹⁴

Meanwhile, according to Hoge Raad what is meant by an unlawful act in a broad sense must be interpreted as:

An act or non-action that violates the rights of other people or is contrary to the legal obligations of the perpetrator of the act, or is contrary to both decency, as well as due diligence in social relations with other people or other people's property, while the person who due to his mistake commits an act that causes harm to another person is obliged to pay compensation.¹⁵

In connection with the above, according to article 1365 BW basically if someone commits an unlawful act and is guilty of that act, which causes harm to another person, then he is obliged to pay compensation. In this regard, the elements of unlawful acts (a) unlawful acts; (b) there was an error or negligence (*schuld*) on the part of the culprit; (c) there are losses suffered by consumers and (d) there is a causal relationship (causal relationship) between acts against the law and losses suffered by consumers.¹⁶ An act is considered unlawful if it conflicts with (a) the rights of other people; (b) contrary to the legal obligations of the perpetrator; (c) contrary to decency; (d) contrary to the care that must be taken into account in society's traffic towards oneself and other people's goods. This act can only be held liable if it is proven to have caused harm to another person. Therefore, in addition to proving the unlawful act

¹⁴ Wirjono Prodjodikoro, *op. cit.*, h. 13.

¹⁵ Suryodiningrat, *Associations Based on the Law*, Tarsito, Bandung, 1980, p. 31.

¹⁶ Eli Hernawati, *Legal Aspects of Consumer Protection in the Production of Canned and Carton Packaged Foods*, Airlangga University, Surabaya, 1995, p. 23.



of the perpetrator and the loss he suffered, he is also burdened with proving that there is causality between the act and the loss he suffered, although it must be admitted that not all Actions that interfere with the interests of other people immediately cause harm to that person.

Losses are not only in the form of reduced assets, but also decreased social interests which must be nominalized in a loss value that is not different from losses in contractual default, namely the elements of damages, profits and costs as permanently outlined in article 1246 BW.¹⁷

In beverages and foods containing liquid nitrogen, it is clear that consumer losses will not arise if producers do not provide liquid nitrogen content which is not a food additive that can be consumed by consumers. In addition, this loss can be considered as a natural result of drinks and foods containing liquid nitrogen. Producers who sell drinks and food containing liquid nitrogen can be classified as violating consumer rights, because producers have violated consumer rights as sellers of purchased drinks and food containing liquid nitrogen and the right of consumers to enjoy their rights. Consumer rights violated by producers are the right to not have defects in the product or to receive the product as promised (article 1491 jis 1504 and 1506 BW). Meanwhile, the right of consumers to enjoy their products is also violated by producers because they cannot enjoy the products they buy (abstract from article 1491 jis 1504 and 1506 BW). Misleading advertising is also a violation of the legal obligations of producers, by interpreting articles 1491 jis 1504 and 1506 BW, the legal obligation of producers is to notify the existence of hidden defects in the products they sell (not even to provide false or misleading information or descriptions), even to defects hidden or what he doesn't know, the producer must still bear it.

Here the producer's obligation is to maintain the quality of goods from the production process to the delivery of these products to consumers.

Article 1365 BW contains the concept of liability based on fault, which can be analogous to *liability based fault*, just like the traditional liability doctrine of *negligence* in the Anglo Saxon system. When viewed from BW, *negligence* is nothing but the negligence of the perpetrator to prevent other people from falling into danger that harms the interests of other people. By relying on this doctrine, at least the consumer must prove that the unlawful act of the producer fulfills the element of *negligence* or *faults* namely the failure to take prudent

¹⁷ Wirjono Projodikoro, op. cit., p.37.



and reasonable efforts that should be done by a person, so that if the defendant or the producer succeeds in proving that he has made enough efforts to be careful, then he can be released from liability even though the consequences of his actions cause losses.

With drinks and food containing liquid nitrogen whose properties and quality are not in accordance with what was agreed upon, it means that the producer has harmed the consumer's interest in the product as it should be and deliberately does not prevent consumers from buying products with lower nature and quality. This accuracy criterion gives discretion to the judge in assessing all interrelated interests of producers and consumers.

In addition, the error in article 1365 BW does not distinguish between intentional and negligent errors as criminal law. Evidence like this is difficult for consumers to do because the error involves the spiritual relationship between¹⁸ the business actor and the violation of the law he committed. Consumers can only prove that after drinks and foods containing liquid nitrogen, consumers experience pain. Where at the time drinks and food containing liquid nitrogen were sold, it was not explained whether the drinks and food contained side effects, but it turned out that after consumers bought and consumed them, side effects occurred, which were even more severe, causing pain. If a business actor suspected of being involved argues that the nature and quality of liquid nitrogen has side effects, even to the point of causing illness or poisoning, it is not purely on his part but due to an error made by the consumer. Things that will be difficult for consumers to prove.

Consequently, according to Yusuf Sofie's opinion,¹⁹ proving that under conditions where consumers are weak and economical compared to the business actors they are suing, making liability based on unlawful acts ineffective in protecting consumers from actions detrimental to business actors.

Originally, product liability was based on the principle of "no contractual relationship, no responsibility". This means that plaintiffs who feel aggrieved by the use of products from business actors are consumers who have indeed made transactions or contractual agreements. This form of loss is the failure of the business actor to guarantee the quality of the goods as promised and the usability of the product according to the manufacturer's standards, because both are part of the achievement itself. The quality of goods, in fact, is

¹⁸ Ibid. h, 24.

¹⁹ Yusuf Sofia, on. Cit., h, 9.



not traded in a limited manner, but is mass-produced, advertised nationally and widely distributed so that it has the potential to influence the public interest.

Product Liabilities in England is very much determined by the appreciation of the court in the form of legal doctrine through its decisions, especially for cases related to consumer protection issues. *Product Liabilities* developed from the negligence doctrine until it was finally affirmed in the Consumer Protection Act 1997. The landmark decision for the negligence doctrine in this context is the case of *Donoghue Vs. Stevenson* (1932).²⁰ It was revealed that Donoghue (the plaintiff) and his friend went to a cafe where the friend bought ice cream and a dark bottle of (ginger) beer. When his friend poured the drink into a glass, it turned out that the beer also had a dead snail in it. As a result, the plaintiff was in shock and suffered from gastroenteritis (vomits when he sees beer). In this case it is clear that the beer is unfit for sale and drinking. It appears that the plaintiff is basically not a buyer of the beer, so he cannot sue the cafe management because he does not have a contractual relationship. Finally he sued Stevenson as the beer producer which was by the *Lord of the house* it was decided that the manufacturer had neglected to carry out the duty of *care* to consumer safety.

Lord Atkin commented on this case:

*A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up a duty to the consumer to take reasonable care.*²¹

Implied Warranty

Another case is *Lambert Vs. Lewis*²² which started from a terrible accident in 1972 that killed the father and son of the Lewis family except for the mother and daughter who immediately filed a lawsuit against Lexmead Ltd. As a coupling manufacturer. It is said that the accident occurred because Lewis's family car collided with a Land Rover driven by a farmer as a result of this farmer's car could not be stopped and hit Lewis' car. Based on the investigation, it was found that the farmer's inability to control his car was due to a design flaw in the clutch of the Land Rover car. On that basis, Lewis' wife jointly sued the farmer, the car dealer and

²⁰ Christopher J. Wright. Op. cit, h. 73

²¹ Ibid. h. 74

²² A. Junaidi, op. cit., h. 115.



the car clutch manufacturer. At the end of the case, the automaker was required to pay compensation to the plaintiff, even though there was no prior contractual relationship. According to the British literature, this is a cornerstone of the application of *strict liability*.

Originally, producer liability in the Netherlands was based on contract law, which included lawsuits for default and acts against the law. The proof is borne by the plaintiff or the consumer who must prove the existence of a mistake and a causal relationship between the act and the loss. The difficulties for the principle of liability for wrongdoing based on unlawful acts then in its development experience changes through court decisions. The principle of reversing the burden of proof has begun to be applied in consumer cases. Likewise risk liability follows in subsequent consumer cases. Meanwhile, a new BW design has been prepared, and it also regulates the product of the *praakelycheid tenacity*. In the Netherlands Producer liability has been regulated in the new Sixth Book of BW (NBW) and was ratified in January 1992. Producer Liability Regulations in this country are called by the terminology "*Sprakelykheid Product*". The risk liability system for consumer lawsuits is implemented in the provisions of Book 6 section 3, regarding engagements, especially article 185 NBW. In this provision it appears that the exclusion of liability does not mention the fault of the defendant or the plaintiff himself.

On the basis of the concordance principle, the Dutch BW, which in its first editorial, which was enacted in 1838, became the basis for contractual liability and sharpened liability as described in the previous paragraph can be used as a basis for protecting consumer interests. However, to overcome the normative weaknesses of contractual liability and unlawful acts by consumers in misleading drug advertisements, it seems that the legislators prefer to enact the UUPK which outlines the accountability of business actors. The responsibility of business actors for consumer losses due to the quality and nature of advertised products that do not match reality based on this non-contractual relationship is known as *product liability*. In the Oxford Dictionary of Law as quoted by Gunawan Wijaya,²³ it is said that

"Product liability is the liability of manufacturers and other persons for defective products. Under the Consumer Protection Act 1987, passed to conform with the requirements of European Community Law,

²³ Gunawan Widjaja and Ahmad Yani, *Law Concerning Consumer Protection*, Gramedia Pustaka Utama, Jakarta, 2000, h. 60.



the producer of defective products that causes death or personal injury or damage to property is strictly liable for damage..."

In the Black's Law Dictionary,²⁴ Product liability in the United States is defined as:

"Product liability is legal liability of manufacturers and sellers to compensate buyers, users, and even by standard, for damaged or injuries suffered because of defects in good purchased. A tort which makes a manufacture liable if his product has a defective condition that makes it reasonable dangerous to users or consumers"

Meanwhile, according to the Convention on Law Applicable to Product Liability (The Hague Convention) as translated by HE Syaefullah,²⁵ what is meant by Product Liability is a legal responsibility from a person or legal entity that produces a product (producer, manufacture) or from a person or entity law that sells or distributes (seller, distributor) even to persons or legal entities involved in the commercial chain of preparation or distribution of products, including workshop and warehousing entrepreneurs.

In the matter of consumer protection for beverages and food containing liquid nitrogen, a competent consumer protection law is the Health Law as a Lex Specialist to the PK Law. That is, as a general law, in dealing with the problem of drinks and food containing liquid nitrogen, the UUPK will only apply if the Health Law does not regulate it and vice versa, the UUPK will not be used if it has been specifically regulated in the Health Law. But in terms of the liability of business actors for drinks and food containing liquid nitrogen, the Health Law does not specifically regulate that the competent law is the UUPK. In terms of product liability, the UUPK outlines it in article 19 chapter VI, concerning Responsibilities of Business Actors:

1. Business actors are responsible for providing compensation for damage, pollution, and or consumer losses as a result of consuming goods and/or services produced or traded;

²⁴ Henry Campbell Black, Black's Law Dictionary, West Publishing Co. Sixth Edition, St. Paul Minn , 1990, p. 120s.

²⁵ HE Saefullah, Responsibility of Producers Against Legal Consequences Arising from Products in the Free Market Era, Mandar Maju, Bandung, 2000, h. 46.



2. Compensation as referred to in paragraph (1) may be in the form of a refund or replacement of goods and/or services of the same or equivalent value, or health care and/or compensation in accordance with the provisions of the applicable laws and regulations;

3. Compensation is carried out within 7 days after the transaction date;

4. The granting of compensation as referred to in paragraph (1) and paragraph (2) does not eliminate the possibility of a criminal charge based on further evidence regarding the existence of an element of guilt;

5. The provisions referred to in paragraphs (1) and (2) do not apply if the business actor can prove that the mistake is the fault of the consumer.

This article contains three important things, namely:

A. The relationship between business actors and consumers does not require a contractual relationship;

B. There is no need for an element of error in filing a lawsuit;

C. Defending business actors with reverse evidence (evidence by business actors regarding mistakes made by consumers), (Article 22 in conjunction with Article 19) .

A. The relationship between business actors and consumers does not require a contractual relationship; This can be interpreted from the sentence:

"(1) Business actors are responsible for providing compensation for damage, pollution and or consumer losses as a result of consuming the goods and/or services produced or traded"

B. There is no need for an element of guilt in filing a lawsuit. The main requirement that must be proven by the plaintiff or heir is that the person concerned suffers a health loss, in this case it is a direct result of consuming the drug produced by the defendant without having to be burdened with the obligation to prove the manufacturer's fault. Article 19 paragraph 4 of the UUPK leaves out contractual requirements in protecting the civil interests



of consumers who are harmed and does not require mistakes in claims for compensation by consumers, as stipulated in article 1365 BW.

C. Defense of business actors with reverse evidence (evidence by business actors of wrongdoing by consumers). The defendant has the right to prove that the person concerned is innocent, or that the reason underlying the lawsuit was not caused by his fault/negligence/that the losses suffered by the plaintiff were caused by the fault/negligence of another party. The liability of business actors in Article 19 of the UUPK above, when the product is proven not to be as advertised and causes harm to consumers, without requiring whether there is a business actor's fault is an affirmation of the application of the *product liability concept*. contains liquid nitrogen.

The health law is a substantive law for consumer protection in misleading drug advertisements. To enforce it, formal law or procedural law is needed for consumers who want to sue for compensation due to the drugs they consume. The Health Law does not specifically regulate the procedural law in question, which has led to the enactment of the UUPK which incidentally is an umbrella law (general) for consumer protection in general, including the problem of misleading drug advertisements. The provisions above reinforce the procedural law that must be guided by the parties involved in consumer disputes in court,²⁶ namely based on article 5 paragraph 1 of the Darussalam Law. 1/1951 which states that civil procedural law at the District Court is carried out by taking into account the provisions of the Dar. according to the previous regulations of the Republic of Indonesia.

The general court civil procedural law above is not used if certain matters have been specifically regulated by the Consumer Protection Act. One of them is the time limit for filing a consumer dispute lawsuit.

The prosecution period determines the success or failure of the lawsuit in consumer disputes. The claim on this matter will not be accepted²⁷ based on the judge's decision. Therefore, it is necessary to understand the time limit (expiration) for lawsuits, which are typically different from the time limits for civil lawsuits in general. Among the time standards stipulated in the UUPK there is the formulation of article 19 paragraph 3 of the UUPK which

²⁶ Sudikno Mertokusumo, Indonesian Civil Procedure Code, Liberty, Yogyakarta, 1993. h. 6-7

²⁷ A. Junaidi, op. cit. h. 132.



stipulates: "compensation is carried out within a period of 7 (seven) days after the date of the transaction", while article 27 paragraph 4:

Business actors who produce goods are released from responsibility for losses suffered by consumers, if. The period for fulfilling compensation payments within 7 days as stipulated in Article 19 (3) UUPK is the period for a business actor-consumer transaction in a contractual relationship, namely a sale and purchase agreement. The business actors in question are distributors such as supermarket entrepreneurs or retail sellers. This reinforces the ambiguity of the formulation of Article 1511 BW which regulates claims for default in buying and selling based on the time period according to prevailing customs.

In contrast to the contractual time limit, article 27 UUPK is intended for producers of goods, in this case drug manufacturers (*product liability*). The 4 year term is the result of an *a contrario interpretation* from being sued by producers by consumers. The filing period starts from the time the goods or medicine are purchased from the retailer. Thus, for a consumer there are two time limits for filing a lawsuit or requesting compensation if he has a loss after consuming a drug product, namely:

- a. 7 (seven) days from the transaction for a lawsuit against the seller or retailer
- b. 4 (four) years since the goods were purchased from the drug manufacturer.

Another submission deadline is during the warranty period for defective goods, as long as it is agreed verbally/in writing. The use of the word or in the formulation regarding the expiration of prosecution in Article 27 paragraph 4: "the expiration of the prosecution period of 4 years from the time the goods are purchased or the expiration of the agreed period of time", indicates that in the case of a drug product there is no mass warranty agreement, then the standard used is 4 years as usual.

Proof in Product liability

Regarding this proof, it is not strictly regulated in the Health Law so that further regulation on this matter refers to the Consumer Protection Law as per the principle of *lex specialist derogat legi generalis*. In the UUPK, this is regulated in article 19 paragraph 4 in conjunction with article 28

Article 19 paragraph 4



The awarding of compensation as referred to in paragraphs 1 and 2 does not eliminate the possibility of criminal prosecution based on further evidence regarding the existence of an element of guilt.

Article 28

Proving whether there is an element of error in the claim for compensation as referred to in Article 19, Article 22 and Article 23 is the burden and responsibility of the business actor.

Proof according to article 28 in conjunction with article 19 paragraph 4 shows that the system of evidence in consumer liability according to UUPK is a reversed proof system which obliges the defendant in terms of business actor liability or criminal defendants to prove their innocence by submitting evidence. As explained on the previous page, the element of whether or not guilt was actually an argument used in unlawful acts in article 1365 BW, where the defendant can release from his obligations if he can prove his innocence by showing: (1) that he has made serious efforts really to avoid losses and even (2) file a counterclaim (article 132 b paragraph (2) HIR) by shifting the blame by arguing that the losses suffered by the plaintiff were caused by the mistakes of other people or the victim (plaintiff) himself and not by himself. On this basis, the consumer must ultimately participate in proving the fault or negligence of the defendant as well.

In consumer problems misleading drug advertisements, compensation arrangements are regulated in article 19 paragraph 2 UUPK, which includes

1. refund or replacement of goods and/or services of the same or equivalent value; or
2. health care ;
3. the provision of compensation in accordance with the provisions of the applicable laws and regulations

The inclusion of health care and compensation as objects of compensation is an addition to the standard compensation for compensation for default in the law on sale and purchase agreements, Article 1508-1510 BW, which only recognizes the return of goods and demands for a reduction or reduction in the price of defective goods purchased. Providing



compensation cannot be identified with reimbursement of money, health care, let alone insurance payments. For consumer losses due to misleading Man, the judge can order business actors to provide compensation to victims in the form of:

1. medical expenses and/or funeral costs, if the consumer dies;
2. medical expenses in the event of injury to the body or health of the consumer.

The thing that must be considered is that the provision of this compensation does not eliminate the defendant's civil obligation to pay compensation whether it occurs on a contractual basis or product liability in the case of losses due to drinks and food containing liquid nitrogen advertisements as described in Article 19 of the UUPK.

This compensation institution should be regulated because actually the determination of compensation for consumer disputes is only placed in the BPSK agreement or decision. Moreover, the legislature has not issued a specific law regarding compensation or compensation payments.

From the description above, it can be seen that in addition to liability on a contractual basis and unlawful acts in BW, product liability in consumer law is regulated in Article 19 UUPK with the burden of proof reversed. The business actor accountability forum is subject to general civil proceedings with the exception of relative competency at the consumer's place of domicile, while compensation in this context is not only in the form of returning goods and demands for reductions or price discounts as in the contractual, or limited to compensation for economic losses as an unlawful act, but also includes compensation for actual damages.

Closing

The use of general civil procedural law in consumer disputes as emphasized in article 45 of the UUPK, with the exception of relative competence under article 23 of the UUPK, makes the benchmark for determining relative competence in the event that there is a lawsuit in a consumer dispute in drug advertisements, deviating from article 118 HIR/142R , Bg the lawsuit is filed at the District Court where the defendant resides;



if there are more than one defendant being sued and they do not live in the same jurisdiction as a District Court, then a lawsuit is filed with the District Court where one of the defendants lives. The plaintiff can choose the residence of one of the defendants;

if the lawsuit is about fixed objects, then the lawsuit is filed with the District Court at the place where the fixed objects are located; A lawsuit can also be filed at the District Court where the plaintiff lives if the residence of the defendant is unknown or the defendant comes from abroad and does not have a place to live in Indonesia.

If there is a place of residence chosen by a deed, a lawsuit is filed with the District Court for the place of residence chosen in the deed.

The specificity of litigation forums in consumer disputes is that in the event that a business actor refuses to comply with compensation for consumer claims as referred to in Article 19, the consumer can file a lawsuit with BPSK or the District Court at the consumer's domicile. This makes it easier for consumer lawsuits against business actors in non-contractual relationships based on product liability which allows consumers to sue producers, even though the two of them are not directly related at the time of the transaction and reside in jurisdictions that are distinguished by provinces or regions of the country.

In this matter, the European Community (EC) regulates it specifically in the Convention on Jurisdiction and Enforcement of Jurisdiction in civil and Commercial Matters (the Brussel Convention)²⁸ which is often differentiated by provincial areas or regional boundaries which regulate the possibility of filing lawsuits against many business actors. This principle is not much different from the principle/principle of lawsuit as stipulated in article 23 of UUPK above. However, in this convention the principle of "Forum Shopping" also applies, namely claims filed at the place where the goods are purchased or obtained by consumers.²⁹

This facilitates consumer lawsuits against business actors in non-contractual relationships based on product liability which allows consumers to sue producers, even though the two are not directly related at the time of the transaction and reside in jurisdictions that are distinguished by provinces or even national territories.

²⁸ Christopher J. Wright. *op. cit.* h. 68

²⁹ A. Junaidi, *op. cit.* p . 136.



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