

**EVALUATING TOYYIBAN IN FOOD SAFETY: A FORENSIC CASE REVIEW ON
MANAGER, TUBORG (MALAYSIA) SDN BHD V PUBLIC PROSECUTOR [1990] 2 MLJ 173**

^{i,*} Nur Hana Maruan

ⁱFaculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM), 71800, Nilai, Negeri Sembilan, Malaysia

*(Corresponding author) e-mail: hanamaruan@raudah.usim.edu.my

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ABSTRACT

The "halal" is not the sole factor that can be relied on for food integrity in the Malaysian market; there is also the element of "toyyiban" which involves food safety, hygiene and high quality. This paper will discuss and analyse the concept of toyyiban that is applied in relation to food safety in the context of the forensic case of Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor [1990] 2 MLJ 173. This case provides an important cautionary example of a manufacturer's constructive criminal liability in the event a sealed product is discovered to have contained biological foreign matter, in this instance fungal growth. This study employs a content analysis method of the Food Act 1983 and relevant legal principles to investigate the procedural forensic shortcomings in establishing the presence of "foreign matter," as well as the meaning of "authorized officer", that resulted in the overturning of the conviction. In addition, this paper makes a philosophical comparison between the doctrine of strict liability in civil law and the Islamic doctrine of toyyiban. The results suggest that a proper balance between legal enforcement and scientific precision is needed to achieve comprehensive consumer protection in the case of the toyyib aspect.

Introduction

With the world population projected to increase by 70% by 2050, necessitating a 70% increase in food production, global food production has outpaced demand. Global food production has outpaced demand, with the world's population projected to grow by 70% by 2050. This quick technological progress has made food value chains longer, more complex and harder to track. This inevitably increases the likelihood of food contamination whether by accident or by deliberate means as part of food fraud which present a great risk to human health.

In Malaysia, food quality is not just measured by the "halal" label, but also by a wider concept "halalan toyyiban". Halal has to do with what is allowed in Islamic law, whereas toyyib has a much broader connotation, including cleanliness, health, safety and high quality (Siddiqui & Yousaf, 2017). In today's world, food safety has become part and parcel of the toyyib element and it is no longer possible to detach it from the bigger picture of halal.

According to the World Health Organization (WHO), hundreds of thousands of people die each year from unsafe food and hundreds of millions become ill from ingesting contaminated food (Awang, 2021; Saad & Ramli, 2018). The number of food poisoning cases reported by the Ministry of Health Malaysia (MOH) has increased by 3.2% locally in 2019. For Muslims, this is not just a physical health concern, it is also a spiritual health concern because eating non-toyyib food can have a negative effect on a person's quality of life (Saad & Ramli, 2018).

The decision in *Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor* [1990] 2 MLJ 173 is a landmark case forensic and legal reference case in Malaysia. It draws attention to the product safety issues before courts and the case of commercial beverages being found to be contaminated by fungal growth. In addition, the case examines the limits of manufacturers' liability for product integrity, once the product is no longer within their "physical possession." A comprehensive assessment is needed to fully unpack the case, which will require an in-depth examination of food forensic science and its interrelationships with civil law and Shariah requirements and the need to ensure that consumer rights are not weakened.

False Trade Description and Product Safety Legislation

Framework of The Trade Description Act

The false trade description concept is closely related to failure to comply with the integrity of information contained in the labelling or the packaging (Ismail et al., 2018). The Trade Descriptions Act 2011 (TDA 2011) will impose serious penalties for any statement or information that misleads consumers about the nature of the contents, quality or safety of goods. Section 5(1) of the TDA 2011 makes it clear that it bans the application of false trade description to goods and goods supplied which are described as false trades (Abdul Rahman et al., 2024).

The JAKIM halal logo is arguably the most powerful trade description in the halal food industry, since it offers a guarantee of a product's halal status to consumers. This logo, however, is often misused by those with aims of making quick money without consideration for Shariah requirements. In this context, a fake trade description is the unauthorized application of counterfeit halal logos, labels containing the wrong ingredients (e.g. a label saying it contains vegetable oil whilst it contains animal fat) or expired certifications.

The Food Act 1983 and Public Safety

Apart from the TDA 2011, the most important piece of legislation relating to health hazards and fraud in food preparation is the Food Act 1983. This Act sets minimum requirements which all manufacturers have to comply with. Some sections of particular importance with respect to product safety and the toyyiban principle are:

Section 13: Outlaws selling food which contains substances harmful to health.

Section 13A: Bans the sale of food which is unfit for human consumption, even if it contains biological or chemical foreign matter.

Section 16: Prevents false, deceptive or misleading food labeling.

In the Tuborg case the appellant's charge was Section 13(1) for selling brewed beer that had fungal growth. As a forensic science issue, the existence of mould is not just a minor quality control problem, it is a fundamental problem of meeting the product's trade description as a safe and hygienic drink.

Comparative Analysis: Strict Criminal Liability vs The Toyyiban Principle

Civil Enforcement Based on Strict Liability

Under Malaysian civil law, violations of the Food Act 1983 are often considered to be strict criminal offences (Ismail et al., 2012). This doctrine allows the prosecution to not prove the element of guilty intent (mens rea) on the part of the accused. On the other hand, the prosecution is only required to prove that the prohibited act (actus reus) took place, which in this case is the sale of contaminated food.

In the key case of Tesco Supermarkets Ltd v Nattrass Lord Diplock argues that 'strict liability' is fully justified in consumer protection law. It is designed to hold employers fully responsible for what their employees do, with a prime aim of increased overall transparency and vigilance in the business world.

There is a "safety valve", however, in civil law under the provisions of Section 23 of the Food Act 1983. Under this section, if a manufacturer can show a "balance of probabilities" that they have taken "all reasonable steps" to prevent the contamination, they will not be liable. In the case of Tuborg, the court eventually dismissed the conviction after the firm proved to the court that they had an extensive system of checks and balances. It indicates that it is not only the absolute presence of the mold that is of importance in civil law, but also the suitability of the procedures used.

The Islamic Rejection in the light of the Toyyiban Principle

Unlike civil law, Islam does not allow contaminated products via an "reasonable steps defense" principle (Awang, 2021). The essence of Toyyib is that it is absolutely pure in (bio)biological, chemical and physical aspects (Saad & Ramli, 2018). From a Shariah perspective, the presence of mold in a beverage may be classified as a basic defect of the Toyyib element and thus the product is considered unfit for human consumption, while in civil law, this might be considered as a mere technical mistake (Siddiqui & Yousaf, 2017).

Responsibility of the manufacturer is not restricted to the factory floor but applies to the product's entire journey from farm to fork (in Islam). The concept of Toyyiban is directly connected to the Objectives of Islamic Law (Maqasid al-Shariah) which is the preservation of life (Hifz al-Nafs) and intellect. Every food that is harmful and toxic and injurious to health is categorically disapproved from the Quranic verse (2:195) which says, "Let not the unbelievers throw themselves into ruin".

The purpose of the civil strict liability is to "punish negligence", and that of the Toyyiban principle is to "guarantee purity". The concept of absolute transparency and honesty is very important in Islam; manufacturers are forbidden from concealing any defects in their products (Surah al-Nisa 4:29). From the Islamic point of view, it is a clear fact that the mold-infested Tuborg is definitely not "Toyyib" and should never have been marketed; even if the manufacturer has been acquitted on civil charges because of technical and forensic issues.

Case Facts: Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor [1990] 2 MLJ 173

The Charge: The appellant, who was the manager-in-chief of Tuborg (Malaysia) Sdn Bhd, was charged with the offence under Section 13(1) of the Food Act 1983 for selling a bottle of beer that contained fungal growth to the complainant.

Chronology of Events: This is an incident at the Club. The complainant, who was an off-duty health inspector, went out for recreation to the Sultan Abdul Samad Club and requested a beer from the caterer of the club (PW1).

The Foreign Matter has been discovered. Foreign Matter has been found. Complainant stated that he noticed something floating in the bottle before opening it. He quickly blocked the caterer's way of opening the bottle.

Forensic Analysis & Chain of Custody: The complainant took this sealed up bottle home and turned it over to the Health Office the next day. This sample was then sent to a chemist for analysis. Importantly, this was not done by giving any written notice and did not involve providing duplicate samples to the manufacturer (the appellant).

The Chemist's Report: The chemist's analytical report revealed the presence of a "floating lump" which on microscopy was found to be fungal growth. Lower Court Decision the Magistrate's Court found the appellant guilty of the crime. A site inspection (locus in quo) of the manufacturing factory was done by the Magistrate who rejected the company's defence that it had taken "all reasonable steps".

Summary and High Court Decision

Justice Wan Yahya ruled that in the appeal before the High Court, the conviction was quashed and the appellant acquitted due to several important points of law and forensic issues.

A complainant must be an "Authorized Officer" of the company.

The court decided that complainant was not an "authorised officer" at the time of the incident as defined in the Food Act 1983. He was a health inspector by trade, but he was not performing any of his duties as a health inspector when he took the bottle. An officer on duty through the statute only after proper legal procedures can exercise statutory powers under the Act including powers for taking samples (Section 5), and powers for issuing notices (Section 6).

A failure to follow the mandatory notice procedures.

Failure to follow mandatory notice procedures.

The court found that there was a serious failure of procedure in relation to Section 6(1) of the Food Act 1983. The enforcement officer did not give a written notice to the manufacturer to have the sample analyzed. This was a denial to the manufacturer of its basic right to test the integrity of the product or to obtain a duplicate sample (counter-proof) for an independent analysis to determine whether the contamination happened in the factory or after distribution.

The main purpose of the work is to establish the presence of 'Foreign Matter'.

During the prosecution evidence there has been no presentation of scientific evidence to prove that the mould should legally be considered to be a 'foreign matter' to the beer, as defined by Section 13(1). The court stressed that the prosecution had the onus of proof upon them as to the existence of an element and that the court should not be left with the element solely in its imagination.

The Defense of All Reasonable Steps

Appellant on a balance of probabilities established that the company had taken reasonable steps in the process of bottling. Optical scanning machines with a 99% efficiency were accepted as proof of a high level of scrutiny and checked every two hours. The High Court found that without taking witness statements the Magistrate had given the wrong impression and rejected this defence.

Forensic Comparison: Tuborg vs Public Prosecutor v Wee Mee Industries Co Sdn Bhd

A comparison with the landmark case Public Prosecutor v Wee Mee Industries Co Sdn Bhd [1991] 1 MLJ 505 will enhance the understanding of the wider issues of food safety and halal integrity in Malaysia.

Nature of the Contamination

In the Tuborg case, the contamination happened when fungal growth occurred in a beverage in a product, which was said to be a prohibited foreign material. The Wee Mee case, on the other hand, was a misrepresentation of ingredients. If so, instant noodles were described as containing “edible vegetable oil” but forensics showed that it was animal fat.

Documentary Evidence (Exhibit P7)

Chemical analytical reports (Exhibit P7) were relied upon heavily in both cases as their primary documentary evidence. The chemist's report in which he concluded that the animal fat was present was found to be conclusive in Wee Mee to prove the company applied a false trade description. A similar report was submitted to the prosecution in the case of Tuborg and led to the prosecution failing to follow the required sampling procedures as specified in Section 6 of the Food Act 1983.

Consequences for the Halal Integrity

The example of Wee Mee shows how the problem of ingredient fraud (animal fat vs. vegetable oil) can be detected by forensic analysis and can be a serious issue affecting the integrity of halal. In contrast, the Tuborg case focused more on product safety technicalities, based on the doctrine of constructive liability. The two case studies highlight the critical importance of the chain of custody for physical and documentary evidence in any food safety case.

Forensic Means of Evidence

Documentary Evidence Forensic evidence in food safety cases is based on documentation. This framework comprises:

Chemist's Analytical Report: Provides microscopic information of what the foreign material is. The Certificate of Analysis (COA): is prima facie evidence of the facts contained in it, signed by a gazetted or appointed analyst. Calibration logs from the optical scanning machines, updated every two hours, were an important documentary piece of evidence to support the defense in the Tuborg case by showing that all reasonable steps had been taken.

Physical Evidence and Packaging Integrity. The most important piece of physical evidence to prove a manufacturer's constructive knowledge is an unopened, unsealed package. The liability of a manufacturer will be limited under Section 28 of the Food Act 1983, unless the product is sold in its original, sealed form. The High Court, in the Tuborg case, asked about the integrity of the seal on the bottle, speculating that it could have been opened or leaked there after it came off the production line. However, from a forensic perspective, it's important to establish that the container had not been tampered with by a third party, meaning that the problem was indeed a manufacturing defect.

The role of expert witnesses and the restrictions on their use.

The functions of expert witnesses and the limits on their use. A witness from MARDI (Malaysian Agricultural Research and Development Institute) was called by the prosecution to testify in the Tuborg case. The court, however, failed to take the opinion of these two experts as evidence since their professional qualifications were not formally established during the proceedings. The prosecution's arguments as to how the bottle was damaged during the bottling process were rejected as being mere "expostulation" speculative statements which could not legally support the prosecution's case where no expert testimony was given.

Forensic Issues in Food Safety and Toyyiban

The contamination Risk and Supply Chain

The halal food safety is entirely based on the integrity of the supply chain from "farm to table" (Saad&Ramli, 2018). Each node in this supply chain will contain unique vulnerabilities that make products vulnerable to different types of contamination:

Raw Material Contamination: This involves the addition of raw materials that contain drug residues, growth hormones or porcine DNA.

Logistical Contamination: Halal and non-halal products are kept in the same containers or warehouses and are not properly ritually cleansed (sertu).

Process Contamination: A cause of contamination by introducing biological foreign matter, for instance mold (as in the Tuborg case) or chemical residues from industrial cleaning agents.

Packaging Contamination: The transfer of harmful chemicals from the packaging material, adhesive, or food labeling to the food product.

Halal Management and Regulatory Standards

Two fundamental prerequisite programmes and standards, namely Good Manufacturing Practices (GMP / MS 1514) and Hazard Analysis Critical Control Point (HACCP / MS 1480) are key to operationalising the toyyib aspect of a product. The focus of GMP is on cleanliness of the premises, equipment and staff (Awang,2021). Unlike HACCP, other systems are designed to manage food safety by reacting to the problem after it has occurred (Awang,2021). Other systems, in contrast, are designed to react to the food safety problem after it has occurred and are not a systematic framework for food safety management.

While Tuborg's company had elaborate quality control processes in place, food forensics has shown that technology is not enough when there is no human control. In the Malaysian Halal Certification Procedure Manual (MPPH) it is compulsory to track raw materials and ensure absolute adherence to the Standard Operating Procedure (SOP) to avoid any statutory offence related to false trade description.

Public Health Implications

In many ways food safety is a natural extension of the consumer's right to products which do not pose a threat to her or his physical health (Ismail et al., 2012). When biological toxins or high levels of pesticide residues are present in the biological food, the consequences are serious: the occurrence of pathogenic microorganisms or fungal growth means the potential for acute gastroenteritis, chronic systemic effects like neurotoxicity or carcinogenicity (Saad & Ramli, 2018). In this context, food forensics is a powerful diagnostic and preventive measure, safeguarding the lives of consumers against threats that cannot be seen with the naked eye.

Conclusion

The case of Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor (PP) provides very profound insights into the importance of ensuring food safety (toyyiban) in terms of the integrity of the procedure and forensic science. The High Court's acquittal of the appellant does not mean that the products which may be contaminated with mold can be sold under the toyyib concept; it rather shows that there is an absolute scientific precision in civil law and strict implementation of enforcement procedures before being convicted of a crime. From a holistic perspective, ensuring the integrity of the Malaysian Halal food system is in need of seamless synergy between strong civil laws (based on the doctrine of strict liability) and a complete understanding of the toyyiban principle among food manufacturers. A breach of toyyib not only erodes consumer confidence but also diminishes the international reputation and integrity of the country's halal industry in the global arena. Food products should clearly meet the criterion of halalan toyyiban both physically and spiritually for the community's protection. This standard must be displayed as a requirement on the label but should not be a marketing ploy; it should be physically demonstrated in the product, ensured safety and commercial honesty. In conclusion, the delicate balance between trustworthy manufacturers, capable inspectors and state-of-the-art laboratories will be the main line of defense for consumers seeking pure, wholesome and safe food.

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