

THE DEVELOPMENT OF PRODUCT LIABILITY IN SOUTH AFRICA

**MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE LLM (MERCANTILE LAW)**

FACULTY OF LAW, UNIVERSITY OF PRETORIA

BY

**KATLEGO LEBEA
STUDENT NUMBER: 12341925**

**PREPARED UNDER THE SUPERVISION OF:
DR JACOLIEN BARNARD**

FEBRUARY 2016

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ACKNOWLEDGEMENTS

I would like to express my gratitude to:

1. my supervisor, Dr Jacolien Barnard, for her expertise, understanding, supervision and valuable guidance, without which, this research paper would not have been realised;
2. my parents and my partner for their unconditional love and support;
3. God for giving me strength and guidance from the first word until the last.

SUMMARY

The dangers posed by defective products can never be overstated. Defective products have vast implications for consumers and nations. They may result in the harm, injury or death of a consumer or have catastrophic consequences for a country's export and international trade. Until recently, the only recourse available to consumers who have suffered harm or sustained injury as a result of a defective product was a claim under the law of contract or the law of delict. Succeeding in each of these claims has proved to be difficult. A breach of warranty and a contractual nexus is required under the law of contract and in respect of the law of delict all the elements of a delict must be present. The enactment of the Consumer Protection Act 68 of 2008 introduced a regulatory framework for strict product liability in South Africa in terms of which a producer or importer, distributor or retailer of any good is liable for any harm caused wholly or partly as a consequence of (i) supplying unsafe goods; (ii) a product failure, defect or hazard in any good; or (iii) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any good, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. The origins of product liability can be traced back to ancient English law imposing strict liability on sellers of contaminated food products. Similarly, the UK Consumer Protection Act 1987 provides that producers or suppliers of products in the course of a business may be liable for personal injury or property damage caused wholly or partly by a defect in the product, irrespective of any fault on the part of the producer or supplier.

CHAPTER 1: INTRODUCTION

1.1 Background and Motivation

The provisions of the Consumer Protection Act¹ relating to product liability came into effect on the general effective date of the CPA, 31 March 2011. Before the enactment of the CPA, liability for damage caused by a defective product was established under the common law and a consumer was able to institute a claim either in terms of the law of delict or the law contract.² A claim under the law of delict was often unsuccessful due to a claimant's inability to establish all of the elements of a delict, specifically fault on the part of the seller; whereas a claim under the law of contract required a contractual nexus and a breach of a warranty. Claimants under the common law are also entitled to rely on the common law warranty against latent defects which automatically applies by operation of the law unless specifically excluded by a *voetstoots* clause.³ A seller may also give an express or tacit contractual warranty against latent defects.⁴ The common law warranty against latent is relevant to establish defectiveness however the focus of this research paper is on the concept of product liability and the harm caused by defective goods.

The dangers posed by defective products can never be overstated, in fact the court in *Herschel v Mrupe*,⁵ with reference to *Donoghue v Stevenson*,⁶ stated that harm caused by defective products involves the infringement of the rights of the user and a breach of duty by the manufacturer. By circulating potentially harmful products, a manufacturer is encroaching on the rights of others (consumers) not to be exposed to danger without warning and without having a reasonable opportunity to become aware of such danger before use.⁷ Defective products have vast implications for consumers. They may result in the harm, injury or death of a consumer or have

¹ 68 of 2008. Hereinafter referred to as the "CPA".

² Loubser & Reid (2012) at 1.

³ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 3 SA 670 (A) at 683H - 684A. See also Barnard (2012) *De Jure* at 457.

⁴ *Nagel et al* (2011) at 223.

⁵ 1954 3 SA 464 (A) at 486E to H.

⁶ (1932) AC 562 (HL). Hereinafter referred to as the "*Donoghue-case*". See also Borra (2013) *Juridical Review* at 202.

⁷ Loubser & Reid (2012) at 43 at 477E.

catastrophic consequences for a country's export and international trade.⁸ Manufacturers are generally in control of the design and manufacturing process of products, and they are likely to be aware of any special dangers that their products present and therefore can most likely convey information about those dangers to consumers through warnings on packaging.⁹

With the introduction of the CPA, the underlying focus of product liability is on whether a defective product has been supplied to a consumer and whether this product has caused harm to the consumer; as opposed to the common law position which requires all the elements of a delict or a breach of warranty to be present in order for the claimant to establish liability. The CPA affords consumers with a remedy which holds suppliers, retailers or manufacturers of defective products jointly and severally liable for damage caused to a consumer as a result of using the defective products. This remedy does not exist under the common law. In fact, our courts placed an onus on the legislature to develop the common law to cater for this remedy.¹⁰ Similarly, the UK Consumer Protection Act¹¹ introduced a statutory remedy for consumers who suffered harm or sustained injury due to defective products. To the extent that the CPA does not apply to a transaction between a consumer and a seller of defective goods, the common law position will apply.¹²

Previously, under English law, the *caveat emptor*¹³ applied in terms of which a consumer who had suffered harm or sustained injury as a result of a defective product was not entitled to claim damages from the seller unless the seller specifically warranted the products.¹⁴ The *caveat emptor* was later replaced with the doctrine of implied warranty of quality, which implied certain duties or responsibilities

⁸ *Herschel v Mrupe* 1954 3 SA 464 (A) at 486F.

⁹ Van Eeden (2013) at 371.

¹⁰ *Wagener Pharmcare Ltd, Cuttings v Pharmcare Ltd* 2003 4 SA 285 (SCA) at para 38, hereinafter referred to as the "Wagener-case".

¹¹ UK Consumer Protection Act 1987. Hereinafter referred to as the "UK CPA".

¹² Melville (2011) at 22.

¹³ Means "let the buyer beware".

¹⁴ Borra (2013) *Juridical Review* at 201.

on the seller's part.¹⁵ A consumer was also entitled to claim if he can establish negligence on the part of the manufacturer.¹⁶

1.2 Research Aims

The purpose of this research paper is to examine the development of product liability in South Africa prior to the enactment of the CPA. To this end, the legal-historical development of product liability under the law of contract and the law of delict will be examined. Furthermore this research paper aims to establish the effect of the CPA and its provisions on product liability and what form of protection is afforded to consumers in terms of the CPA. In the light of the influence exerted by English law on South Africa, especially through legislation and precedent,¹⁷ the research paper will also examine the development of product liability in the United Kingdom as well as the provisions of the UK Consumer Protection Act.¹⁸ The development of product liability in the United Kingdom and the remarks made by the courts can be closely contrasted with that in South Africa as the UK CPA played a significant role in the drafting of the CPA.

1.3 Research Methodology

The research paper follows an analytical and critical approach. The research aims will be achieved by examining national and international legislation, case law from South Africa, the UK, the US and Australia, as well as literature from legal scholars in this area which includes academic text books and journal articles journals.

1.4 Hypothesis

The purchase of goods and services is an important contributor to the South African economy and gross domestic product. To encourage market activity and economic growth, consumers of goods and services have to be protected from harm caused due to the defective nature of the goods or services. Traditionally, protection was afforded to consumers through the common law, either through the law of delict or law of contract. However, additional protection has been introduced through the

¹⁵ *Ibid.*

¹⁶ Dobson (1997) at 392.

¹⁷ Kleyn & Viljoen (2010) at 33.

¹⁸ UK Consumer Protection Act 1987. Hereinafter referred to as the "UK CPA".

enactment of legislation, such as the CPA which will have an effect on the current legal position.

1.5 Delineations

For interpretation purposes, unless the context indicates otherwise:

- (a) references to a statutory provision include any subordinate legislation made from time to time under that provision and include that provision as modified or re-enacted from time to time;
- (b) words importing any particular gender include the other genders (ie the masculine, feminine and neuter genders, as the case may be);
- (c) where any term or abbreviation is defined within the context of any particular paragraph in this research paper, such terms shall bear the meaning ascribed to it for all purposes in this dissertation; and
- (d) the word "consumer" shall bear the meaning set out in terms of the CPA.

Therefore, it is necessary to investigate the development of product liability experienced under the common law position, the protection offered to consumers in terms of CPA as well as the protection offered to consumers in the United Kingdom¹⁹ in order to make worthwhile recommendations.

1.6 Summary of Chapters

Firstly, the origins of the product liability under the common law will be discussed under chapter 2. The discussion will mainly be on product liability under the law of contract and the law of delict. Claims available to consumers will be considered as well as any shortcomings under the law of contract and the law of delict. The need for reform as recognised by South African courts will be assessed. Secondly, the enactment and provisions of the CPA will be considered under chapter 3. The purpose, interpretation, important definitions scope and application of the CPA will be reviewed. The strict product liability framework introduced by section 61 of the CPA as well as any restrictions to the application of the CPA will be discussed. Finally, under chapter 4, the development of product liability in the UK will be considered as well as the provisions of the UK CPA. The research paper is

¹⁹ Hereinafter referred to as the "UK".

concluded in chapters by providing conclusions and recommendations taking into account the comparative position.

CHAPTER 2: THE DEVELOPMENT OF PRODUCT LIABILITY IN SOUTH AFRICA (WHERE THE CPA IS NOT APPLICABLE)

2.1 Introduction

"Product risk is pervasive, increasingly so in the modern economy. Automobiles can crash. Drugs can cause harmful side effects. Chemicals can be carcinogens. Even seemingly benign products pose the risk of serious physical harm. Food, the most basic of all products, can be contaminated. Or a bottle of soda can explode."²⁰

Product liability refers to the liability placed on the producer, distributor, importer, retailer or other supplier of products in respect of death or personal injury or property damage occasioned by the use of the product.²¹ Such liability may arise in terms of a contract, the law of delict or specific legislation creating liability for defective products.²² In this chapter, product liability where the CPA does not apply and the recourse available to consumers, in terms of the law of contract and the law of delict will be discussed.

Product liability is not mentioned in the earliest recorded consolidation of Roman law (the Twelve Tables), the principle of *caveat emptor* prevailed under Roman law.²³ The buyer was responsible for the defect in the thing purchased unless the seller by stipulation expressly undertook such liability.²⁴ In other words, a buyer was only entitled to a claim for harm caused by a defective thing if the seller provided a warranty as to the quality and defect-free nature of the thing sold. As trade began to flourish, the Edict of Aediles mentioned in the Justinian Digest in AD 533 required sellers of slaves to disclose to buyers any latent defects at the time of the sale.²⁵ A latent defect is a defect in the thing sold which is of such a nature that it renders the

²⁰ Geistfeld (2006) at 1.

²¹ Howells (1993) at 1.

²² Loubser & Reid (2012) at 1. See Howells (1993) at 2. In South Africa the legislation creating liability for defect products is the CPA and in the UK, the UK CPA.

²³ Borra (2013) *Juridical Review* at 199.

²⁴ *Ibid.*

²⁵ *Idem* at 200.

thing unfit for the purpose for which it was bought or for which it is normally used, and which defect was not known to the buyer at the time of conclusion of the contract, and could not be discovered by the buyer upon a reasonable examination of the thing sold.²⁶ In South Africa, a warranty against latent defects applies automatically by operation of the law unless specifically excluded by a *voetstoots* clause.²⁷ A seller may also give an express or tacit contractual warranty against latent defects.²⁸ The common law warranty against latent defects or the exclusion thereof by way of a *voetstoots* clause is relevant to establish defectiveness however the focus of this research paper is on the concept of product liability and the harm caused by defective goods.

Product liability has received a lot of coverage in the media in recent years. Largely due to the headlines made by the courts in the United States of America²⁹ for the large amounts awarded by US juries as damages for harm caused by products. Consumers are now empowered to challenge big corporates. In *Liebeck v McDonald's Restaurants*,³⁰ for instance, the plaintiff, an elderly lady instituted a claim against the defendant, a fast food restaurant, after she was burned by the contents of hot cup of coffee which spilled onto her lap. The jury awarded the plaintiff a total of US\$ 2.9 million. This amount was subsequently reduced to US\$ 640 000 by the judge.³¹

Naturally, consumers want to be compensated for injuries that they have sustained from the use of defective products, while those whose business it is to supply products do not want to be overburdened by the cost of compensating injured consumers.³² Insurance cover has now become essential for those involved in the manufacturing and sale of products. Product liability insurance provides manufacturers and other persons in the distribution chain protection against potential

²⁶ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 3 SA 670 (A) at 683H - 684A.

²⁷ *Ibid.* See also Barnard (2012) *De Jure* at 457.

²⁸ *Nagel et al* (2011) at 223.

²⁹ Hereinafter referred to as the "US".

³⁰ 1995 WL 360309.

³¹ Geistfeld (2006) at 1.

³² Howells (1993) at 1.

claims that could arise as a result of harm caused by their products being defective.³³ Manufacturers are usually best placed to assess the risk associated with their products and they can effectively pass on the cost of procuring insurance on the product to the consumers as a cost of doing business.³⁴

The origins of product liability can be traced to the ancient English laws imposing strict liability on the sellers of contaminated foods.³⁵ Under English law there was an implied warranty in every sale transaction that the product being sold matches with its description. This implied warranty was later limited by the doctrine of sanctity of contract which limited a seller's liability to a consumer with whom he had entered into a contract.

2.2 Product Liability under the Law of Contract

Contractual liability for a defective product rests on an express, tacit or implied warranty that the product is free from defects, or on a misrepresentation by the supplier regarding the defect-free qualities of the product.³⁶ A warranty is a contractual undertaking by a party to contract that a certain fact relating to such party's performance is or will be as it is stated or promised to be.³⁷ The person giving the warranty does not promise to perform anything other than to make good any loss suffered by the other party as a result of the fact not existing or materialising as warranted.³⁸ A misrepresentation (which can be fraudulent, negligent or innocent) is a false statement of fact made by one party to the other before or at the time of the contract, usually to induce the other party to enter into the contract.³⁹

A consumer's rights, under the law of contract, are determined by the contract entered into with the supplier of the product.⁴⁰ This contract could either be written,

³³ Katzew & Mushariwa (2012) *SA Merc LJ* at 7.

³⁴ Phillips (1998) at 46.

³⁵ Geistfeld (2006) at 1.

³⁶ Loubser & Reid (2012) at 23.

³⁷ *Idem* at 25.

³⁸ LAWSA Vol 5(1) 'Contract' para 447.

³⁹ Hutchison and du Bois "Contracts in general" 733 - 887 (of the chapter) in du Bois (2007) at 779.

⁴⁰ Loubser & Reid (2012) at 23.

oral or tacit. Only parties to the contract will derive rights and obligations.⁴¹ A supplier can only be held liable for a breach of warranty or misrepresentation if there is a contractual nexus between the manufacturer of the defective product and the party who has suffered harm as a result of the defective product.⁴²

Historically, the doctrine of sanctity of contract protected a manufacturer of a defective product from liability because, in an ordinary product distribution chain, there was seldom a contractual nexus between the manufacturer and the consumer.⁴³ A contractual nexus typically exists between the manufacturer and retailer, and the retailer and consumer. Thus, if a consumer purchases a product from a retailer and a defect (arising during the manufacturing process) is later discovered causing harm to the consumer, the consumer will not have a contractual claim against the manufacturer because the underlining sale contract is entered into between the consumer and retailer. The manufacturer is protected by the fact that he is not privy to the contract between the consumer and the retailer. Thus the right to recover is confined to those who entered into the contract.⁴⁴

The principles of the law of contract in South Africa allow a manufacturer to be liable to a consumer for a breach of warranty, even if there is no contractual relationship between the manufacturer and consumer.⁴⁵ Liability will arise on the basis of, as Loubser and Reid explain, "(a) agency (the manufacturer may have offered a warranty to the purchaser through the distributor or retailer, so that by operation of agency a contractual relationship between the manufacturer and purchaser comes into effect); or (b) a contract for the benefit of a third party (the manufacturer who supplies products with a warranty to the distributor or retailer can be deemed to have entered into a contract for the benefit of the ultimate purchaser, so that subsequent acceptance of the benefits of the warranty by the purchaser creates a contractual relationship between the manufacturer and purchaser)".⁴⁶ In these instances, the

⁴¹ *Ibid.*

⁴² Jacobs *et al* (2010) *PER/PELJ* at 382.

⁴³ Alheit (2006) *CILSA* 265 at 280. A consumers could only sue manufacturers for damage caused by a product if a direct contractual relationship existed between him and the seller.

⁴⁴ Phillips (1998) at 34.

⁴⁵ Loubser & Reid (2012) at 24.

⁴⁶ *Ibid.*

distributor or retailer is acting on behalf of the ultimate purchaser and therefore the sanctity of contract defence cannot aid the manufacturer against the purchaser.

According to Schuster, during the 1960s and 1970s there were several academic attempts to construct contractual or quasi-contractual claims between a manufacturer and a consumer.⁴⁷ These academics suggested that a special implied contract existed between the manufacturer and the ultimate consumer.⁴⁸ In terms of this special implied contract, the name of the manufacturer on the packaging is construed as an offer to a consumer to contract and a consumer is entitled to accept this offer implicitly since the manufacturer is deemed to have waived notification of acceptance.⁴⁹ This approach eliminates the doctrine of sanctity of contract, since the consumer is considered to have entered into a contract with the manufacturer of the products despite the fact that the products were purchased from the retailer. Unfortunately, this approach raises more questions than provides answers. If the consumer is considered to have entered into a contract with the manufacturer then what is the nature of the relationship between the consumer and retailer from whom the consumer purchased the products? Is the retailer acting as an agent for the manufacturer? Will the retailer be liable if it contributed to the defective nature of the product which caused harm to the consumer? The better approach would be to suggest that by displaying the manufacturer's products in his store, a retailer is acting as an agent for the manufacture and a contractual nexus is established between the manufacturer and the consumer by the consumer purchasing the product.

Unless provided otherwise in a sale agreement, a retailer is deemed to have warranted to the purchaser that the goods are sold free from any defect that may render the goods completely or significantly unfit for their normal intended purpose or the specific purpose contemplated by the parties. Liability for a breach of warranty is strict, in other words, the manufacturer is liable regardless of whether he had taken appropriate steps to prevent or detect product defects and even if it was impossible

⁴⁷ Schuster (2009) *Stell LR* at 428.

⁴⁸ *Ibid.* In other words, in addition to the contract of sale, for example, between the consumer and retailer or distributor, there is a contract between the consumer and manufacturer as well.

⁴⁹ *Ibid.*

to comply with the warranty at the time of contracting or if it became impossible afterwards.⁵⁰

The common law remedies available to the consumer for a product defect include the *actio empti* where there is an express, tacit or implied warranty against latent defects, the aedilician actions based on either the existence of a latent defect in the product or on a seller's false pre-contractual statements bearing on the quality of the product, and the action in delict for pre-contractual statements misrepresentation.⁵¹ A breach of a contractual warranty gives rise to the normal remedies for breach of contract, the consumer may seek a reduction in the purchase price, cancellation of the contract or damages.⁵² Further grounds for the *actio empti* include instances where (i) an express or tacit warranty by a seller to a consumer that certain good characteristics are present in the thing sold, or that certain bad characteristics are absent, (ii) the seller intentionally conceals latent defects or makes fraudulent misrepresentation to the consumer or (iii) where the seller acts as a dealer, in which case he will be held liable for all consumer's damages due to the latent defect.⁵³

A consumer may claim cancellation of the contract and damages using the *actio empti* where the seller intended to mislead the consumer in order to persuade the consumer to conclude the contract.⁵⁴ The seller must have the intention to conceal the defect and to deceive the consumer before the consumer can rely on the *actio empti*.⁵⁵ The claim for damages is based on breach of contract and the breach must be sufficiently serious to warrant cancellation.⁵⁶ The aedilician remedies for latent defects allow a consumer to claim a purchase price reduction (*actio quanti minoris*) or restitution (*actio redhibitoria*).⁵⁷ With the *actio quanti minoris* the consumer may claim a *pro rata* reduction in the purchase price.⁵⁸ The exact reduction which the

⁵⁰ Loubser & Reid (2012) at 25.

⁵¹ *Idem* at 24.

⁵² *Idem* at 25.

⁵³ Nagel *et al* (2011) at 225.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* See *Van der Merwe v Meades* 1991 2 SA 1 (A) at para 3.

⁵⁶ Barnard (2012) *De Jure* at 459.

⁵⁷ Nagel *et al* (2011) at 226.

⁵⁸ Barnard (2012) *De Jure* at 459.

buyer may claim will be equal to the difference between the price paid and the true value of the product with the latent defect, at the time of the action.⁵⁹ The purpose of the *actio redhibitoria* on the other hand is to place both parties in the position they would have been in had they not entered into the contract.⁶⁰ The consumer will reclaim the purchase price which he paid to the seller and the seller will reclaim the product sold from the consumer.⁶¹ The aedilician remedies do not include a claim for consequential damages or any other kind of damages.⁶² The consumer is entitled to consequential damages only in special cases, for instance, where the seller gives an express warranty, or is aware of the latent defect, or where the seller is a merchant who publicly professes specialised knowledge of the product. In *Kroonstad Westelike Boere-Kooperatiewe Vereeniging v Botha*⁶³ the court held that where a merchant seller publically professes to have skill and expert knowledge in relation to the kind of goods sold, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it.

2.3 Product Liability under the Law of Delict

Liability in delict arises irrespective of whether or not there is a contractual nexus between the manufacturer and the injured party.⁶⁴ All of the elements of a delict must be established.⁶⁵ The court in *Wagener Pharmacare Ltd, Cuttings v Pharmacare Ltd*⁶⁶ acknowledged that the law of contract and the law of delict are separate branches of law, with their own principles, remedies and defences.⁶⁷ According to the court, one cannot simply graft warranty liability onto a situation patently governed by the law of delict, because of the absence of a contractual nexus between the injured party and manufacturer.⁶⁸

⁵⁹ Nagel *et al* (2011) at 227.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Loubser & Reid (2012) at 27.

⁶³ 1964 3 SA 561 (A).

⁶⁴ See headnote of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA).

⁶⁵ The elements of a delict include: conduct, wrongfulness, fault, causation and damage. See Visser "Delict" 1091 - 1231 (of the chapter) in du Bois (2007) at 1096.

⁶⁶ 2003 4 SA 285 (SCA), hereinafter referred to as the "*Wagener-case*".

⁶⁷ *Idem* at para 22.

⁶⁸ *Ibid.*

An action in delict removes the need for a plaintiff to have acquired an interest in the product or to show reliance on a product warranty provided by the manufacturer.⁶⁹

Under the common law, the general position as far as damages are concerned is captured by the phrase ‘the loss lies where it falls’⁷⁰ and to succeed in a delictual claim, a plaintiff will have to prove the existence of all the elements of a delict, namely: a duty of care, breach of that duty, loss or damage, that the loss or damage was caused by some defect in the product and that the defect was the fault of the person against whom the claim is made.⁷¹ Fault, in the context of product liability, means negligence, since it would be unusual and difficult to prove that the manufacturer intentionally caused harm to a consumer.⁷² The claim could be instituted against the manufacturer, a component supplier for a component fault or against someone later in the distribution chain provided that, that is where the fault occurred. Only a person or persons responsible for creating the fault, or failing to rectify it, can be held liable.

An action in delict directly against the manufacturer or producer of a defective product avoids the need for successive actions for breach of contract by the consumer against the retailer, the retailer against the wholesalers, and the wholesaler against the manufacturer.⁷³ In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*,⁷⁴ the court confirmed that where a manufacturer produces and markets a product which has the potential to be hazardous to consumers, without conclusive prior testing, such negligence may result in the manufacturer being held liable in delict for damages suffered by a consumer.⁷⁵ A delictual claim for damages caused by a defective product will be successful upon proof of all the elements of a delict.⁷⁶ The court further held that a merchant seller who publically professes to have expert knowledge and skill regarding the product sold by him or her will be liable to a

⁶⁹ Loubser & Reid (2012) at 39.

⁷⁰ The original Latin phrase is *casum sentit domus or res perit domino*. See Melville (2011) at 24.

⁷¹ LAWSA Vol 8(1) ‘Contract’ at para 23.

⁷² Loubser & Reid (2012) at 39.

⁷³ *Idem* at 38.

⁷⁴ 2002 2 SA 447 (SCA).

⁷⁵ Gowar (2011) *Obiter* at 522.

⁷⁶ *Ibid.*

purchaser for consequential damages in respects of all latent defects in the thing sold.⁷⁷

The test for negligence, as formulated in *Kruger v Coetzee*,⁷⁸ provides that liability arises if (a) a *diligens paterfamilias* in the position of the defendant: (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such reasonable steps.⁷⁹ In other words, did the manufacturer conform to the standard of a reasonable person to foresee and prevent harm?⁸⁰ If the manufacturer's conduct fell short of the reasonable person's standard, then the manufacturer will be said to be negligent and therefore fulfilling the fault requirement. This test places a burden of proof on the consumer which is difficult to discharge.⁸¹

2.4 Strict Product Liability

As mentioned above, fault is often difficult to prove, especially considering the information and knowledge imbalances between a manufacturer and a consumer.⁸² Consumers are often not well versed with the technical aspects of the manufacturing process. A consumer is likely to succeed in establishing fault if he or she can show a flaw in the manufacturing process and it is unlikely that the retailer will cooperate with or assist the consumer in finding the flaw. Some of the challenges faced by consumers in proving fault in delictual claims are remedied by the application of strict product liability.

Strict product liability refers to the liability of manufacturers in delict, for harm caused by their defective products, without any necessity for the plaintiff to prove fault on the part of the manufacturer.⁸³ According to Loubser and Reid, the basic utilitarian or efficiency based argument for strict liability is that "the burden of losses consequent

⁷⁷ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) at para 48.

⁷⁸ 1966 2 SA 428 (A).

⁷⁹ *Idem* at 430.

⁸⁰ Loubser & Reid (2012) at 49.

⁸¹ *Ibid.*

⁸² *Idem* at 2.

⁸³ *Idem* at 1.

upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur..."⁸⁴ To succeed on a claim based on strict liability, the plaintiff would need to prove that: (i) a product (ii) that is defective (iii) caused (iv) damage or harm (v) wrongfully.⁸⁵

The "touchstone" for liability, as Howells puts it, is 'whether the product is defective rather than being based on the producer's behaviour'.⁸⁶ In other words, regard must be given to whether the product itself is defective, rather than whether the manufacturer was negligent in making it.⁸⁷ A product may be considered defective if it is unreasonably dangerous, and a product is unreasonably dangerous if, in the circumstances, it does not meet the expectations of the reasonable consumer with regards to its safety.⁸⁸ The court in the *Wagener*-case acknowledged that, even if strict liability applies, a plaintiff would still have to prove that the product was defective when it left the manufacturer's control and that it was defective when it was used by the plaintiff.⁸⁹ According to Loubser and Reid, wrongfulness in the context of product liability is closely linked to the question of defectiveness, because the causing of harm is not always necessarily wrongful itself.⁹⁰ In other words, harm is not wrongful unless it was caused by a defective product. It follows therefore, according to Loubser and Reid, that defectiveness should be assessed in terms of the same general standard as wrongfulness, the legal convictions of the community, *boni mores* and general reasonableness, as applied to the nature and qualities of the product and in particular its risks and benefits.⁹¹

A unique feature of strict liability is that, a claim for damages arising from harm or loss caused by a defective product cannot, at common law, be apportioned on the

⁸⁴ Loubser & Reid (2006) *Stell LR* at 416.

⁸⁵ *Ibid.*

⁸⁶ Howells "Introduction: product liability, insurance and the pharmaceutical industry – an overview" pages 1 - 15 (of the chapter) in Howells (1991) at 3.

⁸⁷ Other elements of the enquiry include conduct, causation and harm.

⁸⁸ Neethling & Potgieter (2014) *THRHR* at 506.

⁸⁹ *Wagener*-case at para 19.

⁹⁰ Loubser & Reid (2006) *Stell LR* at 419.

⁹¹ *Idem* at 421.

basis of contributory negligence (which requires fault), since a claim for strict liability does not involve an enquiry as to fault.⁹²

In *Escola v Coca Cola Bottling Co. of Fresno*,⁹³ Traynor J argued that the contaminated-food cases justify a tort rule making product sellers strictly liable for physical harms caused by defective products.⁹⁴ The court held that even if there is no negligence, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.⁹⁵ The court held that it is in the interest of the public to discourage the marketing of products having defects that are a menace to the public.⁹⁶ If such products nevertheless find their way into the market it is in the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.⁹⁷

The Supreme Court of California in *Vandermark v Ford Motor Co*⁹⁸ extended strict liability to all parties involved in the manufacturing, distribution and sale of defective products.⁹⁹ According to Loubser and Reid, holding manufacturers and suppliers strictly liable for harm resulting from defectively manufactured products rest on considerations of fairness and economic efficiency.¹⁰⁰ The elimination of the fault-requirement does not mean that all risk of harm is indiscriminately transferred to manufacturers or suppliers.¹⁰¹ Strict liability does not mean absolute liability, other considerations based on reasonableness remain in place, these include the requirements of wrongfulness and defectiveness.¹⁰²

⁹² Cornelius (2012) *PER/PELJ* at 614.

⁹³ Cal.2d 453, 462 (Cal. 1944).

⁹⁴ *Ibid.* See also Geistfeld (2006) at 2.

⁹⁵ *Idem* at 462.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* See also Katzew & Mushariwa (2012) *SA Merc LJ* at 4.

⁹⁸ Cal.2d 256 (1964).

⁹⁹ Katzew & Mushariwa (2012) *SA Merc LJ* at 4.

¹⁰⁰ Loubser & Reid (2006) *Stell LR* at 415.

¹⁰¹ *Idem* at 422.

¹⁰² *Ibid.*

Strict product liability is usually found in statute rather than in the common law.¹⁰³ In the US, it was developed through case law. Prior to the enactment of the CPA, unlike consumers in many developed and developing countries, consumers in South Africa did not have a legislative framework upon which they could rely on for a claim based on strict liability. The court in the *Wagener*-case held that 'if strict liability is to be imposed it is the legislature that must do it'.¹⁰⁴

2.5 The Need for Reform - *Wagener Pharmacare Ltd, Cuttings v Pharmacare Ltd*¹⁰⁵

The court in the *Wagener*-case considered the extent to which a manufacturer could be held strictly liable in delict for unintended harm caused by the manufacture of a defective product where there was no contractual nexus between the manufacturer and the injured person.¹⁰⁶

The appellant in the first appeal underwent shoulder surgery at a private hospital. The surgical procedure involved the administration of a local anaesthetic called Regibloc injection which was manufactured and marketed by the respondent company. As an aftermath of the surgery the appellant was left with necrosis of the tissues and nerves underlying the site of the operation, and paralysis on the right arm. An identical suit was brought by the appellant in the second appeal, another alleged victim of the Regibloc injection.

The two actions were consolidated, with the main claim being that, contrary to the respondent's duty as manufacturer (in the delictual sense) the Regibloc injection administered was unsafe for use as a local anaesthetic because it resulted in necrosis and paralysis. An alternative claim was that the Regibloc injection administered was defective due to the negligent manufacture thereof by the respondent. The respondent excepted to the main claim as disclosing no cause of action in that it failed to allege fault in the manufacture of the Regibloc injection in question and purported to contend that, as manufacturer, the respondent was

¹⁰³ Loubser & Reid (2012) at 1.

¹⁰⁴ *Wagener*-case at para 38.

¹⁰⁵ 2003 4 SA 285 (SCA).

¹⁰⁶ *Idem* at para 1.

subject to strict liability for the alleged injurious consequences.¹⁰⁷ The court *a quo* upheld the exception but granted leave to appeal.

The court held that in deciding the issues raised by the appeal, it must be accepted, on the facts, (i) that the Regibloc injection was manufactured by the respondent, (ii) that it was defective when it left the respondent's control, (iii) that it was administered in accordance with the respondent's accompanying instructions, (iv) that it was its defective condition which caused the alleged harm and (v) that such harm was reasonably foreseeable.¹⁰⁸ The court also accepted that the respondent, as the manufacturer, although under no contractual obligation to the appellants, was under a legal duty, in delict, to avoid reasonable foreseeable harm resulting from the defectively manufactured Regibloc injection being administered to the first appellant and such duty was breached.¹⁰⁹

The appellants argued that South African law had already attached strict liability for consequential damages arising out of defective merchandise to a merchant seller who professes expert knowledge in relation to such goods and that no more than a decision of legal policy, and a modest shift in principle, is required to extend such liability to a manufacturer in circumstances such as the *Wagener*-case.¹¹⁰ The appellants further argued that fault should not be a requirement to establish liability because it is extremely difficult to prove, since the plaintiff has no knowledge of, or access to the manufacturing process either to determine its workings or establish negligence in relation to the making of the item or substance which apparently caused the injury.¹¹¹ According to the appellants, the courts are in a better position than the legislature to impose strict liability because the imposition of such liability is best implemented incrementally, on a case by case basis, depending on the specific circumstances of each case.¹¹²

¹⁰⁷ *Idem* at para 5.

¹⁰⁸ *Idem* at para 7.

¹⁰⁹ *Ibid.*

¹¹⁰ *Idem* at para 9.

¹¹¹ *Idem* at para 10.

¹¹² *Idem* at para 11.

The court, in making a ruling, acknowledged that the right which the appellants seek to protect and enforce is constitutionally entrenched and that this right has always existed under the common law.¹¹³ The court held that infringement of this right gives rise to the Aquilian action and in order to succeed, proof of negligence, together with the other elements of a delict, is necessary.¹¹⁴ The court further held that it was up to the legislature to deal with the strict liability of manufacturers by way of a unified, comprehensive set of principles, rules and procedures, in contrast to an incremental, case by case development of liability by the courts.¹¹⁵ The court noted that a decision by the courts supporting strict liability would not merely have prospective effect, but would have the effect of stating that the law on this point had always been even if it has never been so stated.¹¹⁶

2.6 Conclusion

It appears that the common law position where the CPA is not applicable is that a consumer who has suffered harm as a result of a defective product is entitled to institute a claim under the law of contract and delict. Succeeding in each of these claims has, in the past, proved to be difficult. In order to succeed under the law of contract, there must be an express, tacit or implied warranty relating to the quality of the product as well as a contractual nexus between the consumer and the person providing the warranty. Under the law of delict, a consumer is required to prove all the elements of a delict, including fault which is often very difficult to prove as illustrated by the outcome of the court in the *Wagner*-case. These challenges may be remedied by the application of strict product liability which does not require the presence of a contractual nexus between the consumer and the manufacturer or negligence on the part of the manufacturer. As mentioned in the *Wagner*-case, it is up to the legislature to deal with strict product liability by way of a unified, comprehensive set of principles, rules and procedures and the legislature has answered this call through the enactment of the CPA. The position in terms of the CPA will forthwith be discussed.

¹¹³ *Idem* para 17.

¹¹⁴ *Ibid.*

¹¹⁵ *Idem* at para 38. See Loubser & Reid (2012) at 3.

¹¹⁶ *Idem* at para 31.

CHAPTER 3: CONSUMER PROTECTION ACT 68 of 2008

3.1 Introduction

Prior to the enactment of the CPA, consumer protection law in South Africa was "fragmented, outdated and predicated on principles that are not applicable in a democratic and developing society".¹¹⁷ Our law lacked "a comprehensive consumer protection statute that clearly spells out rights and obligations of all market participants".¹¹⁸ Furthermore, as Woker notes, general consumer protection measures were scattered across various sources.¹¹⁹ They were found in the national and provincial Consumer Affairs (Unfair Business Practices) legislation and a number of other statutes administered by the various provinces and national government.¹²⁰ There are a number of regulators, as Woker acknowledges, who are responsible for enforcing standards and product safety and for ensuring that businesses do not contravene the various statutes.¹²¹ These regulators include the Department of Trade and Industry, the South African Bureau of Standards and the Departments of Agriculture, Health and Environmental Affairs.

In 2003, the court in the *Wagener*-case held that 'if strict liability is to be imposed it is the legislature that must do it'.¹²² The court noted that such reforming legislation would need to deal with issues such as: the kind of products that would give rise to liability, the definition of defectiveness, the causing of harm by a combined use of products, the defects that should be available, and whether the damage recoverable should be the same as those recoverable with an Aquilian action.¹²³

In 2006, the Department of Trade and Industry published the Draft Consumer Protection Bill.¹²⁴ The Bill encapsulated a vision of a new consumer law, which had

¹¹⁷ Draft Green Paper on the Consumer Policy Framework GN 1957 of 2004 in GG 26774 of 9 September 2004 at para 3.3.

¹¹⁸ *Idem* at para 9.

¹¹⁹ Woker (2010) *Obiter* at 219.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Wagener*-case at para 38.

¹²³ *Idem* at para 35.

¹²⁴ Consumer Protection Bill, 2006. Hereinafter referred to as "the Bill".

the establishment of "a fair, accessible and sustainable marketplace for consumer products and services" as its market objectives.¹²⁵

The CPA was signed by the President of South Africa on 29 April 2009 and published in the Government Gazette on 29 April 2009.¹²⁶ The CPA was put into effect incrementally, Chapters 1 and 5 of the CPA, as well as section 120 of the CPA and any other provision authorising the Minister of Trade and Industry to issue regulations, as well as Schedule 2, came into operation on 24 April 2010, which is one year after the President signed the CPA. The rest of the provisions of the CPA came into operation on 31 March 2011 and the regulations issued in terms of the CPA were published on 1 April 2011. Section 61 of the CPA deals with strict product liability and applies to any goods that were first supplied to a consumer on or after 24 April 2010.

3.2 Purpose and Interpretation

Certain areas of the common law regarding consumer rights have been codified by the CPA.¹²⁷ Consumers have obtained several new rights and some of the existing rights are broadened and reinforced by the CPA.¹²⁸

Section 3(1) of the CPA sets out the purposes of the CPA, which include, *inter alia*, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally, improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers. Section 3(2) of the CPA prescribes additional responsibilities for the National Consumer Commission¹²⁹ to ensure the realisation of the purposes

¹²⁵ Preamble to the Bill. See Loubser & Reid (2006) *Stell LR* at 412.

¹²⁶ Jacobs *et al* (2010) *PER/PELJ* at 302.

¹²⁷ *Idem* at 303.

¹²⁸ *Idem* at 304.

¹²⁹ The National Consumer Commission is established in terms of section 85 of the CPA with jurisdiction throughout South Africa. It is responsible for enforcing and carrying out the functions assigned to it in terms of the CPA.

of the CPA,¹³⁰ these include taking reasonable and practical measures to promote the purposes of the CPA and to protect and advance the interests of all consumers, monitoring and reporting to the Minister of Trade and Industry on certain matters each year and conducting research and proposing policies to the Minister of Trade and Industry relating to consumer matters.¹³¹

The CPA must be interpreted in a manner that gives effect to the purposes set out in section 3 of the CPA. Section 2(2) of the CPA provides that, when interpreting or applying the CPA, a person, court or tribunal or the National Consumer Commission may consider (i) appropriate foreign and international law, (ii) appropriate international conventions, declarations or protocols relating to consumer protection and (iii) any decision of a consumer court, ombud or arbitrator in terms of the CPA, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court. No provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.¹³²

To the extent consistent with advancing the purposes and policies of the CPA, the National Consumer Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by the CPA to be procured by a supplier, to the benefit of the consumer.¹³³

3.3 Realisation of Consumer Rights

Any of the following persons may, in the manner provided for in the CPA, approach a court, the National Consumer Tribunal or the National Consumer Commission alleging that a consumer's rights in terms of the CPA have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:¹³⁴

- (a) a person acting on his or her own behalf;

¹³⁰ Jacobs *et al* (2010) *PER/PELJ* at 304.

¹³¹ Section 3(2) of the CPA.

¹³² Section 2(10) of the CPA.

¹³³ Section 4(4) of the CPA.

¹³⁴ Section 4(1) of the CPA.

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

3.4 Important Definitions

The section 1 of the CPA contains the following important definitions:

"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, unless the transaction is exempt from the application of the CPA by section 5(2) or in terms of section 5(3) of the CPA;
- (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;
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e) of the CPA; and
- (e) a juristic person whose asset value of annual turnover, at the time of the transaction, is R2 million or less.¹³⁵

"court", does not include a consumer court.

"distributor", in relation to any particular goods, means a person who in the ordinary course of business-

- (a) is supplied with those goods by a producer, importer or other distributor; and
- (b) in turn, supplies those goods to either another distributor or to a retailer.

¹³⁵ See section 5(2)(b) of the CPA and R2 million by GN No 294, 1 April 2011, GG 34181.

"goods", includes-

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

"importer", with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.

"juristic person", includes-

- (a) a body corporate;
- (b) a partnership or association; or
- (c) a trust as defined in the Trust Property Act, 1988 (Act No. 57 of 1988).

"producer", with respect to any particular goods, means a person who-

- (a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or
- (b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a).

"supplier", means a person who markets any goods or services. The term "supplier" will be used to describe all the parties in the supply chain.

"supply chain", with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer importer, distributor or retailer of goods, or as a service provider.

"transaction", means-

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

The section 53(1) of the CPA contains the following definitions, all of which are specifically important for purposes of Part H of the CPA:

"defect", means-

- (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) any characteristic of the goods or components that renders the goods 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
- (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized.

"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.

3.5 Scope and Application

The CPA regulates the activities of suppliers and creates rights for consumers. According to section 5(1) of the CPA, the CPA applies to: (a) every transaction occurring within South Africa, unless a transaction is exempted from the application of the CPA; (b) the promotion of any goods or services or of the supplier of any goods or services within South Africa, unless those goods or services could not reasonably be the subject of a transaction to which the CPA applies in terms of (a) or the promotion of any of those goods or services has been exempted from the application of the CPA; (c) goods or services that are supplied or performed in terms of a transaction to which the CPA applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and (d) goods that are supplied in terms of a transaction that is exempt from the application of the CPA, but only to the extent provided for in section 5(5). To the extent that a transaction or sale agreement does not fall within the scope of application of the CPA, the common law position prior to the commencement of CPA will apply.¹³⁶

The CPA does not apply to any transaction:¹³⁷

- (a) in terms of which goods or services are promoted or supplied to the State;
- (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equal to the threshold value determined by the Minister in terms of section 6 of the CPA;

¹³⁶ Barnard (2012) *De Jure* at 456.

¹³⁷ Section 5(2) of the CPA.

- (c) if the transactions falls within an exemption granted by the Minister in terms of sections 5(3) and 5(4) of the CPA;
- (d) that constitute credit agreements under the National Credit Act,¹³⁸ but the goods or services that are the subject of the credit agreement are not excluded from the application of the CPA;
- (e) pertaining to services to be supplied under an employment contract;
- (f) giving effect to a collective bargaining agreement within meaning of section 23 of the Constitution and the Labour Relations Act,¹³⁹ or
- (g) giving effect to a collective agreement, as defined in section 213 of the LRA.

If goods are supplied within South Africa in terms of a transaction that is exempted from the application of the CPA, such goods are still subject to sections 60 and 61 of the CPA.¹⁴⁰ These sections deal with unsafe goods, safety-monitoring, recall and damage caused by defective goods. Thus, strict liability provisions contained in section 61 will apply regardless of whether the goods are supplied in terms of an exempt transaction or to a person or entity which does not qualify as a "consumer" in terms of the CPA.¹⁴¹

3.6 Framework for Strict Product Liability

Product liability forms part of a consumer's fundamental right to fair value, good quality and safety. Sections 54 and 55 of the CPA provide for a consumer's right to quality service, safe and good quality goods. A supplier must ensure that it does not encroach upon these rights when dealing with consumers. An implied warranty of quality in respect of goods supplied to a consumer is imposed in terms of section 56 of the CPA. Section 57 of the CPA provides for a 6 month warranty on repaired goods. A supplier is required, in terms of section 58 of the CPA, to warn consumers of risks associates with goods that could *inter alia* result in serious injury or death. The safe disposal of designated products or components and safety monitoring and recalling of products is provided for in sections 59 and 60 of the CPA. Section 61 protects consumers against harm caused by defective products.

¹³⁸ 34 of 2005.

¹³⁹ 66 of 1995. Hereinafter referred to as the "LRA".

¹⁴⁰ Section 5(5) of the CPA.

¹⁴¹ Loubser & Reid (2012) at 87.

Section 55(2) of the CPA provides the standard and quality of goods that consumers are entitled to expect from manufacturers and retailers of goods. Section 55(2)(a) of the CPA states that every consumer has the right to receive goods that are reasonably suitable for the purpose for which they are generally intended. The common law of sale also requires that goods be fit for their intended purpose, failing which, a consumer will be entitled to rely on the aedilician remedies (that is, the *actio quanti minoris* for price reduction and the *actio redhibitoria* for rescission).¹⁴² Section 55(2)(b) of the CPA provides that every consumer has the right to receive goods of good quality, in good working order and free of any defects. The word "defect" has the meaning given in section 53(1)(a) of the CPA.¹⁴³ Disputes are likely to occur on exactly how long a particular product can be expected to be in good working order and free of any defects.¹⁴⁴ The rights afforded to a consumer in terms of 55(2)(a) and (b) of the CPA do not apply to a transaction where the consumer has been expressly informed of the condition of the goods offered and the consumer has expressly agreed to accept the goods in that particular condition, or has knowingly acted in a manner that is consistent with the accepting of the goods in that condition.¹⁴⁵ This is akin to a *voetstoot* clause in a contract of sale, save for that the supplier must expressly inform the consumer of the specific condition of the goods.¹⁴⁶ Furthermore, according to Van Heerden, if a consumer has specifically informed the supplier of the particular purpose for which he intends to use the goods and the supplier offers such products, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that he has indicated.¹⁴⁷ Thus the purpose for which the consumer intends to use the goods and the condition in which the goods are supplied to the consumer by supplier need to correlate. Section 55(2)(c) of the CPA provides that a consumer has the right to receive goods that will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of

¹⁴² Naudé (2011) *SA Merc LJ* at 339.

¹⁴³ See paragraph 3.4 above.

¹⁴⁴ Naudé (2011) *SA Merc LJ* at 340. Naudé is of the view that a sectoral ombudsman is likely to refine the durability of a product and courts will be approached once the consumer has exhausted all other remedies.

¹⁴⁵ Section 55(6) of the CPA.

¹⁴⁶ Jacobs *et al* (2010) *PER/PELJ* at 368.

¹⁴⁷ Van Eeden (2013) at 351.

their supply.¹⁴⁸ This implies that the goods must, for a reasonable period of time, maintain a certain level and standard of quality. Finally, section 55(2)(d) of the CPA provides that a consumer is entitled to receive goods that comply with any applicable standards set under the Standards Act¹⁴⁹ or any other public regulation. In considering whether goods have satisfied the requirements of section 55(2) of the CPA regard must be given to the provisions of section 55(4) of the CPA which sets out factors to be considered. Section 55(4) of the CPA does not contain an exhaustive list, other factors such as price and the terms of the contract must be considered.¹⁵⁰ According to section 55(5)(a) of the CPA, for greater certainty in applying section 55(4), it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods. In other words, the defect must have been a defect defined in section 53(1)(a) of the CPA and the fact that the defect was not detected by a consumer before taking delivery does not mean that the defect did not exist. Thus the focus is on the condition of the goods and not the conduct of the supplier in supplying the goods or the conduct of the consumer in using the goods. Section 55(3) of the CPA provides that a consumer has the right to expect that goods are reasonably suitable for the specific purpose that the consumer indicated to the manufacturer if the manufacturer ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of the goods. The court in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*¹⁵¹ in applying the Pothier rule, held that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. As noted by the Barnard, although the wording of section 55(3) of the CPA and the Pothier rule look similar, section 55(3) of the CPA should not be regarded as confirmation of the Pothier rule.¹⁵² Section 55(3) of the CPA is not applicable to the supply of any or all goods but only relates to goods which the consumer specifically informed the supplier of the particular

¹⁴⁸ Section 55(2)(c) of the CPA.

¹⁴⁹ Act 29 of 1993.

¹⁵⁰ Naudé (2011) *SA Merc LJ* at 340.

¹⁵¹ 1977 3 SA 670 (A) at 682H - 683A.

¹⁵² Barnard (2012) *De Jure* at 470.

purpose for which the consumer wishes to acquire or use the goods. Under the Pothier rule, the seller must be a merchant seller who has professed in public to have expert knowledge and skill.

According to section 56(1) of the CPA a transaction or agreement pertaining to the supply of goods to a consumer has an implied warranty that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55 of the CPA, except to the extent that those goods have been altered contrary to the instructions or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be. Section 56(2) of the CPA provides that within six months after the delivery of any goods to a consumer, the consumer may ask for a repair, refund or replacement if the goods fail to satisfy the requirements contemplated in section 55 of the CPA. In the event that a refund is requested, the supplier must refund to the consumer the price paid by the consumer for the goods. It is not clear whether, in the case of motor vehicles, a supplier is entitled to set-off the amount attributable to depreciation prior to making a refund to the consumer. The implied warranty imposed by section 56(1) of the CPA and the right to return goods set out in section 56(2) are each in addition to any other implied warranty or condition imposed by the common law (including a warranty against latent defects), the CPA or any other public regulation and any express warranty or condition stipulated by any person in the distribution chain.

According to some authors, section 56 of the CPA imposes interpretational problems and is one of the most controversial sections in the CPA.¹⁵³ These authors cite the use of the terms "producer", "importer", "distributor" and "retailer" (who are suppliers in the supply chain) instead of the general term "supplier" as one of the contributing factors to the interpretational problems of section 56 of the CPA.¹⁵⁴ The authors submit that the implied warranty in section 56 of the CPA may, for example, apply respectively between the retailer, the distributor, the producer or importer and the

¹⁵³ Jacobs *et al* (2010) *PER/PELJ* at 370.

¹⁵⁴ *Idem* at 371.

consumer.¹⁵⁵ In other words, the implied warranty in section 56 of the CPA may, for example, apply between *inter alia* the distributor (as supplier) and retailer (as consumer); between the distributor (as supplier) and another distributor (as consumer) and between the importer or producer (as supplier) and the retailer (as consumer), provided that the transactions are not exempted from the CPA.¹⁵⁶ I submit that the use of the term "supplier" instead of "producer", "importer", "distributor" and "retailer" is not material and the same consequence would have ensued provided that the transaction falls within the application of the act and in the case of the transaction between a "distributor" and "retailer", for instance, the retailer does not exceed the monetary threshold for a juristic person set out in section 5(2)(b) of the CPA.

Contractual conditions such as those that warrant the quality of goods provide consumers with a strong weapon against the other party to a contract. Historically the doctrine of sanctity of contract shielded the manufacturer against liability for harm caused to parties with whom the manufacturer did not enter into a contract with.¹⁵⁷ If harm is suffered by a consumer from use of unsafe or defective goods, which were warranted as safe and defect-free by a retailer, the consumer will only have an action against the retailer and not the manufacturer of the goods. This is because the consumer has a direct contractual relationship with the seller (being the retailer) and not the manufacturer of the goods. However, in the above instance, the retailer could in turn institute action against the manufacturer with whom he has a direct contractual relationship with, provided that the manufacturer has warranted the safety and quality of the goods to the retailer.

Section 61 of the CPA introduces a strict liability framework.¹⁵⁸ According to this section a producer or importer, distributor or retailer of any good is liable for any harm caused wholly or partly as a consequence of (i) supplying unsafe goods; (ii) a product failure, defect or hazard in any good; or (iii) inadequate instructions or

¹⁵⁵ *Idem* at 372.

¹⁵⁶ *Ibid.*

¹⁵⁷ Howells "Introduction: product liability, insurance and the pharmaceutical industry – an overview" pages 1 - 15 (of the chapter) in Howells (1991) at 3.

¹⁵⁸ Jacobs *et al* (2010) *PER/PELJ* at 382.

warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any good, 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 such person will be liable for harm caused by these goods irrespective of whether negligence on the part of the producer, importer, distributor or retailer can be established, and the consumer is relieved of the onerous burden of proving fault.¹⁵⁹ Strict product liability applies to any producer, importer, distributor or retailer (as the case may be) and their liability is joint and several.¹⁶⁰ This seems to be unfair on a retailer, given that the retailer merely serves as a marketer of the goods. The only recourse that the retailer would have in terms of the CPA is a claim for a breach of the implied warranty in section 56 against the supplier or distributor of the goods, provided that the retailer can be considered a consumer for purposes of section 1 of the CPA and does not exceed the monetary threshold for a juristic person in section 5(2)(b) of the CPA.

According to Loubser and Reid, section 61 of the CPA does not distinguish between goods supplied to consumers and goods supplied to commercial entities.¹⁶¹ In other words, not only consumers have a claim under section 61, all injured persons have a claim as well.¹⁶² Therefore, potential claimants may include *inter alia* guests at a consumer's house and any person who has suffered harm or sustained injury as a result of goods supplied to the third party.¹⁶³ Under the law of contract, the supplier is shielded by doctrine of sanctity of contract. Other authors have provided a different view, according to these authors, the CPA is aimed at protecting consumers only, and it is likely that only consumers will be afforded the protection of section 61 of the CPA and innocent bystanders who are not users, beneficiaries or recipients, who are injured by a defective product will still need to rely on the ordinary delictual principles of the common law.¹⁶⁴ In support of these authors, I submit that definition

¹⁵⁹ Section 61(1)(c) of the CPA. See Loubser & Reid (2012) at 56.

¹⁶⁰ Jacobs *et al* (2010) *PER/PELJ* at 383.

¹⁶¹ Loubser & Reid (2012) at 86.

¹⁶² Jacobs *et al* (2010) *PER/PELJ* at 384.

¹⁶³ Loubser & Reid (2012) at 86.

¹⁶⁴ Neethling, Potgieter & Visser (2010) at 374. See Gowar (2011) *Obiter* at 529.

of transaction under section 1 of the CPA would in any event prevent a bystander from instituting a claim for harm caused by a defective under section 61 of the CPA.

Section 61(5) provides that a consumer may recover damages for (a) the death of, or injury to, any person; (b) an illness of any natural person; (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and any loss that result from harm contemplated in (a), (b) or (c). Section 61 of the CPA provides extensive compensation than a consumer would have been able to claim from a retailer under the law of contract.¹⁶⁵ The liability of producers, distributors and suppliers towards consumers who have suffered damage or injury as a result of a product failure or defect is not limited to parties in a contractual relationship. All those who participate in the marketing of defective products contribute to the risk of harm.¹⁶⁶ Furthermore, as long as the distributor and retailer can be traced, the consumer is relieved of the problem of identifying the manufacturer.¹⁶⁷ If more than one person is liable, then their liability is joint and several.¹⁶⁸ According to section 61(6)(c) of the CPA, nothing in section 61 limits the authority of a court to "apportion liability among person who are found to be jointly and severally liable". Section 61 of the CPA utilises concepts associated with the law of delict, albeit not exclusively, such as strict liability, damage, causation and joint and several liability.

In terms section 61 of the CPA any person in the distribution chain may be found liable for harm caused by a defective good irrespective of whether there is a contractual nexus or whether such person was negligent in causing harm.¹⁶⁹ Section 61 CPA does not rely on the law of contract or the law of delict. It is important to note however that the common law is not replaced by section 61 of the CPA, for instance, "the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain intact

¹⁶⁵ Jacobs *et al* (2010) *PER/PELJ* at 387.

¹⁶⁶ Loubser & Reid (2012) at 120.

¹⁶⁷ *Ibid.*

¹⁶⁸ Section 61(3) of the CPA.

¹⁶⁹ In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) at para 48 (see Gowar (2011) *Obiter* at 522), the court was able to find liability under the law of contract (on the basis of a contractual nexus) and the law of delict (on the basis of negligence).

where the CPA is not applicable."¹⁷⁰ Furthermore, the common law will apply in instances where the claimant does not fall under the definition of "consumer" in section 1 of the CPA.

3.7 Defences

Section 61(4) of the CPA carves out instances where liability in terms of the CPA does not arise and these include instances where:

- (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
- (d) the claim for damages is brought more than three years after:
 - (i) death or injury of a natural person;
 - (ii) the earliest time at which a person had knowledge of the material facts an illness of a natural person;
 - (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 any property, respective of where it is movable or immovable; or
 - (iv) the latest date on which a person suffered any economic loss due to death, injury or illness to a natural person, or loss or physical damage to property.

The CPA does not make provision for contributory negligence on the part of the consumer; this is because section 61 of the CPA does not involve an enquiry as to

¹⁷⁰ Barnard (2012) *De Jure* at 478.

the manufacturer's fault. A manufacturer is not entitled to rely on an exclusions clause, excluding the application of section 61 of the CPA as a basis for avoiding liability. Furthermore, a manufacturer cannot rely on evidence setting out the safety of its manufacturing process as this would involve an enquiry into fault. In *Grant v Australian Knitting Mill Ltd*, the manufacturer led evidence setting out how good its manufacturing process was and that the risk of harm was recognised and guarded against by the manufacturer. The court emphasised that an injured person "is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong".¹⁷¹

3.8 Conclusion

Consumers are not in a position to detect a defect in a product as they have little knowledge of the manufacturing process and therefore they should not bear the financial responsibility when an injury occurs. It is the manufacturers and suppliers of the product who are best able to bear the financial responsibility for injuries caused by their defective products, and adjust their costs accordingly.¹⁷²

The CPA has introduced much needed protection and certainty with regards to consumer rights, for instance, there is improved product safety, product use and warning labels, and manufacturing quality.¹⁷³ Improved product quality generally results in increased consumer spending which in turn contributes to the growth of an economy. Although the protection afforded to consumers should be applauded, the unintended consequences of the CPA is that small informal retailers in rural areas may be held jointly and severally liable for supplying a defective product, even though the defect was not caused by the retailer. Section 61 of the CPA has introduced a regulatory framework for strict liability and provides more extensive compensation than the consumer would have been able to claim from a retailer under the law of contract¹⁷⁴.

¹⁷¹ (1936) AC 85 at 101. See Howells (1993) at 73.

¹⁷² Jasper (2007) at 28.

¹⁷³ Howells (1993) at 229.

¹⁷⁴ Jacobs *et al* (2010) *PER/PELJ* at 387.

The CPA does not limit a consumer from exercising any rights afforded in terms of the common law.¹⁷⁵ Section 4(2) of the CPA provides that the court must develop the common law as is necessary to improve the realisation and enjoyment of consumer rights generally, and to promote the spirit and purpose of the CPA. The CPA is aimed at protecting consumers. Only consumers will be afforded the protection of section 61 of the CPA. Innocent bystanders who are not users, beneficiaries or recipients, who are injured by a defective product will still need to rely on the ordinary delictual principles of the common law.¹⁷⁶ Section 61 of the CPA does not does preclude a consumer from establishing liability under the law of contract to the extent that a warranty was given and breached by the seller and a contractual nexus is present between the consumer and seller or under the law of delict where negligence, in addition to all the other elements of a delict, can be established on the part of the manufacturer.

¹⁷⁵ Section 2(10) of the CPA.

¹⁷⁶ Neethling, Potgieter & Visser (2010) at 374. See Gowar (2011) *Obiter* at 529.

CHAPTER 4: PRODUCT LIABILITY UNDER ENGLISH LAW

4.1 Introduction

According to section 2(1)(a) of the CPA, when interpreting or applying the Act, a person, court, tribunal or the commission may consider *inter alia* appropriate foreign and international law. As mentioned in paragraph 2.1 of this research paper, the origins of product liability can be traced back to ancient English law imposing strict liability on sellers of contaminated food products.¹⁷⁷ Furthermore, the historical development of the common law in the UK and the enactment of the UK CPA can be closely contrasted with the development in South Africa. A consumer is entitled to remedies against a manufacturer of a defective product under the law of contract, the law of delict (torts) or as set out in legislation (UK CPA).¹⁷⁸

4.2 The development of Product Liability under English Law

Previously, the *caveat emptor* applied and a consumer who had suffered harm or sustained injury as a result of a defective product was not entitled to claim damages from the seller unless the seller specifically warranted the products but in the 19th century the *caveat emptor* was replaced by the doctrine of implied warranty of quality.¹⁷⁹ In *Gardiner v Gray*,¹⁸⁰ the court declared:

"[T]he purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them."¹⁸¹

¹⁷⁷ Geistfeld (2006) at 1.

¹⁷⁸ Dobson & Stokes (2008) at 132.

¹⁷⁹ Borra (2013) *Juridical Review* at 201.

¹⁸⁰ 171 E.R. 46; (1815) 4 Camp.

¹⁸¹ *Gardiner v Gray* 171 E.R. 46; (1815) 4 Camp. 144 in Borra (2013) *Juridical Review* at 201.

According to the English doctrine of implied warranty, the nature of a sale transaction implies certain duties or responsibilities on the seller's part and a corresponding set of rights held by the buyer. The implied warranty applied only to the parties to the sale transaction.¹⁸² A seller who breached the implied warranty by selling a defective product incurred obligations only to the buyer.¹⁸³ The doctrine of implied warranty was codified by the English Parliament in the Sale of Goods Act 1893.¹⁸⁴ This doctrine can now be found, with some modification, in the Sale of Goods Act 1979.¹⁸⁵ Section 13(1) of the Sale of Goods Act 1979 provides that "where there is a contract for the sale of goods by description, there is an implied condition that the goods correspond with their description."¹⁸⁶ Only the buyer can institute action, if someone other than the buyer was injured by the goods, section 13(1) of the Sale of Goods Act 1979 gives such person no rights.¹⁸⁷ Furthermore, even if the buyer is the victim, such buyer cannot sue the manufacturer under Sale of Goods Act 1979 unless he bought directly from the manufacturer, in other words a contractual nexus is required.¹⁸⁸

During the nineteenth century, courts repeatedly relied on the requirement for a contractual nexus to limit a seller's liability for defective products.¹⁸⁹ The seller of a defective product could be liable to the buyer but not third parties. The courts were concerned that any expansion of liability beyond the contractual relationship would expose manufacturers and other product sellers to excessive liability, thereby disrupting product markets to the detriment of society.¹⁹⁰

In the UK, the modern principle of strict product liability evolved in response to the issues posed in *Winterbottom v Wright*.¹⁹¹ This case involved a plaintiff who had

¹⁸² Geistfeld (2006) at 10.

¹⁸³ *Ibid.*

¹⁸⁴ Borra (2013) *Juridical Review* at 202.

¹⁸⁵ Howells (1993) at 53.

¹⁸⁶ *Idem* at 54.

¹⁸⁷ *Ibid.*

¹⁸⁸ Dobson (1997) at 392.

¹⁸⁹ Geistfeld (2006) at 9

¹⁹⁰ *Ibid.*

¹⁹¹ *Winterbottom v Wright* 152 E.R. 402; (1842) 10 M. & W. 109. See also Geistfeld (2006) at 9.

been driving a coach supplied and serviced by the defendant. The plaintiff was an employee of the coach's owner and had no contractual relationship with the defendant. The coach broke down due to a latent defect, throwing the plaintiff to the ground and permanently disabling him. The plaintiff's action against the defendant was dismissed by the court because there was no contractual relationship or privity between the parties. According to the court, unless we restrict the operation of agreements to the parties who are privity to them, the most absurd and outrageous consequences would ensue.¹⁹² The court held that if it were to hold that the plaintiff could successfully sue in such a case, there would be no limit at which such actions would stop.¹⁹³ The only safe rule, according to the court, is to confine the right to recover to those who enter into the contracts.¹⁹⁴

It was only in 1932, in the celebrated Scottish House of Lords case of *Donoghue v Stevenson*,¹⁹⁵ that reliance on the sanctity of contract doctrine was reconsidered. The court in the *Donoghue*-case established the principle that a consumer who suffers damage because of a manufacturer's negligence can sue the manufacturer for damages irrespective of whether the consumer bought the goods or not.¹⁹⁶

The appellant in the *Donoghue*-case drank a bottle of ginger-beer manufactured by the respondent. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. The appellant alleged that she fell ill after drinking the bottle of ginger-beer and she claimed that she suffered shock and severe gastro-enteritis. The court considered and agreed with Lord Anderson's decision in *Mullen v Bass & Co*,¹⁹⁷ a case similar to the *Donoghue*-case but involved a dead mouse as opposed to a dead snail. The court in the *Mullen*-case held that the manufacturer had rebutted the presumption of negligence and that product manufacturers only owed a duty of care to the ultimate consumers if there was a contractual relationship

¹⁹² *Idem* at 114. See Tebbens (1979) at 50.

¹⁹³ *Idem* at 115.

¹⁹⁴ *Ibid.*

¹⁹⁵ (1932) AC 562 (HL). See Borra (2013) *Juridical Review* at 202.

¹⁹⁶ *Idem* at 599. See Dobson & Stokes (2008) at 134.

¹⁹⁷ (1929) SC 461, 479.

between the parties. Thus product-caused injuries were deemed to be an aspect of the contract law of product warranties, except in those cases where the product seller negligently caused physical harm to another.¹⁹⁸

Thus any person, whether or not he was the buyer, who has suffered harm or sustained injury as a result of a defective product is entitled to claim from the manufacturer provided that he can prove that the manufacturer was negligence.¹⁹⁹ However, negligence was very difficult to prove.

4.3 UK Consumer Protection Act 1987

In the UK, similar to South Africa, the courts felt bound by precedent to leave reform to the legislature rather than through litigation. In the US, however, the courts had no such inhibitions with product liability law being developed through the courts.

In 1985, the EC Council adopted a Directive (Council Directive 85/374/EEC of 25 July 1985)²⁰⁰ which required member states to introduce legislation making manufacturers and other producers strictly liable for damage caused by their products. The Directive was implemented in the UK by Part I of the UK CPA.²⁰¹

The enactment of the UK CPA brought about change to the position of consumers. According to the UK CPA, producers or suppliers of products in the course of a business may be liable for personal injury or property damage caused wholly or partly by a defect in the product, irrespective of any fault on the part of the producer or supplier. This means that the producer or supplier of a defective product will be strictly liable for any harm caused by the product. Similarly to the South African CPA, manufacturers and suppliers under the UK CPA are not entitled to contractually exclude product liability and rely on this exclusion as a basis for a defence. Section 7 of the UK CPA provides that the liability of a person to a person who has suffered damage caused wholly or partly by a defect in a product, or to a

¹⁹⁸ *Idem* at 2.

¹⁹⁹ Dobson (1997) at 392.

²⁰⁰ Hereinafter referred to as the "Directive".

²⁰¹ Sealy & Hooley (2005) at 398.

dependant or relative of such a person, may not be limited or excluded by any contract term, by any notice or by any other provision.

To succeed under the UK CPA, the claimant must establish four things, namely that (a) a product contained a defect, (b) the claimant suffered damage, (c) the damage was caused by the defect, and (d) the defendant was producer, own-branding or importer into the European Community (or, sometimes, supplier of the product)

The definition of product is very wide, there is liability in virtually anything which might be considered a product including goods, electricity and products which are comprised in another product whether by virtue of being a component part or raw material or otherwise.²⁰² Goods are defined as "any natural or artificial substance"²⁰³ which, according to Alheit, suggests that the substance must be tangible.²⁰⁴ Unlike South African CPA, the UK CPA does not specifically include gas and water in the definitions for "product" or "goods". It is important to note that where gas or water is made available in containers, as Loubser and Reid acknowledge, then liability may arise if such containers fail to function as intended.²⁰⁵ For instance, the container might crack or break, allowing the contents to escape so as to cause harm or an insecure container might allow its contents to become contaminated in such a way that injury is caused.²⁰⁶

The basis for liability is the defectiveness of the product rather than the conduct of the manufacturer.²⁰⁷ In other words, regard must be given to whether the product itself is defective, rather than whether the manufacturer was negligent in making it. Defectiveness is defined, according to Howells, 'in terms of whether the product lacks the standard of safety which the consumer is entitled to expect.'²⁰⁸ A product is defective if it does not provide a level of safety that persons are generally entitled to

²⁰² Section 1(2) of the UK CPA. See also Dobson & Stokes (2008) at 139.

²⁰³ Section 45(1) of the UK CPA.

²⁰⁴ Alheit (2006) *CILSA* at 282.

²⁰⁵ Loubser & Reid (2012) at 84.

²⁰⁶ *Idem* at 85.

²⁰⁷ Howells "Introduction: product liability, insurance and the pharmaceutical industry – an overview" pages 1 - 15 (of the chapter) in Howells (1991) at 4.

²⁰⁸ *Ibid.* This is the "consumer expectation test".

expect, taking all circumstances into account, including the presentation of the product, instructions or warnings, the use to which it could reasonably be expected to be put, and the time when the product was put into circulation.²⁰⁹ In *A v National Blood Authority (No. 1)*,²¹⁰ the court, in considering whether blood that was contaminated with Hepatitis C was defective, held that the presence of Hepatitis C within the blood constituted a defect since the public at large was entitled to expect that the blood transfused to them would be free from infection.²¹¹ The court further held that it is not material to consider whether any steps or any further steps could have been taken to avoid or mitigate the risk that the blood would be infected.²¹² In *Ide v ATB Sales Ltd*²¹³ the court found that there is no requirement for the claimant to show how the defect occurred, the existence of a defect is sufficient.²¹⁴

A claim for damages, under the UK CPA, may only be made in respect of death or personal injury or damage to property ordinarily intended for private use or consumption and does not cover damage to the product itself or to any product containing the defective product neither does it cover pure economic loss.²¹⁵ With regards to liability for damage to property, the UK CPA imposes certain restrictions: (i) firstly, the property damage must exceed 275 pounds sterling, (ii) secondly, it does not apply to loss or damage to the product itself or to the loss of or damage to the whole or any part of any product which has been supplied with the product comprised in it, and (iii) thirdly, the damaged property must have been ordinarily intended for private use, occupation or consumption and also intended by the plaintiff for his own private use, occupation or consumption.²¹⁶ Where a defective product is used as a component by another manufacturer, there will be two defective products and two producers.²¹⁷

²⁰⁹ Alheit (2006) *CILSA* at 282.

²¹⁰ (2001) 3 All E.R. 289.

²¹¹ *Idem* at para 80.

²¹² *Ibid.*

²¹³ (2007) EWHC 1667, QB.

²¹⁴ *Idem* at para 25.

²¹⁵ Sections 5(2) and 5(3) of the UK CPA. See also Alheit (2006) *CILSA* at 283.

²¹⁶ Howells (1993) at 91.

²¹⁷ Dobson & Stokes (2008) at 141.

A claim may be brought against the producer, own-brander or importer and where two or more persons are liable for the same damage, their liability will be joint and several.²¹⁸ The number of persons against whom a consumer may institute a claim against is limited. Under the CPA, a producer, importer, distributor or retailer may be held liable. The producer, under the UK CPA is the manufacturer. An own-brander is liable if, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, he has held himself out to be the producer of the product.²¹⁹ The only importer liable under the UK CPA is a person who imported the product into the European Community from a place outside the European Community in order to supply the product to another person in the ordinary course of business.²²⁰ To illustrate, "if a product was made in France and brought to England, there is no importer to sue but only a French producer. If the product was made in the United States and brought to France before being brought to England, then the person who imported it into France is liable."²²¹

4.4 Defences

According to section 4(1) of the UK CPA, in any civil proceedings against any person (the person proceeded against) in respect of a defect in a product it shall be defence for him to show:

- (a) that the defence is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation; or
- (b) that the person proceeded against did not at any time supply the product to another; or
- (c) that the product was not made or supplied in the course of business or it was done without a profit motive; or
- (d) that the defect did not exist in the product at the relevant time; or
- (e) 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; or

²¹⁸ *Ibid.*

²¹⁹ Section 2(2)(b) of the UK CPA.

²²⁰ Section 2(2)(c) of the UK CPA.

²²¹ Dobson & Stokes (2008) at 141.

- (f) that the defect:
- (i) constituted a defect in a product (the subsequent product) in which the product in question had been comprised; and
 - (ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

The burden of proving the defences in section 4(1) of the UK CPA rests on the defendant. Similarly, section 61(4)(c) of the South African CPA contains what is known as the "development risks defence" which is also available under the section 4(1)(e) of the UK CPA. This defence allows manufacturers to rely on the lack of scientific and technical knowledge as the basis for a defence. According to Gowar, this defence puts a consumer in a worse position than he would have been in under the common law especially where a seller has professed skill and expert knowledge.²²² This defence contains a fault element and a defendant may escape liability in the absence of negligence and foreseeable risk.²²³

4.5 Conclusion

The development of product liability under English law can be closely contrasted with that of South Africa. The establishment of a product liability regime arose from the need to address the practical challenges faced by consumers. However, similar to the position in South Africa, the courts in the UK felt bound by precedent to leave reform to the legislature rather than through the judiciary. The basis of liability has shifted from the conduct or fault of the manufacturer to the defectiveness of the product. Therefore, any person who has suffered harm or sustained injury as a result of a defective product is entitled to a claim, irrespective of whether the defendant was negligent or not.²²⁴ According to Gowar, however, a defendant may escape liability in the absence of negligence and foreseeable risk.²²⁵

²²² Gowar (2011) *Obiter* at 534.

²²³ *Ibid.*

²²⁴ Dobson & Stokes (2008) at 141 at 135.

²²⁵ Gowar (2011) *Obiter* at 534.

The UK CPA does not limit a consumer's recourse to common law remedies and other statutory remedies, for instance those provided in the Sale of Goods Act 1979 (including warranties) and the manufacturer is entitled to the defences set out in section 4(1) of the UK CPA. However, unlike the CPA, the UK CPA does not contain any statutory warranties regarding the quality and defect-free nature of goods. Furthermore, unlike the CPA, the UK CPA does provide for a purposive method of interpretation.²²⁶ The CPA provides that all of its provisions must be interpreted in a manner that gives effect to the purpose of the CPA

²²⁶ *Idem* at 536.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Under the common law, a manufacturer's liability for harm caused by a defective product could only be established under the laws of delict or contract. In order to succeed under the law of delict, a consumer is required to prove all the elements of a delict, namely conduct, wrongfulness, fault (intention or negligence), causation and damage. Damage or harm must be borne by the person who has suffered it unless the law permitted another person to be liable.²²⁷ The required fault takes the form of negligence and not intention, while causation must be both factual and legal. It is difficult to establish negligence under the law of delict, especially in the light of the fact that consumers generally have limited knowledge and understanding of the manufacturer's manufacturing processes. Under the law of contract, in order for a consumer to succeed in a claim, the consumer must establish a contractual nexus, the counterparty to the contract must have warranted (either expressly or impliedly) the quality and defect-free nature of the product and there must have been a breach of this warranty.

Strict product liability has been innovatively developed by courts in the US.²²⁸ Courts in South Africa and the UK are only able to develop the law as far as precedents permit them. Thus it was up to the legislature to remedy the injustices of the common law and introduce a strict liability regime. Section 61 of the CPA has removed: (i) a burdensome onus which was difficult to discharge under the law of delict and (ii) eliminated the manufacturer's reliance on the sanctity of contract as a defence. The liability of producers, distributors and suppliers towards consumers who have suffered damage or injury as a result of a defective product or product failure is not limited to parties in a contractual relationship. As such, all those who participate in the marketing of defective products contribute to the risk of harm.²²⁹ Under the UK CPA, a claim may only be instituted against the producer, owner-brand or importer.²³⁰ Thus a claim against a retailer requires a contractual nexus and is instituted under the law of contract. Furthermore, under the CPA, the liability

²²⁷ Melville (2011) at 24.

²²⁸ In *Sindell v Abbot Laboratories* 26 Cal. 3d 588 (1980), it was not possible to identify the manufacturers of a generic and defective drug, the Supreme Court of California found all of the manufacturers liable on the basis of their respect share of the market.

²²⁹ Loubser & Reid (2012) at 120.

²³⁰ Dobson & Stokes (2008) at 141.

of manufacturers, suppliers and retailers is joint and several and the court is entitled to apportion liability between these parties. Fault is no longer required and it is unlikely that a manufacturer, supplier or retailer will succeed in a claim for contributory negligence.

It is important to note that the CPA does not necessarily replace the common law.²³¹ In fact, no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.²³² This means that, notwithstanding the provisions of section 61 of the CPA, a consumer is entitled to rely on a claim under the law of delict if negligence can be established or a claim under the law of contract if there is a contractual nexus between itself and the manufacturer. The CPA does not apply to all transactions in South Africa; it applies to damage caused by a defective product to a natural person or to property and to economic loss resulting from such damage, as well as to juristic persons below the statutory threshold of R2 million.²³³ To the extent that the CPA does not apply, the consumer may still exhaust all the common law remedies available. The UK CPA has also had a similar effect and consumers are entitled to rely on the UK CPA in addition to any other remedies available in law, including those set out in the Sale of Goods Act 1979. Furthermore, the UK CPA and CPA both make provision for the so-called "development risk defence".²³⁴ According to Gowar, this defence contains a fault element because one is required to determine the reasonableness of the defendant's conduct in regards to certain circumstances and a defendant may escape liability in the absence of negligence and foreseeable risk.²³⁵ This defence may therefore circumvent the intended consequences of section 61(1) of the CPA by allowing liability to only result in those instances where the defendant was at fault. I submit that this defence was introduced to encourage product innovation and development, and the defendant would still have to show that he conducted extensive safety tests and the risk was unforeseeable.

²³¹ For instance, the implied warranty in section 56 of the CPA operates in addition to any other warranty or condition imposed by the common law.

²³² Section 2(10) of the CPA.

²³³ Neethling & Potgieter (2014) *THRHR* at 506.

²³⁴ Section 61(4)(c) of the CPA and section 4(1) of the UK CPA.

²³⁵ Gowar (2011) *Obiter* at 534.

Unlike the UK CPA, the CPA specifically provides that all of its provisions must be interpreted in a manner that gives effect to the purpose of the CPA.²³⁶ Section 3 of the CPA sets out the purposes of the CPA, all of which place emphasis on the protection of consumers and section 4(2) of the CPA provides that the court must develop the common law as is necessary to improve the realisation and enjoyment of consumer rights generally, and to promote the spirit and purpose of the CPA.²³⁷ The CPA is aimed at protecting consumers. Only consumers will be afforded the protection of section 61 of the CPA. Innocent bystanders who are not users, beneficiaries or recipients, who are injured by a defective product will still need to rely on the ordinary delictual principles of the common law.²³⁸

Although the protection afforded to consumers should be applauded, the unintended consequences of the CPA is that small informal retailers in rural areas may be held jointly and severally liable for supplying a defective product, even though the defect was not caused by the retailer. The only recourse that the retailer would have in terms of the CPA is a claim for a breach of the implied warranty in section 56 against the supplier or distributor of the goods, provided that the retailer can be considered a consumer for purposes of section 1 of the CPA and does not exceed the monetary threshold for a juristic person in section 5(2)(b) of the CPA.

In conclusion it is submitted that with the enactment of the CPA, the relationship between the consumer and manufacturers is no longer a battle between David and Goliath but a battle between two Goliaths. The protection afforded under the CPA is at the least comparable, if not better than that in most jurisdiction. The continued development of consumer protection laws should be welcomed and encouraged.

²³⁶ Section 2(10) of the CPA. See Gowar (2011) *Obiter* at 535.

²³⁷ Gowar (2011) *Obiter* at 536.

²³⁸ Neethling, Potgieter & Visser (2010) at 374. See Gowar (2011) *Obiter* at 529.

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