

# The application of the Consumer Protection Act in the South African health care context: concerns and recommendations\*

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## *Abstract*

The article examines the application of the Consumer Protection Act 68 of 2008 in the health care context. Issues specifically considered are the introduction of no-fault liability and how this new development impacts on the health care sector; the impact of broadened consumer rights on medical practice in general, as well as relevant foreign and international law. In this regard, comparable legal provisions in the United States and European Union are addressed. The article concludes with a discussion of remedies and remedial procedures, including specific recommendations for health care providers and health care establishments to assist in ensuring that the services they deliver are compliant with the Act, based on conclusions drawn from the comparable international examples.

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## INTRODUCTION

The Consumer Protection Act 68 of 2008,<sup>1</sup> which recently came into effect in South Africa, applies to every transaction occurring within South Africa

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<sup>1</sup> As well as Regulations, published in GG 34180 of 1 April (GN R 293).

involving the supply of goods or services in exchange for consideration<sup>2</sup> unless the transaction is exempted from the application of the Act.<sup>3</sup> The definition of consumer services in terms of the Act makes it clear that a patient is considered a ‘consumer’ for the purposes of this legislation.<sup>4</sup> Despite the urgent need for a comprehensive framework regulating consumer affairs and protecting consumers in general, the application of the Act to the health care sector poses serious practical challenges and creates many uncertainties.

This article will first address the scope, purpose and application of the Act, after which the introduction of no-fault liability by the Act will be discussed. The impact of broadened consumer rights, entrenched by the Act, on general medical practice is examined, specifically in relation to certain changes that will need to be made by practitioners and establishments in order to comply with these new requirements. As the Act specifically states that relevant foreign and international law may be considered in the interpretation of the Act, this article will next discuss comparable legal provisions in the United States and the European Union. In the final instance, the article investigates the remedies and remedial procedures available in terms of the Act. It concludes with some recommendations for health care providers and establishments to ensure that the services they deliver are compliant with the Act, based on the conclusions drawn from an interpretation of the Act and the comparable international examples.

### **SCOPE, PURPOSE AND APPLICATION OF THE ACT**

The Consumer Protection Act (the CPA) is an extensive piece of legislation that aims to protect and develop the social and economic welfare of consumers, in particular, vulnerable consumers.<sup>5</sup> The CPA establishes eight fundamental consumer rights, namely the right to equality in the consumer market;<sup>6</sup> privacy;<sup>7</sup> choice;<sup>8</sup> disclosure and information;<sup>9</sup> fair and responsible

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<sup>2</sup> See also s 1 of the Act.

<sup>3</sup> See s 5(1). The Act does not apply, amongst others, to transactions for the supply (or promotion) of goods or services to the State or transactions that relate to services supplied under an employment contract.

<sup>4</sup> ‘Consumer’ is very broadly defined in s 1 of the Act. In terms of the policy framework, a consumer is defined as a person who purchases ‘goods’ or ‘services’. See GN 1957 in GG 26774 of 9 September 2004, par 25.

<sup>5</sup> See s 3(1).

<sup>6</sup> Sections 8–10.

<sup>7</sup> Sections 11–12.

<sup>8</sup> Sections 13–21.

<sup>9</sup> Sections 22–28.

marketing;<sup>10</sup> fair and honest dealing;<sup>11</sup> fair, just and reasonable terms and conditions;<sup>12</sup> fair value, good quality and safety;<sup>13</sup> and the right to hold the supplier accountable to consumers.<sup>14</sup> The scope of the CPA is very wide, and if found to conflict with other concurrent health care legislation (eg the Health Professions Act<sup>15</sup> or the Medical Schemes Act<sup>16</sup>), the Act offering the greater protection to the consumer will apply.<sup>17</sup> This, without exception, favours the consumer-oriented CPA. This specific provision relating to interpretation entrenches the common law *contra proferentem* rule, which means that if ambiguities exist, a document is construed *contra* the drafter.<sup>18</sup>

A brief overview of some of the key definitions will illustrate the relevance of the CPA's application in the health care context. The definition of 'service' refers, but is not limited, to work performed by a person for the direct or indirect benefit of another, including the provision of information, advice or consultation. Examples of a 'service' are a consultation with a health practitioner, medical advice rendered by such a practitioner, or any medical intervention, such as an operation. 'Service' further includes the undertaking, underwriting or assumption of risk by a person on behalf of another.<sup>19</sup> This would include medical scheme cover and services provided under risk-sharing arrangements. A health care establishment or practitioner will, depending on the context, also be regarded as a 'supplier' in terms of the CPA. A 'supplier' refers to a person who markets goods or services, and may include individuals, juristic persons, partnerships, trusts, organs of state, and public-private partnerships.<sup>20</sup> The verb 'market' in this context means to

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<sup>10</sup> Sections 29–39.

<sup>11</sup> Sections 40–47.

<sup>12</sup> Sections 48–52.

<sup>13</sup> Sections 53–61.

<sup>14</sup> Sections 62–27. See also W Jacobs, PN Stoop & R van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13(3) *PER*, available at:

<http://www.scielo.org.za/pdf/pelj/v13n3/v13n3a09.pdf> (last accessed on 20 June 2011).

<sup>15</sup> 56 of 1974.

<sup>16</sup> 131 of 1998.

<sup>17</sup> Section 4(4).

<sup>18</sup> See *Lynn & Main Inc v Brits Community Sandworks CC* 2009 1 SA 308 (SCA), par 24. See also Jacobs, Stoop & Van Niekerk 5. The CPA provides for various remedies for the enforcement of consumer rights. See Jacobs, Stoop & Van Niekerk at 5 for more detail on these remedies, which include referring a complaint to a relevant ombud or the National Consumer Commission.

<sup>19</sup> Excluding advice or intermediary services in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS), the Long-Term Insurance Act 52 of 1998, and the Short-Term Insurance Act 53 of 1998.

<sup>20</sup> See s 1.

‘supply’ or ‘promote’ goods or services,<sup>21</sup> whereas ‘supply’ means to sell services, or to perform services or cause them to be performed or provided. In relation to goods, ‘supply’ means to sell, rent, exchange or hire for consideration. ‘Goods’ are very broadly defined and include ‘anything marketed for human consumption’.<sup>22</sup> This broad definition includes not only medicines, but also devices and consumables.

It is clear from these definitions that practically all interaction between patients, health care providers, and medical schemes will qualify as a transaction in terms of the CPA. Depending on the context (eg when ordering goods from another supplier), not only patients, but also health care providers may qualify as ‘consumers’ – the latter also clearly being ‘providers’ in most cases. It is doubtful whether medical schemes will be regarded as consumers.<sup>23</sup> Pharmacists, for example, will also be viewed as either ‘consumers’ and ‘suppliers’, depending on the context. Beneficiaries of services (eg medical scheme dependants) will also be regarded as ‘consumers’.

The CPA provides that a regulatory authority may apply to the minister for an industry-wide exemption from one or more provisions of the Act on the ground that the provisions of the CPA overlap or duplicate a regulatory scheme already in existence in terms of national legislation, treaty, international law, or convention.<sup>24</sup> One of the most contentious issues of the CPA, considered next, is the introduction of strict or no-fault liability in respect of damage caused by goods.

### **STRICT LIABILITY FOR DAMAGE CAUSED BY GOODS**

A consumer has the right to expect that goods are reasonably suitable for the purposes for which they are generally intended; are in good working order, free from defects and usable and durable for a reasonable period.<sup>25</sup> Supplementing the common law remedy for breach of contract, a consumer

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<sup>21</sup> See s 1.

<sup>22</sup> See s 1.

<sup>23</sup> The CPA exempts as a ‘consumer’ a juristic person whose asset value or annual turnover exceeds a determined threshold (s 5(2)(b)). This has been set at two million rand by the Minister of Trade and Industry in GG 34181 of 1 April 2011.

<sup>24</sup> Section 5(3). The Southern African Medical Device Industry Association (SAMEDI), for example, applied for exemption to the DG of Health in October 2010. See: <http://www.samed.org.za/uploads/SAMED%20Submission%20to%20NDOH%20re%20CPA%20Oct%202010.pdf> (last accessed on 28 June 2011).

<sup>25</sup> Section 54(1)(c), read together with s 55(2).

is also entitled to the performance of services in a manner and of a quality that persons are generally entitled to expect.<sup>26</sup>

The CPA also provides that the producer or importer, distributor or retailer of goods is liable for harm caused as a result of the supply of unsafe goods, a product failure, defect or hazard in goods, or insufficient instructions or warnings to the consumer relating to any hazard arising from or associated with the use of the goods, *irrespective of whether the harm is the result of negligence on the part of any of these parties*.<sup>27</sup> This provision changes the legal position that existed prior to the CPA dramatically, as previously, a consumer had to rely on contractual remedies against the manufacturer whose product caused him or her harm, or alternatively, had to institute a delictual claim against the manufacturer. In terms of the latter, the consumer had to, amongst others, prove fault on the part of the manufacturer. This posed a difficult hurdle, as there may not have been fault present in the production process, the manufacturer may have been difficult to identify, or the consumer may not have had insight into the production process.<sup>28</sup> In 2003 the Supreme Court of Appeal expressly confirmed the fault requirement for product liability and stated that the recognition of strict (no-fault) liability was the task of the legislature.<sup>29</sup> Now that no-fault liability has been introduced into consumer legislation, it may open the floodgates in respect of litigation, as in order to be successful in a product liability claim in terms of the CPA, a plaintiff need only prove that the relevant goods (that were unsafe, defective, hazardous, or contained inadequate instructions pertaining to a hazard) caused harm. This provision, however, does not specifically refer to a supplier. As follows from the definition of ‘supply’ described above, a specialist that supplies an implant for the purpose of implantation, for example, may be regarded as a ‘retailer’ under this provision. Although medicines differ from ordinary commodities and are not regarded as commodities of trade,<sup>30</sup> all medicines, including prescribed and over-the-counter medicine, are subject to the provisions of the CPA.

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<sup>26</sup> Section 54(1)(b). See also D Dinnie ‘Exposure to the consumer court under the Consumer Protection Act – more litigation for the medical industry?’ (2009) 2/1 *SAJBL* 43–45 at 43.

<sup>27</sup> Section 61.

<sup>28</sup> Jacobs, Stoop & Van Niekerk, n 14 above, at 37.

<sup>29</sup> *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) paras 298–300.

<sup>30</sup> *Eg* the technical qualities of medicines are difficult to assess and medicines are inherently unsafe, to name but two. The Medicines and Related Substances Control Act 101 of 1965, amended by Act 72 of 2008, regulates the registration and control of medicines and scheduled substances.

The CPA further states that a supplier of services, who in conjunction with performing the said services, applies, supplies, installs or provides access to any goods, is regarded as a supplier of those goods to the consumer for the purpose of this provision.<sup>31</sup> This provision may impose strict liability on a range of health practitioners who supply, provide access to, or implant prostheses or medical devices. Since the claimant can sue anyone in the supply chain and hold them liable for harm and cost, and since the health professional who delivered the care is the most easily (and usually the only) identifiable person in the supply chain, she or he can be held strictly liable for the cost of the damages that may follow. This applies, amongst other things, to defective prostheses, implants, pacemakers and medication for which a claim may be brought if damage results.<sup>32</sup> The reason for this provision is to protect the consumer (patient) against defective or inferior implants, as they often have no choice but to rely on the supplier's (or health care provider's) choice of goods. If more than one person is liable in terms of this provision (which will depend on the individual facts), their liability will be joint and several,<sup>33</sup> which means that they may be liable individually or as a group. Consumers may decide to sue either the producer, importer, distributor or retailer, or all of them (which may include the health care provider, if he or she is part of the supply chain, eg as 'retailer'). The type of harm that will be covered by the no-fault liability includes death of, injury to, or illness of a person, or pure economic loss (eg loss of earnings) resulting from the harm.<sup>34</sup> This no-fault liability provision does not limit a court's authority to assess whether harm has been proven; to determine the extent and monetary value of any damages (including economic loss) on terms and conditions that the court considers just and equitable in order to achieve the purposes of the CPA, as well as to apportion liability amongst those found to be jointly or severally liable for the harm suffered.<sup>35</sup> Although the causal link between the defective goods and the harm or death that resulted will still need to be established on a balance of probabilities, the traditional common law obstacle requiring the proof of negligence no longer applies. The consumer still remains at risk of an adverse costs order if he or she is unsuccessful in court.<sup>36</sup>

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<sup>31</sup> Section 61(2).

<sup>32</sup> G Howarth & R Davidow 'Don't be consumed by new Act' (2010) 18(3) *MPS Casebook* 12–13 at 12. See also MN Slabbert 'Medical law – South Africa' in R Blanpain (ed) *International encyclopaedia of laws* (2011) par 178.

<sup>33</sup> Section 61(3).

<sup>34</sup> Section 61(5).

<sup>35</sup> Section 61(6).

<sup>36</sup> See D Dinnie 'In a different class: Litigation and product liability', available at: <http://www.insurancegateway.co.za/9.8.45.Irn=3043> (last accessed on 29 June 2011).

Certain provisions of the CPA allow for class actions, including by consumer protection groups, which will allow a number of claimants to institute a class action<sup>37</sup> based on a well-defined question of fact or law. Not only individuals, but relevant consumer watchdogs, may lodge consumer complaints or reports of product failures, defects, hazards, personal injury, illness or damage to property, caused wholly or in part as a result of product failure, defect or hazard, to the National Consumer Commission (NCC), which in turn may lead to a peremptory product recall initiated by the NCC.<sup>38</sup> Although the common law in South Africa has historically not recognised class actions,<sup>39</sup> the Constitution of the Republic of South Africa 1996, provides for a class action where constitutional rights have been infringed.<sup>40</sup> The CPA undoubtedly makes provision for class actions in respect of the Act's above-mentioned product liability provision. Although the CPA provides for a mechanism through which consumer complaints can be addressed by the NCC, National Consumer Tribunal, relevant ombud or consumer courts, the only forum with the appropriate authority to resolve a *product liability* claim will be a civil court. Dinnie<sup>41</sup> argues that in addition to the removal of the fault requirement, contingency fee arrangements will facilitate product liability litigation.<sup>42</sup> There is no doubt that class actions may be extremely costly to suppliers, which may include health care professionals by virtue of the definition of 'supplier' discussed under the scope and application of the CPA above, who will need sufficient liability insurance for this type of claim.

The CPA expressly provides for exceptions to the no-fault liability regime. Liability in terms of this section will not arise if, amongst others, (a) the

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<sup>37</sup> Section 4(1)(c).

<sup>38</sup> Dinnie, n 36 above. This issue is discussed in more detail below under paragraph 6.

<sup>39</sup> The possibility of class actions was explored by the SALRC in 1998 in a draft bill entitled, *Public Interest and Class Actions Act*. The leading case on class actions is that of *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza and Others* 2001 (10) BCLR 1039 (SCA) in which the applicants as recipients of social grants claimed relief on behalf of themselves and others in the same position, based on the allegation that their grants have been cancelled unlawfully and without notice, reasons or giving them the opportunity to be heard. Cameron JA found that the 'quintessential requisites' for a class action were present: in this case, namely that (1) the class was so numerous that joinder of all its members was impracticable; (2) there were questions of law and fact common to the class; (3) the claims of the applicants representing the class were typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, would fairly and adequately protect the interests of the class (par 16 of the judgment).

<sup>40</sup> Section 38 of the Constitution.

<sup>41</sup> Dinnie, n 36 above at 2.

<sup>42</sup> See s 2 of the Contingency Fees Act 66 of 1997.

unsafe product characteristic, hazard, failure or defect is the result of compliance with any public regulation; (b) the alleged unsafe product characteristic, hazard, failure or defect did not exist in the goods at the time they were supplied to another person alleged to be liable; (c) it is unreasonable to expect the distributor or retailer to have detected the unsafe product characteristic, failure, defect or hazard; and finally, (d) if the claim for damages is brought three years after the death or injury that resulted.<sup>43</sup> Interestingly, even if goods are supplied within South Africa in terms of a transaction that is exempted from the application of the CPA, such goods (as well as the importer or producer, distributor or retailer) will still be subject to the above provisions relating to product liability.<sup>44</sup>

## **THE EFFECT OF THE CPA ON MEDICAL PRACTICE**

### **Marketing**

Health care establishments and practitioners should take note of the CPA's protection against discriminatory marketing, premised on the right to equality in the consumer market. The CPA prohibits the supplier of goods and services to discriminate *unfairly* against a person or category of persons in relation to access, priority, supply and pricing, and also in respect of the termination of an agreement.<sup>45</sup> No supplier of goods or services may treat persons (patients) unfairly in a manner that constitutes unfair discrimination in terms of the Bill of Rights and existing anti-discrimination legislation,<sup>46</sup> with specific regard to, amongst others, (a) excluding persons' access to goods and services; (b) granting some persons or a category of persons exclusive access to goods and services; (c) supplying a different quality of goods or services or charging different prices for goods and services to some persons or certain categories of persons; or (d) targeting or excluding specific communities, populations, market segments for exclusive, priority or preferential supply of goods or services.<sup>47</sup> In addition, a supplier of goods or services may not treat persons differently in a manner that constitutes unfair discrimination in terms of the above-mentioned legislation when, amongst others, (a) assessing the ability of a person to pay; (b) deciding whether or not to enter into an agreement; (c) determining the cost of a transaction or

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<sup>43</sup> Section 61(4) of the CPA.

<sup>44</sup> Section 5(5).

<sup>45</sup> Section 8.

<sup>46</sup> Section 9 of the Constitution and also Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>47</sup> Section 8(1).



agreement; (d) interacting with the consumer; (e) providing services to the consumer; and (f) deciding whether to terminate a transaction or agreement.<sup>48</sup>

This, in medical practice, may often find expression in applying different standards in respect of benefit options, *eg* to provide generic medicines to those medical scheme members on low-cost plans only. It may also relate to the decision to accept a person into a particular medical scheme, or to provide a different quality of service to a category of patients, based on race or the ability to pay, or to provide different levels of fees to certain categories of patient.

### **Contractual aspects**

The CPA protects the consumer against unfair, unreasonable or unjust contractual terms.<sup>49</sup> A supplier must not supply, offer to supply, or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.<sup>50</sup> A consumer may not be required to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.<sup>51</sup> A thorny provision in this regard is that the CPA's definition of an unfair, unreasonable and unjust transaction, agreement, term or condition of a transaction, or agreement, which is said to excessively favour a person other than the consumer, is so adverse to the consumer that it is inequitable, or one that is a false, misleading or deceptive representation, made on behalf of or by the supplier, on which the consumer relied, to his detriment.<sup>52</sup> One such example would be to market goods and services targeted at the emotionally vulnerable, such as obese persons, pregnant mothers, or persons who are HIV-positive. This same provision refers to a *statement of opinion* made by or on behalf of the supplier and relied upon by the consumer to his detriment. The difference between this provision and the preceding one, is that a *statement of opinion* (which could refer to a medical opinion or diagnosis) need not necessarily be false or misleading to be regarded as unfair and unjust, which increases health care practitioners' exposure if patients, to their detriment, rely on these opinions. To compound the (perhaps unintended) consequence created by this provision, the court, in considering whether a term, condition or agreement is unfair, unreasonable or unjust, may consider a number of

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<sup>48</sup> Section 8(2).

<sup>49</sup> See part G of the CPA. For a list of contract terms not deemed fair and reasonable, see regulation 44 of the Regulations to the CPA.

<sup>50</sup> Section 48(1)(a).

<sup>51</sup> Section 48(1)(c).

<sup>52</sup> Section 48(2)(c).

factors, including the parties' relationship to each other; the parties' relative capacity, education, experience, sophistication and bargaining position; whether the parties negotiated, and if they did, the extent of the negotiation.<sup>53</sup> This provision, in tandem with the one referred to above, is problematic for medical practitioners and other health care providers.

No contract with a consumer may contain a clause that limits or exempts the supplier of goods or services from liability for any loss directly or indirectly the result of the *gross*<sup>54</sup> negligence of the supplier or any person acting under his supervision or on his behalf.<sup>55</sup> A contract containing a notice that purports to limit the risk or liability of the supplier, constitutes an assumption of risk or liability by the consumer or imposes an obligation on him to indemnify the supplier for any cause, must be drawn to the attention of the consumer (patient) in the form and manner prescribed by the CPA.<sup>56</sup> In addition, if such notice concerns an activity (eg medical intervention) that is subject to any risk of (a) an unusual nature; (b) that could result in serious injury or death; and (c) the presence of which a consumer (patient) cannot reasonably be expected to be aware of, notice or contemplate, the supplier must *specifically draw* the consumer (patient's) attention to the fact, nature and potential effect of this risk in the form and manner prescribed by the CPA.<sup>57</sup> In addition, a consumer (patient) has to assent to this notice by signing or initialling this provision,<sup>58</sup> and must be given sufficient time and opportunity to receive and comprehend the notice, which must be written in plain language.<sup>59</sup> The attention of the consumer must be drawn to this notice in a conspicuous manner *before* he enters into the agreement; gains access to the facility where the service will be supplied; or before consideration for the services is required from him, whichever occurs first.<sup>60</sup> Health care providers will minimise their liability for unfair contract terms by ensuring that the patient's attention is drawn to the fact, nature or effect of relevant risks; that this is done in plain language; and that the patient is afforded sufficient time to comprehend the notice setting out these risks.

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<sup>53</sup> Section 52(2).

<sup>54</sup> 'Gross' negligence is a degree of negligence that is so high that it can be described as a serious and reckless disregard or carelessness.

<sup>55</sup> Section 51(1)(c).

<sup>56</sup> Section 49(1).

<sup>57</sup> Section 49(2).

<sup>58</sup> Section 49(2)(c).

<sup>59</sup> Section 49(3).

<sup>60</sup> Section 49(4).

In addition, the CPA requires that agreements be in clear and understandable language and set out an itemised break-down of all the financial obligations of the consumer (patient) under the agreement.<sup>61</sup> The patient must be provided with a free copy of the agreement or free electronic access to the agreement.<sup>62</sup> If the agreement is not in writing, the supplier must keep a record of the transactions entered into with the consumer over the telephone or any prescribed recordable format.<sup>63</sup>

Hospital admission forms, as well as indemnification clauses are directly affected by the above provisions and should be carefully scrutinised.

### **Unconscionable conduct**

The consumer (patient), who in terms of the CPA is entitled to the right to fair and honest dealing, is also protected from ‘unconscionable conduct’, which means improper or unethical conduct of such a degree that it would shock the conscience of a reasonable person.<sup>64</sup> Prohibited are the use of, *inter alia*, undue influence; pressure (eg marketing directed at the emotionally-vulnerable); duress or harassment; or unfair tactics. The common law position in terms of which duress and undue influence will render a contract void or voidable, depending on the circumstances, is codified by the CPA, but the latter Act takes this further by extending it beyond consensus between the parties, to improper, unconscionable conduct in relation to marketing, supply, negotiation, execution and enforcement of the contract.<sup>65</sup> In addition, it is also unconscionable for a supplier knowingly to take advantage because a consumer is unable to protect his or her own interests as a result of physical or mental disability, illiteracy, ignorance, the inability to understand the language of the agreement, or any similar factor.<sup>66</sup> This provision sets a very high standard for suppliers to ensure that consumers understand agreements, particularly in the case of vulnerable (and often uneducated or illiterate) consumers (patients).

### **Bundling of goods and services**

The right of the consumer to select suppliers provides *inter alia*, that a supplier may not group or bundle goods by requiring that a consumer buy goods or services from that supplier or enter into an additional agreement or

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<sup>61</sup> Sections 22 and 50(2)(b).

<sup>62</sup> Section 50(2).

<sup>63</sup> Section 20(3).

<sup>64</sup> See also definition of ‘unconscionable’ in s 1 of the Act, in addition to s 40.

<sup>65</sup> Section 40(1).

<sup>66</sup> Section 40(2).

transaction with the same supplier or a designated third party.<sup>67</sup> Bundling of goods and services will be permitted, however, if the convenience of the bundling outweighs the limitation on the freedom of choice of the consumer; is to the economic benefit of the consumer; or if the bundled goods and services are also offered separately at individual prices.<sup>68</sup> This would prevent, for example, requiring that to become a member of a medical scheme, a person must also become a member of a loyalty programme from the same scheme, or that a patient enters into a contract with a specific third party (other health care provider) for the provision of a service that is available at a lower cost from a different provider. Designated service providers selected by medical funds as preferred providers, is arguably another example.

In its preamble, the CPA recognises the need to improve the consumer's access to, and the quality of information necessary to be able to make informed choices in accordance with their individual wishes and needs. There is, however, concern about how this issue of choice (in respect of the selection of suppliers, treatment options, and institutions) may play out in practice. For example, is a surgeon expected to inform a patient that he or she has done seventy-five hernia repairs whereas the surgeon down the hall has done a hundred and fifty, thereby allowing the patient to select the (allegedly) more experienced surgeon? If a procedure could be done in either of two private hospitals, is the surgeon expected to discuss these in detail, eg infection rates and staff qualifications in respect of these institutions? To what extent is a health care provider expected to discuss alternative therapies or medications or different surgical techniques? Does failure to cover every possible treatment option constitute a cause of action? Does failure to discuss the option or even refer for a specialist opinion, constitute a violation of the CPA? The CPA does not provide any clarity in this regard.

### **Quality of goods and services provided or supplied**

One particular aspect of the consumer (patient's) right to fair value, good quality and safety includes, amongst others, the right to the performance of services in a manner and quality that persons are generally entitled to expect,<sup>69</sup> and in the case of goods required for the performance of a service, that these are of a generally expected quality and free of defects.<sup>70</sup> Consumers also have the right to receive goods that are *reasonably* suitable

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<sup>67</sup> Section 13(1).

<sup>68</sup> Sections 13(1)(i)–(iii).

<sup>69</sup> Section 24(1)(b).

<sup>70</sup> Section 24(1)(c).

for the purpose for which these are intended and will be usable and durable for a reasonable period of time, taking into account the use to which these goods are normally put, as well as circumstances surrounding their supply.<sup>71</sup> The CPA also provides for an implied warranty in each transaction or agreement relating to the supply of goods to the consumer, and that the importer, distributor and the retailer *each warrants* that the goods comply with the requirements and standards contemplated in the CPA.<sup>72</sup> The application of these provisions in the health care context is obvious and extends to a range of transactions, from medical treatment and procedures (which may include the implantation of a prosthesis), to the dispensing of medicines.

A specific provision that impacts on the duty to disclose risks in the health care setting, is the obligation of the supplier of any activity or facility that is subject to an uncommon risk, or a risk of which the consumer *could not reasonably be expected to be aware*, or which an ordinarily attentive consumer could not reasonably be expected to foresee, or a risk that *may lead to serious injury or death*, specifically to forewarn the consumer (patient) of the fact, nature and potential effect of this risk.<sup>73</sup> This provision potentially conflicts with the medico-legal test of disclosure in terms of which a risk is regarded as material in the particular circumstances if a reasonable patient, if warned of the risk or danger, would be likely to attach significance to it; or the doctor is or should reasonably be aware that the individual patient, if warned of the risk or danger, would be likely to attach significance to it.<sup>74</sup> In terms of the common law position, all serious and typical risks and dangers should be disclosed, but not *unusual* (or ‘uncommon’ risks as in the CPA) or remote risks and dangers, unless they are serious or typical, or if the patient makes enquiries about them.<sup>75</sup> The common law duty of disclosure has been codified by section 6 of the National Health Act 61 of 2003 (NHA) in terms of which a health care practitioner must inform the patient<sup>76</sup> of (a) the patient’s health status, except in circumstances where there is substantial evidence that the disclosure of the patient’s health status would be contrary to the patient’s best interests; (b) the range of diagnostic procedures and treatment options that is generally available to the patient; (c) the benefits, *risks, costs and consequences generally associated* with each option; (d) the

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<sup>71</sup> Section 25(2)(a) and s 55(2)(c).

<sup>72</sup> Section 26(1).

<sup>73</sup> Section 28(1).

<sup>74</sup> *Castell v De Greef* 1994(4) SA 408(C) at 426.

<sup>75</sup> Slabbert, above n 32, par 128.

<sup>76</sup> The NHA uses the word ‘user’.

patient's right to refuse health services; and (e) the implications, risks and obligations arising from such refusal. In terms of the NHA, the doctor must, where possible, thus inform the patient in a language that he or she understands, and in a manner which takes into account the patient's level of literacy.

The CPA provides for the manner and form to which such notice relating to risks must comply.<sup>77</sup> The CPA, as with the NHA, requires in addition, that this notice must be given in plain and understandable language to enable an ordinary consumer (patient) with average literacy skills and minimum consumer experience to understand it.<sup>78</sup> This will be a challenge in South Africa with its large number of official languages and immigrants from all over the world.

It is clear from the above discussion that a different standard has been introduced by the CPA, compared to the present medico-legal position, relating to the type of risk that must be disclosed. This will have enormous consequences for health professionals and health care establishments generally. To compound this, the CPA stipulates that a packager of hazardous or unsafe goods must display a notice on, or with the packaging, that supplies the consumer with enough adequate instructions for the safe handling of the goods.<sup>79</sup> It is indeed curious that this onerous task falls on the packager of the goods, instead of the producer or importer, distributor or retailer, as the packager may not necessarily be the supplier of the goods. In addition, as discussed above, any of these persons in the supply chain (including health care practitioners) may in any event be held jointly and severally liable for harm caused as a result of unsafe goods.

### **Over-selling and over-booking**

The CPA also provides that should a supplier accept a reservation to supply goods or services on a specific date or time and then fail to provide the goods and services as agreed, the supplier must refund the consumer the amount, together with interest, at the prescribed rate from the date on which the amount was paid until the date of reimbursement, except if the shortage of capacity is due to circumstances beyond the control of the supplier and the supplier took reasonable steps to inform the consumer of this as soon as was practical. The consumer is also entitled to be compensated for costs 'directly

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<sup>77</sup> Section 49(4)(b).

<sup>78</sup> Section 22.

<sup>79</sup> Section 58(2).

incidental' to the supplier's breach of contract.<sup>80</sup> In practice, this would mean that if a health care provider or establishment accepts a reservation to provide a service on a specific date and time (eg a surgeon's list), and then fails to deliver the service on the agreed time and date because of insufficient capacity to supply the service (or a similar service of the same or better quality), the health care provider will need to refund the patient, as described above. Fortunately for the health care provider or establishment, a patient (consumer) who makes an advanced booking may be required to pay a reasonable deposit. If the patient cancels the order or booking for the services, the health care provider or hospital will be entitled to impose a reasonable charge for the cancelled reservation, except if the cancellation is the result of the patient's own death or hospitalisation.<sup>81</sup>

### INTERNATIONAL COMPARISON

The CPA states that when interpreting the CPA, a person, court, tribunal or the Commission, may consider appropriate foreign and international law; or appropriate international conventions, declarations or protocols relating to consumer protection.<sup>82</sup> While it is difficult to predict the impact of the CPA on legal and medical practice, it may be instructive to consider the status of strict product liability law in the United States and Europe. In the United States, the concept of strict liability began to supplant negligence as the major theory in product related injuries in the 1960s.<sup>83</sup> In Europe the strict liability provisions date back only to the 1980s.<sup>84</sup>

In the US and Europe, strict product liability exists when, despite exercising all reasonable care, a manufacturer or supplier is found liable for the consumer's injuries. Strict product liability has been justified on the theory

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<sup>80</sup> Section 47(3).

<sup>81</sup> Section 17(5).

<sup>82</sup> Section 2(2).

<sup>83</sup> Some academics understand a longer history. As early as 1913, the buyer of a food product was allowed to sue a distant manufacturer under the theory of implied warranty (*See Mazetti v Armour & Co* 135 P. 633 (Wash 1913) referenced by Stapleton J 'Restatement (third) of torts: products liability, an Anglo-Australian perspective' (2000) 39 *Washburn Law Journal* 363 at 366, fn 17). Gradually the traditional doctrine of privity was further eroded until, by 1963, 'the terminology of warranty was abandoned' and US courts came to recognise 'strict liability.' (*Greenman v Yuba Power Prods., Inc.*, 377 P 2d 897 (Cal 1963) referenced by Stapleton 366, footnote 17).

<sup>84</sup> Discussing legal theory in the United States is complicated by the fact that while the basic underlying principles are consistent, each state legislates its own law and, generally, follows its own precedence. For ease of discussion this section will focus on basic, core principles illustrated by some specific examples from individual states but note, for example, that approach to a legal theory in one state does not necessarily apply in another.

that it provides ‘(1) compensation through loss spreading; (2) deterrence; (3) encourag[ement for] useful conduct; (4) amelioration of expensive and time consuming problems of proof; (5) protection of consumer expectations; and (6) cost internalization’.<sup>85</sup>

## **United States**

### *Background*

In the US legal system, which has been described as ‘characterized by judicial creativity, a looser regime of precedent, fifty-one final courts of appeal in matters including product claims, and a more volatile role for legislation’,<sup>86</sup> strict liability theory developed as a result of ‘the creativity of judges and the determined reforming zeal of a few prestigious academics.’<sup>87</sup> One of the early significant cases in this area, *Greenman v Yuba Power Products*,<sup>88</sup> notes that

The purpose of such liability is to insure [sic] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.<sup>89</sup>

Any or all of the parties from the top to the bottom of the chain of manufacture of the product, including the manufacturer of its components, the assembling manufacturer, the wholesaler, and the retail store owner are liable for damage caused by the product. Regardless of the care taken, if there is a defect in the product that causes harm, the parties in the chain may be liable. Possible plaintiffs include both those who purchase the product (consumers) and those who have borrowed or have been given the product. Product liability theory has come to include not only tangible property (eg medical devices, pharmaceuticals), but also intangibles such as natural gas, animals (eg pets), real estate and writings (eg navigational charts). Specifically excluded from the definition are human biological material, such as blood and tissues or organs.

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<sup>85</sup> MS Madden ‘Strict Products Liability Under Restatement (Second) of Torts § 402A: “don’t throw out the baby with the bathwater”’ (1993) *Pace Law Faculty Publications* (Paper 150), available at: <http://digitalcommons.pace.edu/lawfaculty/150> (last accessed on 10 July 2011) at 127.

<sup>86</sup> Stapleton, above n 83 at 371.

<sup>87</sup> *Id* at 366.

<sup>88</sup> *Greenman v Yuba Power Prods* 377 P 2d 897; 59 Cal 2d 57 (Cal 1962).

<sup>89</sup> 59 Cal 2d 64.



Again from *Greenman*,

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.<sup>90</sup>

*Model Uniform Product Liability Act (MUPLA)*

As described in The Restatement, there are three distinct categories of product defects, each with its own legal standards: (i) manufacturing defects (a product departs from the intended design during the manufacturing process); (ii) design defects (inherent defects existing before the manufacturing process; foreseeable risks of harm posed by the product that could have been reduced or avoided by the adoption of a reasonable alternative design); and (iii) inadequate instructions or warnings (reasonable instructions or warnings that would have reduced the foreseeable risks of harm).<sup>91</sup>

Individual states have enacted comprehensive, but diverse, product liability statutes (there is no federal products liability law). In 1979, because of concerns regarding individual state standards and in order to stabilise product liability insurance rates, the United States Department of Commerce published its Model Uniform Product Liability Act (MUPLA) which was ‘offered for voluntary use by the states’.<sup>92</sup> It was hoped that MUPLA would benefit product users, sellers and insurers by providing uniformity in product liability law. It also provides a useful comprehensive overview of US law in this area, although the Act does not ‘purport to be an exhaustive compilation of the entire subject of product liability law’ and it is expected that the ‘interstices of the Act will be filled by statutory or common law additions of the individual states’.<sup>93</sup>

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<sup>90</sup> 59 Cal 2d 62.

<sup>91</sup> The ‘Restatements of Law’ are legal treatises that reflect both the current status of the law and how it is changing. While providing guidance, the Restatements are not authoritative and do not necessarily reflect the law in specific states. The ‘Restatement of Torts’ covers the prevailing principles in product liability law. The compilation of the Restatements is accomplished by a group of academic experts, the Reporters. In the Restatement (Second) the approach to products liability was to report the furthest limits to which courts had moved while in the Restatement (Third) the Reporters presented more of a ‘consensus’ approach (Stapleton, n 83 at 372).

<sup>92</sup> Federal Register /vol 44 no 212/October 31 1979/Notices/62714.

<sup>93</sup> Federal Register /Vol 44 no 212/October 31 1979/Notices/62720.

Underlying MUPLA principles include: (i) ensuring that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries; (ii) ensuring the availability of affordable product liability insurance with adequate coverage to product sellers that engage in reasonably safe manufacturing practices; (iii) placing the incentive for loss prevention on the party or parties who are best able to accomplish that goal; (iv) expediting the reparations process from the time of injury to the time the claim is paid; (v) minimising the sum of accident costs, prevention costs, and transaction costs; and (vi) using language that is comparatively clear and concise.<sup>94</sup>

A claim may be made under the Act ‘even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller’.<sup>95</sup>

It was hoped that shifting the threat of product liability judgments onto manufacturers, presumably those best able to ensure loss prevention, was appropriate because firstly, they are best positioned to prevent product-related harm by producing safer products and, secondly, of the members of the product ‘chain’ they are best suited to prevent the loss at the lowest cost. In order to achieve the goal of the fourth principle, to expedite the reparations process and to avoid problems such as the inevitable delays occasioned by litigation, the Act encourages such non-litigation legal procedures as arbitration.

Liability under the Act arises when ‘a preponderance of the evidence’ shows that the plaintiff’s harm was ‘proximately caused because the product was defective’.<sup>96</sup> A product is defective ‘if, and only if’: ‘(1) It was unreasonably unsafe in construction (Subsection A); (2) It was unreasonably unsafe in design (Subsection B); (3) It was unreasonably unsafe because adequate warnings or instructions were not provided (Subsection C); or (4) It was unreasonably unsafe because it did not conform to the product seller’s express warranty (Subsection D).’<sup>97</sup>

The MUPLA discusses each of these criteria in some detail. For example, referring to Subsection B (‘unsafe in design’), it describes a balance of two factors: ‘(1) the likelihood that the product would cause the claimant’s harm or similar harms, and the seriousness of those harms; against (2) the

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Id* at Notices/62721.

<sup>97</sup> *Ibid.*

manufacturer's burden of designing a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.'<sup>98</sup>

Regarding, Subsection D (express warranty), courts have imposed strict liability on product sellers when statements about their products are untrue. For example, strict liability was imposed on a pharmaceutical manufacturer who claimed that its product was 'free and safe from all dangers of addiction' and the claimant, because of a rare and totally unforeseeable susceptibility, became physically dependent on the drug.<sup>99</sup>

A product 'seller' is defined as 'any party in the regular commercial distribution chain' excluding the 'occasional private seller'.<sup>100</sup> The Act does permit exclusion of 'the provider of professional services when a product is utilised or sold as part of a rendition of such services'.<sup>101</sup> Current court decisions tend to look at the factual circumstances of each case and will exclude professionals such as doctors, pharmacists, or opticians who are acting within their legally authorised scope of practice. However, 'appropriate remedies may be available to injured parties under other theories of law, including malpractice'.<sup>102</sup>

The drafters of the MUPLA intended that 'the provider of professional services,' when selling a product while acting within the scope of their practice, should not be considered 'product sellers' in terms of strict product liability. However, a professional, a pharmacist being a good example, selling a product that is not within the scope of his practice (such as perfume or photographic equipment) would be liable to a strict liability cause of action.<sup>103</sup>

#### *The tests*

Despite the 'inconsistency between state product liability laws', most state courts agree that products must be 'in a defective condition unreasonably dangerous to the user or consumer'.<sup>104</sup> To make this determination, state

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<sup>98</sup> *Id* at Notices/62723.

<sup>99</sup> *Crocker v Winthrop Lab Di of Sterling Drug Inc* 514 SW 2d 429 (Tex 1974) referenced at Federal Register/vol 44, no 212/October 31, 1979 / Notices/62725.

<sup>100</sup> Federal Register/vol 44 no 212/October 31, 1979 / Notices/62718.

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

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

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

<sup>104</sup> MD Stovsky 'Product liability barriers to the commercialization of biotechnology: improving the competitiveness of the US biotechnology industry' 16 *Berkley Technology*

courts apply one of two tests: (1) a consumer expectations test; or (2) a risk-utility test. The determining issue under the consumer expectations test is ‘the degree of safety that the reasonable consumer should expect when using the particular product in the manner intended by the manufacturer’. The risk-utility test focuses on the safety of the product’s design asking whether the ‘risk of injury outweighs the social utility of the product in question’.<sup>105</sup>

*Consumer expectation test*

The ‘consumer expectation test’ emerged from the Uniform Commercial Code’s ‘warranty of merchantability’ early in the development of product liability law. It asks whether a product is ‘as safe as consumers expect’.<sup>106</sup> Wide acceptance saw it incorporated into the Restatement (Second) Torts §402A in 1965. As the following case demonstrates, a court may find that a consumer’s expectations are unreasonable in the light of expert opinion.<sup>107</sup> A plaintiff was injured when the tread of a tire separated and the vehicle crashed. She had hoped to ‘prove by circumstantial evidence that there was a design defect because the tire and the vehicle performed below the standard expected by an ordinary consumer when a product is used in a reasonably foreseeable manner’.<sup>108</sup> The California Appeals Court observed that the consumer expectation test ‘applies only when the defect can be determined by common knowledge regarding minimum safety expectations’ and not in a situation, like this case, where an expert was required to evaluate the product design relative to the risk of danger.<sup>109</sup>

Manufacturers became dissatisfied with this test because firstly, enhancing the safety of a product may require a substantially more expensive redesign which prices it out of the market, and secondly, consumers may be prepared to continue to purchase the product even if they are aware of the potentially dangerous defect. In various states, manufacturers have had to eliminate the

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*Law Journal* 363, available at:  
<http://www.law.berkeley.edu/journals/btlj/articles/vol6/Stovsky.pdf> (last accessed on 10 July 2011).

<sup>105</sup> *Id* at fn 15 and related text referencing Restatement (Second) of Torts § 402A (1965).

<sup>106</sup> KW Viscusi ‘Wading through the middle of risk-utility analysis’ (1990) 39 *American University Law Review* 573, available at:  
<http://www.wcl.american.edu/journal/lawrev/39/viscusi.pdf?rd=1> (last accessed on 10 July 2011) at 579).

<sup>107</sup> For example, see *Stephen v Ford Motor Co* (2005)134 Cal App 4<sup>th</sup> 1363.

<sup>108</sup> *Id* at 1370, footnote 6.

<sup>109</sup> *Supra*.

consumer expectation test and make the risk-benefit test the standard for product liability.<sup>110</sup>

*Risk-benefit (risk-utility) test*

The risk-benefit test, first articulated in 1973 by John Wade, has gradually gained acceptance.<sup>111</sup> This test attempts to balance the ‘risks associated with the product design against the utility of that particular design,’ essentially seeking to determine whether a product is too dangerous or should have been designed differently.<sup>112</sup> It seeks to balance ‘consumer and producer interests needed to form any reliable economic judgment regarding the inadequacies of a product’.<sup>113</sup> Put another way, the test ‘recognizes the important trade-offs that are involved in designing and producing products’.<sup>114</sup> In product defect cases, risk-utility analysis has been applied to the evaluation of the ‘engineering aspects of a product’s design’ and hazard warnings.<sup>115</sup> In addition to mechanical products, it has been applied to pharmaceutical products.<sup>116</sup> Some courts have extended the analysis to whether a manufacturer should have marketed a product at all.<sup>117</sup> The Seven Factors proposed by Wade are as follows:<sup>118</sup>

- (1) The usefulness and desirability of the product (the product’s usefulness);
- (2) The safety aspects of the product (the likelihood that it will cause injury, the probable seriousness of such an injury);
- (3) The availability of a substitute product that will meet the same need and not be as unsafe;

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<sup>110</sup> The Restatement (Third) has rejected the consumer expectation test as a means of evaluating an allegedly defective product.

<sup>111</sup> JW Wade ‘On the nature of strict liability for products’ 44 (1973) *Mississippi Law Journal* 825.

<sup>112</sup> Viscusi n 106 above at 574.

<sup>113</sup> *Id* at 613.

<sup>114</sup> *Id* at 578.

<sup>115</sup> *Id* at 598. For example, see also *Carter v Massey-Ferguson Inc* 716 F 2d 344, 347 (5<sup>th</sup> Cir 1983) (stating that any case which concerns design defect must employ risk-utility analysis). The defect analysis applies to warnings as well as defects because courts have held that the lack of a warning is a ‘defect’. *Kay v Cessna Aircraft Co* 548 F 2d 1370, 1372 (9<sup>th</sup> Cir 1977) (deciding that lack of warning indicates product defect) cited by Viscusi n 106 above at 605.

<sup>116</sup> For example, *Feldman v Lederle Lab* 97 NJ 429, 444–46, 479 A 2d 374, 382–83 (1984) (acknowledging that risk-utility analysis could be appropriate in some pharmaceutical products cases) cited by Viscusi n 106 above at 598.

<sup>117</sup> For example, *O’Brien v Muskin Corp* 94 NJ 169, 184–85, 463 A 2d 298, 306 (1983) (deciding whether defective swimming pool should have even been marketed), referenced by Viscusi n 106 above at 605.

<sup>118</sup> Modified from Viscusi n 106 above at 580–581.

- (4) 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 (product alternation);
- (5) The user's ability to avoid danger by the exercise of care in the use of the product;
- (6) The user's awareness of the dangers inherent in the product and their avoidability (warnings);
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance (the cost of compensating injury is included in the price of the product).

In the US, courts have utilised the test in three situations: (i) to evaluate changes in design by determining whether a specific safety mechanism is needed;<sup>119</sup> (ii) if warnings rather than design changes are sufficient to reduce the risk for consumers;<sup>120</sup> and (iii) in determining whether a product should be sold at all.<sup>121</sup>

What financial obligation should be ascribed to the manufacturer? Certainly the manufacturer cannot be expected to pay for all injuries sustained in connection to the use of a product. Consider if motor vehicle manufacturers, for example, were responsible for motor vehicle-related damage and injuries. Not only would the expense be exorbitant (and no doubt passed onto the consumer) but it would reduce the incentive for drivers to be careful knowing that any damage or injury would be paid for. As the history of the asbestos industry in the US has shown, the value of claims against the industry 'exceeded not only the resources of the asbestos industry but also that of their insurers'.<sup>122</sup>

It is interesting to note, regarding the history of strict product liability and the development of the risk-utility test, that when these doctrines were first proposed, neither federal social insurance nor private insurance was as well

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<sup>119</sup> For example, *Byrs v Riddell, Inc* 113 Ariz 264, 267, 550 P 2d 1065, 1068 (1976) (applying risk-utility analysis to a suit brought by injured football player against a helmet manufacturer) referenced by Viscusi n 106 above at 575.

<sup>120</sup> For example, *Watson v Uniden Corp* 775 F 2d 1514, 1515 (11th Cir 1985) (affirming summary judgment ruling for manufacturers based on adequate warnings); *Fraust v Swift & Co* 610 F Supp 711, 713 (WD Pa 1985) (noting that liability cannot be imposed on seller if user knew or should have known danger associated with product), referenced by Viscusi n 106 above at 575.

<sup>121</sup> *Cepeda v Cumberland Eng'g Co.*, 76 NJ 152, 163, 386 A.2d 816, 821 (1978) (concluding that risk-utility analysis can be applied to manufacturer's initial decision of whether to market product at all), referenced by Viscusi n 106 above at 575.

<sup>122</sup> Viscusi n 106 above at 588.

developed as they are now.<sup>123</sup> Viscusi<sup>124</sup> further notes that ‘concern has shifted to dealing with over insurance, as individuals today may have multiple forms of recovery for the same accident.’

In the US system, when a medical product injury occurs, three separate insurance carriers determine who will actually pay for the harm. In this conflict are the health insurer (for the patient), the medical liability insurer (for the doctor), and the manufacturer’s liability carrier (the maker of the product).<sup>125</sup> The battle has raged not only in individual cases, but also through ‘legislative lobbying for immunity, caps and exclusions’.<sup>126</sup>

In circumstances where hospital stays are more prolonged or illness more serious than expected, a health insurer is likely to enquire of the insured patient whether the expensive treatment was the result of physician malpractice or device malfunction. In 2006, the US Supreme Court confirmed that a patient’s insurer could put itself into the position of the insured patient injured by a doctor or device malfunction and recover the costs occasioned by this loss.<sup>127</sup> This process of subrogation, is considered by some to have played a role in the increase in litigation.<sup>128</sup>

### Europe

Key differences between the US and Europe, and other industrialised nations such as Japan, and Australia, may be found in the ‘the lengthy detailed Restatement (Third)’ (of the US), on the one hand, and the ‘sparse’ legislation of the special products laws in the other countries.<sup>129</sup> The Reporters (authors) of the Restatement (Third) are sceptical of the EU approach believing that it provides only a ‘vague, undifferentiating’ standard that requires courts to ‘work out the details’ on a case-by-case basis.<sup>130</sup> The US experience suggests this is unlikely, with some suggesting that ‘courts—even fairly sophisticated courts that confront a substantial and

<sup>123</sup> *Id* at 590.

<sup>124</sup> *Id* at 590.

<sup>125</sup> JT O’Reilly ‘Pin the tail on the other donkey: allocating and avoiding injury losses after drug or device approval’ (2007) 62 *Food Drug Law Journal* 559.

<sup>126</sup> *Id* at 560.

<sup>127</sup> See *Sereboff v Mid-Atlantic Medical Services* 126 SCt 1869 (2006), cited by O’Reilly, n 125 above at 561.

<sup>128</sup> O’Reilly n 125 above at 561.

<sup>129</sup> Stapleton n 83 above at 398.

<sup>130</sup> *Id* at 398, citing JA Henderson Jr & AD Twerski ‘What Europe, Japan, and other countries can learn from the New American Restatement of Products Liability’ 34 (1999) *Texas International Law Journal* 1 at 5.

steady caseload of design defect cases—may require thirty or forty years to ‘get it right’.<sup>131</sup>

While product liability law has a relatively long pedigree in the US, it was only in the 1970s that the European Commission, likely prompted by a combination of the Thalidomide disaster of the 1960s and the perceived useful evolution of US law, began to consider remedies for those injured by defective products.<sup>132</sup> In 1985, the Council of Ministers of the European Communities promulgated the Products Liability Directive.<sup>133</sup> The EC sought to introduce a more uniform system of ‘liability irrespective of fault’ that it was hoped would solve a number of problems related to trade between the different states within the European community.<sup>134</sup>

The Europeans did learn some lessons from the US. For example, the European system ensured that a mere supplier in the middle of the commercial chain could escape liability if it were able to show the liability of a party higher up the chain.<sup>135</sup> The European law was intended to cover other forms of commercial supply beyond the transactional limits of a ‘sale’ and included such entities as ‘sale-service hybrid transactions’ in which a product and a service were supplied together.<sup>136</sup> In addition, the European Commission wanted to ensure that ‘bystanders,’ individuals who were not users of a product but were nevertheless injured, would be able to sue under the Products Liability Directive.<sup>137</sup> The Thalidomide children are an example of ‘bystanders’ who sustained an injury secondary to another’s use of a product.

The Products Liability Directive identifies certain defences available to manufacturers. For example, under the ‘development risks defence’ (also

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

<sup>132</sup> Stapleton n 83 above at 367.

<sup>133</sup> Full title, ‘The Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products.’ (Linger L, at 478.) For those unfamiliar with the European system, a directive is an instruction requiring individual members of the European union to enact its provisions via domestic legislation. Thus, for example, after the Products Liability Directive of 1985, the Parliament of the United Kingdom enacted the Consumer Protection Act 1987 which makes the provisions of the Products Liability Directive the law in the United Kingdom and under which a UK citizen would bring his claim (Stapleton, above n 83 at 370).

<sup>134</sup> Linger, above n 132 at 480.

<sup>135</sup> Stapleton n 83 above at 368.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*



known as the ‘state of the art’ defence), a manufacturer would not be liable if it ‘shows that it did not possess the scientific or technical knowledge to discover the defect prior to circulation of the product’.<sup>138</sup> In the US, it took some time before the courts accepted ‘the equivalent of the development risk defense’ and ‘the basis of design and warning recovery recognized as fault-based’.<sup>139</sup>

### **REMEDIES AND REMEDIAL PROCEDURES**

Effective legislation must be accompanied by efficient and consistent enforcement. In this respect the CPA sets out a number of avenues available to consumers to enforce their new rights in terms of the Act. At the centre of these enforcement mechanisms is the National Consumer Commission.

When a consumer decides to refer a complaint, the consumer has a choice of fora<sup>140</sup> in which to do so. These, which will be discussed individually in greater detail below, are: (1) Alternative Dispute Resolution (ADR); (2) National Consumer Commission (NCC); (3) National Consumer Tribunal (NCT); and (4) A court with jurisdiction.

#### **Alternative Dispute Resolution (ADR)**

An alternative dispute agent is defined as an ombud, a person dealing with arbitration processes, or a consumer court.<sup>141</sup> It appears as if the legislature actually intended that before an application is made to a consumer court, an alternative dispute agent must first be appointed in an attempt to resolve the complaint.

If a supplier is subject to the jurisdiction of any specific ombud or a statutory ombud such as the Department of Health (government), the Hospital Association of South Africa (private), the Council for Medical Schemes, the Health Professions Council of South Africa, the South African Medical

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<sup>138</sup> Linger n 132 above at 478 (referencing the Product Liability Directive – art 7(e)), OJ L 210/29, at 31. For a complete discussion of the implications of the ‘development risks defense’, see Linger at 503–509.

<sup>139</sup> Stapleton n 83 above at 369.

<sup>140</sup> Section 69.

<sup>141</sup> See s 1: ‘alternative dispute resolution agent’ means– (a) an ombud with jurisdiction; (b) an industry ombud accredited in terms of section 82(6); or (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud.

Association or the South African Dental Association,<sup>142</sup> any complaint must first be referred to such an accredited industry ombud.<sup>143</sup> The CPA does not provide a definition of an accredited industry ombud, but it would appear that the CPA had in mind an industry where the interaction or conduct or methods of business are regulated by a code.<sup>144</sup> The councillors of the relevant industry will then regulate the interaction, or the relevant industry ‘code’ will provide for a method of dispute resolution.

The seriousness with which the legislature views mediation is mirrored in forty statutes containing mediation provisions among which is the Health Professions Act.<sup>145</sup> It is in the best interest of all the parties involved in any dispute to settle such a dispute expeditiously and at a considerable lower cost when compared to lengthy litigation processes. Mediation has already taken root in South Africa, noticeably in the fields of labour and family law, and it is only a question of time until the same applies in other areas.<sup>146</sup>

However, in commenting on the NCC on the draft Guidelines for the Development of Industry Codes of Conduct for Accreditation earlier this year, the Law Society of South Africa (LSSA) expressed its concern that these draft regulations, if left to stand, will be no different from court procedure and as such are missing the point as to what mediation is about.<sup>147</sup> Terminology such as ‘balance of probabilities’, ‘admissibility of documents’, ‘expert evidence’ refers to the language of litigation and not mediation. Mediation should be flexible, without the rigid procedures provided for in the rules of court.

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<sup>142</sup> Contact details of these organisations or ombud schemes are available at: [www.ncf.org.za/main.php?include=services/complain.html](http://www.ncf.org.za/main.php?include=services/complain.html) (last accessed on 13 July 2011).

<sup>143</sup> Section 82(6).

<sup>144</sup> Section 82.

<sup>145</sup> Sections 41, 41A, and 42 of Health Profession Act 56 of 1974. Minor transgressions referred to the ombudsman must be mediated by the ombudsman.

<sup>146</sup> The benchmark *Brownlee* judgment (*MB v NB* 2010 (3) SA 220 (GSJ), approved *obiter* in the Supreme Court of Appeal in *S v J* (SCA) (unreported case no 695/1019–11–2010 *per* Lewis JA) casts a heavy onus on attorneys to recommend mediation to their clients in appropriate circumstances or at least consult their clients on the benefits of mediation in comparison to lengthy litigation which should not necessarily be a first resort.

<sup>147</sup> Full comments by the LSSA on the draft regulations can be accessed on the LSSA website at: [www.LSSA.org.za, under Legal Professionals: LSSA Comments](http://www.LSSA.org.za, under Legal Professionals: LSSA Comments) (last accessed on 13 July 2011).

If the relevant ombud or alternative dispute resolution agent manages to settle the dispute between the parties, the parties can agree to make such a settlement agreement an order and submit it to the NCT or High Court.<sup>148</sup>

If the complaint was referred to an alternative dispute resolution agent and was not resolved, the agent (*eg* ombud or other person providing conciliation, mediation or arbitration services) may terminate the process and refer the complaint to the NCC.<sup>149</sup>

### **National Consumer Commission (NCC)**

The NCC, which opened its doors on 1 April 2011, received more than 1 000 complaints during the first two weeks of operation and thereafter an average of 200 complaints per day. Complaints relating specifically to medical aids rank among the most common type of matter that the NCC is dealing with.<sup>150</sup> Other complaints received pertain to medical aids refusing to pay pensioners for life-saving medication that was incorrectly priced and cases where members' medical aid reserves were incorrectly accounted for, *eg* where patients were informed that reserves were depleted three months into a new year.<sup>151</sup>

Upon receipt of a complaint by the NCC, it must be decided whether or not there are grounds for a complaint in terms of the CPA. The NCC may refer the complaint to another regulatory authority that has jurisdiction over the matter or it may instruct an inspector to investigate the complaint.<sup>152</sup> Once the NCC has finalised the investigation into the merits of the complaint it may:

6.2.1.1 issue a notice of non-referral,<sup>153</sup> which means that the NCC is of the opinion that there is no real complaint. The complainant may under these circumstances still approach a consumer court, or with the leave of the NCT, the tribunal itself;<sup>154</sup>

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<sup>148</sup> Section 20(3).

<sup>149</sup> Sections 70(2) and 71.

<sup>150</sup> N Manyathi 'Q & A with National Consumer Commissioner Mamodupi Mohlala' (June 2011) *De Rebus* 28–30.

<sup>151</sup> See [www.timeslive.co.za/local/article1012533.ece/Commission-to-probe-consumer-industries](http://www.timeslive.co.za/local/article1012533.ece/Commission-to-probe-consumer-industries) (last accessed on 13 July 2011).

<sup>152</sup> Ss72(c) and 72(d).

<sup>153</sup> Section 23(1)(a).

<sup>154</sup> Section 25.

6.2.1.2 refer the complaint to the National Prosecuting Authority if the NCC alleges that an offence has been committed,<sup>155</sup>

6.2.1.3 refer the matter to an equality court, a consumer court, or the NCT;<sup>156</sup>

6.2.1.4 agree with the respondent to certain proposed terms of an order.<sup>157</sup>

The NCT or any court with jurisdiction may then, without hearing any further evidence, confirm the agreement as a consent order. It is also important to remember that the NCT or relevant court has discretionary powers and may refuse to make the order or can make changes to the draft order.<sup>158</sup>

In the case of a complaint against a regulated entity, such as a hospital or medical scheme, the NCC may, after concluding an investigation into a complaint, issue a compliance notice to a person or association of persons suspected of engaging in prohibited conduct,<sup>159</sup> based on reasonable grounds,<sup>160</sup> after the NCC has consulted with the regulatory authority<sup>161</sup> that issued a licence to that regulated entity.<sup>162</sup>

The contemplated compliance notice must set out the following: (a) the person or association to whom the notice applies; (b) the provision of the CPA that has not been complied with; (c) details of the nature and extent of the non-compliance; (d) any steps that are required to be taken and the period within which those steps must be taken; and (e) any penalty that may be imposed in terms of the CPA if those steps are not taken.<sup>163</sup>

An issued compliance notice remains in force until it is set aside by the NCT; a court upon a review of an NCT decision concerning that notice;<sup>164</sup> or when the NCC issues a compliance certificate if the requirements of that notice have been satisfied.<sup>165</sup>

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<sup>155</sup> Section 23(1)(b).

<sup>156</sup> Section 23(1)(c), s 73(2), s 73(3), s 73(4) and s 73(5).

<sup>157</sup> Section 24.

<sup>158</sup> Section 24(2)(c).

<sup>159</sup> Section 1: 'prohibited conduct' means an act or omission in contravention of this Act.

<sup>160</sup> Section 100(1), read with s 73(1)(c)(iv).

<sup>161</sup> Section 1: 'regulatory authority' means an organ of state or entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry.

<sup>162</sup> Section 100(2).

<sup>163</sup> Sections 100(3)(a)–(e).

<sup>164</sup> Section 100(4)(a).

<sup>165</sup> Section 100(5).

It may be argued that the NCC, by issuing a compliance notice, is exceeding its purely investigative role and that this amounts instead to a ‘determination’ by the NCC that a person or organisation of persons have engaged in prohibitive conduct. In the case of *Novartis*,<sup>166</sup> the Competition Tribunal stated that the Competition Commission is an investigative body<sup>167</sup> and that the administrative efficiency of that Commission could be severely hampered if, in exercising its discretion to make certain determination,<sup>168</sup> its every action were to be subject to scrutiny under the principle of administrative review. Likewise, although a person has the opportunity to approach the NCT for review of a compliance notice, which would no longer be binding on a person once it has been withdrawn by the NCT, the fact that a contravention of a compliance notice constitutes an offence, renders the action of the NCC (when it issues a compliance notice) tantamount to a determinative action.<sup>169</sup> It may be argued that the right to apply to the NCT for a review in this respect will not deprive a person of a right of review by a court, based on the rules of administrative justice.

The NCC may refer a matter or investigate a matter by means of issuing a summons to any person believed to be able to furnish information on the subject of investigation;<sup>170</sup> obtain an enter and search warrant from a court<sup>171</sup> and ensure that compliance notices are enforced. As the ‘police of consumer affairs’, the investigative powers of the NCC are comprehensive. The NCC also has the power to initiate a complaint in certain circumstances, including if an accredited consumer protection group, such as the National Consumer Forum,<sup>172</sup> or a consumer protection authority has reported prohibited conduct in terms of the CPA.<sup>173</sup>

In view of the abovementioned complaints, the NCC has recently launched investigations into three major consumer-driven industries in respect of which numerous complaints have already been received, which include the

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<sup>166</sup> *Novartis (sic) SA (Pty) Ltd and Others v The Competition Commission and Others* CT22/CR/B/Jun 01, 2.7.2001 (Also cited as *Novartis SA (Pty) Ltd v Main Street 2* [2001–2002] CPLR 470 (CT)).

<sup>167</sup> See *Simelane and Others v Seven-Eleven Corporation SA (Pty) Ltd* SCA 480/2001 (also cited as [2003] 1 All SA 82 (SCA), confirming *Novartis*.

<sup>168</sup> Section 20(2) of Competitions Act 98 of 1998, as amended.

<sup>169</sup> *Novartis* n 165 above at 27.

<sup>170</sup> Section 102(1).

<sup>171</sup> Sections 103–105.

<sup>172</sup> See [www.ncf.org.za](http://www.ncf.org.za). The National Consumer Forum is a non-profit, autonomous consumer group with individual membership dedicated to the protection and promotion of consumer rights and interests in South Africa.

<sup>173</sup> Section 21.

healthcare and pharmaceutical industries.<sup>174</sup> The medical schemes industry was also earmarked for a special investigation during 2011. Preliminary discussions between the NCC and the Council for Medical Schemes were held on 25 May 2011, during which the focus was on full disclosure of the price of goods and services and unfair, unreasonable and unjust contract terms.<sup>175</sup> The NCC will also investigate discriminatory rules such as those prevalent in insurance schemes that have barred people who were HIV-positive insurance cover in certain instances. Its first report in this regard is expected in August 2011.

The NCC has jurisdiction to deal with any complaint arising from any transaction throughout South Africa, irrespective of the origin of that particular product or service, even if such a product is imported. In respect of goods that are supplied in the South African market by a company of which the mother company is situated outside the South African borders, the NCC can still attend to complaints relating to such goods<sup>176</sup> by confirming or founding their jurisdiction through attachment.<sup>177</sup> This is a legal process whereby the High Court issues an order, on application, to instruct the relevant sheriff to attach the goods of the supplier found on South African soil, in order to found jurisdiction in respect of the supplier to enable the NCC to attend to the complaint lodged against the supplier. The purpose of an attachment of property *ad fundandam jurisdictionem* is twofold: firstly to found jurisdiction where no other ground of jurisdiction exists at all; and secondly, to provide an asset in respect of which execution can be levied in the event of a judgment being granted against the supplier.<sup>178</sup> Foreign companies exporting and supplying any medical products to South African customers will hence not necessarily escape the long regulatory arm of the CPA.

It appears that the NCC will try to influence parties to resolve a dispute in a particular manner, which is tantamount to an anticipated ruling of a consumer court. Subsequently, if the NCC has issued a notice of ‘non-referral’, after concluding an investigation within three years of the date on

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<sup>174</sup> See [www.timeslive.co.za/local/article1012533.ece/Commission-to-probe-consumer-industries](http://www.timeslive.co.za/local/article1012533.ece/Commission-to-probe-consumer-industries) (last accessed on 13 July 2011).

<sup>175</sup> See [www.fin24.com/Economy/Consumer-commission-eyes-medical-schemes-20110707](http://www.fin24.com/Economy/Consumer-commission-eyes-medical-schemes-20110707) (last accessed on 13 July 2011).

<sup>176</sup> Manyathi n 149 above at 28–30.

<sup>177</sup> Section 19(1)(c) Supreme Court Act 59 of 1959, as amended.

<sup>178</sup> *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305–8 where both the Roman-Dutch authorities and earlier South African decisions are exhaustively reviewed.

which the incident giving rise to the complaint occurred, and in the absence of any other proceedings instituted in terms of the CPA,<sup>179</sup> the complainant may still approach a consumer court<sup>180</sup> or the NCT directly, with the NCT's leave.<sup>181</sup>

### **National Consumer Tribunal (NCT)**

The NCT was established by the National Credit Act<sup>182</sup> which requires the NCT to exercise its functions in accordance with this Act or any other applicable legislation.<sup>183</sup> The NCT is a juristic person,<sup>184</sup> a tribunal of record,<sup>185</sup> and enjoys jurisdiction throughout the Republic of South Africa.<sup>186</sup> Upon receipt of a referred complaint, the chairperson of the NCT may assign any of the following matters to be heard by a single member of the NCT in accordance with the requirements of the CPA and the applicable provisions of the National Credit Act pertaining to the proceedings of the NCT:<sup>187</sup> (1) an application for transfer of a referral to a consumer court, to the NCT;<sup>188</sup> (2) an application to approach the NCT directly;<sup>189</sup> (3) an application for the re-referral of a matter to the NCT instead of the consumer court if the balance of convenience or interests of justice so require;<sup>190</sup> (4) an application in respect of confidentiality of information furnished to the NCC or NCT;<sup>191</sup> and (5) an application for the extension of time, to the extent that the NCT has authority to grant such an extension in terms of the CPA.<sup>192</sup>

A hearing conducted by the NCT must be informal and follow procedures determined by the Presiding Member at any time during the hearing.<sup>193</sup> The NCT must promote the spirit and purposes of the CPA<sup>194</sup> and must also make

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<sup>179</sup> Section 116(1).

<sup>180</sup> Section 1: 'consumer court' means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation.

<sup>181</sup> Section 75(1).

<sup>182</sup> Section 26 National Credit Act 34 of 2005.

<sup>183</sup> Section 26(1)(d) of the National Credit Act 34 of 2005.

<sup>184</sup> Section 26(1)(a) of the National Credit Act.

<sup>185</sup> Section 26(1)(c) of the National Credit Act. See Reg 23 and 26, GN 789, GG No 30225 of 28 August 2007. Tribunal records may be inspected by arrangement with the Registrar.

<sup>186</sup> Section 26(1)(c) of the National Credit Act.

<sup>187</sup> Section 75(5).

<sup>188</sup> Section 75(5)(a) and s 73(3).

<sup>189</sup> Section 75(5)(b) and s 75(1)(b).

<sup>190</sup> Section 75(5)(c) and s 75(2).

<sup>191</sup> Section 75(5)(d) and s 106.

<sup>192</sup> Section 75(5)(e).

<sup>193</sup> Rule 17(5)(e) of Reg 21(1), GN 789, GG No 30225 of 28 August 2007.

<sup>194</sup> Section 4(2)(b)(i).

appropriate orders to give practical effect to a consumer's right of access to redress, including, but not limited to, any order expressly provided for in the CPA,<sup>195</sup> as well as any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA.<sup>196</sup> The NCT may even grant an order for costs<sup>197</sup> and any other power conferred on it by law.<sup>198</sup> A person who contravenes or fails to comply with an order of the NCT commits an offence.<sup>199</sup>

The NCT may make the following orders: (a) Declare conduct to be prohibited;<sup>200</sup> (b) interdict any prohibited conduct;<sup>201</sup> (c) impose an administrative fine,<sup>202</sup> with or without the addition of any other order;<sup>203</sup> (d) confirm a consent agreement in terms of the CPA as an order of the NCT;<sup>204</sup> (e) condone any non-compliance with its rules and procedures on good cause shown;<sup>205</sup> (f) grant interim relief<sup>206</sup> in the form of an interdict; and (g) grant relief<sup>207</sup> in respect of a notice issued by the NCC regarding the investigation of or recalling of unsafe goods that might have a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer has not taken any steps required by an applicable code.<sup>208</sup>

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<sup>195</sup> Section 4(2)(b)(ii)(aa).

<sup>196</sup> Section 4(2)(b)(ii)(bb).

<sup>197</sup> Section 27(b) of the National Credit Act 34.

<sup>198</sup> Section 27(c) of the National Credit Act 34. In terms of S 69(a) of the CPA, a consumer may approach the NCT to enforce rights.

<sup>199</sup> Section 109(1).

<sup>200</sup> Section 150(a) of the National Credit Act.

<sup>201</sup> Section 150(b) of the National Credit Act.

<sup>202</sup> Section 151 of the National Credit Act.

<sup>203</sup> Section 150(c) of the National Credit Act. The NCT may refer to a matter of non-compliance to the National Prosecuting Authorities for prosecution as an offence, but may not do both (s 110(2)). An administrative fine not exceeding the greater of ten per cent of the respondent's annual turn over during the preceding financial year or R1 000 000,00 may be imposed (ss 112(2)(a)–(b)), which fine must be paid into the National Revenue Fund (ss 213–215 of the Constitution of the Republic of South Africa 108 of 1996; s 112(5) of the National Credit Act).

<sup>204</sup> Section 150(d) of the National Credit Act.

<sup>205</sup> Section 150(e) of the National Credit Act.

<sup>206</sup> Section 114. In terms of the doctrine of the separation of the powers, the power to grant an interdict is not ordinarily at the disposal of the legislature or the executive branch and the administration. However, the NCC in conjunction with the NCT forms part of an administrative structure which does not constitute a court, but can still exercise powers that is analogous to a court, such as the issuance of an interdict. See E van Eeden *A guide to the Consumer Protection Act* (2009) at 285.

<sup>207</sup> Section 20(3) of the CPA.

<sup>208</sup> Section 20(2) of the CPA. SAMED's position on the recalling of medical devices is that it should be a systematic process where items sold are traceable and retrievable. For retail items, the establishment conducting the recall may have to disseminate information in this regard via mass media. Medical Device Regulations: Update and SAMED's position,



The NCC may even approach the High Court, within three years<sup>209</sup> from an order being granted by the NCT, for the recovery of an administrative fine imposed by NCT.<sup>210</sup>

### **A court with jurisdiction**

A ‘consumer court’<sup>211</sup> or a consumer tribunal is a forum that has been established in terms of applicable provincial consumer legislation,<sup>212</sup> while a ‘court’<sup>213</sup> does not include such a consumer court. To date, legislation in respect of market practices and consumer courts have been enacted<sup>214</sup> in Gauteng,<sup>215</sup> the Western Cape,<sup>216</sup> Mpumalanga,<sup>217</sup> the North-West Province,<sup>218</sup> the Northern Cape,<sup>219</sup> the Eastern Cape,<sup>220</sup> the Free State,<sup>221</sup> and the Northern Province.<sup>222</sup>

In terms of the CPA, complaints are lodged with, and investigations into business practices, are carried out by, the provincial consumer protection authority. Upon completion of such an investigation, the relevant consumer protection authority may institute proceedings before the consumer affairs court or tribunal of that province,<sup>223</sup> as the case may be. A consumer court hearing a matter must conduct its proceedings in a manner consistent with

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18 March 2011, available at

[www.sapraa.org.za/presentations/April2011/SAMED%2018%20March%202011%20](http://www.sapraa.org.za/presentations/April2011/SAMED%2018%20March%202011%20)  
(last accessed on 16 July 2011).

<sup>209</sup> Section 152(3) of the National Credit Act.

<sup>210</sup> Section 152(2) of the National Credit Act.

<sup>211</sup> Section 1 of the CPA: ‘consumer court’ means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation.

<sup>212</sup> The provincial consumer courts resort under the provincial governments. Their establishment is the result of the division of responsibilities between the national and the provincial governments, Schedule 4, Part A of the Constitution of South Africa 108 of 1996, as well as the relevant provincial consumer protection legislation.

<sup>213</sup> ‘Court’ does not include a consumer court (s 1).

<sup>214</sup> MA du Plessis ‘Towards better service delivery by consumer courts’ (2008) 20 *SA Merc LJ* 74.

<sup>215</sup> Gauteng Consumers Affairs (Unfair Business Practices) Act 7 of 1996.

<sup>216</sup> Western Cape Province Consumers Affairs (Unfair Business Practices) Act 10 of 2002.

<sup>217</sup> Mpumalanga Consumer Affairs act 6 of 1998.

<sup>218</sup> North-West Province Consumer Affairs (Unfair Business Practices) Act 4 of 1996, Suspension of Certain Provisions of the North West Consumer Affairs Act 13 of 1995.

<sup>219</sup> Northern Cape Province Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

<sup>220</sup> Eastern Cape Province Consumer Affairs (Unfair Business Practices) Act 5 of 1998.

<sup>221</sup> Free-State Consumers Affairs (Unfair Business Practices) Act 14 of 1998.

<sup>222</sup> Northern Province Consumer Affairs (Unfair Business Practices) Act 8 of 1996, as amended by the Consumer Affairs (Unfair Business Practices) Act 2 of 2003.

<sup>223</sup> Section 25.

the requirements applicable to hearings of the NCT,<sup>224</sup> and may make any order that the NCT could have made after hearing the matter.<sup>225</sup>

If a matter is directly referred to a consumer court by the NCC,<sup>226</sup> the respondent may apply to the NCT for an order that the matter be referred to the NCT,<sup>227</sup> the NCT may likewise order that the matter be referred to the consumer court if the balance of convenience or interest of justice so require.<sup>228</sup> An order of a consumer court has the same force and effect as if it has been made by the NCT.<sup>229</sup>

A high court (civil court) has jurisdiction over all persons residing or being in its area of jurisdiction,<sup>230</sup> and has inherent jurisdiction to entertain any claim, or give any order, that would be within its power under common law.<sup>231</sup> The fact that a court has jurisdiction to hear a matter does not necessarily translate into a right of a particular person to be heard, because not all persons may have *locus standi* in terms of the common law. The CPA has a broad perspective on *locus standi*. The requirements to approach a civil court<sup>232</sup> can be summarised as follows: The applicant (complainant) must be: (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 (such as persons incapacitated as a result of certain medical conditions); (c) a person acting as a member of, or in the interest of, a group or class of affected persons (such as Paul Crankshaw, Deputy Chairman of the National Consumers Forum); (d) a person acting in the public interest, with leave of the NCT or consumer court; and (e) an association acting in the interest of its members.<sup>233</sup> The court must be approached in the manner provided for in the CPA.<sup>234</sup>

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<sup>224</sup> Section 25(5)(a).

<sup>225</sup> Section 25(5)(b).

<sup>226</sup> Section 23(2)(a)(i).

<sup>227</sup> Section 23(4).

<sup>228</sup> Section 75(2).

<sup>229</sup> Section 73(6).

<sup>230</sup> Section 19, Supreme Court Act 59 of 1959.

<sup>231</sup> Harms LCT *Civil Procedure in the Superior Courts* (March 2011) at A–7.

<sup>232</sup> Section 4(1).

<sup>233</sup> Section 4(1)(a)–(e).

<sup>234</sup> The procedure for approaching the High Court is set out in the Regulations to the Supreme Court Act 59 of 1959. The manner for approaching the court in terms of the CPA may also be described in Regulations issued in terms of s 102(1)(a) of the CPA. The CPA and Regulations should be read with the Supreme Court Act and Regulations thereto.

Any of the persons mentioned above may seek to enforce any rights in terms of the CPA<sup>235</sup> or in terms of a transaction,<sup>236</sup> agreement,<sup>237</sup> or otherwise resolve a dispute with a supplier.<sup>238</sup>

### **CONCLUSION AND RECOMMENDATIONS**

Our discussion has touched on a limited number of aspects of the CPA relating to health care providers and establishments. There is no doubt that specific adjustments will need to be made by all components of the health care industry in order to comply with the requirements of the CPA. The CPA is likely to redefine the doctor-patient relationship as it uses an approach which is more suited to commerce than to health care. In addition, it imposes on the doctor standards and requirements that are inappropriate to the doctor-patient relationship.

All transactions, agreements, forms and brochures should be carefully scrutinised in terms of their terms and conditions, language and marketing aspects, in line with the issues emphasised above. Health care providers and establishments will also need to review their medical malpractice insurance to ensure that it includes sufficient cover for product liability (to cover both the risk event, the quantum of damages, and legal costs pertaining to claimant and defence costs) created under the CPA. Suppliers should also seriously consider improving quality controls, and if part of a supply chain, obtain appropriate indemnities from all the other parties of the supply chain. Although medical defence organisations continue to assist members faced with medico-legal problems arising from clinical practice, the increased exposure of members to product liability will undoubtedly have an influence on membership fees in the medium term.

As noted above, the CPA permits a court to consider appropriate foreign and international law, hence the importance of considering US and EU law which have a relatively longer tradition of strict products liability legislation.

By identifying the patient as a ‘consumer,’ doctors are placed squarely within the chain that extends from manufacturer to consumer. While the principles guiding strict product liability in the manufacturing world (ie, compensation through loss spreading, deterrence, encouragement of useful conduct, cost internalisation) have shown their value in US and EU product

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<sup>235</sup> Section 69(d).

<sup>236</sup> Section 1 See definition of ‘transaction’.

<sup>237</sup> Section 1 See definition of ‘agreement’.

<sup>238</sup> Section 1 See definition of ‘supplier’.

liability law, their application to a profession already governed by strict rules and regulations remains a question. One hopes that patients are not mere ‘consumers’ and doctors more than just decision-neutral ‘suppliers’ of a product. An error in clinical judgment is more appropriately evaluated, and compensated, by means of malpractice (negligence) litigation in terms of the common law.

For these reasons, the appropriateness of transferring and applying strict product liability tests such as the ‘risk-utility’ test to medical practice needs to be carefully considered. What makes sense regarding the marketability of a car is not necessarily applicable to the marketability of pharmaceutical products as the balancing of risks is quite different.

In line with the legislature’s serious views regarding mediation, the remedial crux of the CPA also turns on alternative dispute resolution rather than lengthy, costly litigation processes. The NCC, which stands at the centre of the mediation processes, is also favoured with extensive investigative powers to aid it in mediating any consumer complaints. Should the consumer, however, find no justice through this channel, he or she is entitled to approach further legislative regulatory authorities with the necessary jurisdiction albeit only with their leave, this being a further protective measure safeguarding the consumer’s rights in terms of the CPA. With the NCC only functional since 1 April 2011 and already flooded with complaints demanding attention, only time will tell how far-reaching the Act’s impact on the health care sector will be.