

**DOES THE CONSUMER PROTECTION ACT 68 OF 2008 PROVIDE
FOR STRICT PRODUCT LIABILITY? – A COMPARATIVE
ANALYSIS**

1 Introduction

The aim of this analysis is to provide a brief background to the concept of strict product liability in South Africa, some policy considerations that played a role in the philosophy behind the reform of our consumer legislation, how this framework of strict liability influences product liability including a comparative approach to strict liability and in conclusion possible insurance implications will be touched upon.

This topic is highly relevant in light of the newly enacted Consumer Protection Act 68 of 2008 (“the CPA”). Even though the CPA is envisaged to come into full effect in October 2010 (Items 2(1) and 2(2) of Schedule 2 to the CPA) it appears likely that the CPA will in all probability only come into operation during 2011 as intimated in a press statement by Numfundo Maseti, the Chief Director of Policy and Legislation at the Department of Trade and Industry (Lake Consumer Protection Act – coming into force later than expected *Business Day* 2010-10-26). Section 61 of the Act which provides for strict product liability has a dramatic influence on the legal position regarding liability for harm caused by goods. This is an important issue in the drive to ensure that markets work for consumers and to address the unbalanced terms of trade that can have negative consequences for consumers in South Africa resulting in unsafe products, counterfeit and substandard goods. The new consumer dispensation is important because it sets out

“the basic rules of conduct that governs the interaction between businesses and consumers to ensure a fair and transparent market place. It therefore needs to regulate all aspects of the purchasing cycle for goods and services, beginning with the advertising or marketing of products, the practices adopted in securing a sale . . . including honouring guarantees and warranties” (Draft Green Paper on the Consumer Policy Framework 09/04 24).

Two of the objectives of the CPA are to “protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace” and to enact a law in order to “protect consumers from hazards to their well-being and safety” (Preamble to the CPA; see further Van Eeden *A guide to the Consumer Protection Act* (2009) for a detailed discussion of the CPA).

2 The South African position regarding strict product liability prior to enactment of the CPA

2.1 General

Prior to the enactment of the CPA, there existed no statutory provision for strict product liability in South African Law.

Product liability is defined as “the liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any other person affected by the use of a defective product” (McQuoid-Mason *Consumer law in*

South Africa (1997) 65). The liability for harm caused to a consumer resulting from a defective product can be found in either contract or delict. A brief summary of each is given.

Product liability is not a foreign concept in Roman-Dutch law. In this regard the classical Roman-Dutch law writers as well Pothier, the French writer, considered some form of strict liability. This form of strict liability is a law-imposed warranty for defective and dangerous products (Snyman "Products liability in modern Roman-Dutch law" 1980 *CILSA* 179).

Strict liability is recognised as an exception on fault liability. Recognised instances of strict liability are rare and stem mainly from modern legislation (like the CPA) or historical actions of Roman origin (Van der Walt and Midgley *Principles of delict* (2005) para 28.)

Greenman v Yuba Power Products Inc 377 P2d 897 901 (Cal 1963) was a vehicle for the adoption of tortious strict product liability in the United States. In *Greenman* the court described this form of liability as follows:

"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. Recognised 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. Although in these cases strict liability has usually been based on the theory of express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."

In the 1960s the United States Restatement (Second) of Torts (1965) (hereafter referred to as Second Restatement) was introduced to adopt the rule of strict product liability law where the consumer need not to prove fault to hold the manufacturer liable (see s 402A of Second Restatement). Because of the fact that section 402A of the Second Restatement was applied to challenge product design cases and no clear distinction was drawn regarding the different types of defects the Restatement (Third) of Torts: Product liability (1998) (hereafter referred to as Third Restatement) was introduced.

The European Directive on Product Liability of 1985 (Council Directive 85/374/EEC of 25 July 1985) has also introduced a strict liability framework for member states. Article 1 of the Directive states that "the producer shall be liable for damage caused by a defect in his product."

Prior to 1992, product liability claims in Australia were based on negligence but the legal position changed in 1992. Part VA of the Trade Practices Act 1974 (Cth) (hereafter referred to as the TPA) was introduced in 1992 and is based on the European Community's Product Liability Directive 1985 (Kellam and Arste "Current trends and future directions in product liability in Australia" 2000 *William Mitchell LR* 142–144). Section 75AD of Part VA provides that an individual who suffers loss as a result of injuries due to a defective product may claim compensation from a corporation in trade or commerce who supplies goods manufactured by it. This provision also applies when a person dies because of injuries caused by the defective product.

It is clear from the above that strict product liability is a well-grained concept in various other jurisdictions.

2.2 Brief historic overview of the concept of strict liability in the law of contract

If a contract exists between the parties, that is, the manufacturer, retailer, distributor, producer, importer, the purchaser or consumer of the goods, liability for defects in the product supplied will be of a contractual nature. Such a defect may relate to any one or a combination of the following:

- the quality of the product;
- the manufacturing process or actual design of the product;
- the absence of sufficient warnings as to dangerous features of the product; or
- the absence of adequate instructions as to the safe and proper use of the product (Van Niekerk and Schulze *The South African law of international trade: Selected topics* (2006) 116).

If damage is suffered due to a defect in the product the prejudiced party can use his or her contractual remedies to recover losses. The common-law warranty against latent defects also protects a purchaser against damage suffered due to such a defect in the product (Kerr *The law of sale and lease* (2004) 117).

The concept of strict liability is by no means new to South African law and different forms of strict liability already existed in Roman law and Roman-Dutch law. Well-known examples are the *actio redhibitoria* and the *actio quanti minoris* (Snyman 1980 *CILSA* 177). The abovementioned remedies were remedial actions available to a party who purchased defective manufactured products. It is a well-known legal principle that a seller or manufacturer incurs liability at common law where a latent defect is present in the thing sold. The liability of the aforementioned two parties is based on different requirements. *Dicta et promissa* or mere “puffing” statements must also be distinguished from express or implied warranties in contracts. A puff is “an exaggerated statement or opinion made by the seller to encourage the consumer to buy the thing but it is not intended to form a term of the contract” whereas a *dictum et promissum* is “a statement concerning the qualities or attributes of the thing sold which is more than mere puffing, but also does not form part of the contract” (*Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) 418). The latter goes beyond the mere “praise and recommendation” of a puff whereas a puff would for example be an obvious exaggeration such as “this is the best radio in the world” (McQuoid-Mason 81). In *Phame (Pty) Ltd v Paizes* 417 it was held that if a seller makes a *dictum et promissum* about the quality of the thing sold while the parties are busy negotiating and that thing fails to measure up to the said quality, the aedilician remedies are available.

In *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) 571 the court stated that the requirements for a seller to be liable for damages caused due to a latent defect are the following:

- The seller must have acted as a dealer; and
- the seller must have professed in public to have expert knowledge of the product sold (see also Kerr 377).

The manufacturer, on the other hand, will incur liability caused by a latent defect in the thing sold without having made any declaration that he has expert knowledge of the product sold and will be liable for all the buyer’s damages (Kerr 211; see also *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A)).

In *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 2 SA 565 (A) 571 Schutz JA referred to the “Pothier rule” that was applied in many South African decisions. The judge stated that the “scope of application” of the so called “Pothier rule” was “commercially important” (571). Schutz JA indicated how commerce has changed since the formulation of the “Pothier rule” with the following example:

“The merchant is denied the opportunity to see, to feel or to smell the produce that passes through his hands. He can as little as examine the metal in the bearings as the beans in the tin or the chip in the computer” (572).

Hence Schutz AJ’s fierce criticism of the test laid down in *Kroonstad*:

“It seems to me cumbrous, wasteful and uncertain of result, and therefore unjust, to require a buyer to prove and a seller to resist in case after case the proposition that the latter publicly professes to have attributes of skill and expert knowledge in relation to particular goods” (*ibid*).

The mere presence of the defect in the product at the time of sale created the possibility of instituting these aforementioned aedilician actions (Snyman 177).

This liability was then extended to the maker of the thing, thus the manufacturer, for consequential damages, whether or not he was aware of the defect (McQuoid-Mason 78). The following four situations can occur where liability for consequential damage may arise, namely the seller:

- acted fraudulently;
- breached an express warranty;
- breached an implied warranty, and
- acted with fault, either intentionally or negligently (*ibid*).

In the event where the seller acted fraudulently, the consumer who suffered loss or damage caused by for example fraudulent non-disclosure, will have to prove that fault was present on the side of the seller and sue for damages using the delictual remedies (*idem* 79). Where the seller breaches an express warranty the consumer may rely on the contract between them to recover loss and to cancel the contract (*idem* 80). In some instances it is possible for manufacturers to exclude liability in the contract concluded with the sellers of the product. In the case where liability is excluded in such a manner the only route for the seller who suffers loss or damage is to institute delictual remedies against the manufacturers (*idem* 81). Where the seller breached an implied warranty the consumer-purchaser will only be able to sue for damages using the aedilician remedies where the seller also acted as manufacturer or where he publicly professed to have skill and expert knowledge. In all other instances the consumer-purchaser will have to prove fault on the part of the seller before he will be able to sue for damages (*idem* 82; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) and *Kroonstad Westelike Boere Ko-op Vereniging v Botha* 1964 3 SA 566 (A)). Lastly, where the seller acted with intent or negligence a delictual action can be instituted by the consumer-purchaser if he can prove the fault (for a detailed discussion of the liability of the various sellers, see McQuoid-Mason 83–110).

2.3 The concept of strict liability in the law delict

A problem arises where there is no contractual relationship between the parties and the prejudiced party suffers damage caused by a defective product. This happens frequently as there is no contract concluded *inter alia* between the

manufacturer of the product and the eventual consumer of that product, especially in international contracts of purchase and sale. “The law of contract governs only actions by a purchaser in a direct contractual relationship with a producer or distributor” (Loubser and Reid “Liability for products in the Consumer Protection Bill 2006: A comparative critique” 2006 *Stell LR* 414). It is trite that the end consumer in many instances is ignorant of the fact that the product was indeed imported. It is in these circumstances that liability is based on the law of delict and that “the reform of the current fault-based delictual liability for defective products, as envisaged by the Consumer Protection Bill [now the CPA], should be as consistent as possible with the existing structure of the law, in particular the law of delict” (*idem* 417). “Where the consumer does not acquire the product directly from the manufacturer, and the manufacturer is thus a third party, such liability amounts to what is sometimes termed ‘product liability’” (*Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) 470). The court further explained (*ibid*) the manufacturer’s product liability towards the consumer and the reason why the manufacturer will be held liable:

“A contractual *nexus* between the manufacturer and the consumer is not required. Although the historical origin of the manufacturer’s liability is an agreement between the manufacturer and the distributor, the liability, which arises from the manufacture and distribution of the product, extends *via* the other contracting party to any third party who utilises the product in the prescribed manner and suffers damage as a result thereof. It follows as a matter of course that a manufacturer who distributes a product commercially, which, in the course of its intended use, and as a result of a defect, causes damage to the consumer thereof, acts wrongful according to the legal convictions of the community.”

Because of this problem, the tendency is to base remedies on the law of delict. Many academics and judges agree that the manufacturer’s liability (product liability) falls within the ambit of the Aquilian action (Neethling, Potgieter and Visser *Law of delict* (2006) 292 and fn 328). In two earlier decisions dealing with product liability, *Combrinck Chiropraktiese Kliniek v Datsun Motors* 1972 4 SA 185 (T) and *A Gibb and Son v Taylor and Mitchell Timber Supply Co* 1975 2 SA 457 (W), the courts confirmed that where a consumer seeks to keep a manufacturer liable and claim for damages suffered because of a defective product, he or she should base the claim on the *actio legis Aquiliae* (De Jager “Die grondslae van produkte-aanspreeklikheid *ex delicto* in die Suid-Afrikaanse reg” 1978 *THRHR* 349). In *Ciba-Geigy* 470 the Supreme Court of Appeal confirmed that where a manufacturer, without the necessary testing, produces and markets a product which has the potential of being hazardous to the consumer, such negligence may expose the manufacturer to delictual liability to the consumer. If one acknowledges the application of the Aquilian action in this context, regard must be had to the requirements for delictual liability, namely an act, wrongfulness, fault, damage and causation (Neethling *et al* 3). By far the most difficult requirement for liability based on the *actio legis Aquiliae* to prove is fault. This requires that the person who acted wrongfully also acted either intentionally or negligently. Before the enactment of the CPA, the manufacturer’s liability for defective products was fault-based. At least negligence had to be proved before the manufacturer could be held liable. Van Niekerk and Schulze 117 state that “[t]here is negligence if the manufacturer did not, in manufacturing the particular product in the way that it did, foresee and prevent damages which a reasonable person would have”. This statement reflects the classic formulation of the test for negligence by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A) 430e–f.

An objective test is therefore used to determine negligence. Because it is difficult to prove negligence on the part of the manufacturer, courts started using the doctrine of *res ipsa loquitur* to alleviate the burden on the plaintiff to prove negligence (Neethling *et al* 294). This maxim is applied where a conclusion of negligence can be drawn from the facts which are usually embodied in the occurrence itself while the cause of the occurrence is not known (Alheit “Delictual liability arising from the use of defective software: Comparative notes on the positions of parties in English law and South African law” 2006 *CILSA* 291). Obstacles that could hamper a plaintiff in proving negligence on the side of the manufacturer include (i) ignorance of the production process; and (ii) a complicated production process that is inaccessible to the plaintiff (Neethling *et al* 294; Van Niekerk and Schulze 117). Even though the doctrine of *res ipsa loquitur* can assist a plaintiff in proving negligence on the part of the manufacturer of a defective product, the court in *Bayer South Africa (Pty) Ltd v Viljoen* 1990 2 SA 647 (A) 661–662 stressed the importance that this doctrine should only be applied where it is appropriate in view of the facts of the case. The court referred to the application of this doctrine as follows:

“There may well be good reasons of policy for allowing this process of reasoning to be applied to the case where the merchant/seller is being sued on the grounds of a defect in his product which has caused damage (provided of course the facts are such as to give rise to an inference of negligence” (661).

However, by imposing strict liability the elimination of fault as requirement does not mean that all risk of harm is automatically transferred to the manufacturers or the suppliers (Loubser and Reid 422). An assessment of reasonableness is still required in a no-fault regime.

3 Policy considerations and justification for strict liability

With regard to the South African position, according to the fault theory the wrongdoer had to act with fault, either intent or negligence, on his part to incur delictual liability (Neethling *et al* 329). In 2003 the Supreme Court of Appeal confirmed the fault requirement “in relation to the manufacture, sale or distribution of goods” (*Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA), discussed by Loubser and Reid 412).

Due to the increase in industrial development and technological climax, the idea of strict product liability was raised in reaction to the fault theory (Neethling *et al* 329). In a case of strict product liability, the plaintiff must prove the following:

- the product was defective;
- he suffered damages; and
- the damage suffered was the result of the defective product (Van Niekerk and Schulze 116).

The concept of strict liability is also commonly referred to as no-fault liability (*ibid*). The above definition of strict liability clearly states that liability is attributed to people in certain instances and no fault, be it intent or negligence, is required to hold them liable. The effect of strict product liability is that

“typically anyone who is engaged in the stream of commerce of the product (from the manufacturer to the wholesaler to the retailer, or all of them) can be held responsible if the product was defective and someone was injured” (http://law.freeadvice.com/general_practice/legal_remedies/strict_liability.htm accessed 29 July 2009).

Although product liability was fault-based for many years, South African writers argued the need for strict or no-fault liability. In the words of Van der Walt “Die

deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk” 1972 *THRHR* 254:

“The recognition of strict liability in the case of products liability can be justified by various other factors: the public interest in the physical-psychological well-being of human beings requires the highest measure of protection against defective consumer products; by marketing and advertising the manufacturer creates a belief in the minds of the public that his product is safe; strict liability serves as encouragement to take the utmost degree of care; the manufacturer is, from an economic perspective, the party most capable of absorbing and spreading the risk of damage by price increases and insurance” (see also Neethling 295 and fn 355).

In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA) 297 300 the Supreme Court of Appeal stated that at that moment no urgent grounds existed to apply strict product liability in South African law and referred the possible imposition of strict liability to the legislature:

“[F]urther, as to the argument that strict liability had to be imposed for commercial reasons, that it was preferable that this should be done by legislation after due Parliamentary process and investigation so as to produce a comprehensive set of principles, rules and procedures. Single instances of litigation could not possibly provide for the depth and breadth of investigation, analysis and determination necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability.”

As suggested in *Wagener*, the legislature did in fact heed the call for the imposition of liability. Due to the uneven playing field that exists between manufacturer and purchaser as to the knowledge of the actual product, the purchaser takes it on trust that the product is safe and without defects (Loubser and Reid 415). This is also reflected by the United States case of *Escola v Coca Cola Bottling Co* 150 P2d 436 443 (Cal 1944):

“As handicrafts have been replaced by mass production with its great markets of transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark.”

One of the arguments that illustrate the need for strict liability is that those who can control the danger or make an “equitable distribution of the losses when they occur” should be burdened with the losses caused by defective products (cf Loubser and Reid 416). There are also other factors in the South African context that militate in favour of strict liability for manufacturers (McQuoid-Mason 108–110):

- (a) The vast majority of manufacturers do not sell directly to the public and cannot be held strictly liable under the *Kroonstad* rule for their harmful products, even though they are responsible for introducing these products into the marketplace.
- (b) Manufacturers who introduce defective products into the marketplace escape liability because the consumer must prove fault on their part, whereas sellers who are often “unwitting conduits” for manufactured products that are latently defective are held strictly liable because they professed that they have skill and expert knowledge in relation to those products.

- (c) Large-scale manufacturers who swamp the market with masses of potentially dangerous goods through intermediaries are not held strictly liable whereas ordinary artists and craftspeople that do not swamp the market with such masses of potentially dangerous goods are held strictly liable.
- (d) The re-entering of South Africa into the global economy with trading partners such as Australia, the European Union, Japan, the United Kingdom and the United States who have introduced strict liability for dangerous and defective products is likely to increase pressure on South Africa to do the same.
- (e) Cognisance must be taken of the notions of fairness and justice emphasised by the Constitution of South Africa “which can be used to develop a new *boni mores* to assist the development of the common law to protect vulnerable consumers against dangerous or defective products, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract” (McQuoid-Mason 109).

The sophisticated state of the manufacturing industry in South Africa also justifies a call for the imposition of strict liability for defective goods on manufacturers irrespective of whether they have a contractual relationship with consumers who suffer harm as a result of defects in their products (McQuoid-Mason 108–110). High product standards can also be achieved if those people involved in the supply chain share the cost of ensuring quality and safety, even if that implies that insurance must be in place to safeguard against possible defects (Loubser and Reid 416). Strict liability therefore also has a preventative purpose. The concept of reasonableness underlies these policy considerations to a large extent and the aspect of fairness must also be kept in mind (*idem* 417). An assessment of consumer behaviour should also be tested against the concept of reasonableness (*ibid*). The fact that one eliminated fault from the equation of liability does not also eliminate the concept of wrongfulness – as stated by Loubser and Reid “no-fault products liability still requires an assessment of wrongfulness” (*ibid*).

4 The new dispensation to be introduced under the Consumer Protection Act

4.1 General

Basic standards for product safety and product liability in cases of unsafe products are a key feature of any consumer protection regime and are necessary to enhance the confidence with which consumers interact in the marketplace (Draft Green Paper 31). Before the enactment of the CPA a prejudiced consumer could only obtain redress from a manufacturer of a product or the distributor if the consumer could prove fault on their sides (Loubser and Reid 412). The reform in the product liability regime therefore creates a strict liability framework in terms of which consumers can claim for defective products which caused them harm. The CPA introduced a framework in which strict liability can be attributed to specific people in the supply chain of goods (s 61 of the CPA and Loubser and Reid 413). The preamble to the CPA states clearly, amongst other things:

- “That it is necessary to develop and employ innovative means . . . (c) to give effect to internationally recognised customer rights . . . a law is to be enacted in order to–
- promote and protect the economic interests of consumers;
 - improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;

- protect consumers from hazards to their well-being and safety;
- develop effective means of redress for consumers.”

It is evident from the above that the aim of the CPA is to embrace a system that enables and informs consumers of their rights and to provide redress in situations where their consumer rights have been infringed. Considerations of fairness and economic efficiency are emphasised when one proceeds to a system of strict liability (Loubser and Reid 415).

4.2 Section 61 of the Consumer Protection Act

In terms of section 61 of the CPA a producer, importer, distributor or retailer of goods will be liable for defective products. These categories of persons are liable jointly and severally. They are also liable wholly or partly as a consequence of (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. At first glance it thus seems that the CPA imposes strict liability on these categories of persons. Section 61(4), however, contains the following defences:

- “Liability of a particular person in terms of this section does not arise if–
- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
 - (b) the alleged unsafe product characteristic, failure, defect or hazard –
 - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
 - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph does not apply;
 - (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers; or
 - (d) the claim for damages is brought more than three years after the –
 - (i) death or injury of a person contemplated in subsection (5)(a);
 - (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or
 - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or
 - (iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).”

The main differences between the jurisdictions that have adopted strict product liability regimes and South Africa, however, lie in the defences available against strict liability as set out in paragraph 5 below.

When the CPA provisions are compared to that of other jurisdictions it appears that interesting differences exist between defences in other jurisdictions and specifically the defence set out in section 61(4)(c) of the South African Consumer Protection Act.

5 Observations regarding section 61(4)(c) and the concept of strict product liability

5.1 Comparative defences: The development risk defence and consumer expectation test in comparative jurisdictions

5.1.1 The development risk defence

In Australia for example, section 75AK(1)(c) of Part VA of the TPA provides for the so-called “development risk defence”. Section 75AK(1) provides for “the state of scientific or technical knowledge at the time when the goods were supplied was not such as to enable the defect to be discovered”. It seems that section 75AK(1)(c) could be “construed as importing a modified notion of reasonableness” and thus reasonable care in discovering the defect would be a defence to a claim based on a defect (Hynes “Doctors, devices and defects: Product Liability for medical expert systems in Australia” 2004 *J of Law and Information Science* 35). In *Ryan v Great Lakes Council* [1999] FCA 177 (Mar 5, 1999) for example, the court had to deal with the issue of the supply of oysters that was contaminated due to an infection. The court held that

“[t]he paragraph obviously intends the defence be unavailable if the goods were supplied notwithstanding the possibility of discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, discovery and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods. Accordingly, it seems to me the defence applies and the s 75AD claim fails”.

Article 7(e) of the European Directive as well as section 4(1)(e) of the UK Consumer Protection Act of 1987 provide for the same defence as section 75AK(1)(c) of Part VA of the TPA. The wording of section 4(1)(e) of the UK Consumer Protection Act, however, is slightly different and provides that

“the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control”.

This defence is not compulsory for member states of the European Union. Luxembourg and Finland opted to exclude this defence whereas France, Germany and Spain opted to remove the defence from specific products (Fairgrave and Howells “Rethinking product liability: A missing element in the European Commission’s Third Review of the European Product Liability Directive” 2007 *MLR* 970).

It is interesting to note that section 68(5)(c) of the Draft Consumer Protection Bill, 2007 (8 September 2006) provided

“that is unreasonable to expect the distributor or retail supplier to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to – (i) that person’s role in marketing the goods to consumers; and (ii) the state of scientific and technical knowledge at the time the goods were under the control of that person”.

However, in the final version of the CPA, section 91(4)(c) provides that

“it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers”.

The reason for the inclusion of the “development risk” defence in the European Directive and the UK Act was respectively because of lobbying done by commerce and the fear of the impact of strict liability on “innovative industries”

(Loubser and Reid 447). It seems that this defence is “readmitting fault-based liability though the back door” and “[i]n effect, it has been regarded as allowing the producer/supplier to escape supposedly ‘strict’ liability by establishing that it was not at fault with regard to establishing latent risk” (*idem* 446). It might be for this reason that the “development risk” defence was omitted from the final version of CPA.

5 1 2 The consumer expectation test

The CPA also does not make provision for the so-called “consumer expectations test” or “legitimate expectations” test provided for by the United States, the European Directive or the United Kingdom Consumer Act (Loubser and Reid 424). Section 402A of Restatement (Second) imposes strict liability on both manufacturers and sellers of defective goods because a seller is liable even if the seller “exercised all possible care in the preparation and sale of his product” (Feeney “In search of a remedy: Do state laws exempting sellers from strict product liability adequately protect consumers harmed by defective Chinese-manufactured products?” 2009 *J of Corporation Law* 569; see also *Vandermark v Ford Motor Co* 391 P2d 168 (Cal 1964) 170–172 where the court held that the manufacturer of a defective car and the dealer were strictly liable despite the fact that Ford delegated the responsibility of final inspection to the car dealership, and that it was also immaterial whether the dealership had disclaimed its liability for personal injuries in its sales contract). Section 402A defines defective products as those “in a condition not contemplated by the ultimate customer, which will be unreasonably dangerous to him”. What is important to note here is that strict liability in terms of s 402A is not only imposed on manufacturers of products but also on non-manufacturers (as noted in comment (f) of the section). In terms of comment (f) “any wholesale or retail dealer or distributor” who sells defective products is liable for damage caused by a defective product.

An interesting provision can be found in article 3 of the European Directive which states that the importer into the European Union and “any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer” are liable for defective products on the same conditions as the producer. Liability is channelled to the producer of the defective product because if a supplier can identify the producer or the person who supplied the product to them, that supplier can escape liability in terms of the defective product (Taylor “The harmonisation of European product liability rules: French and English law” 1999 *Int and Comp LQ* 423).

The “consumer expectations test” in the section 402A comment was adopted by the majority of the states in the US in respect of defective products, including design defects. Due to many states supplementing or replacing it with some version of the “risk-utility test”, problems arose with its interpretation. The risk-utility test requires a balancing of certain objective factors but in the end it comes down to the identical value judgment: “did the producer present an unreasonable risk to consumers?” (Loubser and Reid 426). In *Barker v Lull Engineering Co* 573 P2d 443 (Cal 1978) 451 the court noted that the consumer could not reasonably have an expectation of safety if the risks posed by a product are “open and obvious” and that in case of some products the “consumer would not know what to expect, because he would have no idea how safe the product could be made” (454). In order to avoid these problems the court in *Barker* supplemented the consumer expectations test with the risk-utility test. The court held (*ibid*) held that a

“product may be found defective in design even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product’s design embodies ‘excessive preventable danger’, or in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design”.

As regards both warning and design defects, the Third Restatement relies on a reasonableness test to determine negligence and not the hindsight approach which attempted to classify the liability as strict liability (Wright “The principles of product liability” 2007 *The Review of Litigation* 1077–1078). Section 3 of the Third Restatement also allows a *res ipsa loquitur*-type of inference when a product is defective. Proof of a specific construction or design defect or negligence is required. This inference is allowed even when proof under section 2 of a specific defect is possible. Section 3 provides that

“[i]t may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect when the incident that harmed the plaintiff: (a) was a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution”.

One of the arguments against the “consumer expectations” test is that it relates to design defects and that it is an impossible task for an ordinary consumer to define what he or she expects of the technical design characteristics of a product. It seems that this might be one of the reasons why this defence was not included in the CPA. The interpretation by Loubser and Reid 425 explains the criticism against the “consumer expectations” test very well. They put it as follows:

“While it can be assumed that consumers expect a certain level of safety, how is that level defined when it comes to specific design criteria? For example, what do customers expect of the structural soundness of one type of metal as opposed to another with slightly different characteristics that, if used, would require changes in still other aspects of the design? If the ordinary customer can be said reasonably to expect a product to be “strong”, how strong is strong? Is a general impression of strength or quality sufficient when it comes to technical design features? If so, how is that impression measurable against the actual condition of the design feature in question? These difficult questions led many courts to reject the consumer expectations test as the sole test for defective design.”

5.2 The defence in terms in section 61(4)(c) of the CPA

Although the South African version excluded the so-called “development risk” defence and “consumer expectation” test it did, as indicated, include the section 61(4)(c) defence. At first glance it seems that the legislator is in fact imposing strict liability on the listed persons but it is submitted that section 61(4)(c) creates a dilemma as it appears that the manufacturer (producer) and importer are specifically excluded from the application of this defence and that strict liability is, however, imposed on them. Imposing strict liability on manufacturers can be justified by both the so-called “interest or profit” theory and the so-called “risk or danger” theory. The “interest or profit” theory depends on the manufacturer’s profitability activity whereas the “risk or danger” theory depends on the increased potential for harm as a result of the manufacturer’s activities (Neethling *et al* 295; Alheit 301). Davidow “The unintended defect in the Consumer Protection Act” 2009 para 5 (<http://www.wwb.co.ca> accessed 2009-06-01) is of the view that the defence in section 61(4)(c) provides suppliers with an escape from liability which will apply in most circumstances. Because the consumer no

longer has to prove negligence, suppliers escape liability when they can prove that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers”. Davidow para 6 suggests that the following enquiry must therefore be made:

- “(1) Would the reasonable supplier have foreseen that the defect would have caused harm or damage?
- (2) Would a reasonable supplier in the position of the supplier in the supply chain, have taken steps to inspect or discover the defect?
- (3) Did the supplier take those steps?”

It is submitted that Davidow (para 7) is correct in indicating that the test is one of negligence and that it does not impose strict liability in the true sense. The inference can thus be drawn that the distributor or retailer is not strictly liable. Some argue that strict liability for non-manufacturers must be imposed because of the so-called “marketing enterprise” argument articulated in *Vandermark* 171 to the effect that “retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products”. Another rationale for the strict liability of non-manufacturers articulated in *Vandermark* 171 is that it affords consumers maximum protection because “in some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff”. Others argue that non-manufacturers should be strictly liable because “they will likely be able to seek indemnification from manufacturers and thus will suffer minimal harm if they are not at fault” (Feeney 2009 *J of Corporation Law* 571). In Australia, for example, section 74A of Part VA of the TPA provides an extended definition of “manufacture”. A corporation will be a “manufacturer of goods” for purposes of sections 75AD to 75AG where goods are manufactured by the corporation, where the corporation holds itself out as a public manufacturer, where the goods are manufactured under licence from the corporation that will be the so-called “home brand” goods, where someone is permitted to promote the goods of the corporation as the goods of the corporation or where the corporation is the importer of the goods. In terms of section 75AJ a plaintiff may request in writing the name of the manufacturer or entity which supplied the goods to the person receiving the request. This request can be sent to all known suppliers of the goods that allegedly caused the loss to the potential plaintiff. Another consequence of section 75AJ is that if the plaintiff does not after 30 days know who the manufacturer of the goods is, each supplier of the goods in question “who did not comply with the request” is deemed to be the manufacturer of the goods for purposes of the claim. Any supplier of the product who fails to assist the potential plaintiff within the 30-day period might find him- or herself defending a claim with regard to goods that they did not manufacture (Kellam and Arste 151). From this it is apparent that strict liability is imposed even on non-manufacturers.

It should further be noted that the Model Uniform Product Liability Act, 44 Fed Reg 62 714 of the United States (hereafter the Model Act) exempts non-manufacturers of defective products from liability where, for example, they receive goods in sealed containers and distribute them to consumers without inspection. Section 105C of the Model Act provides that a court can hold non-manufacturers liable to the legal standard of a manufacturer if:

- “(1) The manufacturer is not subject to service of process under the laws of the claimant’s domicile; or

- (2) the manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or
- (3) the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.”

From the above it is clear that the South African CPA provides a form of strict liability for manufacturers and importers but not for distributors and retailers who can escape liability by proving that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers”. One can then assume that the liability of these parties is still fault-based where reference is made to reasonableness. A distributor of a product does not incur delictual liability at common law unless there was a legal duty on him to inspect a product and he failed to do so (Loubser and Reid 431). This, however, does not address the imbalance that currently exists between consumers and businesses in South Africa. The CPA will make no difference to the present position of most South African consumers especially when taking into account the lack of education regarding consumer rights and that most of these consumers are found in the rural areas. These consumers might in most instances not even be aware of the protection afforded by the CPA. It seems that by opening the back door for distributors and retailers, effective redress is not provided for ordinary consumers. This provision is therefore defeating the idea behind true strict product liability because only the manufacturer and importer will ultimately be strictly liable and not the distributors and retailers.

6 Conclusion

In what seemed to be the first case on products liability in South Africa (*A Gibb and Son supra*), Coetzee J was clearly frustrated with the lack of academic writing on the topic. In his judgment he regarded this area of the South African law as “a fertile field for academic research” and foresaw the possibility that the “rather humble saligna scaffolding plank may still set this ball rolling one day” (460–461).

This ball has been rolling for some time in the South African law of products liability. It has in fact been rolling at high speed since the enactment of the CPA and the new criteria for product liability of manufacturers, retailers, distributors and importers of defective products.

The proposed imposition of strict liability in terms of section 61 bears both advantages and disadvantages. Many of the advantages have already been dealt with and are also reflected in the concluding remarks. One of the disadvantages that need to be mentioned here is the cost of insurance that will definitely impact on manufacturers and importers. Liability insurance profiles of the parties mentioned in section 61 will dramatically change and this change will impact on the cost of the products. The recent Toyota recalls have been a wake-up call for manufacturers and emphasised the necessity of extended liability insurance to cover the excessive cost of product recalls (<http://www.timeslive.co.za/business/article389882.ece/Consumer-Protection-Act-to-hit-retailers> accessed 2010-06-07).

In conclusion it is submitted that:

- There is no doubt that strict liability must be imposed on manufacturers of defective products. In this era of high technology there is clearly a duty of care that can be expected from the manufacturer to take all possible steps to

ensure that a manufactured product meets all the requirements to ensure that a safe and non-defective product is produced.

- The same criteria for liability can be imposed on importers of products. Strict liability should also attach to the importer of goods to ensure the quality and safety standard of the product and to make sure that adequate warnings are given regarding appropriate use of the product to meet the expectations of the man in the street.
- It is suggested that the position regarding distributors or retailers as regulated under the principles used by the United States of America should be adopted in South African law. As said earlier “they [retailers] are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products” (*Vandermark* 171). The legal duty to act with the necessary care must thus be extended to impose strict liability on the retailer or distributor of the defective product.

Even though some sources caution that strict product liability will adversely affect the manufacturing or import business in South Africa, it is submitted that the imposition of strict liability on all parties in this field will be welcomed by the consumer. The words of Innes CJ in *Cape Town Municipality v Paine* 1923 AD 207 express fundamental principles that should be applicable to everyone involved in the retail chain:

“Every man has the right not to be injured in his person or property by the negligence of another – and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established and it only remains to ascertain whether it has been discharged.”

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