

# **A CRITICAL ANALYSIS OF STRICT PRODUCT LIABILITY IN SOUTH AFRICA**

by

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## DECLARATION

I, Zinta Strydom, hereby declare that the contents of this dissertation represent my own work and include my own opinions, unless the contrary is indicated.



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Zinta Strydom

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# INTERPRETATION

## 1 RULES OF INTERPRETATION

1.1 In this dissertation:-

1.1.1 unless the context indicates a contrary intention, an expression which denotes any gender includes the other genders; the singular includes the plural and *vice versa*;

1.1.2 references to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended from time to time; and

1.1.3 where any term or abbreviation is defined within the context of any particular paragraph in this dissertation, such terms shall bear the meaning ascribed to it for all purposes in this dissertation.

1.2 In this dissertation, the following abbreviations will have a corresponding meaning:-

1.2.1 “**Act**” or “**CPA**” means the Consumer Protection Act 68 of 2008;

1.2.2 “**CPSA**” means the Consumer Product Safety Act of 1972 in the U.S.;

1.2.3 “**CPSC**” means the U.S. Consumer Product Safety Commission;

1.2.4 “**EU**” means Europe;

1.2.5 “**GPSD**” means the EU General Product Safety Directive 92/59/EEC 29 June 1992;

1.2.6 “**ISO**” means the International Organization for Standardization;

1.2.7 “**NCC**” means the National Consumer Commission of South Africa;

1.2.8 “**RAPEX**” means the Rapid Alert System for Non-Food Consumer Products in the EU; and

1.2.9 “**U.S.**”, “**US**” or “**USA**” means the United States of America.

## SUMMARY

The goal of this dissertation is to highlight the ambiguities contained in section 61 of the Consumer Protection Act 68 of 2008 (CPA), which attempts to introduce strict product liability for the entire supply chain in the event of product failure, and to propose amendments from which both the consumer as well as the supply chain could benefit. The new dispensation of strict product liability will lead to a step away from the no-fault based liability system that our courts have implemented for decades. Although this system is unfamiliar to South Africa, strict liability regimes have been followed in foreign countries for a considerable period of time. A comparative study of the approaches followed in America and Europe, which both advanced strict product liability regimes, will be undertaken in this study in order to illuminate problematic aspects relating to the concept of defect contained in section 61 of the CPA as well as the various duties of the supply chain in a strict product liability regime. It is argued that the provisions of the CPA ought to be supplemented with regulations, including, but not limited to, the implementation of adequate safety regulations to mitigate product recalls and product liability claims.



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# CHAPTER 1: INTRODUCTION

## 1 BACKGROUND TO STUDY

- 1.1 Loubser and Reid remark that strict product liability comes to the aid of consumers harmed by defective products where proof of negligence would be difficult or impossible.<sup>1</sup> The ultimate consumer is normally unable to analyse or scrutinise products for safety, and implicitly takes it on trust that a product will not endanger life, health or property.<sup>2</sup> In many cases though, manufacturing defects are in fact caused by the manufacturer's negligence, but plaintiffs have difficulty proving it.<sup>3</sup>
- 1.2 In an economic age of consumerism, the idea that the consumer needs protection against practices of sellers, suppliers or manufacturers follows naturally.<sup>4</sup> On account of difference in economic strength, influence and knowledge between producer and consumer, the latter is perceived to be in a weaker position.<sup>5</sup>
- 1.3 Furthermore today's consumer market is not only localised but is global in scope. Defective products may have vast implications for individuals and nations.<sup>6</sup> A country's product liability and safety regimes are therefore important factors in creating its manufacturing culture and distribution competitiveness in the long term.<sup>7</sup> To illustrate: In 2007, after a number of high-profile failures of products exported to the international market from China, the Chinese Government closed 180 factories that had put industrial chemicals into food.<sup>8</sup> The country's former chief food and chemicals regulator was executed.<sup>9</sup> In 2009, one of the country's top dairy bosses was jailed for life when at least

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<sup>1</sup>Loubser and Reid "Liability for products in the Consumer Protection Bill 2006: A comparative critique" *Stell LR* 2006 page 415 (hereinafter Loubser and Reid). A strict product liability regime focuses on the defective product itself, rather than the negligence of the manufacturer.

<sup>2</sup> Loubser and Reid page 415.

<sup>3</sup> Ibid.

<sup>4</sup> Floudas "*Some Aspects of Liability for Defective Products in England, France and Greece after Directive 85/374/EEC*" (1995) 1 (hereinafter Floudas) from Interstice, a consulting organization funded by EU Union, retrieved from [http://www.intersticeconsulting.com/documents/Product\\_Liability\\_EU.pdf](http://www.intersticeconsulting.com/documents/Product_Liability_EU.pdf).

<sup>5</sup> Ibid.

<sup>6</sup> Van Eeden "*A Guide to the Consumer Protection Act*" (2009) page 239 (hereinafter Van Eeden).

<sup>7</sup> Ibid.

<sup>8</sup> Van Eeden pages 238 & 239.

<sup>9</sup> Van Eeden page 239.

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six babies died and 300 000 others fell ill after drinking infant milk powder to which an industrial chemical had been added.<sup>10</sup>

- 1.4 Not many years before the aforementioned incidents, meat products from the United Kingdom and the United States have been affected by international product bans, following the discovery of the infection of farm animals with bovine spongiform encephalopathy (Mad Cow disease).<sup>11</sup>
- 1.5 In South Africa, consumers have expressed their dismay during the beginning of 2011 at reports stating that Supreme Poultry (Pty) Ltd, the country's third-biggest chicken supplier, had a standard practice of reworking and repackaging unsold frozen chickens.<sup>12</sup> On 9 February 2011, the Department of Agriculture, Forestry and Fisheries ("DAFF") found that Supreme Poultry's procedure of reworking frozen poultry has contravened the poultry regulations in terms of the Meat Safety Act 40 of 2000.<sup>13</sup> The DAFF has also revealed that Supreme Poultry injected excessive quantities of brine into the chicken it processed in contravention of the Poultry Regulations under the Agricultural Products Standard Act 119 of 1990.<sup>14</sup>
- 1.6 Although not all product failures necessarily affect entire economies,<sup>15</sup> their consequences may nevertheless be devastating to the individual consumer.<sup>16</sup> The realization of the potentially detrimental consequences of product failures on the consumer market has sparked the introduction of strict product liability regimes in various jurisdictions in an attempt to prevent defective products from entering the consumer market and causing harm.<sup>17</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ottermann "Supreme Poultry chicken sell-by dates 'misleading'", Health 24, 20 December 2010 retrieved from [http://www.health24.com/news/DietFood\\_News\\_Feed/1-3420,60229.asp](http://www.health24.com/news/DietFood_News_Feed/1-3420,60229.asp).

<sup>13</sup> "Media release: Brine injection product and Supreme Poultry visit" 9 February 2011, Free State retrieved from <http://www.nda.agric.za/doaDev/articles/BrineInjectionProject.html> on 12 March 2012. The injection of brine was obviously to "fatten up" the chicken for sales purposes.

<sup>14</sup> Ibid.

<sup>15</sup> Van Eeden page 239.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

- 1.7 America's concern for consumer welfare had led to the introduction of a strict liability regime for defective products during the 1960's.<sup>18</sup> In 1964, the American Law Institute ("ALI") adopted section 402A of the Restatement (Second) of Torts.<sup>19</sup> For nearly 50 years, section 402A of the Restatement (Second) of Torts has formed the backbone of strict product liability across the United States.<sup>20</sup> As will be discussed in more detail later, section 402A of the Restatement (Second) of Torts established a standard under which a manufacturer was to be held strictly liable if its product was sold in a "defective condition unreasonably dangerous to the user".<sup>21</sup> Although it was originally intended to apply only to products with latent manufacturing defects, section 402A has also formed the basis for finding manufacturers liable for design defects and for failure to warn.<sup>22</sup>
- 1.8 In 1997, the Restatement (Third) of Torts was introduced in order to cover and supplement the contours of the U.S strict product liability regime exhaustively.<sup>23</sup> The United States has a long set of legal precedents in respect of unusual cases, which *inter alia* include a decomposed mouse in a soft drink bottle, an unpackaged prophylactic in a bottle of Coke, a decomposed moth in a bottle of tab, slivers of glass in a soft drink and a can of spinach infested with worms.<sup>24</sup>
- 1.9 Being the hub of a very active and integrated consumer market, Europe also introduced a strict product liability regime after it experienced a crisis in its product liability system during the eighties.<sup>25</sup> One of the most significant single events in the history of products liability law occurred in Europe with the adoption of the Product Liability Directive 85/374/EEC on 25 July 1985.<sup>26</sup> The European Directive calls upon the member states of the European Union to impose strict liability on producers of defective products that cause personal

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<sup>18</sup> A Cavaliere "The Economic Impact of Product Liability and Product Safety Regulations in the European Union" (2001) page 4 Quaderni Del Dipartimento Di Economia Pubblica Territoriale n. 4/2001 ( hereinafter Cavaliere).

<sup>19</sup> Sandmire "The Restatements of Products Liability: Which one should Oregon follow?" (2003) Ater Wynne Attorneys article ( hereinafter Sandmire).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Levenstein, "Werksmans Brief" Volume 19 (2007) page 2 (hereinafter Levenstein).

<sup>25</sup> Cavaliere at page 4.

<sup>26</sup> Delaney & Van de Zande "A Guide to EU Directive Concerning Liability for Defective Products (Product liability Directive)" 2001 National Institute of Standards and Technology page 1 (hereinafter Delaney & Van de Zande).

injury or property damage.<sup>27</sup> The purpose of this Directive is not only to ensure consumer protection amongst the member states of Europe, but also to reduce the disparities between national laws.<sup>28</sup>

1.10 In line with this trend, the South African legislature has eventually with the introduction of the Consumer Protection Act<sup>29</sup> (hereinafter the CPA or Act) recognised the need to harmonise the protection of South African consumers with the consumer protection trends in advanced international jurisdictions.<sup>30</sup> Generally, in South Africa, the common law position regarding product liability which prevailed prior to the coming into operation of the CPA (and which position has been preserved by section 2(10)<sup>31</sup> of the Act), dictates that conduct of manufacturers must be tested against the care that the reasonable person would have exercised in the particular circumstances and the question is posed whether or not the damage caused to the consumer was reasonably foreseeable.<sup>32</sup>

1.11 A manufacturer's liability, in terms of the common law, fell within the field of application of the "Aquilian" action.<sup>33</sup> Consequently all the elements of a delict have to be present for the liability of the manufacturer to be established.<sup>34</sup> Levenstein remarks that as consumers under the South African common law system have unfortunately found out, it is very difficult to prove fault on the part of the manufacturer because fault is often simply not present in the production process.<sup>35</sup> He points out that it is difficult for the prejudiced party to establish proof of fault as the technological production process is complicated and very difficult to have access to in the evidentiary circumstances of a case.<sup>36</sup>

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<sup>27</sup>Delaney & Van de Zande at page 1. Some German academics suggest that a special, implied contract exists between the manufacturer and the ultimate consumer. See Schuster, "Main Structures of Product liability in German Private and Criminal Law" *Stell LR* (2009) 429.

<sup>28</sup>Delaney & Van de Zande at page 2.

<sup>29</sup> Act 68 of 2008.

<sup>30</sup>Monty & Mann "The effect of the Consumer Protection Bill on the Insurance Industry" 13 February (2009) Legal Magazine Article page 1.

<sup>31</sup> S2(10) of the CPA provides as follows: 'No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.'

<sup>32</sup> Levenstein *supra*.

<sup>33</sup> *Ibid*.

<sup>34</sup> Levenstein *supra*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

1.12 It became increasingly evident that the common law position was not satisfactory and that South African consumers lacked adequate protection in the realm of product liability requiring that this lack of protection should be cured legislatively by the introduction of a strict product liability regime into South African law.<sup>37</sup> Such a regime has now been introduced by section 61 of the CPA as discussed hereinafter, with the result that from the end of April 2010,<sup>38</sup> South African consumers and suppliers have entered into a product liability dispensation where proof of negligence by the supply chain is no longer a requirement.

## 2 RATIONALE FOR RESEARCH

2.1 In order to incentivize producers and manufacturers to avoid defects in products, and prevent society bearing the cost of the damage, Van Eeden indicates that it is essential to hold producers and or manufacturers accountable for errors which result in harm.<sup>39</sup> Reid and Loubser further state that no-fault liability of producers for harm resulting from defective products rests on considerations of fairness and economic efficiency.<sup>40</sup> Nonetheless, the validity of the economic arguments in favour of strict product liability is far from uncontested.<sup>41</sup> It is not fully certain what effect strict product liability will have upon producer prices.<sup>42</sup>

2.2 As for market unity, suppliers have a competitive disadvantage when distributing products with a lesser degree of consumer protection.<sup>43</sup> As a result of the introduction of a strict product liability regime their products will be more expensive, due to insurance premiums being incorporated in the production prices or as a result of the costs of higher safety standards.<sup>44</sup> Apart from the “down-stream” function of strict product liability, Reid and Loubser argue that

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<sup>37</sup> In *Wagener v Pharmicare Ltd, Cuttings v Pharmicare Ltd* 2003 2 ALL SA 167 (SCA), the court was not prepared to recognise strict product liability and concluded that it is the task of the legislature.

<sup>38</sup> Schedule 2 section 3(4) of CPA. 1. See the discussion in Ch 2 hereinafter.

<sup>39</sup> Van Eeden page 238.

<sup>40</sup> Loubser and Reid at page 415.

<sup>41</sup> DA Floudas at page 6.

<sup>42</sup> *Ibid.* For the contemplated effect of a strict product liability regime on product liability insurance in South Africa see Katzew and Mushiwara ‘Product liability Insurance in the Wake of the Consumer Protection Act 68 of 2008’ (2012) *SA Merc LJ* 1.

<sup>43</sup> DA Floudas at page 6.

<sup>44</sup> *Ibid.*

there is also an “up-stream” function.<sup>45</sup> Product liability litigation is seen as a powerful means to induce product safety in some jurisdictions.<sup>46</sup> The parties forming part of the product supply chain can spread the costs of improved quality and safety control, either through insurance or through increased risk prices.<sup>47</sup> The supply chain is only as strong as its weakest link.

- 2.3 From the supply chain’s perspective, the introduction of a strict product liability regime thus necessitates an appraisal of the duties of the supply chain and what it can do to avoid product liability and product liability claims. Clarification of these duties will serve to enhance consumer protection as it will increase product safety and curb the release of harmful products into the consumer market. In this sense thus, by making the supply chain more aware of its duties, the likelihood of defective products entering the consumer market can be limited which will automatically lead to a limitation of the supply chain’s product liability.

### 3 SCOPE OF DISSERTATION

- 3.1 In line with international trends, it is clear that the concept of “defect” is central to the application of strict product liability in the CPA.<sup>48</sup> The point of departure for purposes of strict product liability will thus always be to first determine whether a product was indeed defective.
- 3.2 The dissertation will explore the concept of product liability and its interaction with the concept of defective products. It will indicate the constraints of the product liability regime that prevailed in South Africa prior to the introduction of section 61 of the CPA and it will discuss the rationale behind the policy to introduce a strict product liability regime. Thereafter the scope and nature of the strict product liability provisions introduced by section 61 will be discussed with specific emphasis on the defences available to the supply chain. The role of the supply chain in preventing defects which may give rise to strict product

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<sup>45</sup> Loubser and Reid at page 416.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Lovells “*Product liability in the European Union – A report for the European Commission*” 2003 page 48 MARKET/2001/11/3 (hereinafter Lovells).

liability will consequently be addressed in detail. Throughout the strict product liability regime introduced by the CPA will be analysed and criticised with reference to two comparative jurisdictions that are well-known for their comprehensive product liability regimes, namely the U.S. and the EU. The U.S. is chosen for comparative study due to its innovative role in introducing strict product liability into the law of tort (delict), and the EU, not only for its extensive provisions relating to strict product liability, but also because the European Product Liability Directive clearly served as guiding document for the drafting of section 61 of the CPA.

3.3 The concept of product liability is undeniably wide and varied and it is beyond the scope of this dissertation to clarify the product liability-enigma in one go. However, a critical analysis of certain problematic issues pertaining to product liability, contextualised against the strict product liability regime introduced into South Africa by the CPA, will be ventured in order to add some clarification to this complex and challenging field of law. The main focus of this dissertation is thus the interpretation and application of selected aspects of strict product liability as contemplated by the CPA and an appraisal of the duties of the supply chain in a strict product liability regime. This analysis will be complemented by a comparative discussion with the EU and US. As such the following issues will be addressed:

3.3.1 What constitutes a “defect” for purposes of strict product liability in terms of the CPA? The concept of defect is pivotal and requires proof. From the definition of defect, it appears that when establishing whether a product contains a defect for purposes of the CPA, it will entail a so-called “expectations test”. However, neither the CPA, nor international law, provides the exact meaning of this “expectations test”. Hence, this aspect requires further investigation. Further questions that arise in this regard are whether defect should mean defect in the manufacturing process only or, in the case of a designed product, also a defect of design. It can also be

asked whether it is appropriate for a court to undertake a risk analysis when assessing what a consumer is entitled to expect.<sup>49</sup>

3.3.2 In the second instance it can be asked what the supply chain can do in order to avoid or limit its product liability. This will thus require an appraisal of the supply chain's duties. Due thereto that product liability arises from harm caused by defective products, logic dictates that the most pro-active step the supply chain can take in this regard is to ensure that defective products are not released onto the consumer market. To this end, the application of certain safety and other standards may serve a preventative function. In addition, it is submitted that recall measures to withdraw defective products from the consumer market<sup>50</sup> can fulfil both a remedial and preventative function. These two aspects will thus also be addressed. The question whether the supply chain's duties (and therefore its product liability) can be restricted by agreement will also receive consideration.

3.3.3 The duties of the supply chain, insofar as safety standards and recall programmes are concerned, may assist the supply chain to avoid or restrict its liability for harm caused by defective products. However, where such harm does occur, the question arises as to the availability of defences to the supply chain. In this regard it will thus be necessary to consider the scope and nature of the defences provided by the CPA.

3.4 The discussions in this dissertation are specifically limited to defective goods and an in-depth discussion of defective services will not be undertaken.

## 4 RESEARCH METHODOLOGY

4.1 The study involves an examination of literature from primary sources, such as legislation, as well as secondary sources, such as case law, journals and internet articles.

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<sup>49</sup> Lovells at page vi.

<sup>50</sup> Van Heerden Product Liability Notes (unpublished document dated November 2012) 1 (hereinafter referred to as Van Heerden Product Liability Notes).



- 4.2 From the outset, the study follows a comparative analysis approach. It relies heavily on the European Directive, as it represents a major trend in strict products liability law. The study also assesses the position relating to strict product liability in the United States of America.

## 5 PROBLEM STATEMENT

- 5.1 A critical analysis of the new strict product liability law in South Africa reveals that the wording of section 61 of the CPA contains various ambiguities and loopholes.
- 5.2 This dissertation will suggest that the strict product liability section in the CPA should be complemented with regulations in order to clarify these *lacunas*.

## 6 SIGNIFICANCE OF STUDY

- 6.1 The introduction of the various consumer rights protected in the CPA inevitably adds a reciprocal compliance layer to the duties of suppliers. In the context of product liability with its onerous liability implications for suppliers, it is clear that the supply chain will have to observe extensive compliance obligations.
- 6.2 Having regard to the wide definition of “goods” and “consumer” as well as the wording of Section 61 of the CPA, it appears that the possible scope for the institution of product liability claims is far wider than under the fault-based common law regime. Although mechanisms of redress for consumers will not be dealt with in this dissertation, it should be noted that consumers will be entitled to institute class actions as contemplated in section 4(1) of the CPA.<sup>51</sup> The possibility of grand-scale institution of product liability claims by classes of consumers has thus also been improved as a result of the wide *locus standi*

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<sup>51</sup>Section 4(1) provides as follows: Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer’s rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- (a) A person acting on his or her own behalf;
- (b) an authorised person acting on behalf of another person who cannot act in his or her own name;
- (c) a person acting as a member of, or in the interest of, a group or class of affected persons;
- (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- (e) an association acting in the interest of its members.

provisions in the Act and this in itself may deter the supply chain from releasing defective products which cause harm into the consumer market.

- 6.3 It is thus foreseeable that the supply chain could soon be inundated with numerous product liability claims. Simultaneously, the supply chain will be exposed to severe sanctions due to the ambiguity of the available defences.
- 6.4 The significance of this study is that it in essence attempts to promote fair business practices by the supply chain in respect of products supplied in the consumer market by analysing the concept of strict product liability and indicating which duties the supply chain have to meet in order to avoid or ameliorate strict product liability claims. By increasing awareness of the duties of the supply chain in a product liability regime, it is submitted that it may lead to a decrease of the release of defective and harmful products into the consumer market and, in addition to such preventative function, it may also provide clarity with regards to the processes available to remedy and limit product liability.

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## CHAPTER 2: DEFECTIVE PRODUCTS AND LIABILITY

### 1 THE CONCEPT OF PRODUCT LIABILITY

- 1.1 McQuoid-Mason defines product liability as follows: “The liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any person affected by the use of a defective product.”<sup>52</sup>
- 1.2 In brief, product liability is liability that arises when harm is caused by a defective product. In this sense a defect may include various forms: it may for instance be a manufacturing defect or a design defect as will be discussed in more detail later. Furthermore, in order for product liability to follow, the mere existence of a defect is not sufficient. The defect must have had a specific harmful result which has a causal connection to such defect. As such, the defect must have rendered the product unsafe or hazardous.
- 1.3 In the discussion that follows, the concept of defective products in the South African common law will first be discussed, followed by an investigation of the parameters of product liability in South African common law. The rationale for the introduction of a strict product liability regime in South African law will also be set out. Thereafter, it will be indicated how the concept of defective products have been addressed in the CPA, followed by an exposition of the product liability provisions in the Act.

### 2 DEFECTIVE PRODUCTS: THE COMMON LAW POSITION

#### 2.1 Introduction

- 2.1.1 In terms of common law, the seller has a duty to warrant the purchaser against latent defects in the thing sold (product).<sup>53</sup> This warranty can be given by operation of law (as *naturale*) or contractually (as *incidentale*).<sup>54</sup>

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<sup>52</sup> McQuoid-Mason *Consumer Law in South Africa* (1997) 65 (hereinafter McQuoid-Mason).

<sup>53</sup> Nagel *et al Commercial Law* (4<sup>th</sup> ed) 222 (hereafter Nagel *et al*). In the latter instance it could be given as an express or tacit contractual guarantee or warranty.

<sup>54</sup> Nagel *et al*.

- 2.1.2 A latent defect for purposes of the common law, is a defect in the thing sold which is of such a nature that it renders such thing unfit for the purpose for which it was bought or normally used, and which defect was not known to the purchaser at the time of conclusion of the contract and could not be discovered by him upon a reasonable examination of the thing sold.<sup>55</sup>
- 2.1.3 Latent defects can be distinguished from patent defects in the following manner: a latent defect cannot readily be noticed or discovered by a diligent person.<sup>56</sup> A patent defect on the other hand, will be noticed by a diligent person.<sup>57</sup> The criterion is whether the reasonable person would have noticed the defect after examination of the thing sold.<sup>58</sup>
- 2.1.4 The nature of the defect must also be such that it affects the utility of the thing.<sup>59</sup> Only substantial defects would qualify as latent defects.<sup>60</sup> The nature of the defect, as well as the influence on the utility of the thing, have to be determined objectively.<sup>61</sup> It is further required that the defect had to exist at the time of conclusion of the contract and that the purchaser needs to prove this.<sup>62</sup> However, as indicated above, the purchaser must not have had any knowledge of the defect at the time of conclusion of the contract.<sup>63</sup>
- 2.1.5 In terms of the common law, an implied warranty against latent defects, which applies automatically by operation of law (as *naturale*) forms part of every contract of sale unless it is specifically excluded by a so-called 'voetstoots'<sup>64</sup> clause.<sup>65</sup>

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<sup>55</sup> *Dibley v Furter* 1951 (4) SA 73 (C); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

<sup>56</sup> *Nagel et al* 223.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* The criterion is not whether an expert would have discovered the defect or whether it would only be discovered upon an unusually thorough examination.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* See also *Waller v Pienaar* 2004 (6) SA 303 (CC).

<sup>64</sup> *Kerr Contracts* at 151 describes a *voetstoots* clause as a clause which stipulates that the seller is not to be held responsible for diseases or defects and goods are sold 'as it stands' or 'with all its faults'. The effect of a *voetstoots* clause is that the seller does not take the risk of any diseases or defects that may be present in a product unless he has made a misrepresentation regarding same to the purchaser.

## 2.2 Common law remedies for defective goods

2.2.1 The remedies for breach of the implied warranty against latent defects are the two aedilician actions: the *actio redhibitoria* (to claim restitution) and the *actio quanti minoris* (to claim a reduction in the purchase price).<sup>66</sup>

2.2.2 A seller may however also give an express or tacit contractual warranty against latent defects, warranting that the thing sold does not have any latent defects or that it can be used for the purpose for which it was bought.<sup>67</sup> The seller may thus guarantee the presence of good qualities or the absence of bad qualities and this may be incorporated into the contract.<sup>68</sup> The remedy in such a case is the *actio empti* with which the buyer can claim cancellation of the contract of sale as well as damages.<sup>69</sup> The aedilician actions, namely the *actio redhibitoria* and the *actio quanti minoris*, are also available to the purchaser, but are not as beneficial because no damages can be recovered with them.<sup>70</sup>

2.2.3 The common law position is thus that the aedilician actions are available to the purchaser where a latent defect is present in the thing sold and no express or tacit contractual warranty was given by the seller.<sup>71</sup> It could also apply where an express or tacit contractual warranty was given by the seller, but would seldom be used in such an instance as damages cannot be claimed under the aedilician actions.<sup>72</sup>

2.2.4 The grounds for institution of the aedilician actions are as follows<sup>73</sup>:

2.2.4.1 the thing sold has a latent defect;

2.2.4.2 the seller was aware of the latent defect and fraudulently concealed such fact;

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<sup>65</sup> Ibid. See also *Minister van Landbou Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2002 (6) SA 256 (K).

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Nagel *et al* 224.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Nagel *et al* 226.

<sup>72</sup> Ibid.

<sup>73</sup> Nagel *et al* 227.

- 2.2.4.3 the seller expressly or tacitly guaranteed the presence of good characteristics or the absence of bad characteristics; and
- 2.2.4.4 the seller made a false *dictum et promissum*<sup>74</sup> to the purchaser.
- 2.2.5 The *actio quanti minoris* can be used by the purchaser to claim a *pro rata* reduction of the purchase price.<sup>75</sup> It can be instituted more than once, should more latent defects appear in future.<sup>76</sup> The exact reduction which the purchaser may claim has to be calculated as follows: the court must determine the difference between the price paid and the true value of the thing with the latent defect at the time of the action.<sup>77</sup> The purchaser cannot claim any reduction in price where the thing, in spite of the defect, is worth more than the price paid for it.<sup>78</sup>
- 2.2.6 If the latent defect originated after the contract was concluded, the seller cannot be held liable.<sup>79</sup> Where however it is specifically agreed by the parties that a thing was sold ‘*voetstoots*’ (‘as is’), the buyer has no right to claim anything from a seller for latent defects in the thing sold.<sup>80</sup> An important requisite is that the seller must not, at the time of conclusion of the contract, be aware of any latent defects in such thing.<sup>81</sup> If he is aware of such defect, and intentionally conceals these defects to mislead the purchaser in order to persuade him to conclude the contract, the *voetstoots* clause will not offer him any protection.<sup>82</sup>
- 2.2.7 It is to be noted that the buyer may waive the aedilician actions or the *actio empti*.<sup>83</sup> Such a waiver is not accepted lightly and should be proved by the

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<sup>74</sup> Ibid. A *dictum et promissum* is a declaration made by the seller during negotiations with regard to the qualities and characteristics of the thing sold and which is more than a mere recommendation or praise. Nagel indicates that in general such false *dictum et promissum* is equated with innocent misrepresentation. See also *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid. *Truman v Leonard* 1994 (4) SA 371 (SE).

<sup>77</sup> Ibid. See also *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).

<sup>78</sup> Ibid.

<sup>79</sup> Nagel *et al* 228. Obviously the purchaser can also not institute the aedilician actions where the defect was of a patent (thus visible upon reasonable inspection) and not a latent nature.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid. See also *Van der Merwe v Meades* 1991 (2) SA 1 (A).

<sup>83</sup> Ibid.

seller.<sup>84</sup> Further, the aedilician actions and the *actio empti* prescribe if they are not instituted within 3 years after the claim arose (i.e. prescription only starts to run after the purchaser has become aware of the latent defect).<sup>85</sup>

2.2.8 In respect of ‘merchant sellers’, the common law position is that the seller will be liable for damages occasioned as a result of a product with a latent defect.<sup>86</sup> The so-called Pothier rule required that the merchant seller had to profess in public to have been a dealer at the time of conclusion of the contract and to have expert knowledge and skills regarding the product that was sold.<sup>87</sup>

2.2.9 The historical development of the Pothier rule has been summarised by Kahn as follows<sup>88</sup>: Initially the position was that a claim for consequential damages as a result of a latent defect in a product was restricted to the *manufacturer* (my emphasis) of that product. However in the *Kroonstad*-case<sup>89</sup> as discussed in more detail hereinafter, the court held that a *merchant seller* (my emphasis) was liable for consequential damages where he publicly professed to have expert knowledge in relation to the product sold.

2.2.10 Prior to the coming into operation of the CPA, the Pothier rule was dealt with at length by the Supreme Court of Appeal in *D&H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and another*.<sup>90</sup> The appellant had incurred liability to one of its customers in the amount of R13 million resulting from failure of certain concrete pipes that it had manufactured utilising aggregate and sand supplied to it by the respondent.<sup>91</sup> In the High Court, the appellant unsuccessfully alleged the respondent to be a “manufacturing seller” on the

<sup>84</sup> Ibid. See also *De Vries v Wholesale Cars* 1986 (2) SA 22 (O).

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A).

<sup>88</sup> Kahn (2010) at 39 to 40.

<sup>89</sup> *Supra*.

<sup>90</sup> 2006 (3) SA 593 (SCA) – hereafter *D&H Piping case*.

<sup>91</sup> *D&H Piping case* at 1.

basis that the aggregate and sand supplied to it by the respondent had been latently defective.<sup>92</sup>

2.2.11 The Supreme Court of Appeal *inter alia* considered whether the respondent manufactured the aggregate and sand which it sold to the appellant.<sup>93</sup> In this regard it referred to the fact that the learned Judge in the Court *a quo* held that the production of aggregate and sand by the respondent ‘could not have required any special skill or expertise such as that envisaged by Pothier.’<sup>94</sup> The Supreme Court of Appeal subsequently indicated that the question that arises is whether the passage in Pothier must be interpreted as requiring a *manufacturing seller to have these attributes* (my emphasis).<sup>95</sup> The court subsequently held that, on a proper construction of the authorities, a vendor who sold goods of his own manufacture was liable for consequential loss caused by a latent defect in the goods sold, even if he were ignorant of the latent defect, irrespective of whether he was skilled in the manufacture of

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<sup>92</sup> *D&H Piping case* at 1. The appellant was unsuccessful in its claim, as the High Court found that “(1) the respondent was not a ‘manufacturing seller,’ since the production of aggregate and sand did not require any special skill or expertise; and (2) by reflection of the respondent’s general terms and conditions on its delivery notes and invoices addressed to the appellant, they had been incorporated into the contracts for the sale of aggregate and sand by the respondent to the appellant, thus excluding the respondent’s liability to the appellant.”

<sup>93</sup> *D&H Piping case* at 9. In its particulars of claim, the appellant alleged that the respondent “produced” the aggregate and sand and, in the alternative, that the respondent “publicly held itself out to be an expert seller of the dolomitic aggregate and sand for use in concrete products.” The appellant abandoned reliance on the second allegation in the Court *a quo*.

<sup>94</sup> *D&H Piping case* at 10 and 11. The passage quoted from Pothier provides as follows: “(T)here is one case in which the seller, even if he is absolutely ignorant of the defect in the thing sold, is nevertheless liable to a reparation of the wrong which the defect caused by the buyer in his other goods; this is the case where the seller is an artificer, or a merchant who sells articles of his own make, or articles of commerce which it is his business to supply. The artificer or tradesman is liable to a reparation of all the damage, which the buyer suffers by a thing sold in making a use of the thing for which it was destined, even if such artificer or tradesman were ignorant of the defect. For example, if a cooper or a deal in casks sells me some casks, and in consequence of defects in any of the casks the wine which I put in them is lost, he will be liable to me for the price of the wine which I have lost. Similarly if the wood of the cask, by its bad quality, communicates a bad odour to the wine, the custom is in such a case that the seller is condemned to take the damaged wine for his own account and to pay me for it according to the price of that which remains undamaged. The reason is that the artificer by the profession of this art *spondet peritia martis*. He renders himself in favour of those who contract with him responsible for the goodness of his wares for the use to which they are naturally destined. His want of skill or want of knowledge in everything that concerns his art is imported to him as a fault, since no person ought to publicly profess an art if he does not possess all the knowledge necessary for the proper exercise: want of skill is attributed to him as fault (D 50.17.132). It is the same in regard to the merchant whether he makes or does not make the article which he sells. By the public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he has to deliver for the use to which it is destined. If he is the manufacturer, he ought to employ for the manufacturer none but good workmen for whom he is responsible. If he is not the manufacturer he ought to expose for sale on but good articles; he ought to have knowledge of his wares and ought to sell none but good.”

<sup>95</sup> *D&H Piping case* at 10. In answering this question, the Court had regard to the following quotation of Voet in his chapter on the Edict of the Aediles and the *actio quanti minoris*: “A seller however who was aware of a defect is held liable in addition to make good the whole loss which has been inflicted upon the purchaser as a result of the defective things, though one who was ignorant is not put under obligation for this unless he was a craftsman.”



such goods and irrespective of whether he publicly professed that skill or expertise.<sup>96</sup>

2.2.12 Hawthorne has some valid observations regarding the common law position relating to latent defects: she comments that the common law regarding the instance where a purchaser bought defective or unsuitable goods is fragmented, straddling both the law of contract and the law of delict.<sup>97</sup> The area of the law pertaining to the purchase of defective or unsuitable goods involves implied guarantees, which may depend on the expertise of the seller or the capacity of the manufacturer.<sup>98</sup> A consumer who buys a product with a defect which makes it unsuitable for the purpose for which it was sold and bought has, in terms of the common law, the right to refuse delivery and rescind the contract of sale, since the normal duty of the seller is to deliver goods suitable for the purposes for which they are sold and bought.<sup>99</sup> However, as this normal duty emanates from a default rule, it is possible for the parties to agree that the seller does not warrant that the goods sold will be suitable.<sup>100</sup> Standard contracts often contain a clause stating that the buyer has carefully inspected the goods and are satisfied with their condition.<sup>101</sup>

2.2.13 Having accepted delivery, the position of the buyer does not improve as acceptance of delivery is construed as condonation of all patent defects, that is, those defects which would have been discovered by careful inspection.<sup>102</sup> In respect of so-called latent defects, the common law default rules in the form of the aedilician actions provide the buyer with a choice between cancellation of the contract, which means the return of the goods and a price refund where the thing sold is completely unfit for the purpose for which it was bought or a price reduction to the actual value where the purchased thing can still be used.<sup>103</sup> As stated, these are default rules and the insertion

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<sup>96</sup> *D&H Piping case* at 2.

<sup>97</sup> Hawthorne "Responsive Governance: Consumer Protection Legislation and its effect on mandatory and default rules in the contract of sale " 2011 (26) *SAPL* 433 at 442 (hereinafter Hawthorne).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

of the words “as is” into the so-called conditions of sale excludes these pro-consumer remedies.<sup>104</sup>

2.2.14 Hawthorne remarks that the buyer’s position against the seller is more advantageous if the seller professes to have expert knowledge relative to the thing sold or gives an express warranty.<sup>105</sup> In such an instance the buyer could institute a claim for breach of contract and demand damages, that is, her actual financial loss.<sup>106</sup> Such a merchant seller would be liable for consequential damage caused to the purchaser by the latent defect regardless of the fact that the seller was unaware of the defect.<sup>107</sup>

2.2.15 In addition to the above remedies which derive from the contract between the parties, the buyer can institute a claim against the manufacturer of the product.<sup>108</sup> In this instance a distinction must be made between a claim based on a guarantee given by the manufacturer and the delictual claim the buyer or any third party affected has against the manufacturer for injury or damage caused by defective goods.<sup>109</sup>

2.2.16 The manufacturer’s guarantee is intended to save time and money by eliminating the claim from the consumer to the retailer who, in turn, would seek redress from the manufacturer.<sup>110</sup> However, reliance on this guarantee may often prove detrimental as the consumer may well exchange her common law rights against both retailer and manufacturer (by a waiver of her common law remedies) against the promises a manufacturer makes in her warranty.<sup>111</sup> Retailers often insist that acceptance of the manufacturer’s guarantee absolves them from liability for defective goods.<sup>112</sup> These guarantees may well exclude claims against the manufacturer for injury or

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<sup>104</sup> Ibid.

<sup>105</sup> Hawthorne at 443.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Hawthorne at 443.

damage.<sup>113</sup> Moreover, normally, guarantees introduce short periods within which the consumer can claim on the basis of the guarantee, and sometimes guarantees offer to pay only for new parts and not for labour.<sup>114</sup> Thus, standard contracts generally severely limit, be it in the form of manufacturers' guarantees or retailers' conditions of sale (stating that no warranties or representations regarding the goods have been made), the legal obligations of both manufacturers and retailers.<sup>115</sup>

## 2.3 Product liability: the common law position

2.3.1 Prior to the introduction of the CPA, parliament had not given proper consideration to product liability issues and South Africa did not have a strict product liability regime.<sup>116</sup> As indicated above, consumers had to revert to the common law remedies for redress.

2.3.2 In terms of the common law, a consumer who suffers harm as a result of a defective product has to seek a remedy in terms of the law of contract and/or law of delict.<sup>117</sup> A claim under the law of contract requires a breach of the contractual relationship between the consumer and supplier of goods.<sup>118</sup> The consumer who suffered harm as a result of a defective product will however in terms of the common law, not be able to institute a claim against a manufacturer or distributor in the absence of this contractual link.<sup>119</sup> In such instances, the consumer can only seek a remedy under the law of delict.<sup>120</sup>

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Van Eeden at 242.

<sup>117</sup> Jacobs, Stoop & Van Niekerk "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 *PELJ* 382 (hereinafter Jacobs, Stoop & Van Niekerk).

<sup>118</sup> Ibid. See also Botha and Joubert "Does the Consumer Protection Act 68 of 2008 provide for strict product liability?- a comparative analysis" 2011(4) *THRHR* 305 (hereinafter Botha and Joubert). As pointed out by Botha and Joubert (at 306) if a contract exists between the parties, liability for the defect will be of a contractual nature and may relate to any one or a combination of the following:

- a) the quality of the product
- b) the manufacturing process or actual design of the product
- c) the absence of sufficient warning as to dangerous features of the product.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

- 2.3.3 The problem with founding product liability on the basis of delict is however that delictual liability does not arise at common law against a producer of a defective product unless the producer has in some way been at fault.<sup>121</sup> This may occur where the producer was for example required to inspect the product and failed to detect the defect.<sup>122</sup> In some instances, the consumer is unable to trace the producer and is therefore left (leaving aside contractual remedies against the seller) without a remedy in delict.<sup>123</sup>
- 2.3.4 It is further to be noted that in the context of product liability based on delict, it is trite that the test for wrongfulness involves the standard of ‘the legal convictions of the community’ (*boni mores*).<sup>124</sup> Applying this test involves a balancing of the interests of the parties and the community in order to assess whether the causing of the damage was a reasonable or unreasonable infringement of the plaintiff’s interests or a breach of legal duty to act positively to prevent the harm suffered by the plaintiff.<sup>125</sup> Within the framework of product liability the wrongfulness enquiry focuses on the existence and breach of the legal duty not to cause damage to the consumer.<sup>126</sup> In this regard it has been indicated that a manufacturer has a duty, in terms of the *boni mores*, to take reasonable steps to prevent defective products from entering or remaining in the market and infringing the interest of consumers.<sup>127</sup> The causing of damage by a defective product is in principle wrongful as it is a violation of this legal duty and this essentially means that there must be a defect in the product before wrongfulness on the part of the manufacturer can be established.<sup>128</sup>
- 2.3.5 Sadly the South African legislature for many years failed to address this problematic situation which detrimentally affected many hapless consumers. As indicated hereinafter, the courts were not prepared to address the issue

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<sup>121</sup> Loubser and Reid at 431.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Loubser and Reid at 418 to 419. See also Gowar “Product Liability: A Changing Playing Field?” *Obiter* (2011) 521 (hereinafter Gowar).

<sup>126</sup> Neethling & Potgieter *Neethling Potgieter Visser Law of Delict* (6<sup>th</sup> ed) 317 ( hereinafter Neethling & Potgieter).

<sup>127</sup> Gowar 523.

<sup>128</sup> Ibid.

either and indicated that if a no fault-regime was to be introduced, it would be the task of the legislature to do so.

2.3.6 A few cases relevant to the discussion of defective products that cause harm resulting in product liability and the need that existed to introduce a strict product liability regime into South African law require more detailed consideration:

2.3.6.1 ***Kroonstad Westelike Boere Kooperatiewe Vereniging Bpk v Botha***<sup>129</sup>

2.3.6.1.1 In this case, the plaintiffs apparently carried on operations jointly as kaffircorn farmers.<sup>130</sup> The defendant sold a toxic pesticide to the plaintiffs, known as Metasystox, with which to spray kaffircorn for the destruction of lice.<sup>131</sup> The plaintiffs alleged that it was an implied term of the contract that the pesticide was fit for the purpose for which it was bought and free from latent defects rendering it unfit for such purpose.<sup>132</sup> They further alleged that, in breach of the said warranty, the pesticide suffered from a latent defect rendering it injurious and unsuitable for the purpose for which it was bought and that it grievously damaged the plaintiffs' crops after having been sprayed thereon.<sup>133</sup>

2.3.6.1.2 In replying to the request for further particularity to the declaration, the plaintiffs averred that the implied term was based on the fact that the defendant is a dealer in toxic substances with which to spray plants and, as such, the defendant gives out that it has knowledge of the products sold by it.<sup>134</sup> The plaintiffs also stated that the defendant sold the toxic substance with knowledge that the plaintiffs had to spray it on their kaffircorn for protection against lice.<sup>135</sup>

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<sup>129</sup> 1964(3) SA 561 (A) (hereinafter the *Kroonstad* case).

<sup>130</sup> *Kroonstad* case at 5.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Kroonstad* case at 6.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

2.3.6.1.3 In response, the defendant denied the existence of the aforesaid implied warranty and averred that the plaintiffs specifically asked for Metasystox at the time of purchase.<sup>136</sup> The plaintiffs successfully applied for the striking out of the defendant's plea in the court *a quo*.<sup>137</sup> The defendant appealed against the decision.<sup>138</sup> The appeal involved the enquiry whether a merchant, who sells goods in which it is his business to deal, is merely on that account liable for consequential damages caused to the purchaser by a latent defect in the thing sold, of which the merchant seller was unaware.<sup>139</sup>

2.3.6.1.4 In summary, the appeal court held that liability for consequential damage caused by a latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.<sup>140</sup> The court indicated that whether a seller falls within the category mentioned will be a question of fact and degree to be decided from all the circumstances of the case. It furthermore stated that once it is established that he does fall within that category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it.<sup>141</sup> The remedy, from its nature, is not redhibitorian.<sup>142</sup> The court therefore upheld the appeal.<sup>143</sup>

### 2.3.6.2 ***Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd***<sup>144</sup>

2.3.6.2.1 In this matter the plaintiff averred that it was a term of the contract between the parties that the bricks to be delivered by the defendant to

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid. The appeal court indicated that the early Roman law did not cast on the seller any general duty of warranting the absence of latent defects. If the buyer wished to protect himself, he had to do so by stipulation in a contract. The *aedilician* protection was later introduced and by Justinian's time it applied to every kind of sale, but the relief claimed under the relevant action was limited to a reduction of the price or to rescission against restoration of the price. In the case of a latent defect, the seller was only liable to two specific actions, namely the *quanti minoris* (for reduction of the purchase price) and the *actio redhibitoria* (for restitution), and was not liable to an action for damages *ex empto*.

<sup>141</sup> *Kroonstad* case at 1.

<sup>142</sup> Ibid.

<sup>143</sup> *Kroonstad* case at 13.

<sup>144</sup> 1977 (3) SA 670 (A). (Hereafter referred to as the *Holmdene* case.)

the plaintiff should be free from any defects which would not be apparent from a reasonable examination of the bricks.<sup>145</sup> According to the plaintiff, it was therefore a term of the contract that the bricks to be delivered should have been fit for the purpose for which, to the knowledge of the defendant, they were to be used by the plaintiff, and that they would have been free from any latent defects rendering them unfit for that purpose.<sup>146</sup> The plaintiff's case was based on the rule that a merchant-seller is liable for consequential damage<sup>147</sup> arising from a latent defect in the product even though such seller was ignorant thereof.<sup>148</sup>

2.3.6.2.2 The court *a quo* held that the defendant, having been the manufacturer as well as the seller of the bricks, was liable for consequential damages sustained by the plaintiff as a result of the implied warranty against latent defects.<sup>149</sup> It rejected the plaintiff's argument that the manufacturer-dealer's foreseeability is irrelevant and that the manufacturer-dealer's liability is absolute.<sup>150</sup> The court indicated that the manufacturer-seller is in no worse position than an ordinary seller who has expressly warranted against the occurrence of a defect.<sup>151</sup> The court further indicated that the legal foundation of the plaintiff's claim is the principle that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods.<sup>152</sup> It stated that ignorance of the defect does not excuse the seller.<sup>153</sup>

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<sup>145</sup> *Holmdene* case at 2.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Holmdene* case at 3.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Holmdene* case at 13. The defendant's argument was that the plaintiff failed to take reasonable steps to mitigate its loss. The court indicated that the onus was therefore on the defendant to establish that the demolition of the brick walls was not reasonable in all the circumstances and that an alternative mode, less expensive or burdensome, was available.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Holmdene* case at 14.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* The court further stated that once it is established that the seller falls into one of the categories of sellers, the law irrebuttably attaches the liability to him, unless he has expressly or impliedly contracted out of it.

2.3.6.2.3 From the judgment, it appeared to be common cause that the defendant, a manufacturer of the bricks in question, fell into one of the categories of sellers who can, in accordance with the above-stated principle, become liable for consequential damages.<sup>154</sup> The court indicated that once the issue of whether a seller could be held liable was dealt with, the next step was to enquire whether such seller had sold goods containing a latent defect.<sup>155</sup> Having had regard to the evidence in this case, the court indicated that it was persuaded that the defendant, a manufacturer of bricks, did sell the plaintiff bricks containing a latent defect and consequently rendered itself liable for any consequential damages suffered by the plaintiff by reason of the defect.<sup>156</sup> The court granted judgment and awarded damages in favour of the plaintiff.<sup>157</sup>

2.3.6.2.4 The defendant noted an appeal against the said judgment, which was subsequently dismissed by the appellate division.

2.3.6.3 ***Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd***<sup>158</sup>

2.3.6.3.1 The *Wagener* matter is especially relevant to the discussion of product liability as it emphasized the need for the introduction of a strict product liability regime into South African law.<sup>159</sup> Prior to the *Wagener*-case the Supreme Court of Appeal in *Ciba Geigy (Pty) Ltd v Lushof Farms (Pty Ltd)*<sup>160</sup> confirmed that where a manufacturer produces and markets a product which has the potential to be hazardous to consumers, without conclusive prior testing, such negligence may result in the manufacturer being held delictually liable for damages suffered by a consumer. The *Wagener*-case in essence dealt with the extent to which a manufacturer

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> According to the evidence in the *Holmdene* case, someone with knowledge of bricks, such as a bricklayer or a builder's foreman, should be able to detect an underburnt brick by applying various tests.

<sup>157</sup> These damages were based upon the cost to the plaintiff of demolishing the brick walls, both external and internal, and rebuilding them with other bricks, together with certain concomitant expenses. The court stated that the fundamental rule in awarding damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party.<sup>157</sup>

<sup>158</sup> (2003) 2 ALL SA 167 (SCA) – hereafter “*Wagener* case”

<sup>159</sup> *Wagener* case at 3.

<sup>160</sup> 2002 (2) SA 447 (SCA) at 470.



can be held strictly liable in delict for unintended harm caused by the defective manufacture of a product where there is no contractual privity between the manufacturer and the injured person.<sup>161</sup>

2.3.6.3.2 The facts in the case were that the appellant in the first appeal underwent shoulder surgery at a private hospital conducted by a trust.<sup>162</sup> The surgical procedure involved administration of a local anaesthetic called Regibloc Injection (“Regibloc”) which was manufactured and marketed by the respondent company.<sup>163</sup> As an aftermath of the surgery, the appellant was left with necrosis of the tissues and nerves underlying the site of the operation and paralysis of the right arm.<sup>164</sup> Subsequently, the appellant instituted an action for damages for personal injury in the Cape Town High Court against the respondent company and the private hospital.<sup>165</sup> She alleged, among other things, that her injury and its *sequelae* were caused by the Regibloc.<sup>166</sup>

2.3.6.3.3 The appellant’s main claim was based on the allegation that the Regibloc was unsafe for use as a local anaesthetic.<sup>167</sup> In the alternative, the appellant alleged that the Regibloc administered to her was defective as a result of negligent manufacture by the respondent.<sup>168</sup> The respondent raised an exception against the main claim on the basis that it disclosed no cause of action.<sup>169</sup> The basis of the exception was that the appellant failed to allege fault in the manufacture of the Regibloc in question and purported to contend that the respondent was subject to strict liability for the alleged injurious consequences.<sup>170</sup>

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<sup>161</sup> *Wagener* case at 3.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* A virtually identical suit was brought by another alleged victim of Regibloc in the second appeal. The two actions were consolidated.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Wagener* case at 4.

2.3.6.3.4 In deciding the issues raised by the appeal the court indicated that it had to be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent's control, that it was administered in accordance with the respondent's accompanying instructions, that it was this defective condition which caused the alleged harm and that such harm was reasonably foreseeable.<sup>171</sup> The court indicated that it was furthermore not disputed in law that the respondent was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from the defectively manufactured Regibloc and that such duty was breached.<sup>172</sup> It further indicated that the essential enquiry was whether liability attached even if the breach occurred without fault on the respondent's part.<sup>173</sup>

2.3.6.3.5 The appellants argued that for a variety of reasons the common law remedy by which to protect and enforce the appellants' constitutional right to bodily injury, namely the Aquilian action for damages, was inadequate to achieve those ends.<sup>174</sup> It was argued that, in terms of the Constitution<sup>175</sup>, the court was obliged in weighing and balancing the conflicting interests of consumers and manufacturers to develop the common law by having recourse to the spirit, purport and objects of the Bill of Rights in order to 'fashion a remedy' that did achieve the requisite protection.<sup>176</sup>

2.3.6.3.6 It was further argued, on behalf of the appellant, that in *Kroonstad Westelike Boere Ko-operatiewe Vereniging, Bpk v Botha*<sup>177</sup>, the court had already attached strict liability for consequential damages arising out of defective merchandise to a merchant seller who professes expert knowledge in relation to such goods.<sup>178</sup> In addition, it was submitted

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> *Wagener* case at 4 and 5.

<sup>175</sup> The Constitution of the Republic of South Africa, 1996.

<sup>176</sup> *Wagener* case at 5..

<sup>177</sup> *Kroonstad* case *supra*.

<sup>178</sup> *Wagener* case at 5.

that it required no more than a decision of legal policy, and a modest shift of principle, to extend such liability to a manufacturer in the circumstances of the present matter.<sup>179</sup>

2.3.6.3.7 In their argument, the appellants contended that fault is most often extremely difficult to prove.<sup>180</sup> They argued that a plaintiff has no knowledge of, or access to, the manufacturing process to establish negligence in relation to the making of the item or substance which has allegedly caused the injury complained of.<sup>181</sup> With regards to the *Kroonstad* case, it was argued that it was anomalous that where the injured party was the buyer, and the seller was not even the manufacturer, strict liability applied.<sup>182</sup> However where liability was sought to be imposed on a manufacturer, fault had to be proved in the absence of a contractual relationship between the parties.<sup>183</sup> The respondent thus argued that the *Kroonstad* case was of no assistance, because it concerned a warranty imposed by the law of sale.<sup>184</sup> It was further submitted that it would be illogical and unworkable to impose strict liability on a case by case basis.<sup>185</sup> Even if strict liability was imposed a plaintiff would still have to prove that the product concerned was defective when it left the manufacturer.<sup>186</sup> In the circumstances, it was argued that proving fault was really no more difficult than proving defectiveness.<sup>187</sup>

2.3.6.3.8 The court held that, in evaluating the parties' competing submissions, the starting point was that the right which the appellant sought to protect and enforce was constitutionally entrenched.<sup>188</sup> The next

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<sup>179</sup> Ibid. The court emphasised that there are instances of strict liability which are well known to the law of delict, for example, the *pauperien* action, the *actio de effuses vel dejectis* and the action based on unlawful deprivation of personal freedom. Commercial equity and public protection have influenced the developers of the law in comparable jurisdictions to impose strict liability on manufacturers in situations like the one in the *Wagener* case.

<sup>180</sup> Ibid.

<sup>181</sup> *Wagener* case at 5 and 6.

<sup>182</sup> *Wagener* case at 6.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid .

<sup>185</sup> Ibid.

<sup>186</sup> *Wagener* case at 7.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid. This was therefore one of the factors to be borne in mind when having regard to the injunction to shape the common law in accordance with the Constitution's spirit, purport and objects.

consideration was that this same right has always existed at common law<sup>189</sup>: to succeed in the Aquilian action, proof of fault in the form of negligence has always been necessary.<sup>190</sup> The court further indicated that, even if strict liability applied, a plaintiff would still have to prove not only that the product was defective when used, but defective when it left the manufacturer's control.<sup>191</sup> It further pointed out that there would be the same need to prove factual and legal causation as exists when liability is fault-based.<sup>192</sup>

2.3.6.3.9 According to the court, it was also noteworthy that even if a manufacturer had to show that a proved latent defect could not have been detected by any reasonable examination, the inference may nevertheless be justified that somebody involved in the manufacturing process must have been at fault.<sup>193</sup> It indicated that once there is *prima facie* proof, direct or circumstantial, that the product was defective at the various times material to the action, it is virtually inevitable that the doctrine of *res ipsa loquitur*<sup>194</sup> will apply and require an answer from the manufacturer.<sup>195</sup>

2.3.6.3.10 Pursuant hereto, the court discussed the appellant's reliance on U.S. case law and the American Restatement referred to above.<sup>196</sup> It indicated that it is quite so that the American courts found it remarkably easy to jettison fault, but pointed out that the fundamental reason appears to be given by one of the country's leading writers on the law of torts (delict), Prosser who explained that in its inception a seller's

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<sup>189</sup> *Wagener* case at 7.

<sup>190</sup> *Ibid.* The court indicated that this had been stated in decisions of the court from *Cape Town Municipality v Paine 1923 AD 207* to *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd supra*. It remarked that most of the cases pre-dated the Constitution, but *Ciba-Geigy* was decided after the Constitution came into operation and that the right concerned should therefore be governed by the same principles as applied before.

<sup>191</sup> *Wagener* case at 8. The court that in the case of a medical product, for example, such burden would in any event probably require evidence involving, no doubt, some complexities of scientific analysis. It might also be difficult for a plaintiff to acquire for examination the remaining portions of the administered product or unused samples from the same consignment as that from which the administered product came.

<sup>192</sup> *Wagener* case at 8.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Gowar* at 524 explains that *res ipsa loquitur* means that the facts speak for themselves. When this doctrine is applied an inference of negligence can be drawn from the harmful circumstances which result, if the events would not have taken place had someone not been negligent.

<sup>195</sup> *Wagener* case at 9.

<sup>196</sup> *Wagener* case at 10.

warranty, although subsequently for some purposes regarded as a term of the contract of sale, originally gave rise to liability in tort and never entirely lost its tort character.<sup>197</sup> The tort rule served to extend warranties to the benefit of the ultimate consumer, even without privity of contract between the latter and the producer.<sup>198</sup> Hence cases such as *Greenman v Yuba Power Product Inc*<sup>199</sup> in which one finds the emphatic statement that the manufacturer's liability is governed by the law of strict liability in tort.<sup>200</sup>

2.3.6.3.11 The court then indicated that "warranty" in South African law was an importation from English law in which a warranty was in all respects a matter of contract and that reliance on the law of the United States in this connection would consequently be unjustifiable.<sup>201</sup> The court furthermore remarked that it was significant that counsel for the appellants were unable to refer to any other country in which strict liability is imposed other than by statute as is the case in the major industrialised countries.<sup>202</sup> It pointed out that it is not without significance that in the other parts of the world the imposition has been by way of legislation but remarked that the American Restatement is neither legislation nor a compendium of judicial pronouncements.<sup>203</sup>

2.3.6.3.12 With reference to the respondent's argument, the court remarked that the subject of product liability is boundless as regards the possible structures and codes that can be put in place to produce a comprehensive set of principles.<sup>204</sup> The problem in the *Wagener* case was however, according to the court, that the result sought by the appellant would merely pertain to one type of product and only to manufacturers of such products.<sup>205</sup> To illustrate the dilemma involved

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> 59 Cal 2<sup>nd</sup> 57.

<sup>200</sup> *Wagener* case at 10..

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> *Wagener* case at 13.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid. The court indicated that manufacturer of medicines had, in any event, been the subject of recent extensive statutory regulation without strict liability having been imposed.

in the function of trying to 'legislate' judicially in this complex field, the following questions were raised by the court:<sup>206</sup>

- 2.3.6.3.12.1 What products should be included or excluded when it comes to determining the extent of the liability?
- 2.3.6.3.12.2 Is a manufacturer to include X, the maker of a component that is part of the whole article manufactured by Y, and which is liable if the component is defective?
- 2.3.6.3.12.3 Does defect mean in the making process only or, in the case of designed article, also a defect of design?
- 2.3.6.3.12.4 Should it include the failure, adequately or at all, to warn of possible harmful results?
- 2.3.6.3.12.5 Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control?
- 2.3.6.3.12.6 What relevance should the packaging have – should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examination were made?
- 2.3.6.3.12.7 Is a product defective if innocuous used on its own but which causes damage when used in combination with another's product?
- 2.3.6.3.12.8 What defences should be available?
- 2.3.6.3.12.9 Should the damages recoverable be exactly the same as in the case of the Aquilian claim or should they be limited, as is some jurisdictions, by excluding pure economic loss or by limiting them to personal injury?
- 2.3.6.3.13 The court remarked that the questions enumerated could not be answered on the basis of what had arisen and been debated in the case before it, and thus the appeal could not succeed.<sup>207</sup>

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<sup>206</sup> *Wagener* case at 13.

<sup>207</sup> *Wagener* case at 15

### 3 RATIONALE FOR IMPLEMENTING A STRICT PRODUCT LIABILITY REGIME

- 3.1 The preamble to the European Product Liability Directive<sup>208</sup> highlights the fact that “liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production”.<sup>209</sup>
- 3.2 Ramsay remarks that a primary economic reason for regulating product safety is inadequate consumer information.<sup>210</sup> Consumers may be unaware of hidden or long-term risks and market pressures may fail to provide producers with incentives to disclose this information.<sup>211</sup>
- 3.3 It is submitted that regulation of product liability serves a two-fold purpose:<sup>212</sup> Firstly it is preventative in the sense that it requires the supply of safe products that are free from defects or at least the timeous recall or withdrawal of defective products from the consumer market before they can cause harm or before harm which has been caused spreads further. Secondly, it is remedial in the sense that where harm has been caused by a defective product it provides recourse to the injured consumer.
- 3.4 A regime of strict product liability, which is recognised as an exception to fault-based liability<sup>213</sup>, enhances the regulation of product liability and inevitably contributes to ensuring that fewer defective products reach the consumer market due to increased standards of quality and safety and the implementation of better control and recall measures. Clearly the extent of product liability claims and the possibility of class action litigation have a further deterring effect on the release of defective products into the consumer market. Arguably the most important feature of a strict product liability regime is that it ensures greater consumer protection by eliminating the need for the consumer in the absence of a contractual relationship to prove negligence of the supplier of the

<sup>208</sup> 85/374/EEC on 25 July 1985.

<sup>209</sup> Loubser and Reid at 415.

<sup>210</sup> Ramsay *Consumer Law and Policy* (2<sup>nd</sup> ed) 691.

<sup>211</sup> Ibid.

<sup>212</sup> Van Heerden Product Liability Notes at 1.

<sup>213</sup> Botha and Joubert at 306.

harmful defective product – a feat which has previously hampered access to justice to many product liability victims.<sup>214</sup>

- 3.5 Over the years various South African writers have argued for the introduction of a strict product liability regime. Van der Walt remarked in 1972 already “... the public interest in the physical – psychological wellbeing of human beings requires the highest measure of protection against defective consumer products, by marketing and advertising the manufacturer creates a belief in the minds of the public that his product is safe, strict liability serves as an encouragement to take the utmost degree of care; the manufacturer is, from an economic perspective, the party most capable of absorbing and spreading the risk of damages by price increases and insurance.”<sup>215</sup>
- 3.6 Loubser and Reid argued convincingly in favour of strict product liability based on the argument that those who can control the danger or make an equitable distribution of the losses when they occur should be burdened with the losses caused by defective products<sup>216</sup>. Several other factors in the South African context also required the introduction of a strict product liability regime, namely:<sup>217</sup>
- 3.6.1 The vast majority of manufacturers do not sell directly to the public and cannot be held strictly liable under the *Kroonstad* rule for their harmful products, even though they are responsible for introducing these products into the marketplace.
- 3.6.2 Manufacturers who introduce defective products into the marketplace escape liability because the consumer must prove fault on their part, whereas sellers who are often “unwitting conductors” for manufactured products that are latently defective are held strictly liable because they professed that they have skill and expert knowledge in relation to those products.
- 3.6.3 Large-scale manufacturers who swamp the market with masses of potentially dangerous goods through intermediaries are not held strictly liable, whereas

<sup>214</sup> Van Heerden Product Liability Notes at 2. See also Botha and Joubert at 309-310.

<sup>215</sup> Van der Walt “Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk” 1972 *THRHR* 254.

<sup>216</sup> Loubser and Reid at 416; Joubert and Botha at 311.

<sup>217</sup> McQuoid-Mason at 108 to 110; Joubert and Botha at 311.



ordinary artists and crafts people that do not swamp the market with such masses of potentially dangerous goods are held strictly liable.

- 3.6.4 The re-entering of South Africa into the global economy with trading partners such as Australia, the EU, Japan, the UK and the US who have introduced strict product liability for dangerous and defective products increased pressure in South Africa to do the same.
- 3.6.5 Cognisance of the notions of fairness and justice emphasized by the Constitution<sup>218</sup> militate in favour of developing a 'new *boni mores*' to assist development of the common law to protect vulnerable consumers.
- 3.6.6 The sophisticated state of the manufacturing industry in South Africa justified imposition of strict product liability.
- 3.6.7 Loubser and Reid also argued that high product standards can also be achieved if these people involved in the supply chain share the cost of ensuring quality and safety.<sup>219</sup>
- 3.7 Given the constraints of the common law requirement to prove fault in order to sustain a product liability claim, and all the reasons militating in favour of introducing a strict product liability regime, legislation addressing the need for strict product liability thus became inevitable.

## 4 THE CONSUMER PROTECTION ACT

### 4.1 Introduction

- 4.1.1 The CPA has now changed the South African product liability regime from fault based product liability to strict product liability (no-fault liability). Certain provisions of the CPA came into operation on 24 April 2010 (the early effective date),<sup>220</sup> whereas the bulk of the Act, came into operation on 31

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<sup>218</sup> Constitution of the Republic of South Africa, 1996.

<sup>219</sup> Loubser and Reid at 416.

<sup>220</sup> Schedule 2, Items 2(1) and (2) of the CPA state the following:

"2. (1) Chapters 1 and 5 of this Act, section 120 and any other provision authorising the Minister to make regulations, and this Schedule, take effect on the date that is one year after the date on which this Act was signed by the President i.e. 24 April 2009 (own emphasis);

(2) Subject to subitem (3), and items 4 and 5, any provision of this Act not contemplated in subitem (1) takes effect on the date that is 18 months after the date on which the Act was signed by the President."

Schedule 2, Item 2(3) provides that:

"(3) The Minister, by notice published in the *Gazette* at least 20 business days before the date contemplated in subitem (2), may-

March 2011 (the general effective date).<sup>221</sup> Regulations in terms of the Act were published on 1 April 2011.<sup>222</sup> It is to be noted that the strict product liability provisions contained in section 61 of the CPA as discussed in more detail hereinafter already came into effect on the early effective date and has thus been in operation since the end of April 2010.

4.1.2 The purpose of the CPA is set out in section 3 thereof and entails the promotion and advancement of the social and economic welfare of South African consumers by :

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers
  - (i) who are low-income persons or persons comprising low-income communities;
  - (ii) who live in remote, isolated or low-density population areas or communities;
  - (iii) who are minors, seniors or other similarly vulnerable consumers;  
or
  - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
- (c) promoting fair business practices;
- (d) protecting consumers from

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(a) defer the defective date of any provision contemplated in that subitem for a period of not more than six additional months....”

Schedule 2 Item 3(1)(c) furthermore provides the following:

“3.(1) Except to the extent expressly set out in this item, this Act does not apply to-

(c) any goods supplied, or services provided, to a consumer before the general effective date.”

<sup>221</sup> GG 33581 GN 917 of 23 September 2010.

<sup>222</sup> GG 9515 GN 34180 of 1 April 2010.

- (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
- (ii) deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
- (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

4.1.3 It is important to note that section 2 of the CPA provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3 thereof. Note should also be taken of section 2(2) which stipulates that when interpreting the Act, a person, court or tribunal or The National Consumer Commission may consider appropriate foreign and international law; appropriate international conventions, declarations or protocols relating to consumer protection and any decision of a consumer court, ombud or arbitrator in terms of the CPA.<sup>223</sup>

4.1.4 Another very important provision of the CPA is section 2(10) which provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.

4.1.5 Hawthorne submits that the CPA gives effect to the recognition of the need to develop and employ innovative means to fulfil the rights of historically disadvantaged persons to to promote their full participation in society.<sup>224</sup>

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<sup>223</sup> To the extent that such decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court.

<sup>224</sup> Hawthorne at 431.

Consumer legislation driven by the Constitutional imperative to social transformation transcends the public-private divide by recognising and giving effect to Human Rights and acknowledging that the law of contract involves distributive justice.<sup>225</sup>

4.1.6 The CPA introduces new rules which enables consumers to protect their interests, to obviate a lack of choice and weak consumer bargaining strength, to redress the balance between the interests of the parties and is an important step towards the goal of providing citizens with a life characterised by human dignity.<sup>226</sup> According to Hawthorne, the CPA aims to achieve a fair marketplace and a responsible consumer with the creation of certain fundamental consumer rights.<sup>227</sup>

## 4.2 Scope of application of CPA

4.2.1 In general, the CPA applies to the marketing and supply of goods or services within the Republic of South Africa by a supplier in the ordinary course of his business,<sup>228</sup> to a consumer.<sup>229</sup> It is however not required that the consumer

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<sup>225</sup> Ibid. Hawthorne (at 432 to 433) examines the phenomenon of responsive governance in the form of consumer protection legislation in South Africa as propelled by the Constitution and the Bill of Rights of 1996. She states that the new democratic order is founded on recognition of human rights, and the increasing awareness that realisation of civil and political rights has not been accompanied by the same realisation within the domain of socio-economic rights. Human dignity is the founding value of the South African state and the objective of the Constitution is to achieve social justice and free the potential of each person. Thus, human dignity inspires socio-economic rights which in turn are legislated into positive law in order to achieve and guarantee human dignity. Hawthorne remarks that the promulgation of consumer protection reforms is part of the Government's campaign against poverty within the crusade for human dignity.

<sup>226</sup> Hawthorne at 435 and 436.

<sup>227</sup> Hawthorne at 436.

<sup>228</sup> The CPA does not define "ordinary course of business". It however does define business as 'the continual marketing of goods and services.' Naude 'The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 SA Merc LJ 336 (hereinafter referred to as Naude) points out that although the Act does not define 'ordinary course of business', the SCA held in *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (SCA) (in interpreting this phrase in the Matrimonial Property Act, 88 of 1984) that it was irrelevant whether or not the person in question conducted such transactions regularly; the issue was whether the person performed the juristic act in question in the ordinary course of his business. A single, isolated activity could under proper circumstances be regarded as being performed in the ordinary course of business. The test for determining whether a contract falls within the ordinary course of a party's business is whether the conclusion of the contract falls within the scope of that business and whether the transaction is one with commonly used terms that ordinary businessmen would normally have entered into in the circumstances. She further indicates that case law on income tax accept that if rental income is the 'product of a *bona fide* investment with the purpose of earning an income from the investment', income tax is payable on profit made or any rental loss may be deducted from rental income for the purpose of income tax. Thus, according to Naude, an individual who, apart from her own residence, owns only one flat which she rents out is supplying that flat to that tenant in the ordinary course of her business, and the tenant is therefore protected as consumer under the CPA. The lessor has to pay income tax on the rental owed and is therefore running a business of leasing out the flat, even though this may not be her only or main business or occupation.

must be acting in the ordinary course of his business for the CPA to apply to the marketing and supply of such goods or services. In order to comprehend the scope of application of the CPA it is however necessary to first have a look at specific important definitions.

4.2.2 In view thereof that this dissertation focuses on liability for damages by goods, the definition of goods, but not the definition of services, will be discussed.<sup>230</sup> ‘Goods’ for purposes of the Act, includes:

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of “service” in this section; and
- (e) gas, water and electricity.

4.2.3 It is thus clear that goods have an extended definition: it not only covers the wide range of goods enumerated in the above definition, but the word ‘includes’ indicates that the goods specified in the definition do not constitute a closed list. For purposes of product liability it is thus submitted that such liability may potentially attach to a wider range of products than those expressly mentioned in the definition of goods<sup>231</sup>.

4.2.4 Another notable feature of the Act, for purposes of strict product liability, is the extended definition of a consumer. As such a consumer in respect of any particular goods or services, means:

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<sup>229</sup> See s5(1)(a) to (c) of the CPA. The exact scope of application of the Act has to be determined by reading s5(1) together with s5(2) as the latter section sets out which transactions are exempt from the application of the Act. For a detailed overview of the scope of application of the Act see Nagel *et al* Commercial Law (4<sup>th</sup> ed) chapter 41.

<sup>230</sup> For a definition of “services” see s1 of the CPA.

<sup>231</sup> Van Heerden Product Liability Notes at 2.

- 4.2.4.1 a person<sup>232</sup> to whom those goods or services are marketed in the ordinary course of the supplier's business;
- 4.2.4.2 a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act by section 5(2) or in terms of section 5(3);
- 4.2.4.3 if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- 4.2.4.4 a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).
- 4.2.4.5 For purposes of the CPA, "supplier" means a person who markets any goods or services.<sup>233</sup> "Supply" when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.<sup>234</sup> "Market" when used as a verb, means to promote or supply any goods or services.<sup>235</sup>
- 4.2.4.6 The Act also defines the concept of "supply chain" as meaning, with respect to any particular goods or services, the collectively of all supplies who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods<sup>236</sup>.
- 4.2.4.7 Other definitions that are relevant for comprehending the field of application of the CPA are the following: "agreement" means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them<sup>237</sup>;

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<sup>232</sup> The definition of person includes a juristic person. A juristic person for purposes of the CPA includes a body corporate, a partnership or association or a trust as defined in the Trust Property Control Act 57 of 1988.

<sup>233</sup> S1 of CPA.

<sup>234</sup> S1 of CPA.

<sup>235</sup> S1 of the CPA. It is to be noted that marketing also includes direct marketing as defined in s 1 of the Act.

<sup>236</sup> S1 of CPA.

<sup>237</sup> S1 of CPA.

“consumer agreement” means an agreement between a supplier and a consumer other than a franchise agreement<sup>238</sup>; and “transaction” means

- (a) in respect of a person acting in the ordinary course of business—
  - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
  - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
  - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5 (6), irrespective of whether it falls within paragraph (a).

4.2.4.8 In more specific terms, section 5(1) of the CPA provides that the Act applies to:

- (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
- (b) the promotion of any goods or services, or of the supply of any goods or services, within the Republic unless
  - (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (1); or
  - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
- (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services or separate from any other goods or services; and

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<sup>238</sup> S1 of CPA.

(d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided in subsection (5).

4.2.4.9 The transactions that are exempt from the application of the CPA are listed in section 5(2) and *inter alia* entail transactions where the State is the consumer or where the consumer is a juristic person with an asset value or annual turnover of more than R2 million.<sup>239</sup>

4.2.4.10 However, explaining the scope of application of the CPA in the context of product liability actually hinges on section 5(1)(d) of the Act, which in essence indicates that the strict product liability provisions in section 61 have such a wide scope of application that they apply even where goods are supplied in terms of a transaction that is exempt from the application of the Act.<sup>240</sup> This position is reiterated by section 6(5) which provides that if goods are supplied within the Republic in terms of a transaction which is exempt from the application of the CPA, those goods and the importer, producer, distributor and retailer of those goods are nevertheless subject to section 60 of the Act which deals with safety monitoring and recall and section 61 of the Act which deals with product liability.<sup>241</sup>

4.2.4.11 Note should in the final instance be taken of section 5(8) which provides that the application of the CPA extends to a matter irrespective of whether the supplier:

4.2.4.11.1 resides or has its principal office within or outside the Republic;

4.2.4.11.2 operates on a for-profit basis or otherwise; or

4.2.4.11.3 is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or

<sup>239</sup> Section 5(2) provides as follows:

“(2) This Act does not apply to any transaction

(a) in terms of which goods or services are promoted or supplied to the State;

(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;

(c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);

(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

(e) pertaining to services to be supplied under an employment contract;

(f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or

(g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995)”.

<sup>240</sup> Van Heerden Product Liability Notes at 2.

<sup>241</sup> See also Gowar at 527.



licensed by an organ of state to offer or supply any goods or services, or is a public –private partnership; or

4.2.4.11.4 is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

### 4.3 The CPA: defective products

#### 4.3.1 Relevant definitions

In order to properly comprehend the provisions of the CPA dealing with defective goods and product liability, the following definitions as set out in section 53 of the Act, are relevant:

“(1) In this part, when used with respect to any goods, component of goods, or services-

(a) “defect” means-

- i. any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- ii. any characteristic of the goods or components that renders the goods less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

(b) “failure” means the inability of the goods to perform in the intended manner or to the intended effect;

(c) “hazard” means a characteristic that-

- i. has been identified as, or declared to be, a hazard in terms of any other law; or
- ii. presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and

(d) “unsafe” means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.”

#### 4.3.2 The primary rule: safe good quality goods

4.3.2.1 As a general rule in South African law of contract, a consumer may be able to demonstrate that a product is defective if the product breached an express warranty or failed to conform to other express factual representations upon which he relied.<sup>242</sup> A warranty is a contractual term in terms of which a contracting party assumes absolute or strict liability for proper performance to the extent that he cannot rely on impossibility of performance or absence of fault to escape liability.<sup>243</sup> It is an *incidentale* of a contract which extends the liability imposed by the *essentialia* and *naturalia* of the contract.<sup>244</sup>

4.3.2.2 In terms of the CPA, the supply chain has the general duty to provide safe and good quality goods.<sup>245</sup> In this regard, section 55(2) of the CPA provides that every consumer has a right to receive goods that:

4.3.2.2.1 are reasonably suitable for the purposes for which they are generally intended;

4.3.2.2.2 are of good quality, in good working order and free of any defects;

4.3.2.2.3 will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;

4.3.2.2.4 comply with any applicable standards set under the Standards Act 29 of 1993 or any other public regulation.

4.3.2.3 In addition to the right set out in set out in section 52(2)(a), if a consumer has specifically informed the supplier of the particular purpose for which

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<sup>242</sup> Van der Merwe, Van Huyssteen, Reinecke & Lubbe, “*Contract General Principles*” (2<sup>nd</sup> ed) 272 (hereinafter Van der Merwe *et al*).

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> S55 read with s61. It is to be noted that in accordance with s 55(1) of the Act this right does not apply to goods sold at an auction.

the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods and the supplier:

- a) ordinarily offers to supply such goods; or
- b) acts in a manner consistent with being knowledgeable about the use of those goods,

the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.<sup>246</sup>

4.3.2.4 In determining whether any particular goods satisfied the requirements of sections 55(2) or (3), all of the circumstances of the supply of these goods must be considered, including but not limited to<sup>247</sup>:

- a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of those goods;
- b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- c) the time when the goods were produced or supplied.

4.3.2.5 Section 55(5) provides that for greater certainty in applying section 55(4) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods.<sup>248</sup> In addition, a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.<sup>249</sup>

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<sup>246</sup> S 55(3)

<sup>247</sup> S 55(4).

<sup>248</sup> S 55(5)(a).

<sup>249</sup> S 55(5)(b).

4.3.2.6 In terms of section 55(6), it is provided that sections 55(2)(a) and (b) (i.e. reasonably suitable goods and good quality, working order goods free of defects) do not apply to a transaction if the consumer<sup>250</sup>

a) has been expressly informed that particular goods were offered in a specific condition and

b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

4.3.2.7 Naude remarks that whereas the common law of sale also requires that goods be fit for their intended purpose, under the CPA however, the consumer has the right to *receive* goods that comply with the standards set out in section 55.<sup>251</sup> Thus it follows that the consumer would not any more have to prove that the goods were unfit for purpose at the time of *conclusion* of the contract, as is the case under common law.<sup>252</sup> She further remarks that section 55(2)(c) is quite radical as the requirement that goods must be useable and durable for a reasonable period of time embodies a new right not recognized under the common law.<sup>253</sup> Thus, for the first time in South African law, the consumer has an *ex lege* right to continued good quality.<sup>254</sup> Insofar as the reference to latent as well as patent defects in section 55(5) is concerned, Naude points out that this is obviously a departure from the common law rules on the aedilician actions which require that the defect must be latent, i.e. not visible upon reasonable inspection.<sup>255</sup>

4.3.2.8 Section 55(6) has led to considerable controversy regarding the question whether a supplier would be able to exclude liability for latent defects by means of a *voetstoots* clause, as is possible under the common law. The exact meaning of section 55(6) is not altogether clear and Naude points

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<sup>250</sup> S 55(6)(a) and (b).

<sup>251</sup> Naude at 339.

<sup>252</sup> *Ibid.*

<sup>253</sup> Naude at 339 to 340.

<sup>254</sup> Naude at 340.

<sup>255</sup> Naude at 341.

out that the section can mean one of three things<sup>256</sup>: Firstly, it could mean that the supplier has to expressly point out every individual defect in question to escape liability for a particular defect. She is, however, of opinion that it is highly unlikely that the section will be interpreted this strictly. On the other extreme, she points out that the view has been expressed that it will still be possible to simply agree that goods are sold ‘*voetstoots*’ or ‘as is’ , as long as this is done expressly. However, she is of the opinion that courts are unlikely to follow this view. According to her, it is likely that South African courts will follow a “*via media*” interpretation of section 55(6), namely that the supplier may only escape liability if it described the particular less-than-ideal condition of the goods in specific, though generalized detail, without having to list each and every defect for which it seeks to escape liability.

4.3.2.9 Hawthorne submits that the CPA provides a skeleton of mandatory rules, which it fleshes out with a plethora of default rules.<sup>257</sup> She however states that the standard contract is prevalent in retail sales, with the overall result that consumers will be baffled and confused and will have to rely on extensive and expensive legal advice to enforce their rights concerning warranties.<sup>258</sup>

#### 4.3.3 **Section 56: The implied warranty of quality**

4.3.3.1 Significantly, the CPA has introduced an implied or *ex lege* warranty of quality which supplements the right to safe good quality goods contained in section 55. Section 56(1) of the CPA states that there is an implied provision in any transaction or agreement pertaining to the supply of goods to a consumer that the producer or importer, the distributor and retailer each warrant that the goods complies with the requirements and standards contemplated in section 55. This implied warranty applies except to the extent that those goods have been altered contrary to the instructions or after leaving the control of the producer or importer, a

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<sup>256</sup> Naude at 342 to 343.

<sup>257</sup> Hawthorne at 442.

<sup>258</sup> *Ibid.*

distributor or the retailer, as the case may be.<sup>259</sup> Should the goods fail to satisfy the requirements and standards set forth in section 55,<sup>260</sup> then, within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense.<sup>261</sup>

4.3.3.2 Section 56(2) further provides that the supplier, must at the direction of the consumer, either repair or replace the failed, unsafe or defective goods; or refund to the consumer the price paid by the consumer for the goods. If a supplier repairs any particular goods or any component of such goods, and within three months after the repair, the failure, defect or unsafe feature has not been remedied, the supplier must replace the goods; or refund to the consumer the price paid by the consumer for the goods.<sup>262</sup>

4.3.3.3 The implied warranty imposed by section 56 of the Act, as well as the right to return goods, are each in addition to<sup>263</sup>:

- a) any other implied warranty or condition imposed by common law, the CPA or any other public regulation; and
- b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.

4.3.3.4 The warranty under section 56(1) is curbed by section 55(6).<sup>264</sup> Should the supplier thus have expressly informed the consumer of the specific condition of the goods, and should the consumer have expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition, the implied warranty of quality may be limited.<sup>265</sup> According to Hawthorne the CPA makes provision in section 55(6) for the exclusion of the implied warranty in

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<sup>259</sup> S 56(1).

<sup>260</sup> Section 56(2).

<sup>261</sup> Ibid.

<sup>262</sup> S 56(3).

<sup>263</sup> S56(4)(a) and (b). Hawthorne at 445 submits that this may well lead to confusion as the courts and the National Consumer Commission will have to deal with a number of warranties, exclusions, limitations and different definitions.

<sup>264</sup> Jacobs, Stoop & Van Niekerk at 382.

<sup>265</sup> Ibid. For criticism of the time periods mentioned in s56 see Naude at 347 to 350.

section 56 which leaves only the skeleton of a mandatory implied warranty.<sup>266</sup> It is submitted that its therefore prudent that the consumer is clearly informed and acknowledges the defects in “second quality goods”. It is suggested that such goods relate to goods of an inferior quality or suffering from a certain defect. In this regard it is prudent for a manufacturer or supplier, notwithstanding the extra administration, to have a disclosure of the condition of such product countersigned by the consumer in acknowledgement.

#### 4.3.4 **Section 54: Consumer’s right to demand quality service**

4.3.4.1 Section 54(1) should also briefly be noted for purposes of the discussion of defective products as it *inter alia* provides that, when a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect.<sup>267</sup>

4.3.4.2 The remedy in respect of services contemplated in section 54 are the following: if the supplier fails to perform a service to the standards set forth in section 54(1), the consumer may in terms of section 54(2) require the supplier to either remedy any defect in the quality of the services performed or goods supplied<sup>268</sup>; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure<sup>269</sup>.

#### 4.3.5 **Section 57: Warranty on repaired goods**

4.3.5.1 For the sake of completeness note should also be taken of section 57 which provides a statutory warranty on repaired goods. In terms of section 57 a service provider warrants every new or reconditioned part installed

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<sup>266</sup> Hawthorne at 444. She remarks that the skeleton of section 55 of the CPA which remains is thus that consumers have an implied warranty that goods will be useable and durable for a reasonable period of time and that goods will comply with any applicable standard.

<sup>267</sup> S 54(1)(c).

<sup>268</sup> S 54(2)(a).

<sup>269</sup> S 54(2)(b).

during any repair or maintenance work for a period of three months after date of installation or such longer period as the supplier may specify in writing.

4.3.5.2 A warranty in terms of section 57 is concurrent with any other deemed, implied or express warranty but is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse and abuse. In addition, the section 57-warranty does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to be ordinarily used.

#### 4.3.6 **The CPA: Product liability**

4.3.6.1 Section 61(1) of the CPA introduces product liability for any harm caused as a result of the supply of unsafe products, product failure, or inadequate warnings and instructions.<sup>270</sup> As such section 61(1) provides that except to the extent contemplated in section 61(4)<sup>271</sup>, the producer or importer, distributor or retailer of any goods is liable for any harm, as described in section 61(5), caused wholly or partly as a consequence of

- a) supplying any unsafe goods;
- b) a product failure, defect or hazard in any goods; or
- c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

irrespective of whether the harm resulted from any negligence or the part of the producer, importer, distributor or retailer, as the case may be.

4.3.6.2 It thus appears that section 61 introduces strict product liability or no fault liability in respect of the whole supply chain into South African law, as negligence is no longer a requirement to prove a product liability claim if such claim is instituted in terms of the CPA. Strict product liability thus still

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<sup>270</sup> The concepts “warning” and “instruction” is not defined in the CPA.

<sup>271</sup> This section sets out defences available to the supply chain as discussed hereinafter.



requires the consumer to prove a causal relationship between the defect and the loss suffered, but, contrary to the common law, it is not necessary for the consumer to prove that the manufacturer was negligent in causing the defect.

4.3.6.3 Section 61(2) of the CPA has further severe implications for entities forming part of the supply chain as it provides that a supplier of services<sup>272</sup>, who applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer and thus extends the concept of product liability to the supplier of services also. <sup>273</sup> Section 61(3) furthermore imposes joint and several product liability on the supply chain.<sup>274</sup>

4.3.6.4 Harm for which a person may be held liable in terms of section 61 is broad and includes the death of, or an injury to, any natural person<sup>275</sup>; an illness of any natural person<sup>276</sup>; any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable<sup>277</sup>; and any economic loss that results from harm contemplated as aforementioned.<sup>278</sup> Nothing in section 61 however limits the authority of a court to assess whether any harm has been proven and adequately mitigated,<sup>279</sup> determine the extent and monetary value of any damages, including economic loss<sup>280</sup> or apportion liability among persons who are found to be jointly and severally liable.<sup>281</sup>

4.3.6.5 The strict product liability introduced by section 61 is however not absolute. This is clear from section 61(4) of the CPA which provides a

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<sup>272</sup> See also the definition of 'service provider' in s 1 of the Act which means a person who promotes, supplies or offers to supply any services.

<sup>273</sup> Section 61(2).

<sup>274</sup> Section 61(3). Joint and several liability implies that if one party pays the judgment debt the other party is absolved from payment.

<sup>275</sup> S 61(5)(a).

<sup>276</sup> S 61(5)(b).

<sup>277</sup> S 61(5)(c).

<sup>278</sup> S 61(5)(d).

<sup>279</sup> S 61(6)(a).

<sup>280</sup> S 61(6)(b).

<sup>281</sup> S 61(6)(c).

number of defences that manufacturers may have at their disposal against product liability claims. These defences include the following:

- 4.3.6.5.1 the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;<sup>282</sup>
- 4.3.6.5.2 the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by the person raising this defence to another person alleged to be liable<sup>283</sup>;
- 4.3.6.5.3 the alleged unsafe product characteristic, failure, defect or hazard was wholly attributable to compliance by the person raising this defence with specific instructions provided by the person who supplied the goods to the first mentioned person;<sup>284</sup>
- 4.3.6.5.4 it is unreasonable to expect the *retailer or distributor* (my emphasis) to have discovered the unsafe product characteristic, failure defect or hazard having regard to the person's role in marketing the goods to consumers;<sup>285</sup> or
- 4.3.6.5.5 the claim for damages is brought more than three years after<sup>286</sup>
  - i death or injury of a person contemplated in section 61(5)(a);
  - ii earliest time at which a person had knowledge of the material facts about an illness contemplated in section 61(5)(b); or
  - iii earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in section 61(5)(c) or
  - iv the latest date on which a person suffered any economic loss contemplated in section 61(5)(d).
- 4.3.6.6 Due thereto that it is not possible under the CPA to exclude liability for defective products by means of a *voetstoots* clause, it follows that it will also not be possible to exclude the supply chain's liability for defective products.<sup>287</sup> Such an exclusion would in any event seem to be in contravention of section 51(1)(b) of the Act which indicates that a term of

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<sup>282</sup> Section 61(4)(a).

<sup>283</sup> Section 61(4)(b)(i).

<sup>284</sup> Section 61(4)(b)(ii).

<sup>285</sup> Section 61 (4)(c).

<sup>286</sup> Section 61 (4)(d). This defence thus entails prescription of the plaintiff's claim.

<sup>287</sup> Van Heerden Product Liability Notes at 3.

an agreement that directly or indirectly purports to waive a consumer of a right (i.e to safe good quality goods) in terms of the Act, is void.<sup>288</sup> Naude also points out that it should be noted that a claim for damages caused by goods is not directly affected by a term complying with section 55(6) as compliance with section 55(6) merely has the effect that sections 55(a) and (b) do not apply to the transaction, whereas liability for damage caused by goods under section 61 is not dependent upon proof that the requirements of section 55(2) were met.<sup>289</sup>

4.3.6.7 With regard to the damages that can be claimed in terms of section 61, Gowar indicates that any claim for pain and suffering, loss of amenities of life, or other non-patrimonial damage will still be required to be brought under the law of delict and fault will be a requirement.<sup>290</sup>

## 5 CONCLUSION

5.1 From the aforementioned, it is clear that product liability has its origins in the fact that a product contains a defect and that such defect has the further effect that it causes harm. The ability of the South African common law to provide sufficient redress for consumers is unfortunately diminished by the common law of delict requirement that the consumer must, *inter alia*, prove negligence by the supplier in order to succeed with a product liability claim. The difficulty of meeting this specific requirement is however of such a disproportionate nature that proving a product liability claim under the common law in many instances appear to be an insurmountable task.

5.2 The CPA has now by introducing a strict product liability regime, come to the rescue of South African consumers who are the victims of harm caused by defective products by alleviating their burden of proof as a result of not requiring the proof of negligence anymore in respect of product liability claims. It is also to be noted that the CPA has effectively cast the product liability net much wider by virtue of its requirements regarding safe quality goods, the accompanying ex

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<sup>288</sup> Ibid.

<sup>289</sup> Naude at 345.

<sup>290</sup> Gowar at 528.

*lege* warranty in respect of such goods, as well as the fact that the whole supply chain including service providers is accountable on a joint and several basis for a broad variety of harm caused by defective products.

- 5.3 It is however submitted that the purpose of a product liability regime is not merely to delineate the parameters of product liability and to provide for remedies in instances where defective products cause harm. A product liability regime that is merely reactive can hardly be said to be an effective product liability regime, even if it is as ‘consumer friendly’ as a strict product liability regime that disposes of proof of negligence by the supplier. In order to be truly effective a strict product liability regime should not only make it easier for consumers to institute product liability claims, but it should actually deter the release of defective products into the consumer market and in such way serve to decrease the incidence of defective products leading to product liability claims.<sup>291</sup> In brief an effective product liability regime should result in a decrease in product liability claims, and not merely in a more effective manner in which such claims may be brought. In order for a product liability regime to fulfill such a deterrent function, it is important that the supply chain is aware of its duties in curbing product liability, as a reduction in product liability claims will eventually result in a win-win situation for suppliers as well as consumers.

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<sup>291</sup> Van Heerden Product Liability notes at 3.

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## CHAPTER 3: THE DUTIES OF THE SUPPLY CHAIN – NON-DEFECTIVE GOODS AND WARNINGS

### 1 INTRODUCTION

1.1 Under a fault-based system the negligence requirement, based mainly on the reasonable foreseeability of harm, acts as an important filter in the evaluative process to decide whether liability should be imposed.<sup>292</sup> In the new strict product liability regime introduced by the CPA, it however appears that fault on the part of the supply chain does not play a role in imposing liability on the supply chain. In an effort to produce and supply products to the public that will not harm them and in order to guard itself against product liability claims, the supply chain's duties towards consumers is of pivotal importance.

1.2 The supply chain's duties are however not spelled out in detail by section 61 of the CPA and require the contemplation of various aspects, and will of course differ depending on the product that is at issue. For example, Loubser and Reid remark that society does not benefit from products that are excessively safe, for example, knives with blunt edges.<sup>293</sup> To the contrary, society benefits most when the optimal or reasonable standard of product safety is achieved.<sup>294</sup> It is thus essential to determine what the supply chain's duties towards consumers are in order to determine the extent to which the supply chain can be held liable for harm caused by defective products. In the first instance, it is clear that the paramount duty of the supply chain is not to place defective products on the consumer market – thus to supply safe, good quality goods. In this context, the supply chain's duties will include aspects such as compliance with safety standards and warnings, and the implementation of control measures and recall programmes. In the second instance, the supply chain has a duty to withdraw defective products from the consumer market timeously, or at least to withdraw such products before they can harm further consumers than those already harmed and, where harm has been caused, to remedy such harm by payment of damages.

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<sup>292</sup>Loubser and Reid *at* 417.

<sup>293</sup>*Ibid.*

<sup>294</sup>*Ibid.*

## 2 THE DUTY TO PROVIDE SAFE AND GOOD QUALITY GOODS

There is continuing uncertainty as to the precise meaning of the term “defect”.<sup>295</sup> This is reflected in different interpretations in the cases decided by courts.<sup>296</sup> The upshot of this is that consumers may have difficulty in proving that products are defective when exercising their rights in terms of the CPA.

It is clear that the concept of “defect” is central to the application of strict product liability in the CPA.<sup>297</sup> It is thus imperative to establish exactly what is implied by the concept “defect” and what the scope of this concept is. In order to gain more clarity on this issue, it is necessary to have regard to the position in the U.S. and the EU contrasted to the position in South Africa since the advent of the CPA.

### 2.1 United States of America

#### 2.1.1 Introduction

2.1.1.1 In the United States of America, a manufacturer has a duty to provide products free of manufacturing, design or construction flaws.<sup>298</sup> This guarantees the reasonable safety of all products within any category, enabling the ordinary consumer to focus on risk-utility comparisons across product categories.<sup>299</sup>

2.1.1.2 In the *locus classicus* in U.S. jurisprudence on strict product liability, *Greenman v Yuba Power Products Inc*<sup>300</sup>, the California Supreme Court assigned strict liability to a manufacturer who placed on the market a defective product even though both privity of contract and notice of breach of warranty were lacking.<sup>301</sup> The court rejected both contract and warranty theories, express or implied, as the basis for liability.<sup>302</sup> The Court indicated that strict liability does not rest on a consensual foundation but,

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<sup>295</sup> Lovells at vi.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Geistfeld, “*Product Liability*”, New York University Law and Economics, Working paper, 2009 at 312 (hereinafter Geistfeld).

<sup>299</sup> Ibid..

<sup>300</sup> 1963 59 Cal. 2d 57 [13 A.L.R. 3d 1049]

<sup>301</sup> Torts Strict Liability retrieved from <http://www.west.net/~smith/strict.htm> on 21 December 2011.

<sup>302</sup> Torts Strict Liability *supra*.

rather on one created by law.<sup>303</sup> It stated that liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and due to the limitations in the negligence and warranty remedies.<sup>304</sup> The Court's avowed purpose was to ensure that "the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves".<sup>305</sup>

## 2.1.2 The Restatement Second of Torts

2.1.2.1 The principle in the *Greenman* case was subsequently incorporated in section 402A of the Restatement Second of Torts of 1965, and adopted by a majority of American jurisdictions.<sup>306</sup> Section 402A of the Restatement (Second) of Torts deals with strict product liability.<sup>307</sup> The section is entitled 'Special Liability of Seller of Product for Physical Harm to User or Consumer' and provides as follows:

- "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if the seller is engaged in the business of selling such a product, and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) the rule stated in subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

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<sup>303</sup> Torts Strict Liability *supra*.

<sup>304</sup> Torts Strict Liability *supra*.

<sup>305</sup> Torts Strict Liability *supra*.

<sup>306</sup> Torts Strict Liability *supra*.

<sup>307</sup> Restatement (Second) of Torts , ch 14.

2.1.2.2 The rule stated in section 402A did not rest upon negligence, but its basis of liability was strict and was purely one of tort (delict).<sup>308</sup> It applied to any person engaged in the business of selling products for use or consumption.<sup>309</sup> It therefore applied to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant.<sup>310</sup> In order for the rule stated in section 402A to apply it was further not necessary for the ultimate user or consumer to have acquired the product directly from the seller.<sup>311</sup> Thus “consumers” included not only those who in fact consumed the product, but also those who prepared it for consumption and “users” included even those who were passively enjoying the benefit of the product.<sup>312</sup>

2.1.2.3 In the Commentary to the restatement it is declared that the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility towards any member of the public who may be injured by it.<sup>313</sup> It is further stated that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods.<sup>314</sup> According to the commentary, public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them and be treated as a cost of production against which liability insurance can be obtained.<sup>315</sup> Consequently the consumer of such products is entitled to the maximum protection ‘at the hands of someone and the proper person to afford it are those who market the goods.’<sup>316</sup>

<sup>308</sup> Par m at 355 of commentary on s402A.

<sup>309</sup> Par f at 350 of commentary to s402A.

<sup>310</sup> Ibid. It was not necessary that the seller be engaged solely in the business of selling such products.

<sup>311</sup> Par l at 354 of commentary to s402A.

<sup>312</sup> Ibid. In par o at 356 of the commentary to s402A it was however indicated that casual bystanders had thus far been denied recovery under this section where they were injured as a result of coming into contact with the defective product.

<sup>313</sup> Commentary on s402A, par c at 349-350.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.



- 2.1.2.4 Section 402A applied only where the product was, at the time it left the seller's hands, in a condition *not contemplated* (my emphasis) by the ultimate consumer which would be *unreasonably dangerous* (my emphasis) to him.<sup>317</sup> The seller was thus not liable when he delivered the product in a safe condition and subsequent mishandling or other causes made it harmful by the time it was consumed.<sup>318</sup>
- 2.1.2.5 The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller was upon the injured plaintiff.<sup>319</sup> The commentary to section 402A however explicitly indicated that the requirements for a safe product, at the time of delivery by the seller, would include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.<sup>320</sup> In terms of the commentary to section 402A, a product was not regarded as being in a defective condition if it was safe for *normal* (my emphasis) handling and consumption.<sup>321</sup>
- 2.1.2.6 As indicated, the rule stated in section 402A applied only where the defective condition of the product made it unreasonably dangerous to the user or consumer. It was acknowledged that products cannot possibly be made entirely safe for all consumption, and any food or drug products necessarily involve some risk of harm, if only from over-consumption.<sup>322</sup> This is however not what is meant by section 402A: in terms of this section the product sold had to be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with

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<sup>317</sup> Par g at 351 of commentary to section 402A.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid. Unless evidence could be produced which supported the conclusion that the product was defective at that stage, the burden would not be sustained.

<sup>320</sup> Ibid.

<sup>321</sup> Par h at 351 of commentary. If for example, the injury resulted from abnormal handling, as where a bottle of beverage is knocked against a radiator to remove a cap, or from abnormal preparation or use, such as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and becomes ill, the seller would not be liable.

<sup>322</sup> Par l at 352 of commentary. Eg ordinary sugar is a deadly poison to diabetics.

the ordinary knowledge common to the community as to its characteristics<sup>323</sup>.

2.1.2.7 Wade has listed seven specific criteria to determine if a product is “unreasonably dangerous” by means of a risk-benefit analysis, namely:<sup>324</sup>

- a) The usefulness and desirability of the product. This refers to its utility to the user and to the public as a whole.
- b) The safety aspects of the product. This refers to the likelihood that it will cause injury and the probable seriousness of the injury.
- c) The availability of the substitute product which would meet the same need and not be as unsafe.
- d) The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- e) The user’s ability to avoid danger by the exercise of care in the use of the product.
- f) The user’s anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions.
- g) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

2.1.2.8 Insofar as component parts were concerned, such as a tyre to be placed on a newly manufactured car, the question arose whether responsibility for harm caused did not shift to the assembler.<sup>325</sup> In terms of the commentary to section 402, it was stated, without expressing an opinion on the matter, that when there was no change in the component part itself, but it was

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<sup>323</sup> Ibid. eg bad butter contaminated with poisonous fish oil.

<sup>324</sup> Standler “Elements of Torts in the USA “ retrieved from [www.rbs2.com/torts.pdf](http://www.rbs2.com/torts.pdf) on 31 July 2012 at 14 (hereinafter Standler).

<sup>325</sup> Par q at 358 of the commentary to s402A.

merely incorporated into something larger, the strict liability would be found to carry through to the ultimate user or consumer.

### 2.1.3 Restatement Third of Torts

2.1.3.1 Subsequent to the Restatement (Second) of Torts, the Restatement (Third) of Torts (Product Liability) was introduced in 1998. The Restatement (Third) was drafted to address the concern that portions of section 402A of the Restatement (Second) of Torts were perceived as increasingly outdated and unable to cover developed and developing products.<sup>326</sup> The Third Restatement provides in section 1 thereof: “One engaged in the business of selling or otherwise distributing products that sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”

2.1.3.2 For purposes of the Third Restatement a product is defined in section 19 as:

- a) tangible personal property distributed commercially for use and consumption, other items, such as real property and electricity, are products when the context of their use and distribution is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement;
- b) services, even where provided commercially are not products; and
- c) human blood and blood tissue, even where provided commercially, are not subject to the rules of this restatement.

2.1.3.3 According to section 2, which deals with categories of product defects, a product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design or is defective because of inadequate instructions or warnings. A product:

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<sup>326</sup> William A Dreier, “*The Restatement (Third) of Torts: Product Liability and New Jersey – not quite perfect together*” 1998 Rutgers LR 2059.

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution and the omission of the instructions or warnings renders the product not reasonable safe.

2.1.3.4 Circumstantial evidence supporting an inference of a defective product is dealt with by section 3 which provides that a product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonable foreseeable manner or if there is a risk of danger inherent in the design which outweighs the benefits of that design.<sup>327</sup>

2.1.3.5 One must, however, distinguish a manufacturing defect from a design defect.<sup>328</sup> A manufacturing defect would for example be a flaw that affected only a few products, such as a defective part, loose screw or missing part, whereas a design defect is a flaw that affected every product of that model, such as a car manufacturer's decision not to install seat belts in some model of automobile.<sup>329</sup> In many cases, there is difficulty in proving the one specific defect in either the design or manufacturing of the

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<sup>327</sup> Torts Strict Liability *supra*.

<sup>328</sup> Standler at 13.

<sup>329</sup> *Ibid*.

product that caused the injury.<sup>330</sup> For instance, if the product allegedly caused a fire, the ensuing fire may have consumed the evidence.<sup>331</sup>

2.1.3.6 Also, for example, if a bottle of carbonated beverage explodes, it is impossible after the explosion to determine the pressure in the bottle and to determine whether there was too much carbon dioxide in the bottle.<sup>332</sup> As Prosser remarks, when a bottle of beer explodes and puts out the eye of the man about to drink it, surely nothing should be less material than whether the explosion is due to a flaw in the glass of the bottle or due to overcharged contents.<sup>333</sup>

2.1.3.7 The Restatement (Third) Torts thus rejects the “unreasonably dangerous” terminology of section 402A of the Restatement (Second) Torts.<sup>334</sup> It however imposes product liability for manufacturing and design defects and lack of adequate instructions or warnings. Notably, under section 3, it introduces a consumer expectations test in respect of design defects. Significantly, the Third Restatement provides a new rule of circumstantial evidence as described hereunder:<sup>335</sup>

“It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- a) was of a kind that ordinarily occurs as a result of product defect; and
- b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.”

2.1.3.8 The Restatement (Third) Torts consequently limits the “strict liability” contemplated under section 402A to claims of manufacturing defects and articulates a different standard, more akin to negligence, for design

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<sup>330</sup> Standler at 15.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Sandmire at 1.

<sup>335</sup> Standler at 13.

defects.<sup>336</sup> Under Section 2(b) of the Restatement (Third) Torts, a product is defectively designed when the foreseeable risks of harm could have been reduced or avoided by the adoption of a reasonable alternative design, and the omission of the alternative design renders the product not reasonably safe.<sup>337</sup> This imposes a risk-utility test, while incorporating negligence concepts.<sup>338</sup> It follows that, regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment.<sup>339</sup>

2.1.3.9 In terms of the US torts law, a product may thus be defective because of a defect in the manufacture or design or a failure to adequately warn the consumer of a hazard involved in the use of the product.<sup>340</sup> The plaintiff's injury must have been caused by a defect in the product.<sup>341</sup> The manufacturer is thus not responsible when injury results from an unforeseeable use of its product.<sup>342</sup>

2.1.3.10 Thus the essential elements of a claim based on for instance an alleged manufacturing defect are:<sup>343</sup>

- a) the defendant was the manufacturer or supplier of a product;
- b) the product possessed a defect in its manufacture;
- c) the defect in design existed when the product left the defendant's possession;
- d) the defect in design was a cause of injury to the plaintiff; and
- e) the plaintiff's injury resulted from a use of the product that was reasonably foreseeable by the defendant.

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<sup>336</sup> Sandmire at 1.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Torts Strict Liability *supra*.

<sup>341</sup> Torts Strict Liability *supra*.

<sup>342</sup> Torts Strict Liability *supra*.

<sup>343</sup> Torts Strict Liability *supra*.

- 2.1.3.11 The manufacturer or seller of a product is not liable for injuries or death caused by a defect in its design, which existed when the product left the possession of the manufacturer or seller if:<sup>344</sup>
- a) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and
  - b) the product is a common consumer product intended for personal consumption.
- 2.1.3.12 Sandmire argues that consumer expectations are recognized merely as a risk factor under this standard and do not play a determinative role in determining defectiveness.<sup>345</sup> Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm.<sup>346</sup> According to Sandmire it follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery, neither may conformance with consumer expectations serve as an independent basis for denying recovery.<sup>347</sup> One may therefore ask to what extent the consumer's expectations should be taken into account.
- 2.1.3.13 It is to be noted that section 3 of the Third Restatement also allows a *res ipsa loquitur* type of inference when a product is defective.<sup>348</sup> Proof of a specific construction or design defect or negligence is required.<sup>349</sup> This inference is allowed even when proof under Section 2 of a specific defect is possible.<sup>350</sup>

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<sup>344</sup> Ibid.

<sup>345</sup> Sandmire at 1 and 2.

<sup>346</sup> Sandmire at 2.

<sup>347</sup> Ibid. In particular, Section 6(c) of the Restatement (Third) Torts governs design defects for medical products. To establish liability under Section 6(c), a consumer must prove not only that a medical product cause her harm, but also that a reasonable health care provider would not have prescribed the product for any class of patients. In other words, if every user suffered harm, and no one derived benefit from a medical product, only then could a victim bring a successful claim for a design defect. This new standard reduces company liability and responsibility and increases both corporate profits and public harm. (Trompeter, "Sex, Drugs & The Restatement (Third) of Torts, Section 6(c): Why comment E is the Answer to the Women Question", Volume 48 5 June 1999 American University Law Review.at 1139).

<sup>348</sup> Botha and Joubert at 316.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

## 2.1.4 Case law in the U.S.

### 2.1.4.1 *Escola v Coca Cola*<sup>351</sup>

In 1944, Justice Traynor of the California Supreme Court wrote a concurring opinion that was twenty years ahead of his time.<sup>352</sup> In this case, the Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand.<sup>353</sup>

The Judge indicated that the manufacturer's negligence should no longer be singled out as the basis of a Plaintiff's right to recover in cases like the present one.<sup>354</sup> In his opinion, the Judge said that it should be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.<sup>355</sup>

The principle of absolute liability was confirmed in *MacPherson v Buick Motor Co.*,<sup>356</sup> *Sheward v Virtue*<sup>357</sup> and *Kalash v Los Angeles Ladder Co.*<sup>358</sup> In these cases, the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others.<sup>359</sup> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.<sup>360</sup>

It goes without saying that the manufacturer can anticipate some hazards and guard against the recurrence of others, whereas the public is not in

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<sup>351</sup> 24 Cal. 2d 436 1944.

<sup>352</sup> Standler at 15.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas.1916C, 440.

<sup>357</sup> 20 Cal. 2d 410, 126 P.2d 345.

<sup>358</sup> 1 Cal.2d 229, 34 P.2d 481.

<sup>359</sup> Ibid.

<sup>360</sup> Standler at 15 and 16.



such position.<sup>361</sup> Those who suffer injury from defective products are usually unprepared to meet its consequences.<sup>362</sup>

It is in the public interest to discourage the marketing of products having defects that are a menace to the public.<sup>363</sup> If such products nevertheless find their way into the market it is in the public interest to place the responsibility upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.<sup>364</sup>

#### 2.1.4.2 *Greenman v Yuba Power Products*<sup>365</sup>

In January 1963, Justice Traynor again wrote the opinion for a unanimous California Supreme Court, in a case where serious injuries had been inflicted by a Shopsmith.<sup>366</sup> The Court held that a manufacturer is strictly liable in tort when an article he places on the market, knowing that is to be used without inspection for defects, proves to have a defect that causes injury to a consumer.<sup>367</sup>

In this case, the Plaintiff was able to prove an express warranty only because he read and relied on the representation of the Shopsmith's ruggedness contained in the manufacturer's brochure.<sup>368</sup> The Court stated that, in the circumstances, it should not be the controlling factor whether the Plaintiff selected the machine because of the statements in the brochure, or due to the machine's own appearance, or because the consumer merely assumed that it would safely do the jobs it was built to do.<sup>369</sup> To establish the manufacturer's liability, it was sufficient that the Plaintiff proved that he was injured while using the Shopsmith in any way it was intended to be used as a result of a defect in design and

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<sup>361</sup> Standler at 16.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

<sup>365</sup> 59 Cal. 2d 377 1963.

<sup>366</sup> A 'Shopsmith' is a combination power tool that can be used as a saw, drill and wood lathe.

<sup>367</sup> Standler at 18.

<sup>368</sup> Standler at 19.

<sup>369</sup> Ibid.

manufacture of which the Plaintiff was not aware that made the Shopsmith unsafe for its intended use.<sup>370</sup>

#### 2.1.4.3 *Dippel v Sciano*<sup>371</sup>

In 1964, a large coin-operated pool table collapsed, injuring the Plaintiff's foot.<sup>372</sup> The Defendants owned a tavern that included the pool table.<sup>373</sup> The Court confirmed that the majority of jurisdictions in the United States no longer adhere to the concept of no liability without privity of contract.<sup>374</sup> The reason, which has been reiterated most often, is that the seller is in the paramount position to distribute the cost of the risks created by the defective product he is selling.<sup>375</sup> The seller may either pass the cost on to the consumer *via* increased prices or he may protect himself by obtaining adequate insurance.<sup>376</sup>

In justification of making the seller pay for the risk, Standler remarks that the consumer or user has the right to rely on the apparent safety of the product and that it is the seller in the first instance who creates the risk by placing the defective product on the market.<sup>377</sup> A correlative consideration according to Standler is that the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer.<sup>378</sup>

## 2.2 The EU

### 2.2.1 Introduction

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<sup>370</sup> Ibid.

<sup>371</sup> 37 Wisc. 2d 443 1967.

<sup>372</sup> Standler at 22.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

- 2.2.1.1 Product liability in the EU is dealt with in the EU Directive 85/374 on Product Liability.<sup>379</sup> The core of the Directive is found in Article 1, which declares that “The producer shall be liable for damage caused by a defect in his product.”<sup>380</sup> By virtue of article 2, those products covered by the Directive comprise all movables even if incorporated into another movable or into an immovable.
- 2.2.1.2 Directive 85/374 was amended by Directive 1999/34 which addressed only the issue of how to define a product and was essentially issued to bring agricultural products within the scope of the Directive.<sup>381</sup>
- 2.2.1.3 The liability of a ‘producer’ covers the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part.<sup>382</sup> It also extends to persons presenting themselves as producers, by for example, affixing their names or trade mark to the item such as a supermarket which chooses to supply its own brand name to a product.<sup>383</sup> An importer of a product into the Community is also brought within the scope of liability as a producer by Article 3(2).<sup>384</sup>
- 2.2.1.4 A supplier may incur liability for the supply of a defective product although under Article 3(3) the supplier is able to escape liability by identifying the producer or his or her own supplier.<sup>385</sup> This has the effect that suppliers must keep record of the persons that they supply.<sup>386</sup> From the perspective of the consumer, this system ensures that a claim for compensation cannot be defeated by an initial inability to identify the initial producer, provided a supplier can be identified.<sup>387</sup>

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<sup>379</sup> The Directive imposes an obligation on member states to harmonise their national legislation with the provisions of the Directive.

<sup>380</sup> Weatherill *EU Consumer Law and Policy* (2005) 137 ( hereinafter Weatherill). Weatherill remarks that Article 1 is a ‘dramatically strong pro-consumer statement of risk allocation.’

<sup>381</sup> *Ibid.*

<sup>382</sup> Weatherill at 138.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.* Weatherill indicates that without taking the commercially prudent step of keeping such records the buck will stop at the initial supplier.

<sup>387</sup> *Ibid.*

- 2.2.1.5 Article 7 provides that a producer is not liable as a result of the Directive where it is proved that “the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business”.
- 2.2.1.6 Defectiveness is a condition for liability in terms of section 1 of the Directive. The notion of defectiveness is expanded upon by Article 6 which provides that a product is defective where it does not provide the safety *which a person is entitled to expect* (my emphasis). With regards to the consumer’s expectation, a non-exhaustive list is supplied in Article 6(1) and includes the following:
- 2.2.1.6.1 the presentation of the product;
  - 2.2.1.6.2 the use to which it could reasonably be expected the product would be put; and
  - 2.2.1.6.3 the time when the product was put into circulation.
- 2.2.1.7 Article 6(2) further provides that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation. Weatherill indicates that Article 6(2)’s insistence that a product is not to be considered defective solely because a better product is subsequently put into circulation demonstrates that the product must achieve a relative level of safety, not an absolute level.<sup>388</sup> According to him the fundamental issue arising under Article 6 of the Directive is that it ensures that the focus is on the condition of the product whereas by contrast a fault-based system looks at the conduct of the supplier.<sup>389</sup>
- 2.2.1.8 During the design and planning process, the manufacturer has to choose a material and method of construction that ensures safety, according to available scientific and technological knowledge.<sup>390</sup> If the danger posed

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<sup>388</sup> Weatherill 139.

<sup>389</sup> Ibid.

<sup>390</sup> Schuster “Main Structures of Product Liability in German and Criminal Law” *Stell LR* (2009) at 431(hereinafter Schuster).

by the product was unforeseeable, there is no liability.<sup>391</sup> A product has to be regarded as defective if it could have had another design which a reasonable manufacturer would have chosen in order to protect the user against an unreasonable risk.<sup>392</sup> In general, the product has to be of a composition that ensures the safety of the average consumer.<sup>393</sup>

2.2.1.9 The question of how safe a product has to be also depends on the conclusion drawn by a reasonable manufacturer after weighing the risks for the user and the costs of a safe item.<sup>394</sup> A product is defective in construction if the design is adequate, but there is an unplanned divergence from the requisite composition of the product during the manufacturing process which is not discovered and the product is subsequently put into circulation.<sup>395</sup> The producer has to create security and control facilities according to the existing scientific and technical standards to avoid the distribution of a defective product.<sup>396</sup> The producer has a continuing duty to observe the product after it has come into circulation.<sup>397</sup> This is to ensure that a warning may be given against dangers which were not foreseeable at the time of the manufacturing process.<sup>398</sup>

2.2.1.10 Loubser and Reid state that commentators on the European Directive have pointed out that the language of strict liability which it contains is not followed through, particularly in respect of design and warning or instruction defects.<sup>399</sup>

2.2.1.11 As indicated, Article 6 also contains an expectations test which requires the reasonable expectation of the consumer to be assessed in the light of the “use to which it could reasonably be expected that the product would

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<sup>391</sup> Schuster at 431.

<sup>392</sup> Ibid.

<sup>393</sup> Ibid.

<sup>394</sup> Schuster at 432.

<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

<sup>398</sup> Schuster at 433.

<sup>399</sup> Loubser and Reid at 426.

be put”.<sup>400</sup> Loubser and Reid submit that these phrases seem to indicate a negligence standard based upon the reasonableness of the manufacturer’s design or warning choices.<sup>401</sup> The phrases may be based upon the rationale that a finding of defectiveness in design may force the manufacturer to change the product design or even to stop supplying the product.<sup>402</sup> Loubser and Reid further remark that the emphasis on what the consumer is entitled to expect, as opposed to the actual consumer expectations, draws the courts back to a standard of reasonableness and the extent to which the conduct of the producer meets the reasonable expectations is often considered relevant.<sup>403</sup>

2.2.1.12 Moreover, Article 6(c) expressly provides that “the time when the product was put into circulation” is a consideration in assessing whether it is defective, thus permitting producers to escape liability by arguing that they have conformed to industry standard practice at the time, in other words that they were not negligent.<sup>404</sup>

2.2.1.13 In addition, the European Directive allows member States the option of excluding the so-called “development risks” defence, so that the producer is liable “even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.”<sup>405</sup>

## 2.2.2 Case law in the European Community

### 2.2.2.1 *Richardson v LRC Products Limited*<sup>406</sup>

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<sup>400</sup> Ibid. The presentation of the product is a further consideration, and this is expanded in Section 3(2)(a) of the UK Consumer Protection Act as follows:

“the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product.”

<sup>401</sup> Loubser and Reid at 426.

<sup>402</sup> Loubser and Reid at 426 and 427.

<sup>403</sup> Loubser and Reid at 427.

<sup>404</sup> Ibid.

<sup>405</sup> Ibid.

<sup>406</sup> [2000] Lloyd's Rep. Med. 280.

In this case, a female claimant brought an action for damages for personal injury suffered when a condom manufactured by the defendant failed and she became pregnant.<sup>407</sup> The claimant argued that the condom was defective, as it had been weakened due to damage by ozone while at the defendant's factory.<sup>408</sup> The defendant agreed that ozone damage had occurred, but contended that it must have occurred after the product had been used by the claimant, when it had been left in a cupboard pending the claimant's complaint.<sup>409</sup>

The court explained that the user's expectation was that the condom would not fail, taking into account the safety that persons generally were entitled to expect in all circumstances.<sup>410</sup> It held that the claimant had failed to prove that the condom was defective under the act.<sup>411</sup> The court reached its decision after listening to the evidence of both parties' experts on rubber and the evidence regarding the defendant's manufacturing process.<sup>412</sup> It preferred the evidence of the defendant's expert and therefore concluded that the ozone damage had occurred after the condom had split during sexual intercourse.<sup>413</sup> Moreover, the court held that it was impossible to be certain why the condom had split, as scientific research showed that condoms occasionally burst for no readily discernible reason.<sup>414</sup>

#### 2.2.2.2 *A v National Blood Authority*<sup>415</sup>

In its 82-page judgment in this case, the court gave the most comprehensive consideration in a UK court of the test of a 'defect' under the act and the EU Product Liability Safety Directive (85/374/EEC).<sup>416</sup>

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<sup>407</sup>"Product liability – United Kingdom: Case law lessons on defective products and the development risks defence" 18/02/2010, retrieved from <http://www.internationallawoffice.com> – (hereinafter Case law lessons )

<sup>408</sup> Case law lessons *supra*.

<sup>409</sup> Case law lessons *supra*.

<sup>410</sup> Case law lessons *supra*.

<sup>411</sup> Case law lessons *supra*.

<sup>412</sup> Case law lessons *supra*.

<sup>413</sup> Case law lessons *supra*.

<sup>414</sup> Case law lessons *supra*.

<sup>415</sup> [2001] 3 ALL ER 289.

<sup>416</sup> Case law lessons *supra*.

A total of 117 claimants brought an action for damages under the act arising from their infection with hepatitis C as a result of blood transfusions received after March 1988 (ie, after the act came into operation).<sup>417</sup> The claimants argued that they were entitled to recover damages from the National Blood Authority (hereinafter the Authority) under the act, irrespective of fault on the Authority's part.<sup>418</sup> The claimants' case was based solely on the fact that they had been supplied with infected blood between 1988 to 1991, when it was generally known that blood could be infected with the virus.<sup>419</sup> They claimed that the infected blood was a 'defective product' within the meaning of the act and that they were entitled to expect that they would be supplied with blood that was safe and free from infection.<sup>420</sup>

The Authority argued that as no test for the screening of hepatitis C existed until April 1991, the virus's presence in blood could not have been detected before then.<sup>421</sup>

The court found in favour of the claimants and its judgment has been regarded by many commentators as extremely harsh.<sup>422</sup>

The Authority argued that blood is a natural product which carries an inherent risk of viral infection, and that the medical profession knew of the risk which, for at least part of the period, could not have been avoided.<sup>423</sup> The definition of 'defect' under the directive was fundamental to the outcome.<sup>424</sup> The court referred to the wording of the directive, rather than the act, as it was accepted that insofar as the wordings of the legislation may conflict, the UK courts are obliged to give effect to the Directive.<sup>425</sup>

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<sup>417</sup> Case law lessons *supra*.

<sup>418</sup> Case law lessons *supra*.

<sup>419</sup> Case law lessons *supra*.

<sup>420</sup> Case law lessons *supra*.

<sup>421</sup> Case law lessons *supra*.

<sup>422</sup> Case law lessons *supra*.

<sup>423</sup> Case law lessons *supra*.

<sup>424</sup> Case law lessons *supra*.

<sup>425</sup> Case law lessons *supra*.



The Authority maintained that the inclusion of the words 'all circumstances' obliged the judge to consider what could have been done to prevent the infection and therefore effectively to enquire into the reasonableness of the defendant's actions.<sup>426</sup> However, the court did not accept this approach.<sup>427</sup> It considered that the circumstances referred to in Article 6 of the directive did not include the issue of whether the producer could have avoided the defect or whether the medical profession was aware of the risk of hepatitis C infecting blood products.<sup>428</sup> Thus the court concluded that the blood products were defective within the meaning of Article 6 because the public at large was entitled to expect that blood given to them in transfusions was free from infection.<sup>429</sup>

### 2.2.2.3 *Abouzaid v Mothercare*<sup>430</sup>

The claimant in this case was injured while helping his mother to attach a fleece-lined sleeping bag to his younger brother's pushchair.<sup>431</sup> The product was purchased from one of the defendant's shops.<sup>432</sup> While the claimant was fastening the product to elasticated straps at the back of the pushchair, one of the straps slipped from his grasp and the buckle fastener hit him in the left eye.<sup>433</sup> As a consequence, the claimant almost entirely lost his sight in that eye.<sup>434</sup> The Court of Appeal held that although the case was "close to borderline", the product was defective within the meaning of Section 3.<sup>435</sup>

As part of its defence, Mothercare argued that:<sup>436</sup>

- a) the product had not been defective when supplied because there had been no previous instances of this type of injury and, in 1990,

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<sup>426</sup> Case law lessons *supra*.

<sup>427</sup> Case law lessons *supra*.

<sup>428</sup> Case law lessons *supra*.

<sup>429</sup> Case law lessons *supra*.

<sup>430</sup> December 21, 2000, [2000] EWCA Civ 348.

<sup>431</sup> Case law lessons *supra*.

<sup>432</sup> Case law lessons *supra*.

<sup>433</sup> Case law lessons *supra*.

<sup>434</sup> Case law lessons *supra*.

<sup>435</sup> Case law lessons *supra*.

<sup>436</sup> Case law lessons *supra*.

consumers could not reasonably have expected the product to be designed differently so as to avoid risk of such an injury;

- b) even if the product were defective, the defendant was entitled to use the development risks defence in Section 4(1)(e); and
- c) the claimant had acted carelessly in trying to attach the product and was therefore partly responsible for his own injury.

The expert engineer retained by the parties concluded that in 1990, when the product was manufactured, no manufacturer of childcare products could reasonably have recognized the potential risk of this type of accident, since the potential risk had not been recognized even by experts in childcare product safety.<sup>437</sup> However, he would have to advise a manufacturer of such a product that it would have a safety defect unless (i) the potential risk of injury were eliminated by design, or (ii) consumers were warned of the possible risks and how to avoid them.<sup>438</sup> The expert engineer said that such advice would have to include instructions on fitting the product that avoided the difficulties which the claimant and his mother were evidently having before the accident.<sup>439</sup>

The court found that it was the risk, which arose from the propensity of the elastic straps to spring back, that caused the product to be defective within the meaning of the act.<sup>440</sup> Furthermore, it held that Mothercare was not entitled to rely on the passage of time as a factor in deciding whether the product was defective.<sup>441</sup> As the expert considered that the product was defective in 1999 when the case was heard at first instance, the defect had also existed in 1990, when the product had been manufactured. It was found that the product was to be judged by the expectations of the public at large as determined by the court.<sup>442</sup>

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<sup>437</sup> Case law lessons *supra*.

<sup>438</sup> Case law lessons *supra*.

<sup>439</sup> Case law lessons *supra*.

<sup>440</sup> Case law lessons *supra*.

<sup>441</sup> Case law lessons *supra*.

<sup>442</sup> Case law lessons *supra*.

The court accepted the respondent's argument that public expectations had not altered between 1990 and 1999.<sup>443</sup> Elasticated products had been in use for many years and there was no suggestion of relevant technical advances that might reasonably affect public expectations.<sup>444</sup> The court therefore held that members of the public were entitled to expect better from Mothercare.<sup>445</sup> It commented that the vulnerability of the eye and the serious consequences that may follow from an eye injury from a blunt object were factors in such expectation.<sup>446</sup>

## 2.3 Republic of South Africa

2.3.1 In the previous chapter the provisions of the CPA relating to safe and good quality goods contained in section 55 and supplemented by the *ex lege* warranty in section 56 have been set out in detail. It was further indicated that in order to interpret these provisions one has to have regard to section 53 of the Act which defines the following concepts: 'defect', 'failure', 'hazard' and 'unsafe'. For purposes of this discussion it is necessary to repeat the definition of defect in order to fully comprehend what the Act contemplates when referring to defective products in the realm of product liability.

2.3.2 As indicated, section 53(1) of the CPA defines "defect" as follows:

2.3.2.1 "defect" means-

- (i) any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) any characteristic of the goods or components that renders the goods less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;"

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<sup>443</sup> Case law lessons *supra*.

<sup>444</sup> Case law lessons *supra*.

<sup>445</sup> Case law lessons *supra*.

<sup>446</sup> Case law lessons *supra*.

- 2.3.3 At first sight the CPA appears to introduce radical reforms which import a fundamental consumer right to fair value, good quality and safety.<sup>447</sup> The CPA redefines defects as material imperfections that render goods less acceptable and characteristics that render them less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.<sup>448</sup> The introduction of ‘failure’ as a legal term (the inability of goods to perform in the intended manner or with the intended effect), is followed by the abolition of the distinction between latent and patent for both product failure and defect.<sup>449</sup> Thus, whereas in common law liability for defective products are limited to latent defects, it appears that under the CPA liability is not restricted to latent defects only.
- 2.3.4 It is clear that the concept of defect for purposes of the CPA encompasses manufacturing defects in goods and that this includes defects in components.<sup>450</sup> However, as pointed out by Van Heerden, this definition makes no express mention of design defects and should be amplified to incorporate such defects.<sup>451</sup> It is further clear that ascertaining whether a defect exists in a specific product with regards to material imperfection in the manufacture of goods, components or performance of services or with regard to the usefulness of goods or services, entails the application of a so-called “expectations” test. This test is broadly worded and hinges on what “persons generally would be reasonably entitled to expect in the circumstances”.
- 2.3.5 Neither the CPA, nor international law as indicated above, provides the exact meaning of the “expectations” test. The application of this apparently vague test for defectiveness as prescribed in the various international legislation and the CPA presents obvious difficulties.<sup>452</sup>

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<sup>447</sup> Hawthorne at 444.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid.

<sup>450</sup> The Act does not provide a definition of components and it is thus submitted that ‘components’ should bear its ordinary grammatical meaning.

<sup>451</sup> Van Heerden Product Liability Notes at 4.

<sup>452</sup> Loubser and Reid at 424.

- 2.3.6 For instance, it may be asked whether consumers are entitled to expect more from suppliers than the exercise of reasonable care, skill and knowledge.<sup>453</sup> Loubser and Reid remark that the test purports to be an objective, normative standard for determining defectiveness, but in practice the courts conduct an objective enquiry in the attributes, risks and benefits of a product, and, inevitably, the application of the consumer expectations test in the final analysis involves a value judgment.<sup>454</sup> They submit that perhaps the most important criticism of the consumer expectations test is the impossibility of the task it requires, namely, to define just what an ordinary consumer expects of the technical design characteristics of a product.<sup>455</sup>
- 2.3.7 While it can be assumed that consumers expect a certain level of safety, how is the level defined when it comes to specific design criteria?<sup>456</sup> For example, if the ordinary consumer can be said reasonably to expect a product to be “strong”, how strong is strong?<sup>457</sup> Is a general impression of strength or quality sufficient when it comes to technical design features?<sup>458</sup> If so, how is that impression measurable against the actual condition of the design feature in question?<sup>459</sup>
- 2.3.8 Loubser and Reid indicate that these questions led many foreign courts to reject the consumer expectations test as the sole test for defective design.<sup>460</sup>
- 2.3.9 Stapleton is, similarly, critical of the consumer expectations test as a normative standard, describing it as “impenetrable to analysis”.<sup>461</sup> He remarks that it could surely not mean that the courts must somehow

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<sup>453</sup>Loubser and Reid at 424 and 425.

<sup>454</sup>Loubser and Reid at 425.

<sup>455</sup>*Ibid.*

<sup>456</sup>*Ibid.*

<sup>457</sup>*Ibid.*

<sup>458</sup>*Ibid.*

<sup>459</sup>*Ibid.*

<sup>460</sup>Loubser and Reid at 425.

<sup>461</sup>Loubser and Reid at 425 and 426.

determine the actual expectations of consumers generally.<sup>462</sup> According to him this would be a strange legal standard to adopt.<sup>463</sup>

2.3.10 Loubser and Reid further remark people generally miscalculate risks and sometimes people have an irrational expectation that nothing will or can go wrong.<sup>464</sup> In their opinion legal norm cannot coherently or fairly be based on such a volatile standard.<sup>465</sup> They argue that if it is accepted that the consumer expectations test means that the courts should determine what consumers are entitled to expect, the test is still unsatisfactory, because, as a normative concept, it cannot be rationalised.<sup>466</sup> One may simply assert that in one's opinion the design did not meet consumer expectations.<sup>467</sup> Ultimately they submit that the general reasonableness or cost-benefit-risk-utility analysis still requires a value judgment, but there should be a structured methodology for arriving at such a judgment.<sup>468</sup>

2.3.11 As Stapleton points out, the consumer expectation test in effect requires a subjective value judgment by the court on what consumers are reasonably entitled to expect of a product.<sup>469</sup> The risk-utility test, on the other hand, requires a balancing of certain "objective" factors, although in the end it comes down to the identical value judgment: did the product present an unreasonable risk to consumers?<sup>470</sup> In light of the aforesaid, Loubser and Reid suggest that the linking of defectiveness and wrongfulness on the basis of a general criterion of reasonableness will promote clarity, predictability and coherence in product liability bases.<sup>471</sup> Such approach will according to them, no doubt, remove all subjectivity from the assessment of defectiveness and wrongfulness.<sup>472</sup>

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<sup>462</sup>Loubser and Reid at 426.

<sup>463</sup>Ibid.

<sup>464</sup>Ibid.

<sup>465</sup>Ibid.

<sup>466</sup>Ibid.

<sup>467</sup>Ibid.

<sup>468</sup>Loubser and Reid at 430.

<sup>469</sup>Loubser and Reid at 426.

<sup>470</sup>Ibid.

<sup>471</sup>Loubser and Reid at 430.

<sup>472</sup>Loubser and Reid at 430. In this regard they refer to Stapleton who has pointed out, in the application of many a legal standard, reasonable minds can differ and the difference cannot always be analysed definitively.

2.3.12 Prosser & Keeton<sup>473</sup> are also critical of the consumer expectations test as an independent general standard for defectiveness:<sup>474</sup>

“The meaning is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense he does not “expect” to be adversely affected by a risk or hazard unknown to him. In another sense he does contemplate the “possibility” of unknown “side effects”. In a sense the ordinary purchasers cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury.”

2.3.13 It is consequently submitted, as Van Heerden suggests, that the vagueness of the consumer expectations test in the realm of product liability may be alleviated by the express provision in the CPA for a *res ipsa* inference in a similar fashion as the provision contained in section 3 of the US Restatement (Third) of Torts.<sup>475</sup>

2.3.14 Some of the other controversial questions that need to be answered in the context of product liability as a result of harm caused by product containing a defect are the following:<sup>476</sup>

2.3.14.1 Is there room for a “risk/benefit” analysis when considering the level of safety which a person is entitled to expect?

2.3.14.2 Is the conduct of the producer a relevant factor?

2.3.14.3 Where the safety of a product is closely regulated, and the producer complies with all relevant regulations, in what circumstances, if any, can the producer be held to a higher standard of safety for the purposes of liability?

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<sup>473</sup> Standler referred to *The Law of Torts* 5<sup>th</sup> edition (1984) 699.

<sup>474</sup> Loubser and Reid at 425.

<sup>475</sup> Van Heerden Product Liability Notes at 4.

<sup>476</sup> Lovells at vi.

- 2.3.14.4 Is it enough for a consumer to simply prove that the product failed, thereby causing injury, or does the consumer in addition have to prove the cause of the failure?
- 2.3.15 Loubser and Reid remark that there is a logical and necessary linkage between the standard for determining defectiveness of a product and the requirement of wrongfulness in the South African law of delict.<sup>477</sup> In the absence of such a linkage, there is no clear distinction between a foresight and a hindsight approach to establishing defectiveness.<sup>478</sup> In addition, a standard based on what persons generally are entitled to expect may well re-introduce elements of negligence, contrary to the aim of the CPA.<sup>479</sup>
- 2.3.16 It can be agreed with Loubser and Reid that the definition of “defect should be amended to move away from the “consumer expectations” test for defectiveness and to provide instead for the assessment of defectiveness and wrongfulness in terms of a general standard of reasonableness, assessed with hindsight.<sup>480</sup> According to the aforementioned authors, specific reference to a hindsight approach will make it clear that producers, distributors and suppliers cannot evade liability on the ground that the defect was not reasonably foreseeable at the time of manufacture or supply.<sup>481</sup>
- 2.3.17 Loubser and Reid submit that there should be strict liability for the wrongful causing of harm by a defective product, with the provision for a non-exclusive list of factors that could be taken into account by the courts in assessing defectiveness and wrongfulness, such as:<sup>482</sup>
- 2.3.17.1 the standard intended for the product by the producer;
  - 2.3.17.2 standards or duties prescribed by legislation for the product;
  - 2.3.17.3 the possible prevention of the harmful effect of the product by alternative manufacturing process or design;

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<sup>477</sup> Loubser and Reid at 428.

<sup>478</sup> Ibid.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

<sup>481</sup> Ibid.

<sup>482</sup> Loubser and Reid at 428 and 429.



- 2.3.17.4 the risk, benefit, utility and cost of the product;
- 2.3.17.5 the manner in which, and purposes for which, the product has been marketed, its get-up,
- 2.3.17.6 the use of any mark in relation to the product and
- 2.3.17.7 any instructions for, or warnings with respect to doing or refraining from doing anything with or in relation to the product;
- 2.3.17.8 what might reasonably be expected to be done with or in relation to the product ; and
- 2.3.17.9 the time when the product was manufactured or supplied.
- 2.3.18 Broadly stated, the authors indicate that the assessment of defectiveness and wrongfulness in terms of the factors listed above amounts to a cost-benefit-risk-utility analysis, with a hindsight perspective, to establish whether the product itself was unreasonably dangerous or the instructions or warnings accompanying the product were unreasonably deficient.<sup>483</sup>
- 2.3.19 They argue that this approach would be consistent with the current methodology of South African Courts in assessing wrongfulness.<sup>484</sup> The respective weight to be attached to the various listed factors in assessing defectiveness and wrongfulness will be in the discretion of the court.<sup>485</sup>
- 2.3.20 The adoption of a standard for determining defectiveness is not disputed.<sup>486</sup> In their opinion, however, there should be no rigid distinction between manufacturing, design and warning defects.<sup>487</sup> The categorisation of defects would introduce uncertainty, because the categories will inevitably overlap.<sup>488</sup>

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<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid.

<sup>488</sup> Loubser and Reid *supra* p 429. They concede that in practice, however, different approaches are likely to be adopted to the type of the alleged defect at issue as was the US experience under the Restatement (Second) Torts.

- 2.3.21 In respect of manufacturing defects, their view is that the intended design and the operation of other products of the same type is likely to carry the most weight, whereas in relation to alleged design or warning defects, a cost-benefit-risk-utility approach to assessing the design or warning is likely to be followed.<sup>489</sup>
- 2.3.22 How the South African courts will interpret the meaning of defect is still a question that remains unanswered, and only when the first number of product liability cases under the CPA serves before the courts will one get a clearer indication of how this problematic aspect, which is at the core of product liability, be addressed.

### 3 DUTY TO WARN

In the context of the primary duty of the supply chain to prevent product liability claims, proper instructions regarding how to use the product, as well as warnings regarding risks associated with the product, play a very crucial role. Whilst it is clear that instructions should be complete, legible and comprehensive (thus implying the use of plain and understandable language) and that these criteria should also apply to warnings, one may ask whether it is always necessary that a product, in addition to instructions regarding the use thereof, be accompanied by a warning. To put it simply – what are the parameters of the duty to warn in the context of product liability? With reference to which type of consumer is this duty benchmarked?

#### 3.1 United States of America

- 3.1.1 Under section 402A of the Restatement (Second) of Torts, in order to prevent the product from being unreasonably dangerous, the seller could be required to give directions or warnings, on the package of the product, as to its use.<sup>490</sup> However, a seller was not required to warn with respect to products or ingredients in them, which were only dangerous or potentially dangerous, when consumed in excessive quantity, or over a long period of

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<sup>489</sup>Loubser and Reid at 429.

<sup>490</sup>Par j of commentary on s402A.

time, when the danger or potential danger, was generally known and recognised.<sup>491</sup> Where a warning was given, the seller was entitled to reasonably assume that it would be read and heeded.<sup>492</sup> Thus, a product bearing such a warning, which was safe for use if the warning was followed, was not in a defective condition and was also not unreasonably dangerous.<sup>493</sup>

3.1.2 In the United States of America, the manufacturer has a duty to warn about known dangers.<sup>494</sup> The consumer benefits from the manufacturer's duty to warn, which guarantees that the product warning provides the ordinary consumer with the material information required for informed safety decisions.<sup>495</sup> Once the information already held by the ordinary consumer is supplemented with the information provided by the product warning, the consumer is presumably able to make an informed safety choice.<sup>496</sup>

3.1.3 The question of whether the danger of a product is obvious is not whether the consumer actually foresaw the potential danger, but whether the danger was sufficiently evident that a reasonable consumer would have foreseen it.<sup>497</sup> The question that follows is whether a supplier should inform the consumer of a risk if the reasonable consumer would have had knowledge of same?

3.1.4 Blum points out that a product *supplier cannot be held liable for failure to warn of dangers that are of common knowledge to the public*<sup>498</sup>(my emphasis). It is, for example, common knowledge that a knife may slip and cut a consumer's finger open whilst peeling or chopping vegetables.<sup>499</sup> The limitation on the duty to warn is thus based on the rationale that no recovery

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<sup>491</sup> Ibid.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> Geistfeld at 312.

<sup>495</sup> Ibid.

<sup>496</sup> Ibid.

<sup>497</sup> Theresa Ludwig Kruk JD *supra* p21 & 22.??

<sup>498</sup> George Blum, JD & others, "American Jurisprudence, Second Edition, Database updated", August 2011 at 1 (hereinafter George Blum).

<sup>499</sup> George Blum at 1.

right exists when the party to be warned is already aware of the danger.<sup>500</sup> Thus warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety.<sup>501</sup> When reasonable minds differ as to whether the risk was obvious or generally known, the issue is to be decided based on the facts.<sup>502</sup>

3.1.5 A manufacturer's duty to warn of a product's danger is determined by an objective analysis, namely the awareness of an ordinary person.<sup>503</sup> The necessity of a warning by a manufacturer accordingly depends in part upon the knowledge of the ordinary user who purchases it, and in part upon the ordinary knowledge common of the community as to the characteristic of the product.<sup>504</sup> Manufacturers should therefore acquire in-depth knowledge of their target markets prior to placing their products on store shelves.<sup>505</sup>

3.1.6 The most problematic aspect of this form of liability relates to the cost of disclosure.<sup>506</sup> In "failure-to-warn" cases, the issue is always whether the defendant ought to have supplied consumers with more or better information about product risks.<sup>507</sup> In *Anderson v Hedstrom Corporation*<sup>508</sup> the court stated that the "minimal" cost of product warnings usually weighs in favour of an obligation to warn.<sup>509</sup> That the costs of warnings on products are 'minimal' is not a view necessarily shared by the supply chain, unless of course it is compared to the potential cost of a product liability suit.<sup>510</sup>

3.1.7 Notwithstanding the aforesaid cost implications, some authors are of the opinion that this liability rule gives product sellers an incentive to over-warn.<sup>511</sup> Geistfeld remarks in this regard that a liability rule that induces

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<sup>500</sup> Ibid.

<sup>501</sup> Ibid.

<sup>502</sup> Ibid.

<sup>503</sup> George Blum at 2.

<sup>504</sup> Ibid.

<sup>505</sup> Ibid.

<sup>506</sup> Geistfeld at 313.

<sup>507</sup> Ibid.

<sup>508</sup> 1999, p440.

<sup>509</sup> Geistfeld at 313.

<sup>510</sup> Ibid.

<sup>511</sup> Ibid.

disclosure of too much information is self-defeating.<sup>512</sup> He points out that empirical studies have found that the amount and format of hazard information contained in a product warning affects consumers' ability to recall the information.<sup>513</sup>

3.1.8 Examples of cases where no duty to warn existed and which are instructive to this discussion, are:

3.1.8.1 *Hanus v Texas Utility Co*<sup>514</sup>: In this case the owner's widow could not recover under negligence or strict liability for the owner's death after coming into contact with power lines while digging in the backyard.<sup>515</sup>

3.1.8.2 *Entrekin v Atlantic Richfield Co*<sup>516</sup>: In this case the defendant manufacturer of a Jet-Lube lubricant failed to instruct the plaintiff that the lubricant could be applied to machinery by placing the unopened plastic packet directly into the machinery, and that the plastic packet would not harm the machine's gears.<sup>517</sup> The court held that failure to provide such instructions did not give rise to liability, since the plaintiff was aware of alternative methods of applying the lubricant that would not have required him to come into direct contact with the exposed gears of the machine.<sup>518</sup>

3.1.8.3 *Lucas v City of Visalia*<sup>519</sup>: In this case the court held that a manufacturer is also under no duty to warn against obvious or generally known and recognised dangers under California strict liability.<sup>520</sup>

## 3.2 The EU

3.2.1 Alberto Cavaliere considers the duty to warn as an important factor in product liability and states that public programs of hazard warning may be useful in this respect.<sup>521</sup> He remarks that there are however very problematic

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<sup>512</sup> Ibid.

<sup>513</sup> Ibid.

<sup>514</sup> 71 S.W. 3d 874 (Tex. App. Fort Worth 2002).

<sup>515</sup> George Blum at 2.

<sup>516</sup> 1987 Ala, 519 So 2d 447, CCH Prod Liab Rep, 11704.

<sup>517</sup> Kruk at 22.

<sup>518</sup> Ibid.

<sup>519</sup> 726 F. Supp. 2d 1149 (E.D. Cal. 2010).

<sup>520</sup> Kruk at 22.

<sup>521</sup> Cavaliere at 18.

issues that are connected to this feature of product liability.<sup>522</sup> Some manufacturers will put unsafe products into circulation until a serious accident is publicised by media and sales collapse.<sup>523</sup> Other manufacturers may be unaware of the fact that the product may be dangerous and discover product defects after the product is already on the market.<sup>524</sup> Moreover, consumers can overreact to information about product risks and discourage firms to reveal any information at all.<sup>525</sup> He however points out that the definition of defect in the European Directive extends to the “presentation of the product”.<sup>526</sup> It could therefore be argued that the product is defective if it does not provide adequate instructions and warnings that a person is entitled to expect.<sup>527</sup> Ross is of the view that the duty to warn and instruct in the European Union is significant, and even more difficult than in the US.<sup>528</sup>

3.2.2 It is to be noted that the 1985 European Product Liability Directive is silent in relation to the supply chain’s duty to warn. In 2006, some stakeholders suggested that the “strict liability” standard under the European Directive was inappropriate for dealing with liability arising through design defects or injuries attributed to “informational defects” such as failure to warn.<sup>529</sup> At that stage, however, the Commission did not consider it necessary to submit any proposal for the Directive’s amendment.<sup>530</sup>

3.2.3 It was however subsequently recognised that in order to ensure a high level of consumer protection against harm caused by defective products, and due thereto that it is difficult to adopt Community legislation for every product which exists or may be developed, there is a need for a broad-based, legislative framework of a horizontal nature to deal with such products

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<sup>522</sup> Ibid.

<sup>523</sup> Ibid.

<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

<sup>526</sup> Kenneth Ross, “Post-Sale Duty to Warn” A report on the products liability committee, American Bar Association Section of Litigation 2005.

<sup>527</sup> Ibid.

<sup>528</sup> Ibid.

<sup>529</sup> Commission of the European Union, “Third Report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC of 25 July 1985, amended by the directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999)” 2006 at 11 (hereinafter Third Report).

<sup>530</sup> Third Report at 11.

complementing provisions in existing or forthcoming legislation.<sup>531</sup> It was therefore regarded necessary to establish at Community level a general safety requirement for any product placed on the market, or otherwise supplied or made available to consumers, intended for consumers, or likely to be used by consumers under reasonably foreseeable conditions *even if not intended for them* (my emphasis).<sup>532</sup>

3.2.4 To give effect to the above, Directive 2001/95/EC on General Product Safety was issued. The purpose of this Directive is to ensure that products placed on the EU market are safe.<sup>533</sup> To this effect, article 3(1) of the Directive obliges producers to place only safe products on the market. For purposes of the Directive, a product shall be deemed safe, as far as the aspects covered by relevant national legislation are concerned when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the member State in whose territory the product is marketed.<sup>534</sup> A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the European Commission in the Official Journal of the European Communities in accordance with Article 4.<sup>535</sup>

3.2.5 In circumstances other than those referred to in paragraph 2 of the European Directive, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist:

- a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2;
- b) the standards drawn up in the Member State in which the product is marketed;

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<sup>531</sup> Par 4 and 5 Directive 2001/95/EC of the European Parliament and of the council of 3 December 2001 on General Product Safety (hereinafter 2003 Product Safety Directive).

<sup>532</sup> Par 6 of the 2001 Product Safety Directive.

<sup>533</sup> Article 1 of the 2001 Product Safety Directive.

<sup>534</sup> Article 3(1).

<sup>535</sup> Article 3(2). It is provided that the member states are obliged to publish the references of such standard.

- c) Commission recommendations setting guidelines on safety assessment;
- d) Product safety codes of good practice in force in the sector concerned;
- e) the state of art and technology; and
- f) reasonable consumer expectations concerning safety.

3.2.6 In the context of warnings, Article 5 provides that within the limits of their respective activities, producers shall provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks.<sup>536</sup> It is further expressly provided that the presence of warnings does not exempt any person from compliance with the other requirements laid down in this Directive.<sup>537</sup>

3.2.7 Within the limits of their respective activities, producers are obliged to adopt measures commensurate with the characteristics of the products which they supply, enabling them to be informed of the risks which these products might pose and choose to take appropriate action including, if necessary to avoid these risks, withdrawal from the market adequately and effectively warning consumers or recall from consumers.

### 3.3 Republic of South Africa

3.3.1 The CPA in section 61(1)(c) makes it clear that the supply chain has a duty to warn, as inadequate warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods can give rise to a product liability claim in terms of the Act. In this context, it is to be noted as indicated in Chapter 2 hereof, that for purposes of the CPA, 'hazard' means a characteristic that has been identified as or declared to be a hazard in terms of any other law or presents a significant risk or personal injury to any person or damage to property, when the goods are utilised.<sup>538</sup> Section 58(1)

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<sup>536</sup> Article 5.1.

<sup>537</sup> Ibid.

<sup>538</sup> S53( c)(i) and (ii).



of the CPA provides that the supplier of any activity or facility that is subject to:

- a) any risk of unusual character or nature;
- b) risk of which the consumer could not reasonably be expected to be aware, or which an ordinary alert consumer could not reasonably be expected to contemplated; or
- c) risk that would result in serious injury or death,

must specifically draw same to the attention of consumers in a form that meets the standards set out in section 49.

3.3.2 Section 49 of the CPA deals with notice required for certain terms and conditions and provides that any notice to consumers or provision of a consumer agreement must be drawn to the attention of the consumer if it purports to:

- a) limit in any way the risk or liability of the supplier or any other person;
- b) constitute an assumption of risk or liability by the consumer;
- c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- d) be an acknowledgement of any fact by the consumer.

3.3.3 In addition to subsection 49(1) of the CPA, section 49(2) provides that if a provision or notice concerns any activity or facility that is subject to any risk of an unusual character of nature, the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinary alert consumer could not reasonably be expected to notice or contemplate in the circumstances, or that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of sections 49(3) to (5). It is further required that the consumer must have assented to that provision or notice by signing or initialling the

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provisions or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.<sup>539</sup>

3.3.4 In terms of section 49(3) a provision, condition or notice contemplated in section 49(1) or (2) must be written in plain language as described in section 22. It is submitted that section 22 of the CPA, that will be discussed hereinafter, is central to the question whether proper instructions and proper warnings have been given in respect of a product.

3.3.5 In terms of section 49(4), the fact, nature and effect of the provision or notice must be drawn to the attention of the consumer in a conspicuous manner that is likely to attract the attention of an ordinarily alert consumer; and before the earlier of the time at which the consumer enters into the transaction or agreement, begins to engage in the activity or enters or gains access to the facility, or is required or expected to offer consideration for the transaction or agreement.

3.3.6 Section 58 further provides that a person who packages any hazardous or unsafe goods for supply to consumers, must display on or within that packaging a notice that meets the requirements of section 22, and any other applicable standards, providing the consumer with adequate instructions for the safe handling and use of those goods.<sup>540</sup> A person who installs any hazardous or unsafe goods contemplated in section 58(2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must further give the consumer the original copy of any document required in terms of section 58(2) or any similar document applied to those goods in terms of another public regulation.<sup>541</sup>

3.3.7 Section 22 of the CPA is also relevant in the context of warnings as it embodies the right to information in plain and understandable language. It

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<sup>539</sup> S 49(2).

<sup>540</sup> S 58(2). This subsection does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation.

<sup>541</sup> S 58(4)(a) and (b).

provides that the producer of a notice, document or visual representation that is required, in terms of the CPA or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation; or in plain language, if no form has been prescribed for that notice, document or visual representation.<sup>542</sup> For the purposes of the CPA, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.<sup>543</sup>

3.3.8 The Act further provides in section 22(3) that the Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1) (b).<sup>544</sup> To date however no guidelines for methods to assess whether a notice, document or visual representation satisfies the requirements of section 22(1)(b) have been published.

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<sup>542</sup> S22(1)(a) and (b).

<sup>543</sup> S22(2)(a) to (d).

<sup>544</sup> In terms of s22(4), guidelines published in terms of subsection (3), may be published for public comment.

- 3.3.9 Section 24(2) of the CPA furthermore indicates that a person must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in the trade description.<sup>545</sup> In line with the CPA, there is also other national legislation that governs labelling of specific products. For example, section 13 of the Amendment Bill to the Tobacco Product Control Act,<sup>546</sup> provides that “[n]o person shall package or label a tobacco product in any way that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions, including any term, descriptor, trademark, figurative or other sign that directly or indirectly creates that impressions that a particular tobacco product is less harmful than another tobacco product, and this includes, *inter alia*, terms such as “low tar”, “light”, “ultra-light”, or “mild.”
- 3.3.10 There are also various labelling regulations in South Africa that may serve as valuable guidelines for manufacturers. On 1 March 2010, the Minister of Health published label regulations to the Foodstuffs, Cosmetics and Disinfectants Act.<sup>547</sup> Regulation 2 of the aforesaid regulations stipulate that no person shall manufacture, import, sell or offer any pre-packaged foodstuff for sale, unless the foodstuff container, or the bulk stock from which it is taken is labelled in accordance with these regulations.
- 3.3.11 Regulations 6 and 7 of the CPA Regulations also provide additional labelling guidelines for textiles, clothing, shoes, leather goods and genetically modified organisms. It is therefore prudent that manufacturers provide

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<sup>545</sup> Section 1 of the CPA defines “trade description” as follows:

“(a) any description, statement or other direct or indirect indication, other than a trade mark, as to

- (i) the number, quantity, measure, weight or gauge of any goods;
- (ii) the name of the producer or producer of any goods;
- (iii) the ingredients of which any goods consist, or material of which any goods are made;
- (iv) the place or country of origin of any goods;
- (v) the mode of manufacturing or producing any goods; or
- (vi) any goods being the subject of any patent, privilege or copyright; or

(b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a).”

<sup>546</sup> Act 83 of 1993.

<sup>547</sup> Act 54 of 1972. The regulations were published in GG 146 GN 32975 of 1 March 2010.

adequate information, warnings and instructions to consumers to prevent product recalls and/or product liability claims.

#### 4 CONCLUSION

4.1 Warnings play a pivotal role in the context of the supply chain's duty to supply products that will not cause harm to consumers. It is submitted that the concept of 'defect' for purposes of product liability necessarily imply that failure to warn, in instances where it is required that a product be supplemented with a warning, constitutes defectiveness on which a product liability claim may be based should the product cause harm as a result of the failure to warn adequately. Section 61(1) of the CPA embodies this principle by providing that strict product liability of the supply chain will follow in the event of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods.

4.2 Due to the wide scope of goods that are covered by the CPA, it will be an impossible task to provide a detailed list of warnings that should accompany individual products. It is however submitted that section 49(2) of the CPA provides a workable guideline regarding the type of risks that warnings should cover, namely risk:

- a) of an unusual character or nature;
- b) the presence of which the consumer could not reasonably be expected to be aware of or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
- c) that could result in serious injury or death.

4.3 Clearly, if the warning does not comply with the requirements set by section 49 read with the plain language requirements imposed by section 22, such warning will not constitute a proper warning as contemplated by the CPA and the supply chain will not be able to escape product liability. It is thus imperative that the warning, *inter alia*, be drawn to the attention of the consumer in a conspicuous manner, in legible font and in simple language, and that any illustrations that

accompany the warning are clear and comprehensible to the consumer to whom the product is supplied.

4.4 It is further submitted that considering whether a duty to warn exists with regards to a specific product should be done by considering the informational needs of the least sophisticated and educated consumer to whom the goods are supplied or who can reasonably be contemplated to use the goods.

4.5 In view of the legislature's objective to embrace international consumer protection legislation in South Africa, it is submitted that it can be anticipated that the South African Courts may also adopt the approach followed in the USA regarding obvious or known dangers and that it will thus not be required of the supply chain to warn consumers of obvious or known dangers or risks associated with certain products such as sharp knives.

4.6 It is further submitted that publication by the National Consumer Commission of a set of plain language guidelines for warnings in general would also contribute to enabling the supply chain to comply with its duty to warn and would thus benefit consumers by reducing the risk of harm caused as a result of inadequate warnings on products.

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## CHAPTER 4: DEFENCES, SAFETY MEASURES AND PRODUCT RECALLS

### 1 INTRODUCTION

- 1.1 The existence of liability failures call for the intervention of safety regulations to avoid the social cost of accidents.<sup>548</sup> Failures include manufacture failures, design failures, failures to warn consumers of the product dangers and/or failures to provide adequate instructions.
- 1.2 Alberto Cavaliere argues that these liability failures occur in three main cases:<sup>549</sup>
- a) Compensation for damages exceeds firms' assets.
  - b) Losses, considered from the point of view of a single individual, are so small that injured parties do not file claims.
  - c) Asymmetric information about the cost of care, product risks and care efforts.
- 1.3 It is thus clear why one cannot rely exclusively on the imposition of a legislative scheme of strict liability instead of more comprehensive preventative regulation to reach the objective of preventing or reducing product liability.<sup>550</sup> In economic reality the two institutions interact to control product safety risk.<sup>551</sup>
- 1.4 A drawback of the CPA is that it fails to set forth the control measures that manufacturers should implement in order to raise one of the defences under Section 61(4). One should therefore assess the relevant defences in order to understand the control measures that should be implemented to mitigate the exposure of manufacturers to product liability claims.

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<sup>548</sup> Cavaliere, at 15.

<sup>549</sup> Ibid.

<sup>550</sup> Ibid.

<sup>551</sup> Ibid.

- 1.5 This chapter consequently sets out the defences and the product safety regulations that are in place in the USA and Europe in comparison to South Africa.

## 2 PRODUCT LIABILITY DEFENCES

### 2.1 United States of America

- 2.1.1 In terms of Section 402(A) of the Restatement (Second) Torts, the following defences are at the disposal of the supply chain:

- 2.1.1.1 abnormal use/misuse defence;
- 2.1.1.2 assumption of the Risk Defence;
- 2.1.1.3 intended User Defence;
- 2.1.1.4 substantial Change Defence; and
- 2.1.1.5 technical Defences based on Statutory Law.

#### 2.1.2 Abnormal use/misuse defence

It is well settled in the USA that in order to recover on the theory of strict product liability, a consumer must prove that the product was defective, the defect was a proximate cause of the consumer's injuries and the defect existed at the time it left the manufacturer's control.<sup>552</sup>

Liability under Section 402A of the Restatement (Second) Torts may only be imposed upon proof that the product lacked an element necessary to make it safer for its intended use.<sup>553</sup> The suppliers may therefore raise the defence that the use of the product by the consumer was "abnormal" or constituted a "misuse" of the product.<sup>554</sup>

#### 2.1.3 Assumption of the Risk Defence

Suppliers may raise this defence in terms of Section 402A when the consumer was aware of the known risk posed by the product.<sup>555</sup> Before the

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<sup>552</sup> Schultz at 2.

<sup>553</sup> Ibid.

<sup>554</sup> Ibid.

<sup>555</sup> Ibid.



doctrine of assumption of the risk will be applied to prevent recovery, the evidence must establish conclusively that the consumer was subjectively aware of the risk.<sup>556</sup>

There are four assumptions of the risk defences in terms of the *Restatement (Second) Torts*:<sup>557</sup>

- a) The Consent Defence: This defence entails that the consumer expressly consents to relieve the supplier of its obligation to exercise care for the protection of the consumer.<sup>558</sup> In these cases, the plaintiff agrees to take his or her chances as to injury from a known or possible risk.<sup>559</sup> This form of assumption of the risk, where a defendant can establish that a plaintiff expressly consented to encountering the risk of injury before it occurred, is extremely rare in US product liability cases.<sup>560</sup>
- b) Implied Agreement to relieve supplier of its responsibility: This defence may be raised when the consumer has voluntarily entered into a relation with the supplier which he/she knows involve a risk.<sup>561</sup> In these circumstances, the plaintiff is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility.<sup>562</sup> Again, it would be most unusual for a defendant in a strict product liability matter to prove that the plaintiff entered into some relationship with the product manufacturer that led to an assumption of the risk.<sup>563</sup>
- c) Voluntary acceptance of risk created by supplier: The third assumption of risk defence involves the situation where a consumer is aware of the risk created by the conduct of a supplier and subjectively agrees to accept the risk and to encounter it.<sup>564</sup> Contrary to the “Implied Agreement” defence, this defence can be properly raised in a product liability case, but it is difficult to prove.<sup>565</sup> The courts have repeatedly remarked that with this type of assumption of the risk, the danger must

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<sup>556</sup> Schultz3.

<sup>557</sup> Schultz at 3 and 4.

<sup>558</sup> Restatement (Second) Torts Section 496A.

<sup>559</sup> Schultz at 3.

<sup>560</sup> Ibid.

<sup>561</sup> Restatement (Second) Torts Section 496A.

<sup>562</sup> Schultz at 3. These situations typically arise when a spectator attends a sporting event where it is known that baseballs or hockey pucks leave the playing area.

<sup>563</sup> Ibid.

<sup>564</sup> Restatement (Second) Torts Section 496A, comment c.

<sup>565</sup> Schultz at 3.

subjectively be understood by the plaintiff who then voluntarily decides to accept the risk.<sup>566</sup> Therefore, in the typical punch-press situation where the operator is aware of the risk of using the machine without a guard, but inadvertently places his or her hand at the point of operation, the plaintiff should not be charged with assuming the risk of injury.<sup>567</sup> Moreover, some courts have determined that being compelled to take a risk by an employer obviates the “voluntariness” prong of the assumption of the risk defence.<sup>568</sup> Therefore, an employee who is aware of the risk but is required by his employer to use the product cannot be deemed to have “voluntarily” accepted this risk.<sup>569</sup>

- d) Unreasonable acceptance of a known risk: The fourth form of assumption of the risk involves a consumer who voluntarily encounters a known risk as a result of his/her own negligence.<sup>570</sup> Since negligence in accepting the risk is typically inadmissible in a product liability case, Schultz remarks this form of defence should never be given to the jury.<sup>571</sup> Notwithstanding this, courts have consistently confused this issue and allowed the jury to evaluate a plaintiff’s negligence in encountering the risk.<sup>572</sup> Typically according to Schultz, it is yet another way for a defendant to get the plaintiff’s comparative negligence in front of the jury.<sup>573</sup>

#### 2.1.4 Intended User Defence

Although Section 402A of the *Restatement (Second) Torts* provides that the manufacturers or sellers of defective products can be liable to the “user or consumer”, the courts have engrafted an additional requirement that the consumer-plaintiff prove he was an “intended user of the product”.<sup>574</sup>

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<sup>566</sup> Schultz, “*Defenses in a Product Liability Claim*” 2002 at 3 and 4 (hereinafter Schultz).

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.*

<sup>569</sup> *Ibid.*

<sup>570</sup> Restatement (Second) Torts Section 496A.

<sup>571</sup> Schultz at 4.

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*

<sup>574</sup> *Ibid.*

In *Griggs v Bic Corporation*<sup>575</sup>, the Third Circuit Court of Appeals addressed the issue of the “intended user”.<sup>576</sup> The Court ruled that a young child was not an intended user of a Bic lighter.<sup>577</sup> The Court held that there is a duty in strict liability law to guard against foreseeable use by intended users in the context of the initial determination of defect.<sup>578</sup>

#### 2.1.5 Substantial Change Defence

If there has been a substantial modification to a product, which was not reasonably foreseen by the manufacturer, and if the modification is a superseding cause of the consumer’s injury, the manufacturer is relieved of liability even if there was a design defect existing at the time the product was delivered to the purchaser.<sup>579</sup>

Section 402A of the *Restatement (Second) of Torts* specifically states that a seller of a product will be liable for injuries caused by that product if “it is expected to reach the end user or consumer without substantial change in the condition in which it was sold”.<sup>580</sup> Thus, there should be an unforeseeable substantial change in the product that is the superseding cause of the accident.<sup>581</sup>

#### 2.1.6 Technical Defences based on Statutory Law

In some instances, the manufacturer may argue that a state law product liability claim is barred because of a federal statute governing the manufacture and distribution of the product.<sup>582</sup> Some examples include:<sup>583</sup>

- a) Automobiles: The (U.S.) National Traffic and Motor Vehicle Safety Act 49 of 1996 is an expansive law dealing with uniform regulations for motor vehicle safety.
- b) Medical Devices: Section 360c of the (U.S.) Medical Device Amendments Act of 1976 prohibits states from requiring safety or

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<sup>575</sup> 981 F.2d 1429 (3d Cir. 1992).

<sup>576</sup> Schultz at 4.

<sup>577</sup> Ibid.

<sup>578</sup> Ibid.

<sup>579</sup> Ibid.

<sup>580</sup> Ibid.

<sup>581</sup> Schultz at 5.

<sup>582</sup> Ibid.

<sup>583</sup> Ibid.

effectiveness standards “different from, or in addition to any requirement applicable under the Medical Device Amendments”.

- c) Essentially, defendants raise federal pre-emption under these acts of Congress when they claim that their product complies with the federal statute and regulations governing the product in question.<sup>584</sup> In these circumstances, once a determination is made that the product manufacturer has complied with the federal laws, any state law product liability claims are barred and expressly pre-empted by federal law.<sup>585</sup>

## 2.2 The EU

2.2.1 In terms of Article 7 of the EU Directive<sup>586</sup>, the producer shall not be liable for any product failure contemplated in the Directive if it proves any of the defences set out hereunder, namely:

2.2.1.1 The producer did not put the product into circulation.<sup>587</sup>

2.2.1.2 It is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by the producer or the defect came into being afterwards.<sup>588</sup>

2.2.1.3 The product was neither manufactured by the producer for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business.<sup>589</sup>

2.2.1.4 The defect is due to compliance of the product with mandatory regulations issued by the public authorities.<sup>590</sup>

2.2.1.5 The state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered.<sup>591</sup>

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<sup>584</sup> Schultz at 5.

<sup>585</sup> Ibid.

<sup>586</sup> 85/374/EEC, 1985.

<sup>587</sup> Article 7 (a) of 85/374/EEC, 1985.

<sup>588</sup> Article 7 (b) of 85/374/EEC, 1985.

<sup>589</sup> Article 7 (c) of 85/374/EEC, 1985.

<sup>590</sup> Article 7(d) of 85/374/EEC, 1985.

<sup>591</sup> Article 7(e) of 85/374/EEC, 1985.

2.2.1.6 In the event of a manufacturer of a component, the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.<sup>592</sup>

## 2.2.2 The Development Risk Defence

2.2.2.1 The development risk defence introduced by Article 7(e) is the “most controversial”<sup>593</sup> and further discussion thereof is necessary for purposes of this dissertation.<sup>594</sup> Botha and Joubert state that the reason for the inclusion of the development risk defence in the European Directive was because of lobbying done by commerce and the fear of the impact of strict liability on “innovative industries”.<sup>595</sup>

2.2.2.2 As indicated, Article 7(e) provides that the producer may argue that the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered.<sup>596</sup> The development risk defence was inserted as an optional provision which may be derogated from by Member States.<sup>597</sup> Hunter, Hunton and Brussels are of the view that the scope of the defence is narrow and that it is difficult for producers to avail themselves of it.<sup>598</sup> However this defence plays an important role in limiting liability of producers where the absence of technological knowledge was indeed evident in the circumstances.<sup>599</sup> The aforesaid authors argue that strict liability with such defence roughly resembles fault liability with a reversal of the burden of proof as to fault.<sup>600</sup> This defence is one of the most controversial features of the Directive, in that, as

<sup>592</sup> Article 7(f) of 85/374/EEC, 1985.

<sup>593</sup> Liu, “Two Roads Diverged in a Yellow Wood: The European Community Stays on the Path to Strict Liability” *Fordham International LJ* (2003) 1949 (hereinafter Liu).

<sup>594</sup> It is also noteworthy that some academics refer to this defence as the “State of the Art Defence”.

<sup>595</sup> Botha and EP Joubert at 314.

<sup>596</sup> Article 7(e) of 85/374/EEC, 1985. Botha and Joubert point out that in line with the intention of the European legislatures to harmonise the strict liability provisions in all member states, Section 4(a)(e) of the UK Consumer Protection Act of 1987 also makes provision for a similar defence. It is also noteworthy that Section 75AK (1)(c) of Part VA of the TPA in Australia also provides for the so-called development risk defence.

<sup>597</sup> Liu *supra* p1949. Luxembourg and Finland opted to exclude this defence, whereas France, Germany and Spain opted to remove the defence from specific products.

<sup>598</sup> Rod Hunter, Lucas Bergkamp Hunton & William Brussels, “Should Europe’s Product Liability Regime be Expanded? Comments on the European Commission’s Green Paper on Product Liability” Vol. 29 No 17 *Analysis & Perspective* at 407.

<sup>599</sup> *Ibid.*

<sup>600</sup> *Ibid.*

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Stapleton and others have also argued, it may be regarded as readmitting fault-based liability through the back door.<sup>601</sup>

## 2.3 Republic of South Africa

### 2.3.1 Introduction

As indicated previously, section 61(4) of the CPA provides a number of defences that the whole supply chain may have at its disposal, with the exception of section 61(4)(c) which has limited application.

For ease of reference, these defences are stated again, namely:

- a) The unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation.<sup>602</sup>
- b) The alleged unsafe product characteristic failure, defect or the hazard did not exist in the goods at the time it was supplied by the person raising the defence to another person alleged to be liable.<sup>603</sup>
- c) The alleged unsafe product characteristic failure, defect or hazard was wholly attributable to compliance by a person raising the defence with specific instructions provided by the supplier of the goods.<sup>604</sup>
- d) It is unreasonable to expect the retailer or distributor to have discovered the unsafe product characteristic failure defect or hazard having regard to the person raising the defence's role in marketing the goods to consumers.<sup>605</sup>
- e) The claim for damages is brought more than three years after-
  - (i) The death or injury of a person contemplated in section 61(5)(a);
  - (ii) The earliest time at which a person had knowledge of the material facts about an illness contemplated in section 61(5)(b);or

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<sup>601</sup> Reid and Loubser at 446.

<sup>602</sup> Section 61(4)(a).

<sup>603</sup> Section 61(4)(b)(i).

<sup>604</sup> Section 61(4)(b)(ii).

<sup>605</sup> Section 61(4)(c).

- (iii) Earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in section 61(5)(c); or
- (iv) The latest date on which a person suffered any economic loss contemplated in section 61(5)(d).

A detailed discussion of each of these defences is beyond the scope of this dissertation. However a discussion of the section 61(4)(c) defence is essential due to the peculiar nature of this defence and its impact on the apparent strict product liability regime introduced by section 61.

### 2.3.2 Section 61(4)(c)

2.3.2.1 In line with the European Directive, Section 68(5)(c) of the Draft Consumer Protection Bill contained a provision which provided that it is unreasonable to expect the distributor or retail supplier to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers *and the state of scientific knowledge at the time* (my emphasis) the goods were under the control of that person.<sup>606</sup>

2.3.2.2 Even so, section 61(4)(c) of the final version of the CPA provides a defence, available only to the retailer or distributor, that it is unreasonable to expect the retailer or distributor to have discovered the unsafe product characteristic, failure, defect or hazard having regard to the person's role in marketing<sup>607</sup> the goods to consumers. The South African legislature has thus excluded the development risk defence from the CPA in order prevent a step away from the notion of strict liability.

2.3.2.3 Be that as it may, section 61(4)(c) still creates a dilemma as it appears that the manufacturer and importer are specifically excluded from the application of this defence.<sup>608</sup> Moreover, it can be assumed that the liability of distributors or retail suppliers is fault-based where reference is made to reasonableness.<sup>609</sup>

<sup>606</sup> Botha and Joubert at 314.

<sup>607</sup> As indicated, in terms of Section 1 of the CPA, market means to promote or supply any goods or services.

<sup>608</sup> Botha and Joubert 316.

<sup>609</sup> Botha and Joubert at 318.

- 2.3.2.4 Davidow argues that the intention of the Department of Trade (“DTI”) in proposing strict liability was to ensure that the consumer would be compensated from any one of the suppliers in the supply chain.<sup>610</sup> She also argues that a further purpose of the introduction of strict product liability was to promote accountability and responsibility to consumers even in the cases where there is no contractual nexus between the consumer and the supplier, such as the importer or distributor.<sup>611</sup>
- 2.3.2.5 According to Davidow the reprieve provided in section 61(4)(c) of the CPA may, however, have unintended consequences and may actually have provided suppliers with an escape from liability which could conceivably be applied in most circumstances.<sup>612</sup> In her view, the effect of section 61 is that the CPA is weaker than the DTI anticipated. Although the CPA apparently no longer requires negligence to be proved by the consumer who institute product liability claims, the supplier, in order to escape liability, will have to prove that it was unreasonable to expect him to have discovered the defect based on his role in the market.<sup>613</sup>
- 2.3.2.6 Davidow suggests that section 61(4)(c) will result in the following enquiries:<sup>614</sup>
- a) Would the reasonable supplier have foreseen that the defect would have caused harm or damage?<sup>615</sup>
  - b) Would a reasonable supplier in the position of the supplier in the supply chain have taken steps to inspect or discover the defect?<sup>616</sup>
  - c) Did the supplier take those steps?<sup>617</sup>
- 2.3.2.7 It is submitted that Davidow is correct in arguing that the test is a negligence enquiry and therein lies the defect in section 61.<sup>618</sup> The section does not impose strict liability, in the true sense, as the DTI had intended.<sup>619</sup> As Davidow points out, all the section accomplishes is to shift

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<sup>610</sup> Davidow, “Insurance and Legal Liability The Unintended Defect in the Consumer Protection Act” 27 May 2009 at 1.

<sup>611</sup> Ibid.

<sup>612</sup> Ibid.

<sup>613</sup> Ibid.

<sup>614</sup> Ibid.

<sup>615</sup> Ibid.

<sup>616</sup> Ibid.

<sup>617</sup> Ibid.

<sup>618</sup> Ibid.

<sup>619</sup> Ibid.



the onus onto the supplier to prove that the supplier was not negligent in the circumstances.<sup>620</sup>

2.3.2.8 As a consequence, Davidow argues that although supplier, higher up in the supply chain, should be concerned about the fact that their conduct will now be under greater scrutiny, the suppliers such as importers and distributors should take some measure of comfort in that the unintended defect in the section provides them with an escape route.<sup>621</sup> Suppliers will thus seemingly only be held liable if they were negligent in not discovering the defect or hazard in the goods.<sup>622</sup>

2.3.2.9 Botha and Joubert are also of the view that this provision is defeating the idea behind true strict product liability because only the manufacturer and importer will ultimately be strictly liable and not the distributors and retailers.<sup>623</sup> They argue that there is no doubt that strict liability must be imposed on manufacturers of defective products.<sup>624</sup>

## 2.4 Conclusion

2.4.1 From the above comparative overview, it is evident that the defences available in section 61(4) of the CPA to a large extent mirror the defences contained in the EU Directive. This will of course yield the advantage that South African courts can have recourse to EU jurisprudence in interpreting and applying these defences where they are in conformity with each other. The most controversial defence is arguably the one contained in section 61(4)(c) of the CPA, which not only limits the product liability of distributors or retailers, but appears to do so in a manner that re-introduces negligence through the back door. In this sense thus, section 61(4)(c) undermines the strict product liability character of section 61(4). The legislature's decision not to retain the development risk defence, which was initially inserted into the draft Consumer Protection Bill, can however not be faulted as this defence would have been of little avail to the supply chain and in any event appears to be problematic to apply.

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<sup>620</sup> Ibid.

<sup>621</sup> Ibid.

<sup>622</sup> Ibid.

<sup>623</sup> Botha and Joubert at 318.

<sup>624</sup> Ibid.

2.4.2 It may also be asked why the legislature did not consider expanding the number of defences available to the supply chain. Although the risk defences appear to have been to some extent absorbed by the provisions of section 49 of the CPA in terms whereof the supply chain may limit the extent of its product liability, it is questionable whether the introduction of a defence such as the U.S. ‘intended user’ defence might not also have been appropriate. In the same vein, it may be asked why the legislature did not incorporate the other EU defences, such as the defence that the producer did not put the product into circulation or the defence that a component defect is attributable to the design of the product in which the component has been fitted into South African law.

### 3 RESTRICTION OF SUPPLY CHAIN’S LIABILITY

#### 3.1 Introduction

3.1.1 A topic that arises in the context of the product liability defences which serve to excuse the supply chain from liability for harm caused by defective products relates to the possibility of contractual limitation of the supply chain’s liability. Thus, it may be asked whether it is possible for the supply chain to require consumers to waive their rights to institute product liability claims in respect of defective products that cause harm. Alternatively, if it is not possible to completely contract out of strict product liability, can the supply chain restrict its liability by capping the amount of damages that a consumer may claim under strict product liability?

3.1.2 In the discussion that follows this question will be briefly considered as it is beyond the scope of this dissertation to exhaustively explore this issue.

#### 3.2 United States of America

3.2.1 In US product liability whether or not a limitation of liability clause is enforceable depends on the law of the state in which it is attempted to be enforced.<sup>625</sup> In essence though it is thus possible in US law to contractually

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<sup>625</sup>Howard W. Ashcraft, Jr. Hanson Bridgett, Marcus, Vlahos, & Rudy, LLP “Drafting Limitation of Liability Clauses” February 2002 at 2 retrieved from [www.terrarrq.com/images/pdfs/DraftingLoL.pdf](http://www.terrarrq.com/images/pdfs/DraftingLoL.pdf) (hereinafter Howard).

restrict product liability. In *Markborough v the Superior Court 1991*<sup>626</sup>, the California Appeals Court upheld a limitation of liability clause contained in the fine print of a civil engineer's standard terms and conditions subject to the following caveats.<sup>627</sup>

- a) The client (consumer) was a major residential developer. The court assumed that it was a sophisticated client capable of negotiating commercial agreements. Consumer transactions may be subject to stricter scrutiny;<sup>628</sup>
- b) The suit did not involve personal injuries. The damages were "only money". An attempt to limit liability for non-economic injuries may thus also be subject to stricter scrutiny;<sup>629</sup>
- c) The limitation amount was reasonable. The engineer used the common "\$50 000 or the amount of the fee, whichever is greater" formula. If the limitation amount had been extremely low, it might have been unenforceable;<sup>630</sup> and
- d) The court found that there was an actual opportunity for negotiation. If the designer had strong bargaining power and refused to negotiate, then the clause might not have been enforceable.<sup>631</sup>

3.2.2 Despite these caveats, limitations of liability clauses have significant practical utility and are used to restrict the amount of damages that may be covered in product liability claims.<sup>632</sup> Limitations of liability clauses relating to product liability invariably match the *Markborough* model.<sup>633</sup>

### 3.3 The EU

3.3.1 The approach in the EU to limitation of liability is narrower than the US approach. In terms of Article 12 of the EU Directive,<sup>634</sup> the producer may not

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<sup>626</sup>227 Cal.App.3d 705, 277.

<sup>627</sup>Howard at 2.

<sup>628</sup>Ibid.

<sup>629</sup>Ibid.

<sup>630</sup>Ibid.

<sup>631</sup>Ibid.

<sup>632</sup>Ibid.

<sup>633</sup>Howard at 3.

<sup>634</sup>85/374 EEC of 25 July 1985.

limit his liability, nor is the producer exempted from it, regardless of what contractual arrangements have been made with the injured party.<sup>635</sup>

3.3.2 Article 16 of the Directive however permits Member States to choose to place a limit of not less than 70 million Euros on the total liability of a producer for damage resulting from death or personal injury and caused by identical items with the same defect.<sup>636</sup>

### 3.4 Republic of South Africa

3.4.1 Hawthorne submits that consumer contracts occupied no special place in the common law and that traditionally standard contracts ruled supreme in the marketplace.<sup>637</sup> The rules of the law of contract are divided into a small, important group of mandatory, also referred to as immutable or inalienable, rules and the larger category of default rules.<sup>638</sup>

3.4.2 Immutable rules cannot be changed by contractual agreement, but default rules govern the relationship between the parties unless they explicitly agreed to the contrary.<sup>639</sup> Immutable rules are also referred to as background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, pre-formulated, pre-set, presumptive, standby, standard-form or supplementary rules or *naturalia*, and such rules are terms implied by law defining the rights and duties of the contracting parties.<sup>640</sup> These rules are found in the general principles of the law of contract or in the rules applying to a specific contract.<sup>641</sup>

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<sup>635</sup> Delaney, H. & Van de Zande, R. "A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive) October 2001 at 5 ( hereinafter Delaney and Van de Zande).

<sup>636</sup> *ibid.*

<sup>637</sup> Hawthorne at 436.

<sup>638</sup> *Ibid.*

<sup>639</sup> *Ibid.*

<sup>640</sup> *Ibid.*

<sup>641</sup> Hawthorne at 437. It has been argued that default rules were developed to introduce notions of substantive fairness into the law of contract, but the American view is that default rules represent the contract terms which the majority of contracting parties would have agreed upon if they had anticipated the contingency and the transaction cost had been zero.

- 3.4.3 In consequence, default rules are referred to as majoritarian default rules, and find their justification in the argument that both inefficient contracts and the transaction costs are minimised.<sup>642</sup> Default rules leave the contracting parties the freedom to reach a contrary agreement, which opportunity has been fully exploited by the phenomenon of the standard contract.<sup>643</sup>
- 3.4.4 The CPA has introduced several amendments to the common law rules of the contract of purchase and sale.<sup>644</sup> The rules most seriously affected concern the *essentiale* of price, the default rules regarding defective goods and risk.<sup>645</sup> Furthermore, the CPA has also altered the law of delict with the introduction of strict liability within the supply chain.<sup>646</sup>
- 3.4.5 Important is the fact that the notion of autonomy and the principles derived from it may not necessarily be rigid.<sup>647</sup> Autonomy also entails the decision maker to accept responsibility for his considered actions.<sup>648</sup> The fact that an obligation should be legal, implies that the contracting parties are subject to the values of society.<sup>649</sup> This may require that in particular circumstances less weight be attached to the ideals of individual autonomy and freedom of action.<sup>650</sup>
- 3.4.6 This is furthermore borne out by the application in common law of value orientated concepts like reasonableness, good faith, public policy, possibility of performance, legality and aspects of breach of contract.<sup>651</sup> Consequently, agreements tending to induce fraud or agreements tending to be against public policy would not be enforceable.<sup>652</sup>

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<sup>642</sup> Ibid.

<sup>643</sup> Ibid.

<sup>644</sup> Ibid.

<sup>645</sup> Hawthorne at 438.

<sup>646</sup> Ibid.

<sup>647</sup> S vd Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe, *Contract General Principles* (2nd Ed) 2003 at pages 10 - 11. (hereinafter Van Der Merwe *et al*)

<sup>648</sup> Ibid.

<sup>649</sup> Ibid.

<sup>650</sup> Ibid.

<sup>651</sup> Ibid.

<sup>652</sup> Ibid.

- 3.4.7 The CPA however appears to have had a serious effect on the contract of sale, where in the past consumer had little or no bargaining power regarding the terms of their agreements since standard contracts are usually drafted in such a way as to contract out of common law default rules.<sup>653</sup>
- 3.4.8 Hawthorne indicates that despite the restrictions in Section 61 of the CPA, the CPA allows a manufacturer to enter into consumer agreements that limit its liabilities subject to certain requirements being met. These requirements *inter alia* pertain to compliance with section 49 of the CPA as previously discussed. As indicated, section 49(1) of the Act allows a consumer agreement that purports to limit in any way the risk or liability of the supplier or any other person; constitute an assumption of risk or liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact by the consumer.
- 3.4.9 In addition to meeting the requirements of section 49, the provisions of section 48 and 51 also have to be observed. Section 48 provides that a supplier must not offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust; or on terms that are unfair, unreasonable or unjust.<sup>654</sup> Goods or services may not be marketed or a supplier may not negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust.<sup>655</sup> A supplier may also not require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.<sup>656</sup>

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<sup>653</sup> Hawthorne at 436.

<sup>654</sup> S48(1)(a).

<sup>655</sup> S48(1)(b).

<sup>656</sup> S48(1)(c).

- 3.4.10 Section 48 contains a general indication of unfair, unjust or unreasonable transactions, agreements, terms or conditions or notices, namely if:<sup>657</sup>
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
  - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
  - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
  - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.
- 3.4.11 It should further be noted that Regulation 44(3) contains a so-called “grey” list of contract terms that are presumed not to be fair and reasonable. This list is however merely indicative so that a term so listed may be fair given the circumstances of a specific case. The list is further also not exhaustive so that other terms not included therein may also be unfair for purposes of the Consumer Protection Act.<sup>658</sup> In accordance with regulation 44(3) a term in a consumer agreement is presumed to be unfair if it has the purpose or effect of *inter alia* excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1) of the Act.<sup>659</sup>
- 3.4.12 Section 51 of the Act is also relevant to this discussion as it deals with prohibited transactions, agreements, terms or conditions. In terms of this

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<sup>657</sup> S48(2)(a) to (d).

<sup>658</sup> Reg 44(2)(a) and (b).

<sup>659</sup> Reg 44(3)(a).

section a supplier should not make a transaction or agreement subject to any term or condition if inter alia:

- a) its general purpose or effect is to defeat the purposes and policy of the Act, mislead or deceive the consumer, or subject the consumer to fraudulent conduct;<sup>660</sup>
- b) it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act, avoid a supplier's obligation or duty in terms of this Act or authorise the supplier to do anything unlawful in terms of the Act;<sup>661</sup>
- c) it purports to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier, constitute an assumption of risk or liability by the consumer or impose an obligation on the consumer to pay for damage to, or otherwise assume the risk of handling any goods displayed by the supplier, except to the extent contemplated in section 18(1).<sup>662</sup>

3.4.13 Regard should also be had to section 51(2) which provides that a supplier may not directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in section 51(1). A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes section 51.

3.4.14 Hence, it follows that the wording of section 49 of the CPA does allow for a consumer agreement that purports to limit the risk or liability of the supplier, constitute an assumption of risk or liability by the consumer, impose an obligation on the consumer to indemnify the supplier or be an acknowledgement of any fact by the consumer if such clause is pertinently drawn to the attention of the consumer and is written in plain language. It is

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<sup>660</sup> S51(1)(a).

<sup>661</sup> S51(1)(b).

<sup>662</sup> S51(1)(c). S18(1) deals with a consumer's right to choose or examine goods.



however imperative that such clause should comply with the requirements of section 49 read with the plain language requirements set out in section 22. Accordingly, it is proposed that manufacturers insert a specific and conspicuous reference to the relevant indemnity clause in the head of the terms and conditions.

3.4.15 However, it is further submitted that although it is clear that the supply chain would be able to limit its liability for harm caused by defective products, it would not be able to exclude this liability altogether as a total exclusion of liability would contravene section 51 and thus amount to a void provision. It thus appears that at the most, what a supplier would be able to do is to limit the amount of damages that it is liable for but such limitation should then not be of such a nature that it contravenes section 48 of the Act by constituting an unfair contract term.

3.4.16 Whilst the CPA does not prescribe any further formalities for the conclusion of contracts that limits a supplier's liability, section 50(1) of the CPA contemplates that the Minister may prescribe categories of consumer agreements that are required to be in writing. In addition, section 50(2) provides that if a consumer agreement is in writing, whether required by the Minister or voluntarily, the agreement applies irrespective of whether the consumer signs the agreement and the consumer is provided with a free copy of the agreement or access to a free copy of the agreement as contemplated in section 22 of the CPA. Section 50(3) provides that if an agreement is not entered into, the supplier must keep a record of transactions entered into over the phone or any other records that can later be used as documentary proof of transactions. No such regulations have to date been issued. This provision, once put into effect, will obviously make it easier for a consumer to see whether a supplier has attempted to limit its product liability contrary to the provisions of the CPA.

### 3.5 Conclusion

- 3.5.1 It is an essential feature of an efficient strict product liability regime that the right of a consumer to obtain redress in the form of a product liability claim is preserved by disallowing the supply chain the luxury of merely contracting out of its responsibility in this regard. However, a balanced approach appears to be the most suitable method of addressing the issue of limiting the supply chain's liability for harm caused by defective products. To this end, the CPA seems to have chosen an adequate approach in this regard, in that it does not allow the supply chain to contract out of its product liability, but it apparently does allow it to limit the extent of such liability in a manner that meets the protective requirements of sections 22, 48, 49 and 51.
- 3.5.2 The strict duties imposed on manufacturers by the CPA and implied by the need to avoid product liability will, no doubt, increase the prices of end products in future. This added layer of compliance in the form of observing safety standards, issuing of adequate instructions and warnings and drafting of contracts that are CPA compliant will lead to an escalation in the cost of putting a product on the consumer market and will inevitably also have to absorb the increased cost in indemnity agreements and insurance that the supply chain will have to expend in order to enable it to meet product liability challenges and claims. It goes without saying, that there is a cost to insurance cover, and that it is likely that a headless chicken will experience a big increase in liability premiums. The net effect of this is that consumers will very likely have to pay excessive prices for safe and reliable products. The counter-argument however is that the costs of complying with the supply chain's product liability duties is to be preferred above the dire implications of harm caused as a result of defective products.

## 4 SAFETY CONTROL MEASURES

- 4.1 The nature of safety regulations in the United States of America
- 4.1.1 In the United States, the Consumer Product Safety Act of 1972 ("CPSA") established the U.S. Consumer Product Safety Commission ("CPSC") in

order to implement mandatory product safety standards.<sup>663</sup> Howells argues that this goal has not materialized.<sup>664</sup> The CPSC's objective went unrealized primarily due to a change in regulatory emphasis in favour of de-regulation and voluntary self-regulation.<sup>665</sup> During the 1980's, the CPSC became subject to the Reaganite-deregulation tendency and the emphasis switched from mandatory rule-making towards using voluntary standards<sup>666</sup> wherever possible.<sup>667</sup>

4.1.2 This preference for voluntary standards is mandated by the CPSA, which in its revised post-1981 form only permits a mandatory standard where compliance with any existing voluntary standard is not likely to result in the elimination or adequate reduction of the risk of injury or it is unlikely that there will be substantial compliance with such (voluntary) standard.<sup>668</sup> Similarly, the Office of Management and Budget Circular Number A-119<sup>669</sup> and section 12(d) of the National Technology Transfer and Advancement Act of 1995<sup>670</sup> encourage the involvement of Governmental agencies in voluntary procedures wherever possible.<sup>671</sup>

4.1.3 According to Howells, the CPSC currently works on eight to fourteen mandatory standards per year and forty to fifty voluntary standards.<sup>672</sup> There are numerous standard writing organizations.<sup>673</sup> The three with which the CPSC works most closely are the American National Standards Institute, American Society for Testing and Materials and the Underwriters Laboratories.<sup>674</sup>

4.1.4 Howells further indicates that voluntary standards have no legal effect as such.<sup>675</sup> Industry is, however, often eager to develop voluntary standards,

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<sup>663</sup> Howells "The Relationship between Product Liability and Product Safety – Understanding a Necessary Element in European Product Liability Through a Comparison with the US Position" *Western Law Journal* (2000) 309 (hereinafter Howells).

<sup>664</sup> Ibid.

<sup>665</sup> Ibid.

<sup>666</sup> "Standards" refer to the levels of safety, performance measurements and criteria to be applied to products.

<sup>667</sup> Howells at 309.

<sup>668</sup> Ibid.

<sup>669</sup> 58 Fed. Reg. 57.643 (1993); 61 Fed. Reg. 68.312 (1996) (proposed revisions to OMB circular A-119).

<sup>670</sup> Pub L. No. 104-113, 110 Stat. 775, 783 (1996) (codified in scattered section of 15.U.S.C.).

<sup>671</sup> Howells at 309 and 310.

<sup>672</sup> Howells at 310.

<sup>673</sup> Ibid.

<sup>674</sup> Ibid.

<sup>675</sup> Ibid.

not only to help defend products liability claims, but also to use compliance as a marketing tool.<sup>676</sup>

4.1.5 In the U.S. there is no bridge between mandatory and voluntary standards. Howells indicates that, except in extreme cases, the U.S. system has forgone mandatory regulations and is left to rely upon self-regulation. In contrast, as will be indicated hereinafter the legislatures in Europe have managed to keep a hand on the tiller of product safety regulation by developing directives which establish a framework that integrates voluntary standards.<sup>677</sup> This integration is an effort to achieve those levels of safety considered politically desirable by means with which the industry is comfortable.<sup>678</sup> The integration of the standards into the legal framework has also permitted greater public participation in the formation of standards.<sup>679</sup>

## 4.2 General Safety Control in the United States of America

4.2.1 The CPSA provides that it is unlawful to, *inter alia*, manufacture for sale, offer for sale, distribute in commerce or import any consumer product which is not in conformity with an applicable consumer product safety standard or which has been declared a banned hazardous product.<sup>680</sup>

4.2.2 In contrast to the position in Europe which will be discussed hereinafter, the CPSC has impressive powers to seek remedial action for substantial product hazards and to protect consumers from imminent hazards.<sup>681</sup> The CPSA defines a “substantial product hazard” as existing where a substantial risk of injury to the public is created by a product which either fails to comply with a consumer product safety rule or contains a defect.<sup>682</sup>

4.2.3 If the CPSC determines that a product presents a substantial product hazard and that notification is required to adequately protect the public, it may order the manufacturer, distributor or retailer of the product to do one or more of the following:<sup>683</sup>

a) to give public notice of the defect or failure to comply.

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<sup>676</sup> Ibid.

<sup>677</sup> Ibid.

<sup>678</sup> Ibid.

<sup>679</sup> Ibid.

<sup>680</sup> Howells at 341.

<sup>681</sup> Ibid.

<sup>682</sup> Howells at 342. See also 15 U.S.C. S2070 1994.

<sup>683</sup> Ibid. See also 15 U.S.C. S2064(c) 1994.

- b) to mail notice to each person who is a manufacturer, distributor or retailer of such product.
- c) to mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

4.2.4 In addition, if the CPSC considers it to be in the public interest, it can order the manufacturer, distributor or retailer to choose which of the following actions it wishes to take:<sup>684</sup>

- a) to bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.
- b) to replace such product with a like or equivalent product that complies with the applicable consumer product safety rule or does not contain the defect.
- c) to refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more at the time of public notice, or at the time the consumer receives actual notice of the defect or non-compliance, whichever first occurs).

4.2.5 Before the CPSC takes any of the above measures in relation to substantial product hazards, it must afford interested persons, including consumers and consumer organizations, the opportunity for a hearing.<sup>685</sup> These post-market powers have become more significant since the CPSC's pre-market control has been weakened.<sup>686</sup> Generally, however, the CPSC will attempt to agree on a voluntary corrective plan with the businesses concerned.<sup>687</sup>

4.2.6 The CPSC divides products posing a substantial product hazard into three categories, namely, A, B and C.<sup>688</sup> Class A hazards exist when a risk of death or grievous injury or illness is likely or very likely, or serious injury or illness is very likely. <sup>689</sup>Class B hazards exist when a risk of death or grievous injury or illness is not likely to occur, but is possible, or when

<sup>684</sup> Ibid. See also 15 U.S.C. S2064(d) 1994.

<sup>685</sup> Ibid.

<sup>686</sup> Ibid.

<sup>687</sup> Ibid.

<sup>688</sup> Ibid.

<sup>689</sup> Howells at 343.

serious injury or illness is likely, or moderate injury or illness is very likely.<sup>690</sup> Class C hazards exists when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is likely, or possible.<sup>691</sup> The response to substantial product hazards varies according to how the hazard is classified.<sup>692</sup>

#### 4.3 The nature of safety regulation in the EU

4.3.1 The European Council Resolution in 1985 on the “New Approach to Technical Harmonization and Standards”<sup>693</sup> marked a move away from the detailed product-specific rules to broadly categorized directives.<sup>694</sup> These directives lay down essential safety requirements, but leave the details to be fleshed out by European standards.<sup>695</sup> The linchpin of the system is the standardization process.<sup>696</sup>

4.3.2 In addition, there has been the development of a global approach to certification and testing.<sup>697</sup> The new and global approaches have three limbs, namely more flexible legislation, a prominent role for standardization; and reliance on conformity assessment procedures.<sup>698</sup> The new approach was intended to be both flexible, leaving detailed work to the European standardization bodies, and at the same time attempting total harmonization of all safety aspects in order to reassure member states that they could safely permit free circulation of conforming products.<sup>699</sup>

4.3.3 The basic principles of the new approach to technical harmonization are set out in the 1985 Resolution as follows:<sup>700</sup>

- a) harmonizing legislation should be limited to adopting essential safety requirements to which products should conform, and which if they do

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<sup>690</sup> Ibid.

<sup>691</sup> Ibid.

<sup>692</sup> Ibid. In line with the CPSC, The US Food and Drug Administration also differentiates between three classes of product recalls. According to the Soweto News Reports, the US giant, Novartis, has announced an urgent medicine recall of Excedrin pain tablets in South Africa in January 2012. According to the reports, the recall is a Class A recall as the use thereof may cause serious health consequences.

<sup>693</sup> Council Resolution of 7 May 1985, hereafter referred to as the “new approach”.

<sup>694</sup> G Howells *supra* p 310.

<sup>695</sup> Howells at 310.

<sup>696</sup> Howells at 310 and 311.

<sup>697</sup> Howells at 311.

<sup>698</sup> Ibid.

<sup>699</sup> Ibid.

<sup>700</sup> Ibid.

so conform, should be their passport to free movement throughout the Community;

- b) standardization organizations should be entrusted with the task of drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements;
- c) the technical specification should be voluntary; and
- d) national authorities are compelled to recognize that products conforming to the harmonized standards are presumed to comply with the essential requirements. Manufacturers should have the choice of not manufacturing in conformity with the standards, but in this case are obliged to prove that their products conform to the essential requirements.

4.3.4 Annexure II of the 1985 Resolution contains the following guidelines listing the main elements that the new approach directives should contain.<sup>701</sup>

- a) Scope: The directives will list the range of products covered and the nature of hazards they are intended to prevent.
- b) General Clause: As a general rules, the directives will provide for total harmonization, although the possibility of optional harmonization is allowed.
- c) Essential Safety Requirements: The essential safety requirements must be worded precisely enough so that when implemented in national legislation they create legally binding obligations which can be enforced.
- d) Means of Attestation of Conformity: The means of attestation which the trade may employ are certificates and marks of conformity issued by a third party, results of tests carried out by a third party, declaration of conformity issued by the manufacturer or his agent, possibly couples with the requirement for a surveillance system; or such other means as specified in the directives.
- e) Free Movement Clause: Member states are obliged to accept goods which conform to the general safety obligation and the essential

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<sup>701</sup> Howells at 312 to 314.

requirements. The product's passport to free movement within the Community can be assured by declaring that the product is in conformity with a European harmonized standard.

- f) Safeguard Clause: Even if a product is accompanied by a means of attestation, a member state must take all appropriate measures to withdraw or prohibit the placing on the market of the product in question or to restrict its free movement where it finds that the product might compromise the safety of consumers.

4.3.5 The relationship between the essential safety requirements and standards is central to the new approach.<sup>702</sup> In theory, it provides the means to ensure safety in a manner which is compatible with economic development.<sup>703</sup>

4.3.6 Product safety in Europe is consequently mainly governed by four layers of control, namely, the general safety objective in the body of the directive, the essential requirements to be found in its annexures, harmonized standards and the means chosen by manufacturers to achieve those standards.<sup>704</sup>

#### 4.4 General Safety Controls in the EU

4.4.1 In the first 10 months of 2007, the European Commission received 56 percent more consumer safety alerts from European member states than in the same period in 2006.<sup>705</sup>

4.4.2 It has been asked what is driving this high level of activity in Europe?<sup>706</sup> Are products becoming more dangerous?<sup>707</sup> Is industry becoming more alert to consumer concerns over product safety?<sup>708</sup> European regulation governing the safety of consumer products and foodstuffs has been tightened dramatically over the five past years: what role has this played?<sup>709</sup>

4.4.3 During March 2008, Freshfields Bruckhaus & Deringer published a report (hereinafter the Freshfields Report) that addresses these questions on the

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<sup>702</sup> Howells at 314.

<sup>703</sup> Ibid.

<sup>704</sup> Howells at 314 and 315.

<sup>705</sup> Freshfields Bruckhaus Deringer, "Getting it right: product recall in the EU" March 2008 at 2 retrieved from <http://www.lexology.com/library/detail.aspx?g=e72b8075-9073-46dd-bb3b-4688ffa08a82> (hereinafter Freshfields). The aforesaid study, carried out in 2007 by Ipsos Mori, was commissioned by a consumer products and retail sector group.

<sup>706</sup> Freshfields at 2.

<sup>707</sup> Ibid.

<sup>708</sup> Ibid.

<sup>709</sup> Ibid.



basis of a major international study relating to industry attitudes to product safety and recall in Europe.<sup>710</sup> In their report, Freshfields Bruckhaus & Deringer illustrates which factors industry believes have contributed to high levels of product recall and other corrective action in recent years and suggest the areas that regulators could address to ensure that the European product safety laws are more effective.<sup>711</sup>

4.4.4 The results shows that industry believes that raised levels of product recall and other corrective action in Europe are mainly attributable to stricter legal requirements, better enforcement of the law and increased consumer awareness, which leads companies to fear harm to their brand reputation.<sup>712</sup> The Freshfields report indicates that a significant minority of businesses is still poorly prepared to handle a product safety incident.<sup>713</sup> More than a third of participants in the study would have difficulty quickly identifying the batches of products they had sold to other businesses.<sup>714</sup> Approximately 1 in 10 businesses does not have a formal incident management plan or team.<sup>715</sup> Fifty-five percent of participants who experienced product quality or safety issues found out about at least one product as a result of a consumer complaint.<sup>716</sup> A further 13 percent of participants only knew of the safety issue after the regulator contacted them.<sup>717</sup> The report further indicates that fifty-three percent of companies that have managed a product safety incident in recent years have recalled products from consumers on at least one occasion.<sup>718</sup> This suggests that product recall (described as a last resort in European legislation) is overly common.<sup>719</sup>

4.4.5 It was also indicated in the report that cross-border product recalls or corrective action programmes are especially problematic.<sup>720</sup> A quarter of participants in the study identified inconsistencies in interpretation and enforcement of the supposedly harmonised European product safety laws by regulators.<sup>721</sup> Two-thirds of participants also noted the differences between

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<sup>710</sup> Ibid.

<sup>711</sup> Ibid..

<sup>712</sup> Freshfields at 3.

<sup>713</sup> Ibid.

<sup>714</sup> Ibid.

<sup>715</sup> Ibid.

<sup>716</sup> Ibid.

<sup>717</sup> Ibid.

<sup>718</sup> Ibid.

<sup>719</sup> Ibid.

<sup>720</sup> Ibid.

<sup>721</sup> Ibid.

European laws and the legal requirements of countries outside Europe (rules regarding the need to notify regulators and when and how to do so), whereas a third of participants called for further guidance on how Europe's product safety regulations should be applied.<sup>722</sup>

4.4.6 The new approach directives are intended to create a raft of harmonized EC directives, which meet the twin objectives of free movement of goods and consumer protection.<sup>723</sup> Howells argues that there was, however, a need to impose a general safety obligation to market safe products, encompassing products not covered by the new approach directives and safety aspects not covered in vertical directives.<sup>724</sup>

4.4.7 He remarks that the General Product Safety Directives'<sup>725</sup> (GPSD) definition of "product" makes it clear that it is only intended to apply to consumer products.<sup>726</sup> Although the definition of product is restricted to consumer goods, there is surprisingly little help in determining the scope of the word "product" itself.<sup>727</sup>

4.4.8 Howells is further of opinion that the relationship between the horizontal GPSD and vertical directives is complex.<sup>728</sup> The GPSD is influenced by the German tradition of preferring specific to general regulation.<sup>729</sup> Thus, the GPSD makes it clear that it shall apply "in so far as there are no specific provisions in rules of Community law governing the safety of the product concerned."<sup>730</sup>

4.4.9 The central concept around which the GPSD is organized is that of the "safe product".<sup>731</sup> In terms of Article 2, "safe product" means any product which, under normal or reasonably foreseeable conditions of use, including duration, does not present any risk or only the minimum risks compatible with the product's use, considered as acceptable and consistent with a high level

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<sup>722</sup> Freshfields at 4.

<sup>723</sup> Howells at 334.

<sup>724</sup> Howells at 334 and 335.

<sup>725</sup> 92/59/EEC 29 June 1992.

<sup>726</sup> Howells at 335. Article 2(a) provides that product shall mean any product intended for consumers or likely to be used by consumers, supplied whether for consideration or not in the course of a commercial activity and whether new, used or reconditioned.

<sup>727</sup> Howells at 335.

<sup>728</sup> Ibid.

<sup>729</sup> Ibid. Howells indicates that the question arises whether a specific provision ousts the GPSD, even if it offers less protection is open to some debate. The GPSD seems to imply that where only certain safety aspects are covered by the specific regulations, then the other aspects could be dealt with under the GPSD.

<sup>730</sup> Ibid.

<sup>731</sup> Howells at 336.

of protection for the safety and health of persons, taking into account the following points in particular:<sup>732</sup>

- a) the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance;
- b) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- c) the presentation of the product, the labelling, any instructions for its use and disposal and any other indication or information provided by the producer; and
- d) the categories of consumers at serious risk when using the product, in particular children.

4.4.10 Article 2 goes further by stating that the feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be “unsafe” or “dangerous”.<sup>733</sup> From a consumer perspective there are several positive aspects of this definition.<sup>734</sup> It objectively assesses the actual risks regarding a product and in this respect compares favourably with the defectiveness standard in the Product Liability Directive, which refers to the expectations of consumers.<sup>735</sup>

4.4.11 The GPSD only accepts a product as safe if it either does not present any risk, or presents only the minimum risks compatible with the product’s use.<sup>736</sup> It follows that even these minimum risks must be acceptable.<sup>737</sup> Thus, it is not sufficient that a product is the safest design to perform its intended function.<sup>738</sup> The utility of the purpose must be balanced against the minimum inherent risks to determine whether the risk is acceptable.<sup>739</sup>

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<sup>732</sup> Ibid.

<sup>733</sup> Ibid.

<sup>734</sup> Ibid.

<sup>735</sup> Ibid.

<sup>736</sup> Howells at 336 and 337.

<sup>737</sup> Howells at 337.

<sup>738</sup> Ibid.

<sup>739</sup> Ibid.

- 4.4.12 Although according to Howells there is room for debate about what is considered acceptable, the GPSD indicates that the acceptable level should be compatible with a high level of protection for the safety and health of persons.<sup>740</sup> This is partly a technical/scientific question involving the identification of risk, and partly a social question of determining which risks are acceptable.<sup>741</sup>
- 4.4.13 Howells significantly remarks that the function of a safety standard in a regulatory regime is not to remove all risks from the market, but only those not justified by the benefits derived from the product or because safer alternatives exist.<sup>742</sup> Therefore, the basic definition seems to strike the right balance.<sup>743</sup>
- 4.4.14 As indicated the definition of “safe product” forms the foundation of the general safety requirement in the GPSD.<sup>744</sup> The requirement imposes on producers the obligation to place only safe products on the market.<sup>745</sup> The directive lays down a hierarchy of rules and standards against which a product should be judged to determine whether the general safety requirement is satisfied.<sup>746</sup>
- 4.4.15 Moreover, the GPSD provides means whereby compliance with the general safety requirement can be established.<sup>747</sup> Article 4 of the GPSD provides that “where there are no specific Community provisions governing the safety of the products in question, a product shall be deemed safe when it conforms to the specific rules of national law of the Member State in whose territory the product is in circulation...laying down the health and safety requirements which the product must satisfy in order to be marketed”.<sup>748</sup>
- 4.4.16 Article 4 continues by stating that conformity to the general safety requirement shall be assessed having regard to a list of standards.<sup>749</sup> The standards, although not expressly stated to be hierarchical, are listed in such

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<sup>740</sup> Ibid.

<sup>741</sup> Ibid.

<sup>742</sup> Ibid.

<sup>743</sup> Ibid. He however argues that, to some extent, this rather stringent definition is undermined by the situations in which the GPSD treats products as being safe.

<sup>744</sup> Ibid.

<sup>745</sup> Ibid.

<sup>746</sup> Ibid.

<sup>747</sup> Ibid.

<sup>748</sup> Ibid.

<sup>749</sup> Howells at 338.

a way that implies the drafters conceived a hierarchy along the following lines:<sup>750</sup>

- a) voluntary national standards giving effect to a European standard;
- b) community technical specifications;
- c) standards drawn up in the member states in which the product is in circulation;
- d) codes of good practice in respect of health and safety in the sector concerned;
- e) the state of the art; and
- f) safety which consumers may reasonably expect.

4.4.17 The GPSD places different obligations on producers and distributors.<sup>751</sup> Any professional in the supply chain is treated as a producer, in so far as their activities may affect the safety properties of a product placed on the market.<sup>752</sup> The definition of distributor is the mirror image of this, namely those professionals in the supply chain whose activity does not affect the safety properties of the product.<sup>753</sup> Thus, the crucial point to be considered is whether a party affects the safety properties of the product.<sup>754</sup>

4.4.18 The objective nature of the duty of due care is underpinned by the GPSD, for it states that, in particular, distributors should not supply products which they know, or should have assumed, do not comply with the general safety requirement.<sup>755</sup> Their constructive knowledge is to be assessed having regard both to information in their possession and as professionals.<sup>756</sup>

4.4.19 The European product safety regulations have become much stricter over the past years.<sup>757</sup> The revised GPSD (2001/95/EC)<sup>758</sup>, which came into force in 2004, deals with the safety of non-food consumer products.<sup>759</sup> It requires producers to take appropriate corrective action where a product issue is

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<sup>750</sup> Ibid.

<sup>751</sup> Ibid.

<sup>752</sup> Howells at 339.

<sup>753</sup> Ibid.

<sup>754</sup> Ibid.

<sup>755</sup> Ibid.

<sup>756</sup> Ibid.

<sup>757</sup> Howells at 336..

<sup>758</sup> Freshfields at 7.

<sup>759</sup> Ibid.

discovered.<sup>760</sup> Distributors have complimentary obligations.<sup>761</sup> What corrective action is required depends on the seriousness of the issue and the location of the affected products in the supply chain.<sup>762</sup> This may include product recalls.<sup>763</sup>

4.4.20 The GPSD is further supplemented by category-specific directives that set out additional requirements for products such as toys, cosmetics and motor vehicles.<sup>764</sup> The General Food Law (“GFL”) Regulation (178/2002/EC)<sup>765</sup> has created a parallel safety regime for food and drinks.<sup>766</sup> It came into effect in the EU in January 2005 and imposes obligations on all food business operators from primary producers to supermarkets and restaurants.<sup>767</sup> Immediate notification and corrective action steps are required for unsafe food products in terms of GLF.<sup>768</sup>

4.4.21 This new obligation has drastically compressed the time available to investigate a potential problem and formulate a response based on a proper risk assessment.<sup>769</sup> The Freshfields Report thus indicates that the keys to successfully managing a product safety issue are spotting the problem early and having the right procedures in place to deal with it quickly.<sup>770</sup>

4.4.22 As for preparation, the Freshfield report states that having an incident management policy is a start but is not sufficient in itself.<sup>771</sup> It is submitted in the report that appropriate risk allocation in commercial contracts and insurance should also assist to minimise the financial effects of a product crisis.<sup>772</sup> It is further stated that although the ultimate objective should be the creation of a climate in which businesses take responsibility for producing safer goods, it would be unrealistic to expect this to be achieved simply by enacting legislation.<sup>773</sup> What is required according to the Freshfields Report

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<sup>760</sup> Ibid.

<sup>761</sup> Ibid.

<sup>762</sup> Ibid.

<sup>763</sup> Ibid.

<sup>764</sup> Ibid.

<sup>765</sup> Ibid.

<sup>766</sup> Ibid.

<sup>767</sup> Ibid.

<sup>768</sup> Ibid.

<sup>769</sup> Freshfields at 4.

<sup>770</sup> Freshfields at 4.

<sup>771</sup> Ibid.

<sup>772</sup> Ibid.

<sup>773</sup> Howells at 340.

are both enforcement authorities to enforce the general safety requirements and sanctions for breaching the requirements.<sup>774</sup>

4.4.23 Contrary to the position in the U.S., the GPSD<sup>775</sup> in Europe is generally understood not to grant national authorities the power to order the recall of products which have reached consumers.<sup>776</sup> Howells is of the view that the powers of the national authorities are not as extensive as those possessed by the CPSC.<sup>777</sup>

4.4.24 A discussion of product safety regulation in Europe is however not complete without a brief reference to the innovative RAPEX-system that is in effect in the EU to address cross-border safety issues. RAPEX is the EU rapid alert system that facilitates the rapid exchange of information between the member states and the Commission on measures taken to prevent or restrict the marketing and use of products posing a serious risk to the health and safety of consumers with the exception of food, pharmaceutical and medical devices, which are covered by other mechanisms.<sup>778</sup> Every Friday, the European Commission publishes a weekly overview of the products posing a serious risk as reported by the National Authorities.<sup>779</sup> This weekly overview provides information on the product, the possible danger and the measures that were taken by the reporting country.<sup>780</sup>

4.5 The nature of safety regulation in the Republic of South Africa

4.5.1 In light of the aforesaid, it is evident that a supplier's liability for defective products can be limited if a good supply chain management system ("SCM") is maintained.

4.5.2 According to Leenders and Fearon, SCM is the systems approach to managing the entire flow of information, materials and services from the raw materials suppliers through factories and warehouses to the end customer.<sup>781</sup>

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<sup>774</sup> Ibid.

<sup>775</sup> Council Directive 92/59/EEC of 29 June 1992 on General Product Safety. The revised General Product Safety directive (2001/95/EC), which came into force in 2004, deals with the safety of non-food consumer products as well.

<sup>776</sup> Howells at 342.

<sup>777</sup> Ibid.

<sup>778</sup> Information obtained from [ec.europa.eu/consumers/safety/rapex/index\\_en.htm](http://ec.europa.eu/consumers/safety/rapex/index_en.htm) accessed on 30 November 2012.

<sup>779</sup> Ibid.

<sup>780</sup> Ibid.

<sup>781</sup> Ambe & Badenhorst Weiss, "South African Automotive Industry: Trends and Challenges in the Supply Chain" *Journal of Contemporary Management* Vol 8 348 undated (hereinafter Ambe & Badenhorst Weiss).

- 4.5.3 Christopher defines SCM as “the management of upstream and downstream relationships with suppliers and customers to deliver superior customer value at less cost to the supply chain as a whole.”<sup>782</sup> As previously indicated section 1 of the CPA provides that the supply chain “with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.”
- 4.5.4 In general, SCM involves relationships and managing the inflow and outflow of goods, services and information (network) between producers, manufacturers and consumers.<sup>783</sup> Wisner, Tan and Leong argue that many businesses are only beginning to realise the benefits and problems that accompany an integrated supply chain.<sup>784</sup> Business that practice SCM concepts continually improve their ability to reduce waste, decrease time, be flexible and cut costs, which ensure future profitability.<sup>785</sup> SCM also serves as a deterrence function for compulsory product recalls and product liability claims.<sup>786</sup> The implications of product recalls include business interruption and reputation damage.<sup>787</sup>
- 4.5.5 The CPA unfortunately fails to set forth the control measures that manufacturers should implement to raise one of the defences provided for in section 61(4). It is however submitted that sufficient safety control measures fulfils an indispensable role in limiting the supply chain’s liability for harm caused by unsafe, defective or hazardous products.
- 4.5.6 To avoid product liability minefields, a wholesaler or retailer must ensure that the products it sells are produced by reputable manufacturers which employ reasonable measures.<sup>788</sup> Commitment to providing safe and reliable products and services is becoming more critical to long-term success in today’s quality-conscious marketplace.<sup>789</sup>
- 4.5.7 During the design and planning process, the manufacturer thus has to choose a material and method of construction that ensures safety, according

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<sup>782</sup> Ambe and Badenhorst Weiss at 348.

<sup>783</sup> Ibid.

<sup>784</sup> Ambe and Badenhorst Weiss at 349.

<sup>785</sup> Ibid.

<sup>786</sup> Ibid.

<sup>787</sup> Ibid.

<sup>788</sup> Kenneth, “*Product liability risk control*” Professional Safety, 2003 edition (hereinafter Kenneth).

<sup>789</sup> Ibid.



to the available scientific and technological knowledge.<sup>790</sup> If the danger posed by the product is unforeseeable, there is no liability.<sup>791</sup>

4.5.8 This predicament was explained by the court in *Safbank Line Ltd and others (“the plaintiffs”) v Control Chemicals (Pty) Ltd (“the defendant”).*<sup>792</sup> The plaintiffs were the owners and operators of an ocean vessel on which an explosion and fire had caused damage to the cargo.<sup>793</sup> The plaintiffs alleged that the explosion and fire had originated in a container packed with cartridges of calcium hypochlorite tablets manufactured by the defendant.<sup>794</sup> The plaintiffs claimed that the damage had been caused by the defendant’s negligent failure to maintain process and quality control over the raw materials used by it in the production of the tablets.<sup>795</sup> Although there was no direct evidence of the cause of the fire, the defendant maintained that the heat of the sun might have caused the cargo to combust.<sup>796</sup> The plaintiffs’ expert testified that the heat of the sun could not have contributed to the ignition of the calcium hypochlorite.<sup>797</sup> The court consequently held that the explosion had to have been caused by a defect in the calcium hypochlorite.<sup>798</sup> The decision was subsequently overturned on appeal.<sup>799</sup> The Supreme Court of Appeal found that the plaintiffs’ expert witness had been unable to identify the exact contaminants or defects in the tablets.<sup>800</sup> It held that there was no justification for the decision of the court *a quo*.<sup>801</sup>

4.5.9 Similarly, in *Bethlehem Export Co (Pty) Ltd v Incorporated General Insurances Ltd*<sup>802</sup> the court held that it is essential for an insured to prove that the condition of the goods did not change due to the natural behaviour of the subject matter.<sup>803</sup> The insured may discharge the onus by showing that the goods were sound when shipped, that they arrived damaged, and that

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<sup>790</sup> Ibid.

<sup>791</sup> Ibid.

<sup>792</sup> 1997 (4) SA 852 (C).

<sup>793</sup> *Control Chemicals (Pty) Ltd v Safbank Line Ltd and others 2000 (3) SA 357 (SCA)* at 2 – 4 (hereinafter *Safbank case*).

<sup>794</sup> *Safbank case* at 2 to 4.

<sup>795</sup> *Safbank case* at 2 to 4 .

<sup>796</sup> *Safbank case* at 2 to 4 .

<sup>797</sup> *Safbank case* at 2 to 4 .

<sup>798</sup> *Safbank case* at 16.

<sup>799</sup> *Safbank case* at 34.

<sup>800</sup> *Safbank case* at 31-32.

<sup>801</sup> *Safbank case* at 32.

<sup>802</sup> 1984 (3) SA 449 (W) (hereinafter *Bethlehem case*).

<sup>803</sup> *Bethlehem case*.

the damage is of such a kind as to raise a presumption of some external cause.<sup>804</sup>

4.5.10 The aforesaid cases illustrate the importance of safety and quality control measures. Care must not only be taken during the manufacturing process but also thereafter so that the product is not damaged by temperature extremes or adverse storage conditions. It is thus clear that the supply chain's duty to provide safe products is a duty that continues after the initial manufacture of the product.

4.5.11 Procedures are required to ensure that a product cannot escape a quality control checkpoint.<sup>805</sup> Kenneth is of the opinion that a company should develop a written quality assurance program that is revised periodically and, at a minimum, provides for:<sup>806</sup>

4.5.11.1 Testing, evaluation and inspection of raw materials, component parts and completed products;

4.5.11.2 Inspection of packaging, manuals and labels;

4.5.11.3 Detailed records of quality assurance activities;

4.5.11.4 Validation of quality standards and sizes of test samples;

4.5.11.5 Control of non-conforming materials and rejects;

4.5.11.6 Calibration of testing and measuring equipment;

4.5.11.7 Audits of materials supplied by other companies; and

4.5.11.8 General adherence to nationally recognized quality systems such as ISO 9000 and ISO 9001.

4.5.12 Schuster points out that the producer has a continuing duty to observe the product after it has come into circulation.<sup>807</sup> This is to ensure that a warning may be given against dangers which were not foreseeable at the time of the production.<sup>808</sup> This obligation can lead to a duty to recall the defective product and, in certain circumstances, to remove the danger.<sup>809</sup>

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<sup>804</sup> *Bethlehem case.*

<sup>805</sup> Kenneth *supra*.

<sup>806</sup> *Ibid.*

<sup>807</sup> FP Schuster, Ass iur Mag iur Dr iur, Akademischer Rat, J Gutenberg – University, Mainz, Rechtsanwalt, Wiesbaden, "Main Structures of Product Liability in German and Criminal Law"p431 Stellr 2009.

<sup>808</sup> *Ibid.*

<sup>809</sup> *Ibid.*

4.5.13 Similar to Europe<sup>810</sup>, South Africa also has various regulations governing the supply chain, such as the regulations of the Pharmacy Act 53 of 1974 and the regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. Manufacturers should also adhere to nationally recognized quality systems such as ISO 9000<sup>811</sup> and ISO 9001<sup>812</sup>. The South African legislature has however failed to implement general safety regulations. The upshot of the legislature's failure to set out safety and quality control measures in the CPA is that there it is likely that significant product recalls to be seen in South Africa in the foreseeable future.

#### 4.6 General Safety Control in South Africa

4.6.1 Similar to the US<sup>813</sup> legislation, the CPA allows the National Consumer Commission ("NCC") to rather initiate product recalls than to rely on manufacturers to remove their defective products from store shelves.<sup>814</sup>

4.6.2 One may ask what the impact of product recalls on consumers is? When one reads this question, one thinks about mothers complaining that suppliers are injecting excessive quantities of brine into frozen chickens and dog lovers mourning about the loss of their dogs due to defective dog pallets.

4.6.3 The drawback of the implementation of product recalls is that it is reactive rather than pro-active and exposes the supply chain to product liability claims. However, product recall programmes are not without merit: at least it enables a supplier who has detected a defect in a product to withdraw such product from the market in order to avoid harm to consumers. Even in those instances where a defective product has caused harm to a consumer an effective product recall can prevent such harm from occurring to other consumers. In order to defend themselves against these claims, manufacturers have to implement full product tracking systems to prove that the defect did not exist in the goods at the time it was supplied. The net effect is that consumers may see an increase in product prices, due to the

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<sup>810</sup> For example, in Europe, it is compulsory to record the temperature of frozen food. The European Directive No. 92/1/EEC states that the recording of air temperature is required and that devices must comply with NF EN 12 830. For thermometers, the recent European Standards NF EN 13 485 and EN 13 486 respectively define testing characteristics and methods.

<sup>811</sup> International Standard for Quality Management Systems - fundamentals.

<sup>812</sup> International Standard for Quality Management Systems – requirements.

<sup>813</sup> Food Safety Bill of July 2009.

<sup>814</sup> Section 60 .

safety mechanisms to be implemented by the supply chain. However this cost disadvantage is off-set by the advantage in being provided with safer good quality products which minimize the risk of harm to consumers.

4.6.4 The National Consumer Commissioner has published draft Consumer Product Safety Recall Guidelines in terms of the CPA in order to address situations where defective products that may cause harm are released onto the consumer market.<sup>815</sup> These guidelines require a supplier to adopt a system that will ensure the efficient and effective recall of unsafe consumer products from consumers and from within the supply chain.<sup>816</sup> Such systems are required to be tailored to the type of product and the risk posed to consumers.<sup>817</sup> A supplier may seek independent advice (including legal advice) regarding the system to be developed or put in place when conducting a consumer product recall.<sup>818</sup>

4.6.5 The range of goods covered under the CPA, and to which the product safety requirements apply, is broad and covers any goods as defined by the Act.<sup>819</sup> The guidelines have been developed to help suppliers plan for, and respond to, an incident where the recall of potentially unsafe consumer products is required.<sup>820</sup> It does this by setting out:<sup>821</sup>

- a) the legal requirements for suppliers in relation to a consumer product recall specified in the CPA;
- b) the role and responsibilities of suppliers and Government agencies when a recall is necessary;
- c) the requirements for conducting a recall, including notification, recall strategy, retrieval of the product and reporting on the recall.

4.6.6 The guidelines indicate that a consumer product safety recall may take place when a problem that may be identified as a health or safety hazard occurs.<sup>822</sup> Voluntary product recalls may be initiated by suppliers when they become

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<sup>815</sup> GG 34771 GN 486 of 18 July 2011 at 3( hereinafter referred to as the Recall Guidelines).These Recall Guidelines are accompanied by a prescribed recall notification form that inter alia requires notification of where,when and by whom the product was sold, the defects in the product and the hazards that can be caused by the product.

<sup>816</sup> Recall Guidelines at 6.

<sup>817</sup> Ibid.

<sup>818</sup> Ibid.

<sup>819</sup> Recall Guidelines at 8.

<sup>820</sup> Recall Guidelines at 6.

<sup>821</sup> Recall Guidelines at 6 and 7.

<sup>822</sup> Recall Guidelines at 7.

aware of safety issues.<sup>823</sup> Product recalls may also be negotiated with suppliers by the NCC or other Regulators when they identify a safety issue or following enforcement or compliance action.<sup>824</sup>

4.6.7 As a last resort, the NCC may order a compulsory recall to protect the public from any unsafe goods in terms of section 60(2) in terms of the CPA.<sup>825</sup> When this happens, the NCC may issue a written notice stipulating the manner in which the recall is to occur.<sup>826</sup> The NCC is tasked with monitoring compliance with all such notices issued by it.<sup>827</sup>

4.6.8 When a recall occurs all of the particular consumer products subject to the recall must be removed from the market place.<sup>828</sup>

#### 4.7 Involvement of the NCC in Consumer Product Recalls

Suppliers have an obligation under the CPA to notify the NCC when they undertake a voluntary recall.<sup>829</sup> As indicated, the NCC may also order compulsory product recalls. The Commission's primary purpose with regards to product recalls is to ensure that any unsafe product is effectively removed from the marketplace and the hands of consumers.<sup>830</sup>

##### 4.7.1 Safety monitoring and recall: legal requirements

4.7.1.1 Section 60 of the CPA deals with safety monitoring and recall. In terms of section 60(1) the Commission must promote, within the framework of section 82,<sup>831</sup> the development, adoption and application of industry wide codes of practice providing for effective and efficient systems to:<sup>832</sup>

a) receive notice of

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<sup>823</sup> Ibid.

<sup>824</sup> Ibid.

<sup>825</sup> Ibid.

<sup>826</sup> Ibid.

<sup>827</sup> Ibid.

<sup>828</sup> Recall Guidelines at 9.

<sup>829</sup> Recall Guidelines at 7.

<sup>830</sup> Ibid.

<sup>831</sup> An 'industry code' for purposes of section 82 means a code regulating the interaction between or among persons conducting business within an industry or regulating the interaction, or providing for alternative dispute resolution, between persons contemplated as aforesaid and consumers. S82(2) empowers the Minister to prescribe an industry code on the recommendation of the Commission. Provision is also made in s82(3) for the accreditation of industry codes.

<sup>832</sup> S 60(1)(a) to (c).

- (i) consumer complaints or reports of product failures, defects or hazards;
  - (ii) the return of any goods because of a failure, defect or hazard;
  - (iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard: and
  - (iv) any other indication of failure, defect or hazard,  
in any particular goods or in any component of them or injuring or damage resulting from the use of those goods;
- (b) monitor the sources of information contemplated in paragraph (a) and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use or exposure to those goods;
  - (c) conduct investigations into the nature, causes, extent and degree of risk to the public;
  - (d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods;
  - (e) if the goods are unsafe, recall those goods for repair, replacement and refund.

4.7.1.2 If the NCC has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code contemplated in section 60(1), the NCC, by written notice, may require that producer to conduct an investigation contemplated in section 60(1) or carry out a recall programme on any terms required by the Commission.<sup>833</sup>

4.7.1.3 Section 60(3) indicates that a producer or importer affected by a notice issued in terms of section 60(2) to conduct a safety investigation or to carry out a recall programme may apply to the Tribunal to set aside the notice in whole or in part.<sup>834</sup>

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<sup>833</sup> S 60(2).

<sup>834</sup> Recall Guidelines at 9.

#### 4.7.2 Voluntary product recall

4.7.2.1 A voluntary recall occurs when the supplier initiates the recall and voluntarily takes action to remove the relevant goods from distribution sale, and/or consumption.<sup>835</sup> A voluntarily recall may also be negotiated with a supplier by the NCC following enforcement or compliance action.<sup>836</sup>

As indicated by the NCC in the Consumer Product Safety Recall Guidelines, the use of the word “voluntary” however does not correspond to whether or not the distribution network/chains can choose to remove the product from sale.<sup>837</sup> It thus merely means that the supplier initiates the recall.

4.7.2.2 The NCC requires the notification to it in writing within two days of the supplier initiating the recall.<sup>838</sup> The notice must state that the goods are subject to a recall and set out the nature of the defect, or the dangerous characteristic of the goods.<sup>839</sup> A supplier who fails to notify the NCC of a recall may be found guilty of an offence under Section 110(2) of the CPA.<sup>840</sup>

#### 4.7.3 Compulsory recalls

4.7.3.1 As indicated section 60(2) empowers the NCC to order a supplier to recall any goods which on reasonable grounds the NCC believes that those goods will or may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code.<sup>841</sup> The NCC may thus by written notice, require that the producer carry out a compulsory recall programme on any terms required by the NCC.<sup>842</sup>

#### 4.7.4 Responsibility for the supply of safe products

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<sup>835</sup> Ibid.

<sup>836</sup> Ibid.

<sup>837</sup> Ibid.

<sup>838</sup> Recall Guidelines at 10.

<sup>839</sup> Ibid.

<sup>840</sup> Ibid. Section 111(1)(b) states that that any person convicted of an offence in terms of the CPA is liable to a fine or imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

<sup>841</sup> Recall Guidelines at 10.

<sup>842</sup> Ibid.

- 4.7.4.1 As indicated previously, the CPA contemplates that the Supply Chain's main responsibility is to provide safe products. Similarly, the product recall guidelines also provide that a supplier is the entity who has the primary responsibility for the supply of safe consumer products in South Africa.<sup>843</sup>
- 4.7.4.2 According to the Product Recall Guidelines individual suppliers are responsible for the investigation and rectification of safety related hazards in products that they supply.<sup>844</sup> A safety hazard may be identified by many means, including:<sup>845</sup>
- a) detection by the supplier undertaking the recall or another supplier within the supply chain;
  - b) complaint by a consumer;
  - c) detection by an industry body or consumer organisation; and
  - d) detection by the Commission, another regulator or a State entity.
- 4.7.4.3 The Recall Guidelines indicate that an unsafe product may result from a manufacturing or production error, that is, where the manufacturer of the product departed from its design or material specifications during production.<sup>846</sup> An unsafe product may also result from a design defects, that is, a product may be unsafe even if the product is manufactured exactly in accordance with its design and specifications.<sup>847</sup> A defect in design may also be the cause of risk or injury as a result of the operation or use of the product, the reasonably foreseeable use of the product, or the failure of the product to operate as intended.<sup>848</sup>
- 4.7.4.4 Where the Commission detects or becomes aware of a safety related hazard it will attempt to identify the supplier at the highest level in the supply chain in order to assist the supplier to ensure all relevant suppliers from within the supply chain, including international recipients, are identified and advised of the safety related hazard relating to the product.<sup>849</sup>

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<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> Recall Guidelines at 10 and 11.

<sup>846</sup> Recall Guidelines at 11.

<sup>847</sup> Ibid.

<sup>848</sup> Ibid.

<sup>849</sup> Ibid.



#### 4.7.5 Suppliers' Recall Responsibilities

4.7.5.1 In terms of the guidelines, a supplier has the following general responsibilities in relation to a recall:<sup>850</sup>

- a) conduct a comprehensive risk analysis of the safety hazard;
- b) stop distribution of a product that has been identified for recall;
- c) cease production or modify the manufacturing process for a product that has been identified for recall;
- d) remove the unsafe product from the marketplace;
- e) notify the relevant regulator/s;
- f) notify the public;
- g) notify international product recipients;
- h) notify others in the domestic supply chain;
- i) facilitate the return of recalled products from consumers;
- j) store and dispose of recalled products safely;
- k) have a written recall strategy/plan;
- l) maintain records and establish procedures that will facilitate a recall (records should be in a form that can be quickly retrieved) and
- m) provide progress reports on the conduct of the recall to the Commission and relevant regulators.

4.7.5.2 Where the risk analysis determined that it is not necessary to retrieve products from consumers, some other action by the supplier is required to mitigate the safety risk.<sup>851</sup> These other actions may include a trade level recall or issuing a safety alert.<sup>852</sup>

4.7.5.3 Where a supplier initiates a trade level recall, the same general responsibilities listed above would apply except that the supplier would not be required to notify the public.<sup>853</sup> Likewise when issuing a safety alert, a supplier would have the same general responsibilities.<sup>854</sup> An important difference between a trade level recall and a general product safety recall

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<sup>850</sup> Recall Guidelines at 11 and 12.

<sup>851</sup> Recall Guidelines at 12.

<sup>852</sup> Ibid.

<sup>853</sup> Ibid.

<sup>854</sup> Ibid.

as contemplated by the Consumer Product Safety Recall Guidelines is that it would however not be required that the unsafe product be removed from the marketplace.<sup>855</sup>

#### 4.7.6 Identifying a Consumer Product Safety Hazard

4.7.6.1 The Consumer product Safety Recall Guidelines attempt to assist suppliers in establishing a course of action upon detection of a possible safety hazard in order to minimize the risk of harm being caused by the product. Where a supplier becomes aware of a possible safety hazard in a consumer product that may cause injury to a person, the Guidelines stipulate that a supplier should immediately conduct the following assessment:<sup>856</sup>

- a) gather and assess the reliability of all available information about the potential hazard;
- b) identify how the problem occurred;
- c) conduct a comprehensive risk analysis; and
- d) look at all possible ways to address the safety related hazard and decide whether the product can be repaired or modified.

4.7.6.2 The Commission requires a supplier to contact it when commencing such an assessment.<sup>857</sup> This will enable the Commission to work with the supplier to determine what action (if any) is required to mitigate a safety related hazard with the product.<sup>858</sup>

#### 4.7.7 Determining and appropriate course of action

4.7.7.1 Depending on the outcome of the aforesaid risk analysis there are a number of possible action that a supplier may choose in terms of the guidelines to mitigate a safety related hazard.<sup>859</sup> These include:<sup>860</sup>

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<sup>855</sup> Ibid.

<sup>856</sup> Ibid.

<sup>857</sup> Recall Guidelines at 13.

<sup>858</sup> Ibid.

<sup>859</sup> Ibid.

<sup>860</sup> Ibid.

- a) Calling back or withdrawing of products from the market or distribution chain;
- b) Requesting consumers or other suppliers;
  - (i) to return products for refund, replacement or modification; or
  - (ii) contact the supplier to arrange for a replacement product or part to be sent to the consumer;
- c) sending a service agent to a person's home or place of business to repair or modify a product; or
- d) requesting a service agent repair or modify a product when it is next presented for servicing.

4.7.7.2 The decision about the most appropriate action in order to reduce the risk to consumers will depend on a number of factors, including the nature of the risk and distribution and lifecycle of the product.<sup>861</sup> The Guidelines provide that suppliers should consult with the Commission about the most appropriate strategy.<sup>862</sup>

#### 4.7.8 Objectives of Recall

4.7.8.1 According to the Consumer Product Safety Recall Guidelines the objectives of a recall are to<sup>863</sup> stop the distribution and sale of the affected product as soon as possible; inform the relevant authorities of the problem; inform the public of the problem; effectively and efficiently remove from the market place any product which is potentially unsafe; and to prevent the further distribution of unsafe products.

#### 4.7.9 Requirement for conducting a recall

4.7.9.1 The Consumer Product Safety Recall Guidelines emphasize that the supplier has the prime responsibility for implementing a recall.<sup>864</sup> A recall

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<sup>861</sup> Ibid.

<sup>862</sup> Ibid.

<sup>863</sup> Ibid.

<sup>864</sup> Ibid.

should be implemented in accordance with the supplier's recall policy and after consultation with the NCC.<sup>865</sup>

4.7.9.2 In order for the NCC to be assured that a product safety risk will be effectively mitigated, it requires that the supplier undertake the following actions:<sup>866</sup>

- a) notify the regulator/s of the recall, which includes providing details of other entities within the supply chain that have been notified of the recall;
- b) prepare and submit a recall strategy to the regulator/s;
- c) retrieve the affected product from consumers and from within the supply chain; and
- d) report on the recall to the regulators.

4.7.10 Notification to NCC of recall

4.7.10.1 A supplier undertaking a safety-related recall is required to notify the NCC in writing preferably before commencing recall action.<sup>867</sup> However, the supplier must notify the NCC within two days of commencing a recall action.<sup>868</sup>

4.7.10.2 As a matter of administration, the NCC recommends that a supplier notify the NCC when the supplier decides to take any of the following actions to mitigate a product safety related hazard:<sup>869</sup>

- a) call back or withdraw products from the market or distribution chain;
- b) requesting consumers or other suppliers to return the products for refund, replacement or modification or to contact the supplier to arrange for a replacement product or part to be send to the consumer;
- c) send a service agent to a person's home or place of business to repair or modify a product; or
- d) make arrangements for a service agent to repair or modify a product when it is next presented for servicing.

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<sup>865</sup> Recall Guidelines at 14.

<sup>866</sup> Ibid.

<sup>867</sup> Recall Guidelines at 15.

<sup>868</sup> Ibid.

<sup>869</sup> Ibid. A Recall Notification Form can be obtained directly from the NCC offices.

#### 4.7.11 Notification to International Recipients

4.7.11.1 The modern consumer market has global dimensions and in many instances it may occur that a domestic product is exported to the international market. Over and above the aforesaid, a supplier undertaking a voluntary or compulsory safety-related recall is thus responsible for goods supplied outside South Africa.<sup>870</sup> It is therefore required that the supplier notify any person outside South Africa in writing, to whom it has supplied goods, that the goods are subject to a recall.<sup>871</sup>

4.7.11.2 Recall effectiveness is contingent upon the effective notification and cooperation between all parties in the supply chain.<sup>872</sup> The Commission therefore requires a supplier who undertakes a safety related recall of consumer goods to notify any entity within the domestic supply chain in writing that a recall has been initiated.<sup>873</sup>

4.7.11.3 Where a supplier has complied with this requirement to notify entities from within the domestic supply chain that a recall has been initiated, the supplier should advise the Commission.

#### 4.7.12 Recall Strategy

4.7.12.1 A supplier is required to submit a recall strategy to the NCC on initiating a recall thereby assuring the NCC that the product safety risk will be effectively mitigated.<sup>874</sup> The recall strategy is the first stage of reporting in relation to a recall and will assist the NCC to assess whether the product safety risks associated with the unsafe product will be adequately addressed.<sup>875</sup>

4.7.12.2 A supplier's recall strategy must include:

- a) an explanation of the problem, including the hazard associated with the product and the supplier's assessment of the risk posed by the product;

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<sup>870</sup> Recall Guidelines at 16.

<sup>871</sup> Ibid.

<sup>872</sup> Ibid.

<sup>873</sup> Ibid.

<sup>874</sup> Ibid.

<sup>875</sup> Recall Guidelines at 17.

- b) the number of units supplied to consumers and others in the supply chain;
- c) information about any known injuries or incidents associated with the product;
- d) information about the life cycle of the product;
- e) information about the proposed communication with consumers including the method of communication, frequency with which the communication will be repeated and details of the message. This should be negotiated with the NCC;
- f) information about the way in which the supplier will manage to contact from consumers about the recalled product, including any complaint handling procedures;
- g) information about the manner in which the recalled product will be collected, destroyed or rectified;
- h) contact details of the manufacturer and/or importer of the product;
- i) contact details of other entities in the supply chain to whom the recalling supplier has supplied the product;
- j) contact details of international product recipients; and
- k) action taken by the supplier to identify and correct the cause of the hazard, including the outcome of any root cause analysis or the time period in which such analysis will occur.

#### 4.7.13 Communicating plan, progress reports and reporting schedule

4.7.13.1 The purpose of communicating with consumers about a recall is to ensure that product related injuries are prevented through the removal or rectification of unsafe products.<sup>876</sup> Matching the communication medium to the consumer is thus important to achieve the objective for compliance with a recall notice.<sup>877</sup> A written recall notice must include the product

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<sup>876</sup> Recall Guidelines at 18.

<sup>877</sup> Ibid.

description, picture of a product, description of the defect and a statement of the hazard.<sup>878</sup>

4.7.13.2 In order to monitor the progress and enable ongoing assessment of the effectiveness of the recall the Commission requires a supplier to provide progress reports.<sup>879</sup> The Commission will develop a reporting schedule with a supplier at the beginning of a recall that appropriately reflects the product risk being addressed.<sup>880</sup>

#### 4.7.14 Closing of Recall

4.7.14.1 When a supplier has taken all reasonable steps to effectively mitigate the risk posed by the unsafe product, the recall can be closed.<sup>881</sup> Once a recall is closed, the supplier no longer needs to actively promote the recall and the regulatory oversight ceases.<sup>882</sup>

## 5 CONCLUSION

5.1 From the above comparative overview, it is evident that the implementation of safety control measures is paramount to the supply chain's duty to provide non-defective products with the objective of preventing or limiting instances of product liability. It is further submitted that an effective system for tracking defective products is essential in order to minimize harm caused by defective products. In a nutshell, it is submitted that it can be concluded from the comparison between the U.S. and EU systems discussed above, that the GPSD Directive provides a far more complete system of protection than the U.S. Consumer Product Safety Commission is able to offer, but in areas like product recall the U.S. system still remains superior.<sup>883</sup>

5.2 It is further submitted that although mandatory safety standards are desirable it would be an insurmountable task to provide a mandatory set of safety standards that would cover every product that may give rise to a product liability

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<sup>878</sup> Ibid.

<sup>879</sup> Recall Guidelines at 20.

<sup>880</sup> Ibid.

<sup>881</sup> Ibid.

<sup>882</sup> Ibid.

<sup>883</sup> Howells at 309.

claim. As such the U.S. approach of supplementing mandatory standards with voluntary industry standards appear to be a more workable solution to this dilemma. However, the value of a general set of safety standards should not be underrated, as such set of standards would provide an efficient guideline that can be accessed by industry when drafting appropriate industry standards. In this regard the following aspects of the GSPD may be instructive, namely:<sup>884</sup>

- a) the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance;
- b) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- c) the presentation of the product, the labelling, any instructions for its use and disposal and any other indication or information provided by the producer; and
- d) the categories of consumers at serious risk when using the product, in particular children.

5.3 As in Europe, it is submitted that the utility of the purpose of the product must also be balanced against the minimum inherent risks to determine whether the risk is acceptable. It is further important that regular consultation between industry and the consumer authorities take place in order to ensure that safety standards meet the demands of a modern globalized market. This ties in with the continuous duty of the supply chain to ensure the safety of a product after its initial manufacture and to cater for non- foreseeable dangers that may subsequently emanate from products. Because it is not possible to remove all the risk that can ever attach to all products released onto the consumer market, it is clear that a risk incidence policy is an indispensable tool in providing safe products, as such policy would contribute to the withdrawal of potentially defective products before they harm consumers.

5.4 In the South African context, it is submitted that the Draft Consumer Product Safety Recall Guidelines would not be sufficient in itself to ensure the implementation of sufficient safety measures in businesses. Apart from the

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<sup>884</sup> Ibid.



draft guidelines for product recalls, it is further submitted that manufacturers would have to follow ISO standards for the time being to mitigate product risks.

- 5.5 It is therefore suggested that the South African legislature ought to formulate an initiative to introduce general safety regulations. Moreover, it is also suggested that the legislature makes provision for the classification of product recalls in line with the US legislation. It is submitted that the comment on the “Restatement Third Torts: Products Liability” that torts law serves the instrumental function of creating safety incentives<sup>885</sup> can be agreed with: manufacturing and quality control are focal points for ensuring that products are manufactured in conformance with design criteria and specifications.<sup>886</sup> People, equipment, material and the work environment must function effectively as a system so that nothing degrades product integrity and safety during the production process.<sup>887</sup> Controls are required to ensure that only prescribed materials are used.<sup>888</sup> Care must be taken so that the product is not damaged by overstressing, temperature extremes, falling impacts or adverse storage conditions.<sup>889</sup> Coding may be necessary to prevent misassembly, particular when differences between component parts are not easy to discern visually.<sup>890</sup>
- 5.6 In the final instance it is submitted that the introduction of a cross –border safety regulation device such as the European RAPEX–system coupled with the measures as suggested above may go a long way towards the prevention of harm to consumers as a result of defective products.

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<sup>885</sup> Torts Strict Liability *supra*. See also Loubser and Reid at 416.

<sup>886</sup> R Kenneth, *supra*.

<sup>887</sup> R Kenneth, *supra*.

<sup>888</sup> R Kenneth, *supra*.

<sup>889</sup> R Kenneth, *supra*.

<sup>890</sup> R Kenneth, *supra*.

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 1 INTRODUCTION

1.1 From the perspective of South African consumers, the introduction of a strict product liability regime by the CPA is a much welcomed innovation. However, the introduction of a no-fault liability system *via* section 61 of the CPA will yield severe repercussions for the supply chain. From section 61 it is clear that the product liability net of the CPA is cast wide in order to hold the whole supply chain including suppliers of services who installs or provides access to goods, accountable. As indicated, the supply chain will face a myriad of compliance duties to give effect to their primary duty which is to prevent defective products from being released into the consumer market.

1.2 It is submitted that the introduction of a strict product liability regime is not *per se* sufficient to address the problem of harm caused by defective products and that an appraisal of the duties of the supply chain in such a regime and proper regulation thereof, by means of mandatory regulation as well as voluntary industry regulation, is pivotal to ensure the success of such a regime.

### 2 DEFECTIVE GOODS AND PRODUCT LIABILITY

2.1 As submitted in this dissertation, the purpose of a product liability regime is not merely to delineate the parameters of product liability and to provide for remedies in instances where defective products cause harm. Thus an efficient product liability regime should not merely be reactive, but it should in the first instance be pro-active by deterring the release of defective products which may cause harm to the consumer market.

2.2 It is evident that the right to safe and good quality goods seems to be central to the strict product liability regimes in the United States of America and Europe. In line with these international trends, section 55 of the CPA contemplates that a manufacturer has the general duty to provide safe and good quality goods. It is submitted that the introduction of the statutory right to receive good quality

goods will significantly contribute to reducing product liability claims as it will reduce the incidence of defective products that may result in harm to consumers. The introduction of the implied or *ex lege* warranty of quality in section 56 of the CPA which supplements the right to safe good quality goods in section 55 is also an innovative feature that will deter the supply chain from supplying defective products. This feature of the product liability regime introduced by the CPA is enhanced by the wide definition of ‘consumer’ and the broad spectrum of ‘goods’ that are covered by the Act and the fact that the definition of a ‘defect’ in section 53 includes defects in component parts. As indicated the CPA attempts to extend this protection even further by making section 61 applicable even to transactions that are exempt from the application of the Act.

### **3 THE DUTIES OF THE SUPPLY CHAIN IN RESPECT OF SAFE, GOOD QUALITY GOODS AND WARNINGS**

#### **3.1 Safe good quality goods**

3.1.1 The efficiency of the strict product liability regime is unfortunately underscored by the problematic issues surrounding the concept of ‘defect’ and in this respect it appears that the introduction of the vague ‘consumer expectations test’ is the main culprit. It has been indicated that the definition of ‘defect’ in section 53 of the CPA largely resembles the concept of ‘defect’ encompassed by the EU directive and that the provisions of section 55(3) mirror the provisions of article 6 of the EU Directive. It was subsequently pointed out that it can thus be expected that when the South African courts have regard to foreign law, as they are entitled to do by virtue of section 2 of the CPA, that they will by large have regard to how the European courts interpreted the concept of defect.

3.1.2 As indicated, it can be agreed with Loubser and Reid that, neither the US (Third) Restatement, nor the European Directive, has entirely eliminated elements of fault-based liability.<sup>891</sup> A further shortcoming that was pointed out is that neither the foreign legislation, nor the foreign case law, provides a

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<sup>891</sup>Loubser and Reid at 427.

concise meaning of the expectations test. This test is undeniably vague and its applicability will differ depending on the type of product that is being scrutinized. Due to the integral role that consumer expectations play in regard to the concept of defect (which is clear from the incorporation thereof in the product liability systems of both the U.S. and the EU), it can be agreed with Van Heerden that it appears unlikely that this test could ever be discarded arbitrarily.<sup>892</sup>

3.1.3 As submitted, the introduction of a *res ipsa* inference akin to that contained in section 3 of the U.S. Restatement (Third) of Torts may however alleviate some of the vagueness surrounding the consumer expectations test. It is further submitted that clarity regarding the parameters of the aforesaid test should be provided by the courts sooner rather than later, as it will assist the supply chain in complying with the duty to provide safe good quality goods. Furthermore, it is submitted that the definition of defect should be augmented to expressly incorporate design defects.

## 3.2 Warnings

3.2.1 As indicated, warnings play a pivotal role in the context of the supply chain's duty to supply products that will not cause harm to consumers. It appears that the concept of 'defect' for purposes of product liability necessarily imply that failure to warn, in instances where it is required that a product be supplemented with a warning, constitutes defectiveness on which a product liability claim may be based should the product cause harm as a result of such failure to warn adequately. Section 61(1) of the CPA embodies this principle by providing that strict product liability of the supply chain will follow in the event of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods.

3.2.2 Due to the wide scope of goods that are covered by the CPA it will be an impossible task to provide a detailed list of warnings that should accompany

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<sup>892</sup> Van Heerden Product Liability Notes at 4.

individual products. It is however submitted that section 49(2) of the CPA provides a workable guideline regarding the type of risks that warnings should cover, namely risk

- 3.2.2.1 of an unusual character or nature;
  - 3.2.2.2 the presence of which the consumer could not reasonably be expected to be aware of or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
  - 3.2.2.3 that could result in serious injury or death.
- 3.2.3 Warnings that do not comply with the requirements set by section 49 read with the plain language requirements imposed by section 22, will not constitute proper warnings as contemplated by the CPA and the supply chain will not be able to escape product liability. It is thus imperative that the warning *inter alia* be drawn to the attention of the consumer in a conspicuous manner, in legible font and in simple language, and that any illustrations that accompany the warning are clear and comprehensible to the consumer to whom the product is supplied.
- 3.2.4 In considering whether a duty to warn exists with regard to a specific product it is submitted that it should be done by considering the informational needs of the least sophisticated and educated consumer to whom the goods are supplied or who can reasonably be contemplated to use the goods. Thus in the context of warnings the intended user of the product should be the benchmark for appraising the adequacy of the warning. It should also not be necessary to warn the intended user of obvious or known dangers or risks associated with certain products such as sharp knives.
- 3.2.5 It is further submitted that publication by the National Consumer Commission of a set of plain language guidelines for warnings in general would contribute to enabling the supply chain to comply with its duty to warn and would thus benefit consumers by reducing the risk of harm caused as a result of inadequate warnings on products. The supply chain's duty to warn may also

be alleviated in industry context by requiring that industry codes address product related warnings.

#### **4 DEFENCES**

4.1 The defences available in section 61(4) of the CPA to a large extent mirror the defences contained in the EU Directive, which yields the advantage that South African courts can have recourse to EU jurisprudence in interpreting and applying these defences where they are in conformity with each other. The defences contained in section 61(4) of the CPA is the most controversial, as it not only limits the product liability of distributors or retailers, but appears to do so in a manner that re-introduces negligence through the back door and thus undermines the strict product liability character of section 61(4).

4.2 As indicated, the legislature's decision not to retain the development risk defence which was initially inserted into the draft Consumer Protection Bill can however not be faulted, as this defence would have been of little avail to the supply chain and in any event appears to be problematic to apply.

4.3 It is submitted that the legislature should consider expanding the number of defences available to the supply chain. The introduction of a defence such as the US 'intended user' defence might be considered as well as other EU defences, such as the defence that the producer did not put the product into circulation or the defence that a component defect is attributable to the design of the product in which the component has been fitted into South African law.

#### **5 LIMITATION OF LIABILITY**

5.1 A comparative oversight of the product liability regimes in the US and the EU indicates that a strict product liability regime will be of little use if the supply chain is at liberty to contract out of its liability for harm caused by defective products. It is thus an essential feature of an efficient strict product liability regime that the right of a consumer to obtain redress in the form of a product liability claim is preserved by disallowing the supply chain the luxury of merely

contracting out of its responsibility in this regard. However, a balanced approach appears to be the most suitable method of addressing the issue of limiting the supply chain's liability for harm caused by defective products. To this end, the CPA seems to have achieved a satisfactory method of addressing this issue in that it does not allow the supply chain to contract out of its product liability, but it apparently does allow it to limit the extent of such liability in a manner that meets the protective requirements of sections 22, 48, 49 and 51.

- 5.2 The strict duties imposed on manufacturers by the CPA and implied by the need to avoid product liability will, no doubt, increase the prices of end products in future. This added layer of compliance in the form of observing safety standards, issuing of adequate instructions and warnings and drafting of contracts that are CPA-compliant will lead to an escalation in the cost of putting a product on the consumer market and will inevitably also have to absorb the increased cost in indemnity agreements and insurance that the supply chain will have to expend in order to enable it to meet product liability challenges and claims. It goes without saying, that there is a cost to insurance cover, and that it is likely that a headless chicken will experience a big increase in liability premiums. The net effect of this is that consumers will very likely have to pay excessive prices for safe and reliable products. The counter-argument, however, is that the costs of complying with the supply chain's product liability duties is to be preferred above the dire implications of harm caused as a result of defective products.

## **6 SAFETY AND RECALL MEASURES**

- 6.1 The implementation of safety measures, which should include an efficient tracking system, is paramount to the supply chain's duty to provide non-defective products with the objective of preventing or limiting instances of product liability. Although mandatory safety standards are desirable, it would be an insurmountable task to provide a mandatory set of safety standards that would cover every product that may give rise to a product liability claim. As such, the US approach of supplementing mandatory standards with voluntary industry standards appears to be a more workable solution to this dilemma.

- 6.2 It is submitted that a general set of general safety standards would provide an efficient guideline that can be accessed by industry when drafting appropriate industry standards. In this regard, the following aspects of the European GSPD may be instructive, namely:
- 6.2.1 the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance;
  - 6.2.2 the effect on other products, where it is reasonably foreseeable that it will be used with other products;
  - 6.2.3 the presentation of the product, the labelling, any instructions for its use and disposal and any other indication or information provided by the producer; and
  - 6.2.4 the categories of consumers at serious risk when using the product, in particular children.
- 6.3 As in Europe, it is submitted that the utility of the purpose of the product must also be balanced against the minimum inherent risks to determine whether the risk is acceptable. It is further important that regular consultation between industry and the consumer authorities take place in order to ensure that safety standards meet the demands of a modern globalized market. Because it is not possible to remove all the risk that can ever attach to all products released onto the consumer market, it is clear that a risk incidence policy is an indispensable tool in providing safe products as such policy would contribute to the withdrawal of potentially defective products before they harm consumers.
- 6.4 In the South African context, it is submitted that the Draft Consumer Product Safety Recall Guidelines would not be sufficient in itself to ensure the implementation of sufficient safety measures in businesses. Apart from the draft guidelines for product recalls, it is further submitted that manufacturers would have to follow ISO standards for the time being to mitigate product risks.
- 6.5 It is therefore suggested that the South African legislature ought to formulate an initiative to introduce general safety regulations. Moreover, it is also suggested that the legislature makes provision for the classification of product recalls in



line with the US legislation. In the final instance it is submitted that the introduction of a cross-border safety regulation device such as the European RAPEX-system coupled with the measures as suggested above may go a long way towards the prevention of harm to consumers as a result of defective products.

## **7 FINAL REMARKS**

- 7.1 The strict product liability regime introduced by section 61 of the CPA will indeed have severe compliance implications for the supply chain. These compliance implications will indeed impact on the cost of supplying products to consumers. There is no argument about this. It is however clear that the supply chain has significant control over the extent to which it will be affected by this regime. It is clear that the supply chain will no longer be able to ignore the benefits of introducing sound policies in terms whereof they manage their duty to provide products that are not harmful to consumers. This aspect is crucially important and should be an integral feature of the supply chain's business plan. In this manner the supply chain will eventually have an efficient system in place which will in time alleviate the cost of production due to economies of scale.
- 7.2 The supply chain should further comprehend that the duty to provide safe good quality goods is a continuous duty and as such they should make a continuous effort to improve their ability to prevent or at least minimize their product liability risk. By attending to compliance with the supply chain duties imposed by the CPA'S product liability regime, suppliers will not only be able to place safe good quality goods on the consumer market, but they will also limit the incidence of product liability claims. In this way, the introduction of the strict product liability regime contemplated by the CPA can be viewed in a positive light as a wake up call to the supply chain to also protect itself from unnecessary product liability expense which has the potential, if unattended, to put many suppliers out of business.

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