

**SELECTED ASPECTS RELATING TO DEFENCES TO STRICT PRODUCT LIABILITY
AS INTRODUCED BY THE CONSUMER PROTECTION ACT 68 OF 2008.**

By

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Submitted in part fulfilment of the requirements for
the degree of

MAGISTER LEGUM

at the

UNIVERSITY OF PRETORIA

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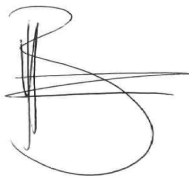
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Summary

The Consumer Protection Act 68 of 2008 has extended consumer protection to South African Consumers in various areas, notably also by introducing a strict product liability regime . Quite a number of authors have already investigated the parameters of the product liability regime introduced by section 61 of the Act with emphasis on the absence of a requirement of negligence and how this aspect has opened up access to redress for consumers harmed by defective products. Although this dissertation provides an overview of the new product liability regime introduced by the Consumer Protection Act it has a very specific focus, namely to analyse the defences available to the supply chain against product liability claims. The reason for doing so is twofold: in the first instance it is necessary to appreciate that the product liability regime introduced by the Act, although strict, is not absolute. Hence the provision made in section 61 for a number of defences that may be raised by the supply chain. Second, it is submitted that unless a balanced approach to the issue of product liability is taken, consumers will suffer because a product liability regime that does not provide for any defences to product liability claims may stifle development and innovation to the detriment of consumers. The dissertation thus investigates the closed list of defences introduced by section 61(4) of the Act and compares them with the statutory defences available under the EU Product Liability Directive in order to draw conclusions regarding their content and adequacy within the realm of modern product liability law.

Declaration

I Marius Buys student number 13338464 declare herewith that the content of this dissertation represents my own work and include my own opinions, unless the contrary is indicated.



MARIUS BUYS

Acknowledgement

I wish to thank:-

- My supervisor, Prof Van Heerden for her guidance, encouragement and support; and
- My spouse and family for their support and help.

Chapter One

Introduction

1. Background

The modern consumer market has global dimensions. This means that manufacturers can sell their products across the globe with very few constraints. Unfortunately this global trade in consumer products also imply that there is an increase in instances where manufacturers release defective products onto the consumer market which cause harm to consumers. The thalidomide disaster in the 1970's and the 'mad cow'-disease epidemic of the 1990s serve as notorious examples. Van Eeden aptly remarks that "[T]he design, manufacture and distribution of products are activities that are central to the wealth and welfare of society, but they may also be attended by, or result in death, disease or injury for a wide range of parties, eg workers in factories or along distribution channels, users of defective products, and third parties, eg occupants of defective or unsafe vehicles, or innocent bystanders."¹

This problem of defective products causing harm has led to the evolution of a focused area of law, namely that of product liability. Briefly put, the law of product liability holds manufacturers who make products available to the public responsible for injuries caused by defective products. This liability can be founded either in contract, or where no contract between the manufacturer of defective goods and the consumer who was harmed by those goods exist, in the law of delict.² In terms of the South African common law a manufacturer will incur liability for damage caused by a latent defect in goods.³ It was further held in *Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha*⁴ that a merchant seller can be held liable for damage caused by latent defects in goods if the following requirements are met:

¹ Van Eeden *Consumer Protection Law in South Africa* (2013) 367.

² Ibid.

³ Botha & Joubert "Does the Consumer Protection Act 68 of 2008 provide for strict product liability? A comparative analysis" (2011) *THRHR* 307.

⁴ *Kroonstad Westelike Ko-operatiewe Vereniging v Botha* 1964 (3) SA 561 (A) 571.

- The merchant seller must have acted as a dealer
- The merchant seller must have professed in public to have expert knowledge of the product.⁵

Remedies for product liability *ex delicto* under the common law falls within the ambit of the Aquilian action.⁶ Providing redress to consumers, from a delictual perspective, that is, where no contractual nexus exists between the manufacturer of a product and a person (hereinafter consumer) who was injured by such product, has proved to be especially problematic. This is because a consumer generally has no or little knowledge of, or access to, the manufacturing process either to determine its workings generally or, more particularly, to establish negligence in relation to the manufacturing of the item or substance which caused the injury.⁷ The development of an effective product liability system requires consideration of this impediment and many other challenges faced by consumers in the context of product liability. The introduction of no fault or “strict” product liability regimes in many jurisdictions has therefore been regarded as an effective solution in providing consumers access to redress as it does away with the proof of the element of negligence to establish delictual liability for damage caused by defective products, which has in the past severely hampered the ability of consumers to prove product liability claims.⁸

2. Rationale of research

In terms of the South African common law of delict, all the elements of a delict, namely conduct, fault, causation, harm and damage must be proved to found a product liability claim.⁹ Proving fault on the part of the manufacturer in order to found a product liability claim has however proved to be especially problematic. The case of *Wagener v Pharmacare*¹⁰ clearly illustrates the difficulties encountered by consumers who wanted to pursue product liability claims in instances where they suffered harm as a result of defective products. In this case the court however declared that due to the complex

⁵ This is also referred to as “The Pothier Rule”. See also *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (A) 571.

⁶ *Ciba –Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447.

⁷ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* [2003] 2 All SA 167 (SCA).

⁸ Loubser and Reid “Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique” (2006) *STELL LR* 412

⁹ *Ibid.*

¹⁰ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* [2003] 2 All SA 167 (SCA).

nature of product liability, it was not for the court, but rather for the legislature to introduce strict product liability into South African law.

This approach has hampered South African consumers for decades in their endeavours to obtain redress as it presented an often insurmountable difficulty in pursuing a product liability claim successfully. Actually the whole consumer protection landscape in South Africa was severely lacking in its ability to provide protection generally to consumers.¹¹ Existing consumer protection measures were outdated, fragmented and needed a comprehensive framework of legislation, policies and government authorities to regulate consumer-supplier interaction.¹² Our own development in consumer law necessitated the legislature to give effect to internationally recognised consumer rights as a result of South Africa's introduction into the global economic playing field, which lead to new consumer legislation. This brought about major development in terms of product liability to promote and protect the economic interest of consumers.

As a result of the lack of proper consumer protection the Consumer Protection Act 68 of 2008 (CPA) was enacted to provide the comprehensive consumer protection framework found to be wanting in South Africa.¹³ This Act particularly sought to provide a solution to the problem of consumer redress in the context of harm caused by defective products. Section 55 of the CPA provide consumers with a right to safe, good quality goods implying that suppliers should not release defective goods onto the consumer market. As will be discussed in more detail over the course of this dissertation the CPA sought to introduce a strict product liability regime¹⁴ by means of section 61 of the Act, where proof of negligence by a manufacturer is no longer a prerequisite and so aims to afford South African consumers better protection in the context of product liability. It has also sought to extend this consumer protection by providing for a very broad definition of "consumer"¹⁵ and that

¹¹ Woker "Why the Need for Consumer Protection Legislation?" (2010) *Obiter* 217.

¹² DTI *Draft Green Paper on the Consumer Policy Framework* 09/04 9 GN 1957 in GG 26774 of 9 September 2004.

¹³ Act 68 of 2008.

¹⁴ Van Eeden refers to this as 'modified strict liability'. See Van Eeden *Consumer Protection Law in South Africa* (2013) 372.

¹⁵ In terms of s1 of the Act "consumer" in respect of any particular goods or services means

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business
- (c) a user of those particular goods or a recipient or beneficiary of those particular services, regardless of whether such person was a party to a transaction for the supply of those goods or services
- (d) and a franchisee

the whole supply chain is jointly and severally liable for harm caused by defective products after the coming into early operation of the Act. However, the strict product liability regime introduced by the CPA is not absolute. This is evident from the fact that the Act provides for a number of statutory defences that a supplier can raise to a strict product liability claim.

It is submitted that the introduction of statutory defences to product liability is necessary to achieve a “balanced” product liability regime. If suppliers had to trade under a product liability regime which held the whole supply chain liable *per se* for harm caused by defective products it would clearly stifle technological advance, innovation and risk-taking which is a necessary component of product development.¹⁶ Consumers would be prejudiced by such a narrow approach to product liability as they would be deprived of the benefit of a dynamic product market especially in the context of health and medicine. There is of course also the drawback that suppliers of necessary goods may decide to exit the market if they have to bear the risk of limitless product liability.¹⁷ Hence it is agreed with Van Heerden that the introduction of defences to product liability has a balancing purpose and in an indirect manner thus also protects consumers against a crippling exodus of manufacturers who actually have much to contribute in the context of product innovation.¹⁸

3. Scope of Dissertation

The focus of this dissertation will be on the statutory defences to product liability created by the CPA. The nature, scope and adequacy of each defence will be assessed. These defences will also be compared with statutory defences available to suppliers in strict product liability regimes of selected comparative jurisdictions. Good comparative guidelines may be found in international trends that have developed earlier than South African consumer legislation. The purpose of such comparison will be to assess the measure of protection that the Consumer Protection Act gives to suppliers.

4. Significance of Study

¹⁶ Van Heerden ‘Perspectives on the concept of a material defect in terms of the Consumer Protection Act’ paper presented at International Mercantile Law Conference, Bloemfontein, November 2013 (hereinafter Van Heerden Bloemfontein .paper).

¹⁷ Ibid.

¹⁸ Van Heerden Product Liability Notes

The introduction of a strict product liability regime into South African law is very new. As has been the case in many instances where new laws are introduced it can be expected that the strict product liability regime introduced by section 61 of the CPA will not be without teething problems. Many authors have written about the fact that under this new regime a consumer is not required to prove negligence in order to found liability against the supplier.¹⁹ At the time of writing this dissertation not much has been written though on the closed list of statutory defences introduced by section 61(4). It is however necessary to consider these defences in order to conclude on whether they are appropriate in the context of the product liability regime introduced by the CPA and whether they should be retained as they are currently framed and also whether they need to be expanded by introducing more defences for suppliers.

5. Research Methodology.

This research involves examination of primary sources which include legislation and secondary sources such as journals and case law. A comparative analysis of the statutory defences to product liability available in selected other jurisdictions is also undertaken.

6. Problem statement

This research will focus on the question whether the closed list of statutory defences introduced by the Consumer Protection Act are adequate in their current format or whether they require further reform and expansion in order to contribute to an efficient and balanced product liability regime in South Africa.

¹⁹ Eg Loubser and Reid "Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique" 2006 *STELL LR* 412; Botha and Joubert "Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? –A Comparative Analysis" (2011) *THRHR* 318; Neethling and Potgieter "The Continued Importance of Common Law Product Liability *Ex Delicto: Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA); [2011] 3 All SA 362(SCA)" (2014) *THRHR* 1; Katzew and Mushariwa "Product Liability in the Wake of the Consumer Protection Act 68 of 2008" (2012) 24 *SA Merc LJ* 1; Gowar "Product Liability: A Changing Playing Field?" (2011) *Obiter* 521.

Chapter 2

The CPA and Product Liability

2.1 Introduction

The introduction of the CPA hails a new area of Consumer Protection in South Africa. In essence this Act applies to goods and services promoted and supplied by a supplier in the ordinary course of the supplier's business, to a consumer.²⁰ The Act came into operation incrementally as some of its provisions came into effect on an "early effective date", namely at the end of April 2010, whereas the bulk of its provisions came into effect on the "general effective date" which was 31 March 2011. It is to be noted that the product liability provisions in the Act already came into effect on the early effective date and are thus in operation since the end of April 2010. It should further be noted that with regards to product liability it is not necessary to become embroiled in the intricacies of determining whether the CPA applies in a certain instance or not as section 5(5) of the Act extends the application of the product liability provisions contained in section 60 and 61 of the Act even to goods supplied in terms of a transaction that is exempt from the application of the Act.²¹ Thus, where a product liability claim has arisen after the end of April 2010 the consumer will be able to pursue his claim under the provisions of the CPA provided all the requirements set by the Act are met. In this regard though it is important to take cognisance of section 2(10) of the CPA which preserves the common law rights of consumers by providing that '[N]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.'

2.2 The product liability provisions contained in section 61

At the outset it should be noted that the Consumer Protection Act affords a very wide meaning to the concept of "consumer" thus broadening the reach of the Act's protection.²² In terms of section 1 of the Act a consumer 'in respect of any particular goods or services, means-

²⁰ S5(1) of the Act.

²¹ S5(5) provides as follows: 'If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of his Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to section 60 and 61.'

²² See fn 12 above

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3)
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to(e).'

Section 61 provides that, except to the extent contemplated in section 61(4), the producer or importer, distributor or retailer of any goods²³ is liable for any harm, as described in section 61(5), caused wholly or partially as a consequence of

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

It is further stated that the liability in terms of section 61 is "irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be." Thus it appears that the CPA has introduced a no fault or strict product liability regime as it has done

²³ Goods are broadly defined in s1 of the Act to include-

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service" in s 1;
- (e) gas, water and electricity.

away with the onerous obligation to prove negligence imposed on the consumer by the common law.²⁴

Section 61 acknowledges that product liability can arise not only from harm caused by manufacturing and design defects but also from harm caused by inadequate instructions or warnings. Section 61 has to be read with section 53 of the Act as the latter section provides the definitions for the concepts relating to defectiveness of a product which lies at the root of product liability.²⁵ In terms of the definitions in section 53, when used with respect to any goods, component of any goods, or services:

‘defect means-

- (i) any material imperfection²⁶ in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable²⁷ than persons generally would be reasonably entitled to expect on the circumstances²⁸; or
- (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

‘failure’ means the inability of the goods to perform in the intended manner or to the intended effect.

‘hazard’ means a characteristic that-

- (i) has been identified as, or declared to be, a hazard in terms of any other law; or

²⁴ Loubser and Reid “Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique” 2006 *STELL LR* 412.

²⁵ Van Heerden Bloemfontein paper November 2013.

²⁶ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 53-2 indicate that ‘material’ ordinarily means serious, substantial or important and thus a material imperfection is a serious or important fault.

²⁷ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 53-2 indicate that ‘acceptable’ ordinarily means ‘satisfactory’, ‘pleasing’ or ‘tolerable’ and indicates a subjective reaction to goods.

²⁸ This entails that whether goods contain a defect for purposes of the Consumer Protection Act is determined with regards to a consumer expectations test. This test which appears in the product liability legislation of other jurisdictions has attracted criticism from many writers. For a brief overview of such criticism, see Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 53-3.

(ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and ‘unsafe’ means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.”

The liability provided for in section 61 is wider than afforded under the common law²⁹ and applies to the whole supply chain and also extends to a supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods.³⁰ If in a particular case, more than one person is liable in terms of section 61, their liability is joint and several.³¹

Strict product liability in terms of the CPA does however not mean ‘absolute’ liability.³² This is evident from section 61(4) that sets out a closed list of statutory defences available to the supply chain. It provides that liability of a particular person in terms of section 61 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 (i) 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

²⁹ In terms of the common law *ex delicto* the manufacturer and in certain instances a merchant seller could be held liable. See Nagel *Commercial Law* (4th ed) par 11.4

³⁰ See s61(2) which provides that such supplier of services must also be regarded as a supplier of the goods he applies, supplies, installs or provides.

³¹ S61(3).

³² Van Heerden paper Bloemfontein paper November 2013.

- (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).'

Liability only arises if a defective product actually caused harm to a consumer.³³ Harm for which a person may be held liable in terms of section 61 includes the death of, or injury to, any natural person; an illness of any natural person; any loss of, or physical damage to any property (movable or immovable) and any economic loss that results from harm contemplated as aforesaid.³⁴

With regards to the powers of the court in respect of product liability claims, section 61(6) provides that nothing in section 61 limits the authority of a court to assess whether any harm has been proven and adequately mitigated; determine the extent and monetary value of any damages, including economic loss; or apportion liability among persons who are found to be jointly and severally liable.

2.3 Analysis of the statutory defences provided by section 61(4)

In terms of the common law a manufacturer is liable where harm is negligently caused by a defective product.³⁵ Although a comprehensive discussion thereof is beyond the scope of this dissertation, it should be noted

³³ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-2 indicates that although the consumer has been relieved of the onerous burden of proving fault, he must still prove that the product 'had some kind of flaw that made it unsafe or otherwise defective in terms of the definitions in section 53...and that the damage was caused wholly or partly by this defect.'

³⁴ For a detailed discussion see Neethling and Potgieter "The Continued Importance of Common Law Product Liability *Ex Delicto: Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA); [2011] 3 All SA 362 (SCA).

³⁵ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-1.

that various defences were available to a manufacturer in terms of the common law, such as that no “defect” existed in the goods, the product was not the cause of the harm or that no “harm” was caused by the product, contributory negligence by the consumer, lack of negligence on the part of the manufacturer and so forth.³⁶ Other defences under the common law *inter alia* entailed voluntary assumption of risk by a consumer and failure to adhere to instructions or warnings provided by the manufacturer.³⁷

The CPA now specifically provides for a closed list of statutory defences that are available to the supply chain. In order to comprehend the nature and scope of the defences listed in section 61(4) it is necessary to dissect and analyse each defence in detail. Some of these defences as will be seen, applies to the whole supply chain whereas some have a more limited application, as will be pointed out below. To date there is no case law available that deals specifically with the statutory defences as introduced by the CPA hence each of these defences will have to be dissected in order to determine how and in which circumstances they will operate.

2.3.1 Defence one: compliance with public regulation

The defence in section 61(4)(a) is to the avail of any person in the supply chain. It is further available with respect to an unsafe product characteristic, failure, defect or hazard that resulted in harm.³⁸ The requirement for its application is that such unsafe characteristic, failure, defect or hazard must be “wholly” attributable to compliance with any public regulation. It thus appears that where such defect is only partially attributable to compliance with a public regulation, this defence will not be available to whomever in the supply chain wishes to rely upon it. Loubser and Reid indicate that legislation such as the Foodstuffs, Cosmetics and Disinfectants Act³⁹ or the Medicines and Related Substances Act⁴⁰ aims to promote safety and compliance with

³⁶ Alheit (2006) *CILSA* 296.

³⁷ *Ibid.*

³⁸ See the definitions of these concepts in par 2.2 above.

³⁹ Act 54 of 1972.

⁴⁰ Act 101 of 1965.

these Acts and should therefore not render the supplier liable under section 61(4)(a) if such compliance brought about defectiveness in a product that subsequently caused harm to a consumer.⁴¹ However they remark that compliance with codes of practice or voluntary standards would not of itself provide a defence under section 61(4)(a).⁴² They further point out that in the ‘European experience’ this defence is rarely invoked since “as the purpose of most regulations is to make products safe, it will rarely be the case that compliance will force the producer to make an unsafe product.”⁴³ Loubser and Reid further indicate that the public regulation relied upon for purposes of this defence must have been enacted prior to the time that the goods were supplied and that non-compliance with codes of practice or voluntary standards are excluded as a defence although they may be regarded as mitigating factors.⁴⁴

2.3.2 Defence two: defect did not exist at time of supply

The defence in section 61(4)(b)(i) entails that the alleged unsafe product characteristic, failure, defect or hazard did not exist at the time of the supply of the goods by the person alleged to be liable. In essence it thus entails that either the goods were not defective at the time of supply or that the defect only came into being at a later time. This interpretation points to a weakness in this defence that operates to the detriment of the consumer; surely if the defect did not exist at the time of supply it is possible that it may have manifested itself later as it could have been that the goods contained a latent defect. It is submitted that it could never have been the intention of the legislature to create a situation wherein a supplier could avoid liability for harm caused by a latent defect which only manifested after the time of supply. Thus it is submitted that section 61(b)(i) should be interpreted narrowly to mean that the defect did not exist at all, thus not even latently, at the time of supply of the goods and that if any defect manifested itself at a later stage it was caused by external factors subsequent to its supply.

⁴¹ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* 61-10.

⁴² Ibid.

⁴³ Howells (ed) *The Law of Product Liability* (2000) par 4.211.

⁴⁴ Loubser and Reid (2012) 131.

Loubser and Reid point out that “supply” for purposes of the Consumer Protection Act includes selling, renting, exchange and hiring for consideration.⁴⁵ They remark that a crucial issue left open by the legislation is the point when “supply” is regarded as having taken place for purposes of this defence.⁴⁶ They suggest however, that the pragmatic interpretation of these provisions is that the time of supply is “the point when the defendant relinquishes possession in favour of another party.”⁴⁷ According to them the purpose of this provision would appear to be to allow the defendant to escape liability if the defect arose after the goods left its control: thus, if a product has become defective due to mishandling or inappropriate modification, the producer and those who have supplied it in its original, safe condition should not be held liable.⁴⁸

2.3.3 Defence three: compliance with instruction by prior supplier

Loubser and Reid remark that section 61(4)(b)(ii) deals with the situation where a supplier(A) has passed on goods to another in the retail chain (B) and in so doing A has provided B with instructions, for example regarding the use or safekeeping of the product.⁴⁹ Section 61(4)(b)(ii) affords any supplier in the supply chain a defence against a product liability claim by a consumer harmed by a defective product if that supplier did not in any way contribute to the defectiveness of the product or the harm caused thereby but his absolute compliance with the instruction of the prior supplier who supplied goods was the cause of the harm suffered by the consumer. As a result of the use of the word “wholly” in section 61(4)(b)(ii) it is submitted that this defence will not be to the avail of a supplier who caused the consumer harm as a result of partial compliance with the instructions of a prior supplier. The qualification to this subsection to the effect that where this defence is to the avail of the supplier section 61(4)(b)(i) (namely that the defect did not exist at the time of

⁴⁵ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-10.

⁴⁶ Ibid.

⁴⁷ Ibid. They indicate that delivery may, of course, be constructive, so that supply may be deemed to have taken place, for example when the goods in question was delivered to a third party for the purposes of warehousing on account of the person ultimately alleged to be liable.

⁴⁸ Ibid. They indicate that this should be the position unless it can be argued that the product’s vulnerability to mishandling etc is in itself a defect.

⁴⁹ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-10.

supply) will not apply, means that even if the goods were defective at the time of their supply the supplier will have the defence in terms of section 61(4)(b)(ii) to his avail as long as the defectiveness of the product can be wholly attributed to his compliance with the instructions of a prior supplier. According to Loubser and Reid where harm occurs as a result of compliance with these instructions, section 61(4)(b)(ii) “provides a defence for B, and also stipulates that A cannot use the defence in section 61(4)(a) (absence of a defect at the time of supply) to exonerate itself”.⁵⁰

Loubser and Reid indicate that the defence(s) set out in section 61(4)(b) is of considerable importance to suppliers of components as component parts also qualify as goods as defined in section 1 of the Consumer Protection Act.⁵¹ They point out that the producers and suppliers of the defective component are in principle liable therefore if that defect has caused the complex product to fail.⁵² They remark that “[H]owever, the complex product has also been made defective by the inclusion of that component and on that basis the producers and suppliers of the complex product are likewise strictly liable, albeit with a right of recourse ultimately against the producer of the effective component. The legislation does not place any general limit on the consumer’s right of recourse against any of these parties. However, section 61(4)(b) allows the producer or supplier of a component part to escape liability if it can show that that component was sound at the point when it was delivered to the producer of the complex product.”⁵³

2.3.4 Defence four: Unreasonable expectation

The defence in section 61(4)(c) has limited application in the sense that it is not available to the whole supply chain but only to a distributor or retailer whose unique position in the supply chain apparently warrants such exclusion. Distributors and retailers usually merely fulfil the role of distributing, marketing and selling goods and have no involvement in the manufacturing process. Even though importers are also usually not involved

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2013) 61-11.

in the manufacturing process the defence in section 61(4)(c) is not to their avail, presumably because in the EU Product Liability Directive importers are held liable together with manufacturers⁵⁴ or maybe because importers often have to assemble imported goods which may increase the opportunities for defects to arise. The availability of this defence to distributors and retailers specifically have been criticised by writers.⁵⁵ It should be noted that the defence in section 61(4)(c) is only available to a distributor or retailer if it 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 the marketing of the product. Thus the starting point to determine whether this defence can be upheld is to ascertain the exact role of the distributor or retailer in the marketing of the product. As 'market' is defined in terms of the Consumer Protection Act to include both promoting and selling of goods it is submitted that the distributor's role should be analysed in this broader context. If it is concluded that the role of the specific distributor or retailer is such that a reasonable person in the specific marketing role of such distributor or retailer could not be expected to have discovered the defect, then the defence would be available to the said distributor or retailer. Thus section 61(4)(c) entails the application of an objective test based on the reasonableness of expecting the distributor or retailer to have discovered the defect in the specific instance.⁵⁶ Of course, where the distributor or retailer did discover the defect (even if it was not reasonable to have expected them to discover it) but still supplied the product to the consumer they will not be able to rely on the defence in terms of section 61(4)(c).⁵⁷

The defence in section 61(4)(c) has elicited the most response from commentators. The prime critique against this defence is that it erodes the apparent strict product liability regime introduced by the Consumer

⁵⁴ See the discussion in chapter 3 hereof regarding the 1985 EU Product Liability Directive 85/374/EEC.

⁵⁵ See Botha and Joubert "Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? –A Comparative Analysis" (2011) *THRHR* 318. The learned authors opine that s61(4)(c) has reintroduced fault-based liability. For a contrary opinion, see Otto "Verborge Gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act" (2011) 74 *THRHR* 525.

⁵⁶ Van Heerden Bloemfontein paper November 2013.

⁵⁷ Loubser and Reid (2006) Stellenbosch LR 446.

Protection Act as it “reintroduces negligence through the back door”.⁵⁸ Loubser and Reid indicate that the use of a “reasonableness test” that evaluates the conduct of distributors and retailers, and removes liability for risks which could not reasonably have been ‘anticipated’, brings the ‘strict’ liability of the legislation back closer to the standards of Aquilian liability, in which the duty to take into account known and foreseeable risks is built into the formulation of the general duty towards the consumer”.⁵⁹ They further state that “[I]n view of the policy considerations underlying the introduction of strict liability for defective products it seems appropriate to set a high, although not unattainable, standard of reasonableness if this defence is to be admitted. Even applying such standards, there are various categories of defect that one could not reasonably expect even a highly responsible distributor or retailer to discover.”⁶⁰

2.3.5 Defence five: prescription

The defence in section 61(4)(d) is essentially a defence that the product liability claim has prescribed. The prescription period in this subsection is linked to a three year period since the occurrence of the events listed in section 61(4)(d)(i) to (iv). Loubser and Reid remark that section 61(4) appears to provide for a prescription period in respect of “liability” arising under section 61, but it does not employ the established terminology of prescription which, in terms of the South African Prescription Act⁶¹ generally deals with the effect of the passage of time on a “debt” and in terms whereof prescription begins to run when the debt is due.⁶² They indicate that the broad question arising from section 61(4)(d) is to what extent its provisions are intended to co-exist with the operation of prescription under the

⁵⁸ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015)61-11; Botha and Joubert” Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? – A Comparative Analysis” (2011) *THRHR* 318

⁵⁹ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015)61-11.

⁶⁰ *Ibid.*

⁶¹ Act 68 of 1969.

⁶² Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-14.

Prescription Act.⁶³ They also pose various other questions in this regard, namely:⁶⁴

- Does the “liability” arising under section 61 constitute a debt for purposes of the Prescription Act?
- Does the time period prescribed by section 61(4)(d) begin to run in the same way as a prescription period under the Prescription Act?
- Does knowledge of the existence of facts pertaining to a claim affect the running of the time period prescribed by section 61(4)(d) in the same way as it affects the running of a prescription period under the Prescription Act?
- What is the effect of expiry of the time limit set by section 61(4)(d) and can a court of its own accord apply the time limit set by section 61(4)(d) or must it be invoked by the defendant?
- Can the right to invoke the time limit set by section 61(4)(d) be waived?
- How must the time limit set by section 61(4)(d) be calculated?

The learned authors point out that the potential co-existence of the Prescription Act with other statutory provisions on time limits for claims or actions is primarily provided for by section 16 of the Prescription Act which states that the provisions of the Prescription Act shall apply to any debt arising after the commencement of the Prescription Act, save insofar as they are ‘inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt.’⁶⁵

They pose the question whether the liability arising under section 61 constitutes a “debt” for purposes of the Prescription Act. In this regard they refer to the fact that the concept “debt” is not defined in the Prescription Act but that it must be understood in a wide and general sense according to case law, so as to include any duty side of an obligation. Thus “debt” includes any

⁶³ Ibid.

⁶⁴ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-14 to 61-15.

⁶⁵ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-15. They point out that there is a similar provision in section 11(d) of the Prescription Act which provides that the general 3 year prescription period applies to all debts not otherwise provided for in section 11, “save where an Act of Parliament provides otherwise.”

liability arising from delict, contract or statute.⁶⁶ They conclude that the liability for harm in terms of section 61 involves an obligation to pay damages hence it constitutes a debt for purposes of the Prescription Act.⁶⁷

Loubser and Reid further indicate that the general prescription period which would apply to a debt under the Prescription Act is three years which is similar to the time period in section 61(4)(d) of Consumer Protection Act.⁶⁸ Thus there is no inconsistency between the aforementioned two Acts insofar as the time period is concerned with the result that, when considering the nature and effect of the time period prescribed by section 61(4)(d) in respect of 'liability' under section 61, courts can take into account case law pertaining to a debt in the Prescription Act.⁶⁹

2.4 Conclusion

The Consumer Protection Act has introduced a strict product liability regime which ensures greater access of redress, at least initially, to consumers. As indicated this is not a regime of absolute liability as is evident from the number of express statutory defences available to the supply chain as provided for in section 61(4). When one has regard to these defences individually they generally appear to be sensible measures introduced in order to bring a sense of balance to the strict liability regime introduced by the Act. At this stage though it is only possible to remark on possible problems of interpretation relating to those defences or aspects where a clearer formulation could possibly contribute to legal certainty. However it is submitted that only once these defences are benchmarked against those available in a more developed regime with a much older strict product liability legislative regime, such as the product liability regime in the EU, will one be able to conclude on the adequacy of the statutory defences contained in section 61(4).

⁶⁶ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015) 61-15. See also *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) 370 A-C.

⁶⁷ *Ibid.* They differentiate between a debt and a cause of action and indicate that a cause of action 'is the factual basis or set of material facts that 'begets' the plaintiff's right of action and its correlative, the defendant's debt.

⁶⁸ Loubser and Reid in Naude & Eiselen *Commentary on the Consumer Protection Act* (2015)61-16.

⁶⁹ *Ibid.*

Chapter 3

Product Liability in the EU

3.1 Introduction

Loubser and Reid remark that the framework chosen for the South African product liability regime introduced by the Consumer Protection Act appears to follow closely the European Product Liability Directive, hence it is appropriate to have regard to this Directive for comparative purposes.⁷⁰ The 1985 EU Product Liability Directive sets out the parameters of product liability in the EU.⁷¹ This Directive was the result of an agreement between EU Member States that a system of strict liability for defective products should be instituted in all states, and that producer liability should not be limited.⁷² The Directive aims to provide greater uniformity in products liability law in Europe by harmonizing relevant national laws.⁷³ The Directive was necessary

⁷⁰ Loubser and Reid “Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique” 2006 412 at 413.

⁷¹ Council Directive of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) (hereinafter the EU Product Liability Directive)

⁷² Boger “The Harmonization of European Products Liability Law” (1983) *Fordham Int LJ* 1 at 6 (hereinafter Boger).

⁷³ *Ibid.* In *Commission of the European Communities v Hellenic Republic* (2002) C1-154/00 par 12 it was held that the margin of discretion available to Member States for making provision for product liability “is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.”

because the differing national laws restricted the free movement of goods, and provided uneven consumer protection.⁷⁴

3.2 The 1985 EU Product Liability Directive

3.2.1 General

Under the Directive a producer's liability, while strict, is not absolute.⁷⁵ Article 1 of the Directive states that the "producer" shall be liable for damage caused by a defect in his product. For purposes of the Directive "product" initially meant all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable.⁷⁶ Since the Mad Cow Disease disaster in the 1990's the scope of the Directive has however been extended to include primary agricultural products.⁷⁷ "Producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product present himself as its producer.⁷⁸

Without prejudice to the liability of the producer it is provided that any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of the Directive and shall be responsible as a producer.⁷⁹ Where the producer of a product cannot be identified, each supplier of the product is treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.⁸⁰ This also applies to an

⁷⁴ Ibid.

⁷⁵ Boger at 29.

⁷⁶ Article 2." Primary agricultural products" means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. "Product" includes electricity.

⁷⁷ See Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁷⁸ Article 3.1

⁷⁹ Article 3.2

⁸⁰ Article 3.3

imported product if the product does not indicate the identity of the importer even if the name of the producer is indicated.⁸¹

Article 4 of the Directive expressly provides that the injured person shall be required to prove the damage, the defect and the causal relationship between the damage and the defect. It does not require the injured person to prove that the producer was negligent with regard to the design or manufacture of the product or with regard to warnings and instructions that would have made the product safe. Where, as a result of the provisions of the Directive, two or more persons are liable for the same damage, they are liable jointly and severally.⁸²

For purposes of the Product Liability Directive a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:⁸³

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.

Article 6(2) however provides that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

3.2.2 Defences provided for by the Directive

The defences available to a producer under the Product Liability Directive are set out in article 7. It is stated that a producer shall not be liable if he proves:

- (a) that he did not put the product into circulation;
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or

⁸¹ Ibid.

⁸² Article 5. This liability is without prejudice to the provisions of national law concerning the rights of contribution or recourse.

⁸³ Article 6(1).

- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

3.2.3 Other matters provided for by the Directive

Article 8(1) provides that without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party. The liability of the producer may however be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.⁸⁴

For the purpose of section 1 of the Product Liability Directive “damage” means:⁸⁵

- (a) damage caused by death or by personal injuries;
- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU provided that the item of property is of a type ordinarily intended for private use or consumption *and* was used by the injured person mainly for his own private use or consumption.

⁸⁴ Article 8(2).

⁸⁵ Article 9. The Directive stipulates that this Article applies without damage to national provisions relating to non-material damage.

In terms of Article 10 EU Member States must provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in the Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.⁸⁶

So as not to create limitless liability Article 11 of the Directive stipulates that Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to the Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put the product into circulation which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

The Directive further provides that the liability of the producer arising from the Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.⁸⁷ Article 13 provides that the Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment of notification of the Directive. It is further stated that the Directive does not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by Member States.

3.3 Analysis of EU statutory defences to product liability

After the plaintiff in an EU product liability claim establishes defect, damage and causation, the producer may rebut the plaintiff's *prima facie* case by proving one or more of the defences in Article 5 of the Directive.

3.3.1 Defence one: manufacturer did not put product into circulation

A producer (and also an importer) can escape liability in terms of article 5(a) of the Directive if he proves that he did not put the product into circulation.

⁸⁶ Article 10(2) however provides that the laws of the Member States regulating suspension or interruption of the limitation period shall not be affected by the Directive.

⁸⁷ Article 12.

This means that even though it may be evident that he is the producer of the product, he did not release the product onto the consumer market. Essentially this defence turns on the interpretation of the words “in circulation”. The Memorandum on the Product Liability Directive explains that according to the European Commission, liability for the producer should arise only when he places the defective product into the stream of commerce of his own free will.⁸⁸

In *Henning Veefald v Arhus Amtskommune*⁸⁹ the European Court of Justice indicated that Article 7(a) of the Directive does not define “put into circulation” and that these words have to be interpreted strictly. It held that this defence allows for an exemption of liability only if a person other than the producer caused the process to leave the manufacturing process.⁹⁰

3.3.2 Defence two: defect did not exist at time of supply

The wording of this defence is important. Article 5(b) enables a producer (and also an importer) to escape liability under the Product Liability Directive if he can prove that it is probable that, having regard to the circumstances, the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards. It appears that the “circumstances” referred to in this article are the “circumstances of supply of the product”. It is understandable that no liability arises for the producer if the defect did not “exist” at the time of supply as it is submitted that the word “exist” is wide enough to encompass defects that are latent in nature. To explain: a defect in a product that is latent in nature will “exist” at the time of supply although it will usually only manifest itself thereafter- the word “exist” covers this situation so that a producer will not be able to escape liability if a defect was latent at the time of supply of the goods but only manifested itself thereafter. It appears that the word “or” creates an alternative defence to the non-existence of the defect at the time of supply. It is submitted that this means that even if a producer is unable to present evidence that a defect did not exist at the time

⁸⁸ Memorandum on the Product Liability Directive point 14 at 16.

⁸⁹ *Henning Veefald v Arhus Amtskommune* (2001) C-203/99.

⁹⁰ At par 17 -18.

of supply he will get off the hook if he can present evidence that the specific defect that caused the harm only came into being after he supplied and product and, by implication, that he had nothing to do with such defect coming into being.

3.3.3 Defence three: product not manufactured for sale or economic purpose

This defence entails that the manufacturer must prove that the product was neither manufactured by him for sale or any other form of distribution for economic purposes nor manufactured or distributed by him in the course of his business. Thus, even though he manufactured it, it was never his intention to sell it or distribute it to make a profit from it or distribute it in the course of his business. Essentially it boils down to a defence that although he created the product it was for private use and purposes. Bogart gives the example of products manufactured for research purposes in this regard.⁹¹

In *Henning Feevald v Arhus Amtskommune* referred to above, this defence was also raised.⁹² In this regard it was argued that the funds that was used to maintain the hospital where the plaintiff underwent his defective kidney transplant was derived from the public, especially taxpayers contributions, hence the plaintiff did not have to pay for the operation, thus meaning that there was no manufacture for an economic purpose. The court however rejected this contention and indicated that the activities rendered by hospitals or medical establishments are not charitable. It also pointed out that it would be anomalous to hold a private hospital liable in such an instance but not a public hospital.⁹³

3.3.4 Defence four: compliance with mandatory regulations

A producer can escape liability if he can prove that the defect in the product that caused harm was due to compliance with mandatory and thus binding, regulations.

⁹¹ Bogart at 30.

⁹² *Henning Feevald v Arhus Amtskommune* (2001) C-203/99.

⁹³ At par 17.

3.3.5 Defence five: development risk

Where a producer is able to prove, as required by Article 5(e), that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered, he will be able to escape liability under the Directive. This defence is also known as the “Development Risk”-defence⁹⁴. The EU product Liability Directive has made an exception with regard to this defence in that it has given Member States the option to choose whether they wanted to incorporate this defence in their national product liability legislation or not. Thus some of the Member States have chosen to adopt the defence whereas others have not incorporated it into their domestic legislation.⁹⁵

The defence in Article 7(e) is determined objectively with reference to the most advanced level of knowledge possessed by a reasonable producer.⁹⁶ “The producer’s state of knowledge is determined with reference to *inter alia* “all data in the information circuit of the scientific community as a whole , bearing in mind however, on the basis of a reasonableness test, the actual opportunities for the information to circulate.”⁹⁷ This knowledge must have been accessible at the time when the relevant product was put into circulation and if so, it will exempt the producer from liability only for unforeseeable and latent risks.⁹⁸ From the aforementioned it thus appears that this defence may be extremely difficult to prove.

3.3.6 Defence six: defence regarding component part

This defence is specifically available to a manufacturer of a component and thus has limited application. Such manufacturer will be able to escape liability by virtue of Article 5(f) of the Directive if he can prove that the defect may be attributed to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product. Although the definition of “product” in the Directive is wide enough to cover

⁹⁴ Ibid.

⁹⁵ Boger at 5.

⁹⁶ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (1997)C-300/95 at par 17.

⁹⁷ Loubser and Reid (2006) *Stell LR* 448.

⁹⁸ Ibid.

component parts the EU legislature deemed it fit to expressly provide for this defence due to the fact that often a component itself may be free from defects but once fitted into a product of which it is a part, certain attributes of that product into which it is fitted, such as its design may give rise to a defect in relation to how the component operates within the product which then subsequently causes harm to a person. Similarly even if the product that the component was fitted into did not contain any design defects the fitting of the component into the producer's product may result in a defect if the producer failed to provide the manufacture of the component part with any or correct instructions regarding the component part. It is submitted that the broad wording of the defence the instructions by the producer for purposes of this defence must also be afforded a broad meaning ranging from how the manufacture of the component part was instructed to manufacture the component or which function he was instructed the component part should fulfill or how it should be fitted into the producer's product.

3.3.7 Defence seven: prescription

Although not listed under the statutory defences contained in article 5 it is clear from article that prescription is a statutory defence recognised by the EU Product Liability Directive.

3.3.8 Defence eight: ten year limitation

This specific defence, although not grouped with the list of statutory defences in article 5, is also a statutory defence. It is quite an innovative defence in that it imposes a "super-prescription" limitation after which time period no product liability claim can be instituted. The reason for the introduction of this defence appears to be to give a producer some "peace of mind" that he will not face an everlasting possibility of civil claims or "limitless liability" as a result of harm caused by a defective product that he released onto the consumer market. Obviously it also serves to make sure that consumers who suffered harm caused by such defective products are not tardy and institute their claims as soon as possible in their given circumstances. It is submitted that the need to pursue product liability claims as soon as possible is clear: the longer the consumer takes to pursue his claim the more difficult it is to

obtain the necessary evidence, also memory is fallible and of course there is the danger that the producer may have exited the market or gone bankrupt.⁹⁹

3.4 Conclusion

From the aforementioned it is clear that the EU, by the introduction of the 1985 Product Liability Directive, has sought to introduce a harmonised system of product liability throughout the EU Member States in order to create an equal level of protection for EU Consumers who are harmed by defective products. The EU has dropped the onerous requirement of having to prove negligence on the part of the manufacturer (producer) but has counteracted this liberal move by providing a closed list of statutory defences available to producers of products and component parts in products. These defences are wide-ranging in nature and provide a measure of balance to the fact that since the introduction of the Directive access to redress for consumers who have been harmed by defective products has been significantly opened up as a result of the introduction of a strict product liability regime.

⁹⁹ Van Heerden “The product liability regime introduced by the Consumer Protection Act 68 of 2008 in comparative perspective” paper presented at the International Association of Consumer Law Conference in Santa Fe, New Mexico, May 2014 (hereinafter Van Heerden Santa Fe paper).