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The effectiveness of the product liability regime in terms of the Consumer Protection Act 68 of 2008 in South Africa: a comparative analysis with Australia

submitted in partial fulfilment of the requirement for the degree LLM (Mercantile Law) by

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Summary of Dissertation

Product liability arising from the harm caused by a defective product being supplied to a consumer, is currently and has historically been a pressing concern within the South African consumer context. The establishment of this liability has previously been catered for in terms of the South African common law, either in terms of the law of Delict or via principles captured within contract law. The evident practical flaws of establishing product liability in terms of the common law, coupled with the new Constitutional dispensation, urged the South African legislature in promulgating and implementing the Consumer Protection Act ("CPA") and specifically introducing the so called 'strict' product liability regime as captured within section 61 of the CPA. The primary difference between this method of product liability establishment and the method captured within the common law, is that fault is now not required to be proven on behalf of the 'supplier' (party to the supply chain) for product liability to ensue.

Although this newly originated 'strict' product liability regime as captured within section 61 of the CPA has alleviated the primary common law burdens of establishing product liability, it still has evidential practical flaws and obstacles, which impair both the application and effectiveness of the CPA. This dissertation will seek to determine whether this newly introduced 'strict' product liability regime is in fact effective or not. The past and present positions governing product liability in South Africa will be critically examined and analyzed, in determining the current position's effectiveness. Additionally, the Australian position on product liability will be consulted, in order to draw possible recommendations as to alleviate the current South African position's practical flaws.

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1. Chapter 1: Introduction and Research Aim

1.1. Introduction

Product liability can generally be defined as the liability imposed on parties in a supply chain, for supplying defective products to consumers and as a result, the consumer suffers some form of harm. Amongst others, the parties to the supply chain include the supplier, manufacturer, and/or distributor of the product.[1] Prior to the introduction of the Consumer Protection Act ("CPA"), product liability cases in South Africa were catered for in terms of the South African common law. In terms of the common law, product liability could be established either in terms of the law of Delict (*ex delicto)* or in terms of contractual principles. In terms of the law of Delict, all elements of a Delict (wrongfulness, fault, conduct, harm, and causation) would first have to be established in a court of law for product liability to ensue.[2] In terms of the law of contract, product liability could be established in terms of the contract of sale itself, via a breach of warranty and or a misrepresentation on the part of the supplier/seller.[3]

However, through much jurisprudential debate and consumer complaints, it was identified and recognized that the Common law position governing product liability in South Africa was littered with unnecessary complexities and difficulties.[4] From this many academic as well as legal opinions started to arise, calling for the implementation of a 'strict' product liability regime. A driving factor for the move to a 'strict' product liability regime was the new Constitutional dispensation which South Africa had entered.[5] Specifically, arguments started to surface, stating that in light of the Constitutional notions of fairness and justice that the Common law should be developed in conjunction with that of section 39(2) of the Constitution of the Republic of South Africa, 1996.[6] This section of the Constitution is important as it strives to protect vulnerable groups of persons (consumers) against the

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[1] 68 of 2008.

[2] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 36 & 58.

[3] Loubser & Reid *Product Liability in South Africa* (2012) Juta 1 23.

[4] Van Heerden & Barnard "*Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA)."* 2019 THRHR 444 445-450.

[5] Van Heerden & Barnard 2019 THRHR 450.

[6] Van Heerden & Barnard 2019 THRHR 450.

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dangers of defective products. A further argument which strived to perpetuate change, was the argument of unequal bargaining power between consumers or possible claimants and suppliers. There exists an evident inequality between the consumer who is a natural person and suppliers who are by majority, large corporations with an almost indispensable litigation fund. The sheer difference between the consumer's and the supplier's available resources, created a severe unequal bargaining power dynamic between the two parties. The existence of this dynamic, served as a further driving factor to implement notable changes within South Africa's product liability landscape.[7]

The primary argument which was raised in opposition to that of the common law position governing product liability, was that it is far too onerous for consumers to satisfy the 'fault' element in establishing product liability in terms of the law of Delict. Therefore, arguments were proposed to remove this onerous obligation placed on consumers and thus by not requiring consumers to showcase negligence (fault) on the part of the supplier, consumers will be afforded a greater degree of protection. These arguments were merely theoretical, until the case of *Wagener v Pharmacare Ltd Cuttings v Pharmacare Ltd*[8]*,* where the court openly recognized that change was required and thus made the judgement that it was the job of the legislature, to create and implement a legislative framework in which a 'strict' product liability regime can operate. This naturally resulted in the creation and introduction of the CPA, specifically section 61 of the Act which caters for cases of product liability.

The CPA strives to protect vulnerable consumers within South Africa and has effectively recognized the importance of consumer rights as well as have provided consumers with a wider degree of protection and routes of recourse against unscrupulous suppliers. In theory, the CPA is a step in the right direction, especially when taking into account South Africa's unequal past. Theoretically, the CPA should provide consumers with a wider and more efficient degree of protection. In practice however, the CPA's effectiveness as well as efficiency have been topics of much judicial deliberation and academic debate.[9] Its

[7] Woker "*Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act"* 2010 Obiter 217 231.
[8] 2003 2 All SA 167 (SCA).
[9] Van Heerden & Barnard 2019 THRHR 459-464.

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effectiveness has been questioned by several noteworthy academics as well as been a point of contention within South Africa's judicial system.[10] Therefore, determining the effectiveness of the CPA as a whole and specifically the new product liability regime introduced in terms of the CPA, are both important discussions which need to be catered for, in order to improve upon the current consumer protection position within South Africa.

1.2. Research aim and questions

The primary aim of my research is to evaluate the effectiveness of the product liability regime of South Africa in terms of the CPA, considering the judicial interpretation thereof. In the determination of answering this primary research aim, three additional research questions will be critically discussed as well as answered. The first question which needs to be explored, is addressing what South Africa's position was in relation to product liability prior to the introduction of the CPA (common law position). The second is determining what the current position governing product liability in South Africa is as well as highlighting the notable interpretational concerns of both academic scholars as well as South African jurisprudence, in relation to this new product liability position. The final research question is determining what the product liability position in Australia is and how the Australian position can possibly aid us in alleviating problems highlighted within the South African product liability regime, as well as being used as a comparative element in determining the effectiveness of South Africa's current product liability position.

1.3. Research Methodology

In light of the fact that the primary focus of this dissertation is to assess the effectiveness of the product liability regime introduced by section 61 of the CPA, South African sources of law will primarily be consulted. These sources broadly include South African legislation, jurisprudence, and South African academic writings. Notable sources specifically include: The CPA, the South African Constitution as well as the common law as it is articulated

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[10] 2017 (1) SA 333 (SCA).

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within South Africa's jurisprudence. These notable sources of law will be utilized to critically provide a detailed exposition of South Africa's past position on product liability, as well as its current position on product liability. Secondary sources of law, such as academic writings found in journal articles as well as certain thesis and/or dissertations, will be used to gain a subjective perspective on South Africa's product liability system. Specifically, determining the effectiveness of South Africa's product liability position as well as discussing its varying strengths and weaknesses. Finally, due to the comparative nature of this dissertation, relevant Australian legislation as well as jurisprudence will be explored to fully juxtapose as well as identify the Australian product liability position.

1.4. <u>Outline of Chapters to follow</u>

1.4.1. Chapter 2: The South African common law position on product liability

This chapter of the dissertation will serve to provide a detailed analyses of the common law position governing product liability, which was the position prior to the enactment of the CPA. Prior to the introduction of the CPA, product liability could be established in terms of the law of Delict or in terms of the contract of sale itself.[11] In terms of the law of Delict, all elements of a Delict would first have to be proven in a court of law for liability to ensue. Therefore, this chapter will provide an in-depth analysis of each element of a Delict and its operation within the product liability realm.[12] Specific focus will however be placed on the element of fault, as the establishment of this element has proved to be the most burdensome element within the South African consumer context. It should be noted however, that although fault is not required to be proven in terms of the new product liability regime as captured in terms of section 61 of the CPA, the other elements of a Delict must still be proven, thus, an exploration of each element of a Delict is necessary.

In terms of the law of contract, product liability can arise because of a breach of contract. The breach arises due to the seller breaching specific express or implicit warranties

[11] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 36.
[12] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 58.

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and/or a misrepresentation on the part of the seller.[13] Therefore, this chapter will critically explore the operations of different types of warranties and how this could result in a possible product liability claim. It should be noted however, that one of the insurmountable obstacles which persons face when attempting to establish product liability in terms of the law of contract, is the existence of a Voetstoots clause. Thus, chapter 2 will serve to give a detailed explanation of the Voetstoots clause and how it stands in the way of consumers in establishing product liability.

Finally, this chapter will give a detailed exposition of the primary common law remedies available to consumers in successful product liability claims. This will include an exposition of both the aedilitian remedies as well as the action empti. Moreover, in conclusion of this chapter, I will provide an opinion on the topic at hand as well as provide a justification for the legislative shift from the Common law position governing product liability to the introduction of the CPA. This will include addressing the problems and complexities faced by consumers in establishing product liability in terms of the Common law.

1.4.2. Chapter 3: Product liability in terms of the CPA

The CPA is an integral legislative component within South Africa's consumer realm. This legislative instrument recognizes as well as gives effect to consumer rights in South Africa. Additionally, the CPA is responsible for protecting these consumer rights as well as affording consumers the relevant rights of recourse in instances of dispute. This chapter of the dissertation will critically engage as well as explore the provisions of the CPA. This will include an in depth-analysis of both the objectives and aims of the CPA (Section 3) as well as the interpretational rules governing the CPA (Section 2). Moreover, this chapter will critically provide an exposition of the CPA's application as captured in terms of section 5 of the CPA. Additionally, this chapter will expand upon the content of both sections 55 and 56 of the CPA as well as critically engage with section 61 of the CPA, as these sections are closely related to the new product liability regime introduced in South Africa.

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[13] Loubser & Reid *Product Liability in South Africa* (2012) Juta 1 23.

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Before providing a concise and critical exposition of the core provisions within the CPA, this chapter will firstly detail the transition from the common law position governing product liability to that of the new product liability regime introduced in terms of the CPA. Hereafter, a critical overview of the CPA will be provided in order to gain a better understanding of the current position regulating product liability in South Africa. Finally, this chapter will include a brief exposition of my opinion on the overall introduction of the CPA as well as my opinion on the most notable changes introduced into the realm of product liability.

1.4.3. Chapter 4: The applicatory and interpretational concerns regarding Section 61 of the CPA including comments on Eskom Holdings v Halstead-Cleak

Since the introduction of the CPA, there has been much controversy and academic debate regarding the practicality of the CPA's application and operation. This chapter will seek to critically discuss these newly originated practical concerns relating to the workings of the CPA. In order to do so effectively, the South African jurisprudence will play a critical role in the discussion at hand, specifically the case of *Eskom Holdings v Halstead-Cleak*[14]. A critical case discussion of the above-mentioned case will be provided, as this case clearly identified and elaborated upon the practical misunderstandings which could arise in product liability cases catered for in terms of the CPA. Specifically, this chapter will engage with the problems which arise due to the ambiguous nature of specific terms such as 'consumer' and how certain misinterpretations of terms and provisions could have a detrimental impact on the overall application of the CPA. Moreover, this chapter will engage with the problems associated with the application of the statutory defenses captured in terms of section 61(4) of the CPA, specifically the statutory defense which has been said to re-introduce an element of reasonableness (section 61(4)(c)). Throughout the case discussion of *Eskom Holdings v Halstead-Cleak*[15] as well as the identification of practical concerns relating to the CPA, this chapter will provide noteworthy academic opinions and arguments which relate specifically to the identified problems relating to the CPA. Finally, this chapter will serve to deliver my opinion on the problems

[14] 2017 (1) SA 333 (SCA).
[15] 2017 (1) SA 333 (SCA).

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identified within the CPA as well as an opinion on the judgment delivered within the case of *Eskom Holdings v Halstead-Cleak*[16].

1.4.4. Chapter 5: The Australian position governing product liability

Chapter 5 of this dissertation will seek to provide an adequate exposition of the position governing product liability in Australia. The position which governs product liability within Australia is set to be categorized as a hybrid system of laws, comprising of both the Australian Common law but primarily that of the Australian Consumer Law ("ACL"), which is captured within schedule 2 of the Competition and Consumer Act of 2010[17]. This chapter will primarily place emphasis on the application of the product liability provisions found in terms of the ACL (possible claimants) as well as the 'risk development defense' captured within section 142 of the ACL.[18] This chapter will primarily be focused on these two topics as both topics seem to be most burdensome within the South African context. Thus, in order to fully draw appropriate recommendations from the Australian product liability position, a discussion of these topics within the Australian context is required. After a critical analysis of these two topics are provided, I will provide my opinion on the matter at hand as well as deliver commentary on some of the recommendations which can be drawn from the Australian position, in order to possibly resolve the difficulties faced by consumers within the South African product liability regime.

1.4.5. Chapter 6: Conclusions and Recommendations

The final chapter of this dissertation will serve to provide conclusions and specific recommendations. After having critically discussed all relevant factors which play a role in the determination of the effectiveness of South Africa's product liability regime, this chapter will pass judgement and definitively answer the overarching research question. Moreover, this final chapter will highlight the primary points raised throughout the dissertation as well provide a conclusion relating to the comparative analyses with Australia's product liability position. Finally, after having fully answered the overarching research question as well as all subordinate questions, the final chapter of this

[16] 2017 (1) SA 333 (SCA).
[17] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[18] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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dissertation will provide specific recommendations on the research which had been concluded.

1.5. Delineations and Limitations

The central spotlight of this dissertation will be placed on the Consumer Protection Act, as our focus is to determine the effectiveness of the product liability regime in South Africa as it is captured in terms of section 61 of the CPA. Therefore, although mention will be made to other pieces of South African legislation, such as the Standards Act as well as the Insolvency Act[19], these legislative instruments will not be discussed in detail as primary focus will be placed on the CPA. The second and most notable limitation of this dissertation, is that product recalls will not be discussed. The regulation of Product Recalls in South Africa is captured in terms of section 60 of the CPA, this is a notable limitation as product recalls and product liability are very closely connected, especially in South Africa's consumer market. The reason why product recalls will not however be covered in this dissertation, is that it is a topic in its own right and thus in order to fully give product liability its necessary attention, product recalls cannot be discussed. The final limitation of this dissertation is in relation to the dissertation's comparative element. Only Australia's position on product liability will be discussed and juxtaposed to that of the South African position. Multiple jurisdictions will not be used, in light of the fact that it will not be feasible, given the restrictions (time and page limit) placed on the dissertation. Moreover, it should be noted that the Australian position governing product liability can be justified to serve as a dissertation in its own right. Therefore, the Australian position governing product liability will not be provided for in its entirety, instead, only the two topics which prove to be most burdensome within the South African context will be elaborated upon. It should be noted that this research paper relates to the law as it is up until September 2021 and thus future changes or additions to the law after this date are not included in this dissertation.

[19] 24 of 1936.

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2. Chapter 2: The South African common law position on Product Liability

2.1. Introduction

Prior to the introduction of section 61 of the Consumer Protection Act, 2008 ("CPA"), product liability was established in terms of the common law. Although, majority of recent product liability cases in South Africa are dealt with in terms of Section 61 of the CPA. It is still necessary to fully grapple with the prior existing common law position, in order to gain a better understanding as to why there was a legislative shift in catering for product liability cases in South Africa. In terms of the common law, product liability could be established in terms of the law of Delict or via contractual principles within the contract of sale itself.[20]

In terms of Delictual principles, all relevant elements of a Delict will first have to be established for product liability to ensue. These elements include: Fault, harm, causation, conduct and wrongfulness.[21] An in-depth analysis will be placed on the element of fault, as it has proven to be the most difficult element to establish. Additionally, it was held in the case of *A Gibb & Son (Pty) Ltd v Taylor & Michell Timber Supply Co (Pty) Ltd*[22]*,* that the element of fault is the most important element in dealings of liability arising as a result of a defective product.

Product liability could also be established in terms of the contract of sale itself. Liability arises due to the breach of an existing warranty (express and implicit) and or a misrepresentation on the part of the seller.[23] It is, however, very difficult to establish product liability in terms of the contract due to the existence of a Voetstoots clause. Therefore, a detailed discussion will be provided on the workings of the Voetstoots clause and how it operates as an obstacle in the way of consumers in establishing product liability.

[20] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 36.
[21] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 58.
[22] 1975 (2) SA 457 (W).
[23] Loubser & Reid *Product Liability in South Africa* (2012) Juta 1 23.

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After a detailed exposition of both the Delictual and contractual position has been provided, this chapter will explore the common law remedies available to the consumer when product liability has been established. This will include an exploration of the adellitian remedies as well as the actio empti. Finally, this chapter as a whole will serve as a justification as to why there has been a shift to legislative regulation in terms of the CPA, which entails addressing the problems and difficulties in establishing product liability in terms of the common law.

2.2. Product liability in terms of contractual principles

In terms of the common law, product liability can arise in terms of the contract itself, through contractual principles. Once the consumer has entered into a contract with that of the supplier, either expressly (written or orally) or tacitly, both parties to the contract are afforded specific contractual rights.[24] It should be noted however, that only parties to the contract derive specific rights and obligations from the contract and thus no third parties could derive such a right. Therefore, only parties to the contract can be held contractually liable for product liability. This common law position stems from the doctrine of privity of contract. This contractual position requires a valid contractual nexus to exist between two parties for the parties to receive specific contractual rights and rights of recourse if need be.[25] Furthermore, this results in a situation where third parties are not afforded any rights in terms of the contract and thus are not afforded recourse in the event that a defective product causes harm to a third party (if a third party were to receive a defective product as a gift).[26]

There are generally two situations wherein product liability can arise in terms of contractual principles. The first arises in terms of a breach of either an express or implied warranty against defects and secondly, the liability can arise as a result of a

[24] Loubser & Reid 23.
[25] Phillips J *Product Liability: In a Nutshell* 5th ed (1998) West Group 34.
[26] Loubser & Reid 23.

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misrepresentation on behalf of the seller. In both instances it will result in a breach of contract, which affords the consumer the relevant remedies to resolve the matter.[27]

2.2.1. Warranties

As stated above, the supplier can be held contractually liable for product liability, provided the supplier had breached a warranty against latent defects. This warranty against latent defects can either form part of the contract implicitly or expressly.[28] Before critically assessing the two types of warranties as well as the effect this may have on the types of remedies afforded to the consumer, it is first necessary to explain what exactly a warranty is and how it operates in relation to the concept of latent defects.

A 'warranty' is an agreement (either expressly or implicitly) reached between the parties to a contract of sale, wherein the supplier has agreed that the Merx being sold holds specific qualities which relate either to the quality of the Merx, the function of the Merx, the durability of the Merx or any other attribute which enticed the consumer to enter into the contract.[29] Once this warranty either expressly or implicitly exists in the contract and the supplier fails to meet the set requirements of this warranty, the consumer will have specific remedies available to him, which will be discussed in detail at a later stage.

The warranty against latent defects can be implicitly entered into the contract as part of the naturalia of the contract. The naturalia of the contract, are those terms which are read into a contract as an operation of law. The types of naturalia read into the contract are dependent on the essentialia of the contract (the type of contract). In the case of a contract of sale, one of naturalia is the warranty against latent defects.[30] In addition to the fact that warranties can be implicitly entered into a contract as an operation of law, they can also be implied into a contract by assessing the terms, facts surrounding the parties' agreement as well as via a well-known custom or trade usage.[31]

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[27] Loubser & Reid 23.
[28] Gangiah *A critical analysis of Product Liability under the Consumer Protection Act 68 of 2008* (LL.M-Dissertation, University of KwaZulu-Natal, 2015) 12-13.
[29] Loubser & Reid 25.
[30] Nagel *Commercial Law* 6 ed (2019) 226.
[31] JTR Gibson & CJ Visser South African Mercantile and Company Law 8 ed (2003) 80.

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The parties may agree to expressly provide for a warranty against latent defects in terms of the contract itself. In which case the warranty will form part of the incendentalia of the contract.[32]It should be noted however that an express warranty can take a variety of forms and that not all statements made during the negotiation process can be viewed as a warranty or a guarantee. Opinions given by the seller about the quality of the Merx, sale puffs and promotional advertising usually do not create legally binding obligations and thus cannot be relied upon the consumer as an express warranty.[33]

The primary importance to distinguish between warranties read into a contract as part of the naturalia of that contract and the parties agreeing (tacitly or expressly) to include a warranty, is that different types of remedies are afforded in the case of a breach of these two types of warranties. These remedies will be expanded upon at a later stage, however, if there has been a breach of an *ex lege* warranty, then the aggrieved party (consumer) may rely on the aedilitian remedies.[34] Where the parties have agreed to contractually include a warranty into the contract of sale and a breach then does occur, the consumer will be able to rely on the aedilitian remedies as well as the actio empti.[35] It should be noted however, regardless as to what warranty is being dealt with, in case of a breach, the aggrieved party will be able to rely on the aedilitian remedies.[36]

2.2.2. Manufacturers and merchant-sellers

Manufacturers as well as merchant-sellers are susceptible to an extended form of product liability in South Africa. In conjunction with the earlier ‘Pothier rule’ as well as the leading judgement given in the case of *Kroonstad Westelike Boere-Kooperatiewe Vereeniging v Botha*[37], liability will be attached to merchant sellers who publicly profess to have specific expert knowledge in relation to the goods they are selling.[38] Therefore, if a merchant seller publicly professes to have expert knowledge or skill in relation to the goods he is selling

[32] Strydom *A critical analysis of strict product liability in South Africa* (LL.M-Dissertation, University of Pretoria, 2012) 19.
[33] Loubser & Reid 25.
[34] Nagel (2019) 227.
[35] Nagel (2019) 228.
[36] Barnard “*The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages*” 2012 De Jure 455 457.
[37] 1964 (3) SA 561 (A).
[38] Loubser & Reid 28.

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and those goods contain latent defects within them, the merchant will be held liable in terms of product liability, regardless as to whether the contract contained a warranty or not. Additionally, they will be held liable regardless as to whether they were unaware of the latent defect in the Merx being sold.[39] Merchants can, however, escape this liability by either expressly or implicitly contracting out of the eventual liability. Additionally, in terms of the law of Delict, the seller does not have to satisfy the element of fault in order to establish product liability in terms of the law of Delict. Once it has been established that the merchant is liable, he or she will be liable for the consequential losses suffered by the consumer.[40]

2.2.3. Misrepresentations

In addition to the seller being held contractually liable for a breach of warranty, he or she may be held liable for any form of misrepresentation made in relation to the Merx being sold. The definition of a 'Misrepresentation' was clarified in the case of *Wright v Pandell*[41], where the court defined a misrepresentation as a "false statement of past or present fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance relating to it".[42] In simple terms, a misrepresentation is a statement made by the seller, verifying, or making a comment which is materially incorrect with the purpose of inducing the buyer into binding himself to the contract of sale.[43] It should be noted however, that the intention in which the misrepresentation was made is of great importance, as this determines the degree of liability as well as the remedies available to the buyer. The misrepresentation can either be made fraudulently, negligently, or innocently.[44]

Furthermore, it is of great importance to distinguish between a misrepresentation and other possible misstatements made by the seller during the pre-contractual negotiations

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[39] Loubser & Reid 28.
[40] Loubser & Reid 29.
[41] 1949 (2) SA 279 (C).
[42] Hutchison & Pretorius The Law of Contract in South Africa (2012) 116.
[43] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 49-50.
[44] Van Rensburg et al 'Contract' in Joubert et al (eds) LAWSA vol 9, 3 ed (2014) 317.

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phase.[45] During the pre-contractual negotiations, it is possible for the seller to make statements relating to a warranty, an opinion of his or her relating to the Merx, statements of law, puffs or dicta et promissa.[46] It is important to distinguish these statements from that of a misrepresentation, as it determines the remedies available to the buyer.

2.2.4. The Voetstoots clause

The primary obstacle standing in the way of establishing product liability in terms of the contract itself (through an express or tacit warranty) is the existence of a Voetstoots clause or more commonly referred to as an 'as is' clause. The Voetstoots clause is a clause which is entered into a contract of sale, which effectively absolves the seller of any liability which could potentially arise as a result of a latent defect found in the merx being sold.[47] The operation of this contractual mechanism was perfectly articulated in the case of *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd*[48].It was stated in the abovementioned case that the presence of a Voetstoots clause in a contract of sale will exempt the seller's potential liability, regardless as to whether the liability arises because of a breach of an implied warranty of quality (naturalia) or an ex lege warranty (an agreed warranty between the parties).[49] It should be noted that the parties to the contract do not have to expressly refer to it as a Voetstoots clause within the contract of sale, regardless as to what it is referred to in the contract of sale, it will act as a Voetstoots clause.[50]

Furthermore, the Voetstoots clause can either be entered into the contract expressly by the parties to the contract or can be implicitly entered into the contract. If the Voetstoots clause is implicitly entered into the contract it could potentially lead to a situation where the existence of the clause will be disputed by one of the contracting parties.[51] The court will then attempt to ascertain the true intentions of the contracting parties by considering

[45] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 49.
[46] Hutchison & Pretorius The Law of Contract in South Africa (2012)117-120.
[47] Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 286.
[48] 2004 (1) All 1 (SCA).
[49] Bauling *An analysis of the evolution of the South African law on the warranty against latent defects* (LLM-Dissertation, University of Pretoria,2014) 55.
[50] Bauling *An analysis of the evolution of the South African law on the warranty against latent defects* (LLM-Dissertation, University of Pretoria,2014) 55.
[51] Barnard 2012 De Jure 460.

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a multitude of factors. If one of the contracting parties brings into contention the existence of the Voetstoots clause, the onus lies on the party alleging its existence to prove to the court that it exists, however, this position is still debated amongst academics.[52] It has however been generally accepted that courts are less likely to accept the existence of an implied voetstoots clause, due to the existence of a common law presumption against the existence of a voetstoots clause.[53]

The Voetstoots clause will not be applicable in circumstance of fraud or where the Merx which has been delivered has a material difference to that which has been agreed upon in the contract.[54] In cases of fraud, it has been annunciated by the court in *Van der Merwe v Meades*[55] that two requirements need to be met in order for an act to be considered fraudulent. Firstly, it must be proven that the seller had knowledge of the defect contained in the merx at the time of the contract's conclusion. Secondly, it must be shown that the seller who had knowledge of the defective merx actively attempted to conceal this defect, with the intention of deceiving the buyer into purchasing the Merx.[56] It was then later reemphasized and confirmed in the case of *Odendaal v Ferraris* [57]that only once these two requirements have been proven can the court declare the action fraudulent. Once it has been proven that the seller has acted fraudulent, he or she may not rely on the application of the Voetstoots clause, as it was confirmed in the case of *Truman v Leonard* [58]that the application of the voetstoots clause is only available to the 'honest' seller.[59]

The second circumstance in which the voetstoots clause will find no application, is when the seller delivers a merx to the buyer, where the merx is materially different to that which was agreed upon in the contract of sale.[60] It was held in the case of *Freddy Hirsch Group*

[52] Glover 287.
[53] Barnard 2012 De Jure 460.
[54] Glover 287.
[55] 1991 (4) All SA 42 (AD).
[56] Glover 288.
[57] 2009 (4) SA 313 (SCA).
[58] 1994 4 All SA 445 (SE).
[59] Barnard 2012 De Jure 464.
[60] Glover 287.

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(Pty) Ltd v Chickenland (Pty) Ltd [61]that this action will amount to non-performance as opposed to defective performance and thus the voetstoots clause finds no application.

The existence of a voetstoots clause within a contract of sale is of great importance. Reason being, that its presence in a contract of sale, results in a situation where the buyer is unable to hold the seller liable for any latent defects found in the Merx. This results in a situation where the buyer is unable to rely on either the aedilitian remedies or the actio empti, effectively having no right of recourse.

2.3. Product liability in terms of the law of Delict

In terms of the common law position, product liability can also be established in terms of the law of Delict. It should be noted that product liability in terms of the law of Delict can be established regardless as to whether there exists a valid contract between the relevant parties, all that is required is the establishment of all elements of a Delict.[62] Thus, in situations where there is no contractual relationship between the consumer and the supplier, the consumer can rely on the law of Delict to establish product liability.[63]The relevant elements as stated above include conduct, fault, wrongfulness, causation, and harm. In order to establish product liability in terms of the law of Delict, it must be proven in a court of law that the supplier (including all parties to the supply chain) have intentionally/negligently as well as wrongfully supplied a defective product to a consumer and that said defective product caused the consumer to suffer harm.[64]

[61] 2011 (4) SA 276 (SCA).
[62] Strydom *A critical analysis of strict product liability in South Africa* (LL.M-Dissertation, University of Pretoria, 2012) 27.
[63] Loubser & Reid 38.
[64]Van Heerden & Barnard "*Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA)."* 2019 THRHR 444 449.

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2.3.1. Conduct

In relation to the element of conduct, in order to satisfy this element, it must be proven that there was some form of an act on behalf of the 'supplier'. Van Heerden & Barnard refer to the statements made by De Jager, wherein De Jager defined 'conduct' as to include the voluntary control and supervision over the design, manufacturing, and distribution of the product.[65] Additionally, stating that releasing the defective product into the consumer market can be viewed as the 'conduct' element being satisfied.[66] This element does not prove to pose any difficulties in being established, as it is generally accepted that the supply of the defective product to the consumer is considered to be the 'act' and or 'conduct' of the liable party.

2.3.2. Harm

In order to successfully establish product liability, the consumer or aggrieved party must prove that he or she had suffered some form of harm. The harm suffered by the party could be that of a patrimonial or non-patrimonial loss. In which case either compensation will be paid to the victim who suffered patrimonial damages or satisfaction to the party who suffered a non-patrimonial loss.[67]This is referred to by academics such Neethling, Potgieter and Visser as the 'compensation function' of the law of Delict.[68] In situations where the defective product results in the death of a breadwinner, then the dependent of that breadwinner will have a claim. It should be noted however, that this claim is limited to a patrimonial or economic loss as the claim for *solatium* for the loss of companionship is not recognized within South Africa's common law.[69]

2.3.3. Causation

[65] Van Heerden & Barnard 2019 THRHR 446.
[66] Van Heerden & Barnard 2019 THRHR 446.
[67] Van Heerden & Barnard 2019 THRHR 449.
[68] Neethling, Potgieter and Visser *Law of Delict* (2015) 1 221.
[69] Loubser & Reid 96.

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To establish product liability in terms of the law of Delict, it is necessary that both factual and legal causation is proven.[70] Reason being is that it is a Delictual rule that liability can only be imposed on those who have 'caused' the specific harm to that of the plaintiff. With regards to factual causation, in order to determine whether the defendant's conduct was the factual cause of the consumers harm, the court implores the 'but for' test.[71] What this test entails is asking the question 'but for the suppliers' actions, would the consumer have suffered harm?'. If the answer is no, then factual causation has been established.[72] In relation to establishing legal causation, it was stated in the case of *S v Mokgethi*[73] that legal causation is established by taking in policy considerations based on reasonableness, fairness and justice into consideration and then determining whether there exists a sufficiently close nexus between the wrongdoer's actions and the resulting harm suffered.[74] Courts have used tests such as the 'direct consequences' and 'reasonable foreseeability' test to determine the proximity of this nexus between the wrongdoers conduct and the resulting harm.[75]

2.3.4. Wrongfulness

An act performed by the supplier, which then causes harm to the consumer, is alone not sufficient to establish Delictual liability. It was found by Neethling that the 'act' conducted by the supplier must be deemed 'wrongful'.[76] Additionally, it was stated in the case of *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [77]that wrongfulness entails an infringement of a legal protected interest, in a manner which is considered legally reprehensible. Whether the interest is legally protected or whether the infringement was made in a legally reprehensible way is determined by public policy considerations or the boni mores of the community.[78] Furthermore, it was confirmed

[70] Van Heerden & Barnard 2019 THRHR 448.
[71] Van Heerden & Barnard 2019 THRHR 448.
[72] Van Heerden & Barnard 2019 THRHR 449.
[73] 1990 (1) SA 32 (A).
[74] Van Heerden & Barnard 2019 THRHR 449.
[75] Van Heerden & Barnard 2019 THRHR 449.
[76] Van Heerden & Barnard 2019 THRHR 447.
[77] 2003 2 All SA 465 (SCA).
[78] Van Heerden & Barnard 2019 THRHR 447.

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in the case of *Ciba-Geigy v Lushof farms*[79] that a manufacturer can be considered to have acted wrongfully (in terms of the legal convictions of the community), if he or she distributed a defective product commercially and that said product caused damage, when being used for its intended use.[80]

2.3.5. Fault

In relation to the element of Fault, primary focus will be placed on negligence rather than intention. Reason being is that it is much easier to establish fault in terms of negligence rather than attempting to prove that the supplier intentionally supplied a defective product. Fault can be established onto almost everybody in the supply chain, but the general rule is that liability will be placed on those who hold 'fault'.[81] To determine whether the wrongdoer acted negligently, an objective standard test is used by our courts, this test is commonly known as the reasonable man test. This test is used by the court in order to determine whether the party in question has acted in accordance with a standard which is legally required of him.[82] The specific reasonable man test was perfectly set out and encapsulated in the case of *Kruger v Coetzee.*[83]

The test entails asking whether a reasonable person in the position of the 'wrongdoer' would have not only foreseen the reasonable possibility that his or her actions would have caused harm to a person, but also whether that reasonable person would have taken reasonable measures to prevent harm from ensuing.[84] The second part of the reasonable man test, is then to reach the conclusion that the wrongdoer has in fact failed to meet the standards of that of the reasonable person (did he foresee and take active steps like a reasonable person in his or her position would have). If the answer to the above-mentioned question is no, then negligence and the element of fault have been

[79] 2002 2 SA 447 (SCA).
[80] Van Heerden & Barnard 2019 THRHR 447-448.
[81] Van Heerden & Barnard 2019 THRHR 447-448.
[82] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 69-70.
[83] 1966 (2) SA 428 (A).
[84] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 71.

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established. It should be noted however, that the burden to prove that the wrongdoer has not acted reasonably, lies with that of the consumer.

2.4. Remedies

If there has been a breach of any type of warranty (ex lege or through agreement) the aggrieved party will at the very least have the aedilitian remedies available to him or her.[85] Additionally, if there has been a fraudulent misrepresentation on part of the seller in relation to the quality of the merx, the aedilitian remedies will also become available. The aedilitian remedies are comprised of the actio rehibitoria as well as the actio quanti minimoris. The actio rehibitoria allows for the aggrieved party to be placed in the position he or she was in prior to the contract's conclusion, this is done in terms of restitution.[86] In cases where the breach of contract is not of a serious nature, the aggrieved party may rely on the actio quanti minimoris, this remedy enables the consumer to claim a proto reduction of the purchase price.[87] It has been generally accepted by our courts, that the pro rata reduction value, is the difference between the purchase price of the Merx which was sold and the actual value of the defective goods supplied.[88]

The remedy known as actio empti, is available to those cases where there has been a breach of an express or tacit warranty, entered into the contract of sale via an agreement between the parties. It should be noted however, that the remedy is further available to those who were victims of a fraudulent misrepresentation. The actio empti allows the consumer to cancel the contract and claim damages for the harm he or she had suffered. It should be noted however, that this remedy is only available to cases where the breach of contract was of a serious nature. Additionally, this remedy can be excluded by the presence of a Voetstoots clause.[89]

[85] R Sharrock Business Transactions Law 8 ed (2011) 297.
[86] Barnard 2012 De Jure 458.
[87] Barnard 2012 De Jure 458.
[88] Barnard 2012 De Jure 458-459.
[89] Barnard 2012 De Jure 458-459.

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In cases where all elements of a Delict have successfully been proven and thus product liability has been established, the aggrieved party may claim damages in terms of the law of Delict for the harm he or she had suffered.[90]

2.5. Conclusion

It is evident when one analyses the common law position that it did cater for product liability cases as well as provide recourse to those who suffered harm, however, the common law position did have some noticeable shortcomings, which is why it did not provide sufficient protection to consumers. With regards to establishing product liability in terms of the contract itself, there are two major concerns. The first is that that only parties to the contract derive specific rights and recourse in cases of a breach of contract. This limits the scope of establishing product liability drastically. In terms of this, an innocent bystander or a person who is not a party to a contract is afforded no rights of recourse in the event that he or she was harmed by the defective product, only the consumer (party to the contract) is afforded these rights. Thus, one of the greatest flaws of establishing product liability in terms of the contract, is its limited application to those who are parties to the contract, this is a result due to the existence of the doctrine of privity of contract. The second shortcoming of establishing product liability in terms of the contract is the existence and presence of a Voetstoots clause. Most contracts of sale today have a Voetstoots clause included within them and as discussed above, the Voetstoots clause serves as a great obstacle in establishing product liability in terms of the contract itself.

Even though the law of Delict does allow for innocent bystanders to establish product liability, the burden placed on the consumer in doing so is just too great. The primary flaw with establishing product liability in terms of the law of Delict is the burden placed on the consumer in proving the element of fault (negligence). Consumers have very little knowledge of a supplier's design and manufacturing process, thus attempting to prove negligence (what the reasonable supplier would do) is extremely difficult. Over and above

[90] Barnard 2012 De Jure 459.

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the difficulty of establishing negligence on the part of the supplier, it is costly to institute legal fees in establishing the elements of a Delict.

In conclusion, the common law did provide for the establishment of product liability in South Africa. This was done either in terms of the contract itself or via Delictual principles. The effectiveness of this was however not sufficient as well as had several fatal flaws. Thus, the climate was set for legislative intervention. This was recognized in the case of *Wagener v Pharmacare Ltd*[91], which will be discussed in the examination of the CPA and its introduction.

[91] 2003 2 All SA 167 (SCA).

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3. Chapter 3: Product liability in terms of the CPA

3.1. Introduction

The introduction of the Consumer Protection Act ("CPA") has been said to have revolutionized the consumer landscape within South Africa, specifically in relation to cases concerned with product liability. The CPA has recognized the importance of protecting consumer rights as well as affording consumers a wider degree of protection as well as affording them several routes of recourse. The introduction of the CPA did not however sporadically occur, it was through judicial deliberation and academic debate that the CPA was enacted. To better understand the operation of the CPA as well as the changes it has introduced within the South African consumer market, it is important for this chapter of the dissertation to critically engage with the introduction of the CPA. This includes an analysis of the legislative shift from the common law position governing product liability to that of the CPA. Several issues surrounding the application of section 61 of the CPA is related to specific principles of interpretation, thus, an in-depth analysis of sections 2 and 3 of the CPA will be provided, as these sections dictate the interpretational rules governing the CPA.

Furthermore, this chapter will critically explore the application of the CPA, as it is captured in terms of section 5 of the CPA. This will include an in-depth elaboration of specific terms and definitions, in order to gain a better understanding of the CPA's application. Moreover, before engaging with the contents of section 61 of the CPA (product liability), this chapter will examine sections 55 and 56 of the CPA, as these two sections are closely linked to the issue of product liability in terms of the CPA. Finally, and most importantly, this chapter will provide a detailed exposition of the contents of section 61 of the CPA. This includes a detailed exposition of each subsection of section 61 as well as a critical look at the changes introduced by section 61 in relation to product liability in South Africa. Finally, I will provide my own opinion on the introduction of the CPA as well as the notable changes introduced into the realm of product liability.

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3.2. The enactment of the CPA

It had become increasingly evident within South African jurisprudence, that the common law did not sufficiently acknowledge consumer rights and thus did not provide sufficient protection to consumers in cases concerning product liability. Leading up to the introduction of the CPA, it was clearly indicative within South Africa's case law that a change was required. As early as 1913 in the case of *Union Government v Sykes*[92], the court indicated that the fault-based liability system was unnecessarily giving consumers unequal treatment. It was then later reemphasized and brought to light in the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging Bpk v Botha and Another*[93], where the court decided to impose strict liability (the proof of the element of fault is not required) on merchant sellers.

In terms of case law, it became increasingly evident that the common law was not offering consumers sufficient protection. Even though in terms of the law of Delict, consumers were able to hold suppliers liable for damage caused by defective goods, the burden placed on consumers in establishing negligence or the element of 'fault' was too great.[94] Especially, in light of the fact that the South African manufacturing process was under an unprecedented modernization, which resulted in suppliers as well as consumers becoming even more distant from the production process and effectively exposing the consumers to more risk of defective goods.[95] The modernization of South Africa's manufacturing and production processes resulted in a situation where consumers were unable to establish the element of fault. The reason for this was either that they did not find the necessary evidence to prove fault or more so, that they did not have access to or understand the new complicated design of the production process and thus could not establish or pinpoint the element of fault.[96] This together with the fact that larger manufacturing companies were adamant about protecting their reputation and thus resolved matters of product liability outside of court, before their company could be

[92] 1913 AD 156.
[93] 1964 (3) SA 561 (A).
[94] Alheit "*Delictual liability arising from the use of defective software: comparative notes on the positions of parties in English law and South African law*" 2006 CILSA 269.
[95] Alheit 2006 CILSA 294.
[96] Alheit 2006 CILSA 295 & 300.

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exposed to unnecessary reputational damage. Additionally, the expensive legal costs of holding these companies liable for product liability acted as a further deterrent for consumers to seek out adequate redress.[97]

South Africa entering into a new constitutional dispensation with the introduction of the Constitution of the Republic of South Africa, 1996 ("Constitution") acted as a further catalyst to introduce a change in establishing product liability in South Africa.[98] The introduction of the Constitution birthed an era in South Africa which placed importance on human rights. The Constitution recognized the importance of human and consumer rights as well as strived to protect these rights. With the introduction of the Constitution, arguments started to surface which held that new public policy considerations or *boni mores* should be developed, with the notions of fairness and justice serving as its basis for development. It was argued that the common law position governing product liability should be developed in conjunction with that of section 39(2) of the Constitution.[99] In relation to this it was argued that the common law surrounding product liability should be developed in such a way as to impose strict liability on manufacturers, thus ensuring that consumers are afforded more protection and are not burdened with the obligation of proving the element of fault on behalf of the manufacturer.[100]

The periodic criticisms laid against the common law position governing product liability, coupled with the problems brought to light in case law as well as the backdrop of the new constitutional dispensation reached a climax in the case of *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd.*[101] The court in this case held that due to a number of complexities posed by the common law position governing product liability, change was required. It was held that strict liability should be imposed on parties in the supply chain (including manufacturers) as opposed to fault-based liability. The court held that this would afford consumers a greater degree of protection as well as make it more practicable

[97] Tennant *Strict product liability in South Africa: An analysis of the concept of "defect" and the statutory defences available to the supply chain* (Thesis for Doctor of Laws, University of Pretoria, 2018) 82-83.
[98] Van Heerden & Barnard "*Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA).*" 2019 THRHR 444 450.
[99] Van Heerden & Barnard 2019 THRHR 450.
[100] Van Heerden & Barnard 2019 THRHR 450.
[101] 2003 (2) All SA 167.

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in establishing product liability.[102] The court however, noted that it was not up to them to implement this change, instead they held that it should be left to the working of the legislature to design and implement a strict product liability regime.[103]

After the court in *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*[104], recognized the pressing need for the implementation of a strict product liability regime, the legislature did exactly this and on the 31st of March 2011, the Consumer Protection Act was enacted. The CPA strived to recognize and give effect to consumer rights, as stated in section 3 of the CPA, its purpose is to advance and promote consumer rights and welfare. However, it should be noted that the common law position which governs product liability still exists. As found in section 2(10) of the CPA, the Act must not be interpreted in such a manner as to exclude the consumer's common law rights, thus the common law position and the rights afforded to consumers, operates parallel to that of the provisions of the CPA.

3.3. <u>The objectives and interpretation of the CPA</u>

The purpose and policy of the CPA plays an important role in the discussion to follow, thus, it is appropriate to give a detailed exposition of the purposes of the CPA. The purposes for which the CPA was enacted, is captured within section 3 of the CPA. In terms of section 3(1) of the CPA, the overarching purpose of the CPA's existence, is to ensure the promotion and advancement of both the social as well as economic welfare of consumers in South Africa. Section 3 of the CPA goes on to list specific mechanisms which will be implored to achieve this overarching purpose. These mechanisms range from establishing a legal framework in which a consumer market which is fair, efficient and for the benefit of consumers is achieved and maintained, to providing consumers with redress which is easily accessible as well as effective. Additionally, section 3(2) of the CPA sets out specific obligations placed on the Commission, in order to ensure that the purposes of this Act as well as the rights afforded in terms of the Act, are realized. These obligations range from the Commission having the responsibility to take reasonable steps

[102] 2003 (2) All SA 167.
[103] Alheit 2006 CILSA 302.
[104] 2003 (2) All SA 167.

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to ensure that the purposes of the Act are promoted as well as consumer interests being protected and advanced, to the Commission being tasked with researching and proposing policies to the Minister. It is evident when one examines the contents of section 3 of the CPA, that the CPA is heavily geared towards helping consumers which are considered to be vulnerable. This serves as evidence to the fact that the legislature has acknowledged both the social as well as economic inequality in South Africa, which they have attempted to reconcile to some extent through the promulgation of the CPA.

The interpretation of the CPA has served as the root cause to numerous academic debates as well as caused much confusion within South Africa's judiciary, thus, the way in which courts interpret the CPA plays a vital role in the discussion to follow. This method of interpretation is provided for in terms of Section 2 of the CPA. In terms of section 2(1) of the CPA, the CPA must be interpreted in such a manner as to give effect to the promotion and advancement of the social as well as economic welfare of consumers in South Africa (section 3 of the CPA). Therefore, by critically examining the wording of section 2(1) of the CPA, it is evident that the CPA must be interpreted in a purpose-method of interpretation, rather than a literal method of interpretation. It has however, been argued by academics such as De Stadler, that even though the CPA has adopted a 'purpose-method' of interpretation, a literal interpretation must be used in cases where the language used in provisions are unclear and/or ambiguous.[105] This purpose-method of interpretation has been expressly emphasized in terms of section 4(3) of the CPA. This section states that when either a court or tribunal is faced with a provision of the CPA which can be interpreted to have multiple meanings, they must interpret the provision in the manner which best accommodates the promotion of the Act's purpose's as well as lead to the improvement of realizing the enjoyment of consumer rights.

Further important sections relating to the discussion which follows, are sections 2(2)(a) and section 2(10) of the CPA. It is stated in terms of section 2(2)(a) of the CPA that when any court or tribunal within the Republic of South Africa, either applies or interprets provisions of the CPA, they may consider foreign or international law. Section 2(10) of the CPA is highly important, as it protects the consumers common law rights. In terms of this

[105] Section 2 in Naudé & Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 2-3 to 2-4.

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section, it is stated that the CPA must be interpreted in such a manner as to not prevent or preclude a consumer from exercising his or her rights afforded in terms of the common law. Therefore, it is held by academics such as Du Plessis, that the CPA must be interpreted in a manner which takes the common law into account, an interpretation which can be reconciled with the existing common law.[106]

In conclusion, the CPA very clearly sets out its purpose as well as the methods which should be implored when interpreting CPA provisions. Although, sections 2 and 3 of the CPA set out the general position regarding the interpretational rules governing the CPA, in practice there has been much controversy regarding these principles. This will be clearly elaborated upon and specifically showcased in the chapter to follow, where a critical case discussion of *Eskom Holdings v Halstead-Cleak*[107] will be used to illustrate these practical interpretational issues.

3.4. Application of the CPA

3.4.1. Definitions

To fully grasp the application of the CPA within South Africa, it is first necessary to define specific terms as captured in terms of section 1 of the CPA. The relevant terms which require expansion are as follows: 'transaction', 'consumer', 'supplier', 'supply-chain', 'ordinary course of business', 'goods', 'service', 'harm' as well as 'defect'. A 'transaction' is defined in terms of section 1 of the CPA as an agreement between persons, wherein one person supplies or potentially supplies goods or services in exchange for consideration (usually a monetary consideration). Additionally, a transaction is defined in such a manner as to include a supply of goods or services at the direction of a consumer in exchange for consideration as well as includes the interaction between parties as captured in terms of section 5(6) of the CPA. The term 'consumer' is broadly defined in terms of section 1 of the CPA. The definition includes any person to whom goods or services are marketed to in the ordinary course of business as well as includes any person

[106] Du Plessis *Re-interpretation of statutes* (2015) 178.
[107] 2017 (1) SA 333 (SCA).

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who has entered into a transaction with a supplier in the ordinary course of business, unless however, that transaction is exempt from application in terms of either section 5(2) or 5(3) of the CPA. Furthermore, 'consumer' is defined in such a way as to include the user, beneficiary and recipient of goods or services, regardless as to whether those persons were parties to the transaction of those goods or services. Moreover, the definition of the term 'consumer' includes a franchisee in terms of a franchise agreement. A supplier is defined in terms of section 1 of the CPA as any person who is in the business of marketing goods or services. In relation to this, a 'supply-chain' is defined in terms of section 1 of the CPA as the collective group of persons who have had a direct or indirect contribution to the ultimate supply of goods or services to the consumer. These parties include but are not limited to a producer, importer, distributor and or retailer.

The CPA is only applicable in situations where parties to the supply chain act in the ordinary course of their business, the definition of this is however not contained within the CPA and thus the South African jurisprudence must be used to elaborate on this concept. In terms of South African case law, it was found in the case of *Griffiths v Janse van Rensburg* and *Gazit Properties v Botha* [108] that an objective test is used by taking an array of surrounding factors into consideration when determining whether a party to the supply chain has acted in the ordinary course of his or her business. Moreover, it has been stated by Van Eeden as well as Barnard, that although the CPA does not provide a definition for the concept of 'ordinary course of business', it should be interpreted in the same manner as it is in terms of section 29 of the Insolvency Act[109].[110]This point was then later confirmed in the case of *Eskom Holdings v Halstead-Cleak,*[111] where the court was of a similar opinion. The court confirmed that an objective test should be implored in order to determine whether the action was made in the ordinary course of business. It was noted in the case of *Doyle v Killeen*[112] that the following factors are taken into consideration when determining whether a party has acted in the ordinary course of business: Firstly, the court considers whether the party's business is registered or not,

[108] 2016 (3) SA 389 (SCA).
[109] 24 of 1936.
[110] Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) LexisNexis 32.
[111] 2017 (1) SA 333 (SCA).
[112] 2014 ZANCT 43.

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secondly the nature of the business is consulted and finally the court looks at whether that business normally sells those specific type of goods and how frequently those goods are sold. If it has been determined that the goods were not sold in the ordinary course of business, then the CPA will not be applicable in that specific circumstance.[113]

'Goods' are defined in terms of the CPA as to include all tangible, intangible, corporeal as well as incorporeal things. Additionally, 'services' are defined in such a way as to include any work done or undertaken to be done for the benefit of another party. This is inclusive of any type of promoting or the offering of services.'Harm' for the purposes of this section is defined in terms of section 61(5) of the CPA. In terms of this section, 'harm' is defined in a manner as to include the following: Any death or injury caused to a natural person, an illness contracted by a natural person, any loss of or physical damaged caused to movable or immovable property and finally 'harm' includes any pure economic loss suffered by the consumer. Finally, a 'defect' is defined in terms of section 53(1)(a) of the CPA. In terms of this definition a 'defect' is any type of material imperfection found in the product or a component of the product, which renders the product less acceptable, useful, practicable or safe than a person would reasonable be entitled to expect from said product. This definition of defect provided for in terms of section 53 of the CPA, correlates with the common law definition of 'latent defect', which was elaborated upon in the case of Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd[114].[115] In relation to the definition of 'defect' as contained in terms of section 53 of the CPA, Barnard provides arguments raised by Loubser and Reid, wherein they state that the consumer's entitled expectation is in direct contradiction to the consumer's actual expectation and that this contrast will result in a regression to the standard of reasonableness.[116] Additionally, Barnard states that Loubser and Reid argue that the entire 'consumer expectation test' should be removed as a whole and replaced with a general standard of reasonableness which is to be assessed in hindsight.[117]

[113] Tennant *Strict product liability in South Africa: An analysis of the concept of "defect" and the statutory defences available to the supply chain* (Thesis for Doctor of Laws, University of Pretoria, 2018) 102.
[114] 1977 3 SA 670 (A) 680.
[115] Barnard 465.
[116] Barnard 465.
[117] Barnard 465.

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Van Eeden, however, opines that the definition of defect in terms of section 53 of the CPA, requires the proof of the material imperfection within the product as well as the proof of what the product would have been like without this imperfection. Moreover, Van Eeden argues that proof of what people would reasonably expect in the circumstances must additionally be provided for. He does, however, give credit to the arguments raised by Loubser and Reid, but believes that the wording of section 53 of the CPA is closely tailored to the wording used in international instruments. Moreover, Van Eeden is of the opinion that the definition of defect contained in section 53 of the CPA introduces a type of modified negligence liability regime.[118]

3.4.2. Application of CPA

The general application of the CPA is applicable to all suppliers who in their ordinary course of business promote or supply consumers with goods or services. This application of the CPA is enshrined within section 5 of the CPA. In terms of section 5(1) the CPA will generally be applicable to every transaction which takes place within the Republic of South Africa, provided the transaction is not specifically excluded by the Act in terms of either section 5(2) or 5(3) and (4). Furthermore, the CPA will be applicable to any promotion of good or services which take place within South Africa, unless however, the promotion of those goods or services have been explicitly exempt by the CPA or the subject matter of those goods and services do not reasonably fit the parameters of a transaction as encapsulated in terms of the Act. Finally, the CPA is applicable to any supply of goods or performance of services in terms of a transaction recognized by the Act, including the goods which are supplied but are exempt, only in so far section 5(5) allows it.

Section 5(2) of the CPA specifically provides situations wherein the CPA will find no application. In terms of section 5(2), the CPA will not be applicable in the situation where goods or services are either supplied or promoted to the State. Moreover, the CPA is not applicable to juristic persons who have an annual turnover more than the amount set by the Minister in terms of section 6 of the CPA. In relation to the Minister, they may also

[118] Van Eeden *A guide to the Consumer Protection Act* (2009) 66 245.

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exempt certain transactions from falling within the ambit of the CPA's application (in terms of subsections (3) and (4)). Finally, the CPA will not be applicable in the following situations: dealings which are considered to be credit agreements in terms of the National Credit Act ("NCA")[119], services provided for in terms of an employment contract and finally transactions which give effect to a collective bargaining agreement do not find application from that of the CPA.

It should be noted that although the CPA specifically sets out which situations are and are not within the scope of its application, in certain circumstances sections 60 and 61 of the CPA will nevertheless be applicable. This is held in terms of section 5(5) of the CPA, which is highly important for the purposes of this dissertation. Section 5(5) of the CPA states that regardless as to whether the transaction in question is exempt from the CPA's application, the parties in the supply chain who are part of that transaction, will still be subject to sections 60 and 61 of the CPA. Therefore, sections 60 and 61 of the CPA are applicable in situations even where the CPA generally should not be applicable in terms of section 5.

3.5. <u>Section 55 and 56 of the CPA</u>

Sections 55 and 56 of the CPA are highly important in relation to the discussion surrounding the regulation of product liability in terms of the CPA. Sections 55 and 56 recognizes the consumers right to goods which are of safe, good quality as well as recognizes the existence of an implied warranty of this quality. Section 55(1) of the CPA starts off by stating that section 55 of the CPA (consumers right to good quality goods) does not apply to goods which are purchased at an auction.[120] The primary rights conferred onto consumers is captured in terms of section 55(2) of the CPA. In terms of this section, consumers have a right to receive goods which hold the following characteristics: Firstly, the goods must be reasonably suitable for the purposes they are intended. Secondly, the goods must be defect free as well as of good quality. Thirdly, the

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[119] 34 of 2005.

[120] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-3.

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goods must be useable as well as durable for a reasonable time, considering normal wear and tear. Finally, consumers have a right to goods which are compliant with the applicable standards as set out in the Standards Act [121]or any other type of prescribing public regulations.[122]

It should be noted however, that the rights conferred onto the consumer as captured in terms of section 55(2) are subject to the exceptions given in terms of section 55(6) of the CPA. In terms of this section, if the consumer has been expressly informed that the goods which he or she had purchased, were being purchased in a specific condition and the consumer has then expressly agreed to that condition or has acted in a way which conveys acceptance, then the consumer loses his or her right to goods which are suitable for their reasonable purpose or goods which are defect free (good quality, section 55(2)(a) & (b)).[123]

Section 55(3) of the CPA confers an additional right to that of consumers. This section states that if a consumer buys a product for a specific purpose (or an intended use) and he or she informs the supplier of this fact, then the consumer has a right to expect to receive a product which is reasonably suitable for the specific purpose he or she had specified.[124] Provided the supplier ordinarily supplies such goods or the supplier has acted in a way which conveys knowledge about the use of those goods. Section 55(4) of the CPA sets out an open list of factors which are taken into consideration when determining whether the goods which have been supplied comply with the requirements set out in section 55(2) and (3).[125] These factors range from the manner in which the goods were marketed to the time when the goods were produced and supplied. Finally, section 55(5) of the CPA is of great importance as it states that whether a defect is one

[121] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-12.
[122] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-12.
[123] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-13.
[124] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-13.
[125] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 55-17.

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which is patent or latent is irrelevant considering the CPA's application.[126] This is important as in terms of the common law position, whether the defect was patent or latent is of relevance as it determined the extent of liability placed on the supplier.[127]

Section 56 of the CPA regulates the implied warranty of quality in transactions concerning the supply of goods and services to consumers. In terms of section 56(1) of the CPA, in any transaction or agreement which deals with the supply of goods or services to a consumer, an implied provision is automatically entered into the agreement, which states that all parties in the supply chain have complied with the standards set out in terms of section 55 of the CPA.[128] Furthermore, it is held in terms of section 56, that the consumer may within 6 months of receiving the goods return the product without occurring any form of penalty.[129] Additionally, if within 6 months of receiving the product it is discovered that the product is one which does not comply with the standards and requirements set out in terms of section 55 of the CPA, then the consumer may request to either have the product repaired, replaced or refunded. Finally, in relation to the implied warranty of quality as captured in terms of section 56 of the CPA, this warranty in terms of section 56(4) exists in conjunction with and in addition to any common law warranty or tacit/express warranty agreed to in terms of the contract.[130]

3.6. Product liability- Section 61 of the CPA

Section 61 of the CPA has seemingly introduced a strict or faultless product liability regime in South Africa. Section 61 of the CPA regulates the product liability imposed as a result of harm caused by defective goods.[131] Section 61(1) states that parties to the

[126] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 55-23.
[127] Loubser and Reid "Section 55" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 55-23.
[128] Loubser and Reid "Section 56" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 56-1 to 3.
[129] Loubser and Reid "Section 56" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 56 – 1 to 3.
[130] Loubser and Reid "Section 56" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 56-18 to 20.
[131] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act"* (2014) Juta p 61-2.

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supply chain (producer, importer, distributor, and retailer) will be held liable for any harm caused (caused as a whole or partially caused) by supplying goods which are considered to be unsafe, supplying goods which contain a defect or hazard within them or supplying goods to consumers without providing the consumer with adequate instructions or warnings as to the possible hazard which might occur during the use of those said goods. Section 61(1) furthermore states, that liability will be imposed on the parties to the supply chain regardless as to whether the harm was caused due to negligence on their part. It is clear when one analysis the wording of this section, that it is not a requirement to prove fault (negligence) in order to establish product liability, thus reenforcing the idea of a faultless liability introduction. In terms of section 61(3), if more than one party in the supply chain is held liable for the harm caused by a defective product, then those parties will be held jointly and severally liable.[132] It should be noted however, that section 61(1) of the CPA is subject to section 61(4), which sets out situations wherein product liability does not arise.

Section 61(4) of the CPA provides parties to the supply chain with possible statutory defenses which can be raised in order to escape liability. The first defense is captured in terms of section 61(4)(a), this section states that product liability cannot be established if the presence of an unsafe characteristic or a defect within the product which then causes 'harm', can be fully attributable to the supplier simply complying with public regulations. Therefore, if the supplier was simply complying with any type of public regulations and this then resulted in the product becoming unsafe as well as causing 'harm', then the supplier may not be held liable. Secondly, if the unsafe characteristic or defect contained in the product did not exist at the time the product was supplied to the person who suffered the harm, then the supplier cannot be held liable. However, if the defective product was the result of the person simply following the instructions of the person who supplied the goods, then the defense will not be applicable. The third defense which can be raised by parties to the supply chain is found in terms of section 61(4)(c). In terms of this section, product liability cannot be established if it would be considered unreasonable for either the distributor or retailer to have discovered the defect within the product at the time of its

[132] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 61-9.

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supply to the consumer, especially taking into consideration the distributor and retailers' role in marketing the goods to the consumer. Finally, product liability cannot be established if the consumer brings a claim for damages more than three years after he or she had suffered the 'harm' as contemplated in terms of section 61(5) of the CPA (prescription).

The CPA in terms of section 61(6) affords the court specific powers in relation to product liability cases. In terms of this section, the court has the power to assess the extent to which the 'harm' has been proven as well as sufficiently mitigated. Secondly, the court has the power to determine the monetary amount of the damages suffered, this is inclusive of pure economic loss. Finally, the court in terms of section 61(6) has the power to adequately apportion the liability and damages amongst parties to the supply chain who have been found to be jointly and severally liable.

3.7. <u>Conclusion</u>

It is evident when one looks at the contents of the CPA, especially in light of the common law regulated past, that much change has been introduced within South Africa's consumer landscape. One of the primary changes introduced by the CPA generally, is the recognition of consumer interests and rights. The CPA has created a legislative framework in which consumers are afforded a greater degree of protection and unscrupulous suppliers are being punished and deterred. The CPA has introduced a structured framework which offers consumers several routes of redress as well as provided detailed provisions which entitle consumers in South Africa to good quality goods as well as a safer and more effective consumer-supplier experience.

The most important and relevant change introduced by the CPA, is the strict product liability regime introduced in terms of section 61 of the CPA. This section has completely removed the onerous burden placed on consumers under the common law, in having to prove negligence on behalf of the supplier. Additionally, the CPA has introduced a wider degree of possible liability, by virtue of the standards which are required to be met in terms of section 55 of the CPA, the implied warranty as captured in section 56 and the

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fact that multiple parties to the supply chain can now be held jointly and severally liable. This detailed and more structured approach as adopted in terms of section 61 of the CPA in my opinion will provide consumers with a greater degree of certainty and comfort in their dealings with suppliers. Additionally, it will deter unscrupulous suppliers in supplying products which are defective.

Although in theory the introduction of the CPA as a whole and especially section 61 seems to be a step in the right direction for consumers in South Africa, In practice however, the CPA and section 61 especially, does not come without its flaws and interpretational problems. These new problems which have surfaced as a result of the introduction of the CPA will be discussed in great detail in the following chapter.

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4. Chapter 4: The applicatory and interpretational concerns regarding Section 61 of the CPA including comments on *Eskom Holdings vs Halstead-Cleak*

4.1. Introduction

The introduction of the Consumer Protection Act ("CPA") has proved to be advantageous in South Africa's consumer realm, by recognizing the importance of consumer rights as well as providing consumers with a broader spectrum of protection. The CPA is, however, not a perfect legislative instrument in practice and has given rise to certain interpretational as well as applicatory problems. This chapter will critically discuss these newly originated issues, specifically those surrounding the CPA's product liability provision found in section 61 of the CPA. In the discussion of these issues, South African jurisprudence will play a pivotal role, specifically the case of *Eskom Holdings v Halstead-Cleak*[133], where the court as well as academic commentaries identified the dangers of certain interpretational misunderstandings.

A critically discussion regarding the ambiguous nature of specific terms such as 'consumer' will be provided, as well as the detrimental results of interpreting 'consumer' in a narrow fashion. Moreover, this chapter will explore the issues which have been brought to light within South African jurisprudence, regarding the application of the statutory defenses found in terms of section 61(4) of the CPA. Focus will be placed on the statutory defense contained in section 61(4)(c), as this introduces an element of 'reasonableness', which has been debated amongst academics to defeat the purposes of the CPA. Finally, I will provide my own opinion and conclusion on the issues highlighted by South African courts as well as South African academics.

[133] 2017 (1) SA 333 (SCA).

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4.2. Eskom Holdings v Halstead-Cleak

The case of *Eskom Holdings v Halstead-Cleak*[134] served as the ignition to the discussions surrounding the possible interpretational and applicatory difficulties faced by section 61 of the CPA. For the purposes of this discussion, it should be noted that only an analysis of the Supreme court of Appeal's judgement will be provided. This case concerns a respondent attempting to hold Eskom liable in terms of section 61 of the CPA (product liability), for harm which they had suffered due to low hanging powerlines which were not supplying nor required to supply electricity to anyone.[135] Eskom specifically raised three defenses or reasons as to why they could not be held liable in terms of section 61 of the CPA. Firstly, they stated that in this instance, they cannot be considered a supplier and/or producer as captured in terms of section 1 of the CPA, thus, the CPA is not applicable. Secondly, they argued that the plaintiff did not fall within the definition of 'consumer' as defined in terms of section 1 and thus cannot rely on the CPA for protection. Finally, Eskom stated that the harm suffered by the plaintiff was not the result of a 'defect' contained within the goods as well as the fact that it would be unreasonable for them to have been expected to have discovered the condition in which the powerlines were.[136]

The court's point of departure in *Eskom Holdings v Halstead-Cleak*[137] was to refer to the interpretational principles set out in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[138] as well as the case of *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[139]. By referring to these two judgements the court reemphasized the fact that when interpreting the CPA, the court must consider the circumstances and context in which the legislature's intention was when the CPA was promulgated. Additionally, the court stated that the CPA must be interpreted in such a manner as to give full effect to the purposes set out in terms of section 3 of the CPA, specifically focusing on the promotion and protection of vulnerable consumers in South Africa.[140] The court went onto

[134] 2017 (1) SA 333 (SCA).
[135] 2017 (1) SA 333 (SCA).
[136] 2017 (1) SA 333 (SCA).
[137] 2017 (1) SA 333 (SCA).
[138] 2012 (4) SA 593 (SCA).
[139] 2015 (4) All SA 417 (SCA).
[140] 2017 (1) SA 333 (SCA).

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elaborate on the CPA's application as captured in terms of section 5. Noting the fact that, sections 61 and 60 of the CPA will be applicable to the relevant transaction regardless as to whether that transaction is exempt in terms of the CPA. Thereafter, the court referred to the definition of 'consumer' and noted that the term 'consumer' was defined in such a manner as to include persons who were not party to the transaction concerning the supply of goods or services. Thus, including parties such as beneficiaries, recipients and or users of the goods. Therefore, emphasizing the fact that the CPA's application extends to parties who are not privy to the transaction or contract at hand. Hereafter, the court reemphasized the fact that the CPA was set out to protect consumers and thus when interpreting the provisions of the CPA, the court must pay attention to the fact that the CPA was designed to protect 'consumers' as it is defined in terms of the CPA.[141]

After having examined the purposes of the CPA, certain core definitions as well as the contents of section 61 of the CPA, the court concluded that in order for product liability to be established in the case at hand, the following would need to be established. Firstly, it had to be established that the plaintiff in his or her capacity as a consumer (as defined in terms of section 1) had suffered harm and that Eskom could be categorized as a producer of electricity. Additionally, it must be proven that the harm which the plaintiff had suffered, was as a result (fully or partially) of Eskom supplying the plaintiff with defective or unsafe electricity, in the ordinary course of their business, in exchange for some type of consideration.[142]

The supreme court of appeal held, that product liability in terms of section 61 of the CPA could not be established in the case at hand. The court's primary justification was that the plaintiff could not be considered a 'consumer' and thus could not rely on the CPA to establish product liability on Eskom.[143] The court's reasoning as to why the plaintiff could not be considered a consumer in terms of the CPA was two-fold: Firstly, the court held that the plaintiff did not enter into any type of transaction with Eskom, in Eskom's ordinary course of business as a supplier and/or producer of electricity. Secondly, the court stated that although the plaintiff had suffered harm, he was not utilizing, a recipient of or a

[141] 2017 (1) SA 333 (SCA).
[142] 2017 (1) SA 333 (SCA).
[143] 2017 (1) SA 333 (SCA).

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beneficiary of the electricity when he suffered the harm. From the above, the court held that the plaintiff was not a consumer as defined in terms of the CPA. Therefore, due to the lack of a consumer-supplier relationship in the current situation, the court made the judgement that the plaintiff could not rely on section 61 of the CPA for protection, as it fell outside the scope and ambit of the Act's application.[144]

4.3. Academic commentaries on the application of section 61

Considering the rights afforded in terms of the CPA, as well as analyzing specific defining terms and CPA provisions, it is evident that certain requirements need to be met for the CPA to be appliable. Generally, in very broad terms, for the CPA to be applicable the following requirements must first be met. Firstly, the claim, which is being instituted in terms of the CPA, must be made after the CPA has come into operation (April 2011). Secondly, the person instituting the claim must fall within the definition of a 'consumer' as defined in terms of the CPA. Furthermore, the person against whom the claim is lodged, must fall within the definition of a type of 'supplier' or party to the supply chain as defined in terms of section 1. Finally, for the CPA to be applicable, the claim must be in relation to either the 'promotion' or 'supply' of 'goods' or 'services' (as defined in the Act) in the supplier's 'ordinary course of business'.[145] In relation to the above-mentioned, it is assumed that if the person who is instituting the claim does not fall within the CPA's definition of consumer, then the CPA will not be applicable. Moreover, if one of the above-mentioned aspects of the CPA's application is not present, then it can be accepted that the CPA is not applicable in the situation at hand.[146]

There has been much debate surrounding the application of the above-mentioned requirements in cases regarding section 61 of the CPA (product liability). The primary question of concern is whether all the above-mentioned requirements first need to be complied with, for section 61 to offer its protection to consumers. Academics as well as

[144] 2017 (1) SA 333 (SCA).
[145] Van Heerden & Barnard "*Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA).*" 2019 THRHR 444 459.
[146] Van Heerden & Barnard 2019 THRHR 459.

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courts have taken opposing views to the above-mentioned question. It effectively boils down to a problem of varying interpretations of the CPA's application and differentiating interpretations of the provisions and terms contained within the CPA. The debate and conclusion are highly important however, as determining whether the CPA has a narrow application or a broad one, effectively determines the effectiveness of the CPA.

The first argument which supports the idea that the legislature intended for section 61 to have a broad scope of application rather than one which is narrow, is merely the existence of section 5(5) of the CPA. It is evident when one examines the contents of this section as well as the surrounding circumstances of its promulgation, that the legislature placed great importance on cases of product liability. The first reason is by virtue of the fact that section 61 of the CPA took effect on an earlier date than that of the rest of the CPA, which is testament to the fact that section 61 of the CPA was at the very least considered more important than other provisions of the CPA.[147] Additionally, it is held in terms of section 5 of the CPA, that sections 60 and 61 of the CPA will be applicable in transactions which are exempt in terms of section 5 of the CPA. Thus, reemphasizing the importance of section 61 being available and applicable to persons in South Africa. Furthermore, the wording of section 61 expressly provides for the fact that the entire supply chain can possibly be held liable, thus emphasizing the broad net of liability cast by section 61 of the CPA. In conclusion it can be argued that the wording of section 5 of the CPA is indicative to the fact that it was the legislatures intention for section 61 of the CPA to specifically have a broadened scope of application.[148]

Barnard and Van Heerden are of the opinion, that to interpret section 61 of the CPA in such a way as to only be applicable to 'consumers' as defined in terms of section 1 of the CPA, will have two detrimental consequences.[149] Firstly, they state that this interpretation will result in a negation of the fact that the Delictual position regarding product liability serves to protect innocent bystanders, it enables persons who are not parties to the contract ('consumers') a chance to achieve redress if they are victims to a defective

[147] Van Heerden & Barnard 2019 THRHR 460.
[148] Van Heerden & Barnard 2019 THRHR 460.
[149] Van Heerden & Barnard 2019 THRHR 460.

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product which causes them harm.[150] Secondly, this interpretation will result in a situation where the seemingly greater degree of protection afforded to persons in sections 61, section 5(5) and 5(8) is non-existent and in practice has a narrower scope of protection than that which is afforded to persons in terms of Delictual principles captured in terms of the South African common law.[151] In terms of South Africa's Delictual principles governing product liability, 'any person' who had suffered harm by way of a defective product would have some form of redress awarded to them (provided they can establish all elements of a Delict). However, if one interprets section 61 in such a manner as to only be available to 'consumers', then innocent bystanders and/or third parties receive no protection from section 61 of the CPA. Hence, this method of interpretation being criticized, for in practice affording persons less protection than the historical common law position.[152] If the method of interpretation used in the case of *Eskom Holdings vs Holstead-cleak*[153] sets the precedent, it will result in a situation where third parties who have suffered harm because of a defective product, not receiving protection in terms of the CPA. Rather, these victims will be left to turn back to the Delictual principles in terms of the common law, which includes satisfying the onerous obligation of proving fault on behalf of the 'supplier', which is highly unlikely.[154]

It has been argued that by reading section 2 of the CPA in conjunction with the objectives set out in terms of section 3 of the CPA, that one could warrant a broad interpretation of 'consumer'. An interpretation which provides innocent bystanders with the appropriate redress captured in terms of section 61 of the CPA. As stated above, one of the primary objectives of the CPA, is to protect and advance vulnerable groups of persons. An argument can be made that innocent third parties who do not fall within the narrow definition of 'consumer', can be categorized as a 'vulnerable group' of persons, as these people are disadvantaged by the onerous obligation of having to prove fault in terms of the law of Delict. Therefore, if they are viewed as a vulnerable group of persons, a broader interpretation of consumer should be warranted as it is one of the CPA's primary

[150] Van Heerden & Barnard 2019 THRHR 460.
[151] Van Heerden & Barnard 2019 THRHR 460.
[152] Van Heerden & Barnard 2019 THRHR 460.
[153] 2017 (1) SA 333 (SCA).
[154] Van Heerden & Barnard 2019 THRHR 461.

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objectives to protect these vulnerable groups of persons. The same argument could be made for the fact that one of the CPA's primary objectives as captured in terms of section 3 of the CPA, is to create an efficient and effective system of redress. Therefore, it can be argued that an effective and efficient system of redress is one which warrants a broad interpretation of the term 'consumer'. However, the problem with this argument is that section 3 of the CPA explicitly makes mention to the term 'consumer' as it is narrowly captured and defined in terms of section 1 of the CPA.[155]

The rights and principles captured in terms of the Constitution of the Republic of South Africa, 1996 ("Constitution")[156] can be used as a further argument to justify a broad interpretation and application of CPA terms and provisions, specifically that of 'consumer'.[157] It can be argued that by limiting the scope of section 61's application to that of only 'consumers', infringes on innocent bystanders (parties who do not fall within the narrow definition of 'consumer') right to equality as captured in terms of section 9 of the Constitution.[158] This argument states that it can be considered unfair or viewed as unequal treatment for parties who are not privy to the contract as well as innocent bystanders, as these parties do not receive the protection of section 61 of the CPA as they do not fall within the narrow definition of 'consumer' as defined in terms of section 1 of the CPA.[159] Rather, they are left with the onerous obligation of proving fault (negligence) in terms of the law of Delict. Whereas parties who are not privy to the contract but do fall within the definition of 'consumer' (recipients, beneficiaries and users), can enjoy the protection and strict product liability regime introduced in terms of section 61 of the CPA.[160] A further Constitutional argument can be made for the infringement of section 34 of the Constitution. Section 34 of the Constitution affords all people in South Africa the right to access to courts/justice.[161] An argument can be made that by virtue of the fact that innocent bystanders are required to rely on the onerous obligations of establishing fault in terms of the law of Delict (which is highly unlikely), they thus in fact

[155] Van Heerden & Barnard 2019 THRHR 461.
[156] Constitution of the Republic of South Africa, 1996.
[157] Van Heerden & Barnard 2019 THRHR 463.
[158] Constitution of the Republic of South Africa, 1996.
[159] Van Heerden & Barnard 2019 THRHR 463.
[160] Van Heerden & Barnard 2019 THRHR 463.
[161] Constitution of the Republic of South Africa, 1996.

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receive no form of redress (justice) for the harm which they had suffered.[162] It is argued that these groups of persons are prejudiced as they do not receive the faultless or wide degree of protection and liability afforded in terms of the CPA (section 61).[163]

It is evident that there are clear inconsistencies and ambiguities within the wording used in certain provisions of the CPA, which have a detrimental impact in the application of the CPA as well as poses specific interpretational concerns. Loubser and Reid have identified one of the primary inconsistencies within the wording of section 61 of the CPA. Specifically, the legislatures inconsistency in referring to 'consumer' in one subsection of section 61 (section 61(1)(c) and section 61 (2)) and then referring to a 'natural person' (section 61(5)(a) and section 61(5)(b)).[164] This inconsistency clearly has an applicatory impact on section 61, as it is unclear as to whether section 61 of the CPA applies only to 'consumers' or to all 'natural persons'.

Due to the above-mentioned as well as other reasons, Loubser and Reid hold the following opinion on the application of the CPA as well as the judgement delivered in the case of *Eskom holdings vs Halstead-Cleak*[165]. Loubser and Reid disagree with the supreme court of appeals judgement in the case of *Eskom holdings vs Halstead-Cleak*[166]. Specifically, they are of the opinion that it was not the legislature's Intention for such an outcome to be reached. Loubser and Reid are of the opinion that when one analyses the contents of section 53 of the CPA, specifically the definition of 'defect', that innocent bystanders are not unanimously excluded from the application of the CPA. They argue that in light of the extended application provided for in terms of section 5(5) read together with section 5(1)(d) of the CPA, that it was the legislatures intention for section 61 of the CPA to be applicable to all persons (including innocent bystanders) who have suffered harm as a result of a defective product.[167] Furthermore, they argue that due to the inconsistency and ambiguity contained within the wording of section 61, a purpose

[162] Van Heerden & Barnard 2019 THRHR 463.
[163] Van Heerden & Barnard 2019 THRHR 463.
[164] Van Heerden & Barnard 2019 THRHR 464.
[165] 2017 (1) SA 333 (SCA).
[166] 2017 (1) SA 333 (SCA).
[167] Van Heerden & Barnard 2019 THRHR 463-464.

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method of interpretation should be warranted.[168] In doing so, they argue that by virtue of the fact that one of the overarching purposes of the CPA is to protect vulnerable consumers, it can be argued that these 'innocent bystanders' fall within this category of persons (vulnerable consumers). Thus, being entitled to the protection afforded in terms of section 61 of the CPA.[169] In conclusion, Loubser and Reid argue that the CPA should be interpreted via a purpose-method of interpretation and in doing so, the definition of 'consumer' should be extended as to accommodate innocent bystanders who have suffered harm because of a defective product.[170]

Kriek takes a stricter approach to the interpretation of the CPA. Kriek is of the opinion that the ambiguity and inconsistencies present in the wording of section 61 can be resolved by interpreting section 61 as to be applicable to users, recipients and or beneficiaries of the goods and services (regardless as to whether they were not privy to the transaction/contract).[171] Additionally, Kriek notes that the Consumer Protection Bill made no reference to innocent bystanders in the definition of 'consumer' and thus argues that if it were the legislatures intention to included innocent bystanders in the definition of 'consumer' , they would have expressly referred to these groups of persons in the definition of 'consumer'.[172] Therefore, Kriek is of the opinion that section 61 of the CPA is only applicable to those expressly made mention to in the definition of 'consumer' and therefore, section 61's application is not extended to innocent bystanders who were not privy to the contract.[173] Kriek, does however criticize the fact that it would have been in the interests of legal certainty for the legislature to not only have made express mention to 'innocent bystanders' in the definition of 'consumer', but also to have been more

[168] Van Heerden & Barnard 2019 THRHR 464.
[169] Van Heerden & Barnard 2019 THRHR 463-464.
[170] Van Heerden & Barnard 2019 THRHR 464.
[171] Van Heerden & Barnard 2019 THRHR 464.
[172] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 324.
[173] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 325-326.

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consistent in the use of the legislature's wording of 'persons' and 'consumers' in section 61 of the CPA.[174]

Professors Neethling and Potgieter hold a similar opinion to that of Kriek. They argue that the entire purpose behind the enactment of the CPA was to protect 'consumers' in South Africa. They thus believe that section 61 of the CPA should only be available to those parties specifically made mention to in the definition of 'consumer', as captured in terms of section 1 of the CPA. Therefore, innocent bystanders who do not fall within the categories referred to in the definition of 'consumer' (users, beneficiaries, or recipients), must rely on the common law Delictual principles to gain some form of redress and/or protection.[175]

4.4. Statutory defenses - Academic commentaries on section 61(4)(c) of the CPA

Section 61(4) of the CPA provides parties to the supply chain with certain statutory defenses, which can be utilized to escape product liability. Although it is evident that parties to the supply chain now have a formal legal framework of defense and thus enjoy a more established method of protection, there has been much controversy and academic debate which has arisen in the application of these statutory defenses. Specifically, the statutory defense provided for in terms of section 61(4)(c) of the CPA. It should be noted that only a detailed discussion regarding the operation of the defense contained in section 61(4)(c) will be provided, as this statutory defense has served as the root cause to much academic debate and has had an evident impact on the workings of the strict product liability regime introduced in terms of section 61 of the CPA. Moreover, it should be noted that although many academics draw parallels between the defense captured in terms of section 61(4)(c) and that of the 'development risk defense' found in the European Union

[174] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 324.
[175] Neethling & Potgieter *Law of Delict* (2010) 374.

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Directive on Product Liability 1985 [176]and the United Kingdom Consumer Protection Act of 1987[177], this will not be a topic which is discussed in the following section.

As a point of departure, it should firstly be noted that the defense captured in terms of section 61(4)(c) has a limited scope of application, this defense is only available to retailers and distributors of goods. This section states, that if it is considered to be 'unreasonable' for either the retailer or distributor of a product, to have discovered an unsafe characteristic or defect contained in the product, then that said retailer or distributor cannot be held liable in terms of section 61 of the CPA. Furthermore, it is emphasized in terms of section 61(4)(c) of the CPA, that the role of both the distributor and retailer in the supply chain, is a factor which must be taken into account when applying this statutory defense. The crux of the matter at hand is the term 'unreasonable'. This term is indicative of the fact that the defense ultimately introduces an element of reasonableness, which similarly to that of the position found in terms of the law of Delict, requires the establishment of fault (negligence at the very least).[178]

The element of 'reasonableness' serves as the primary point of concern to many South African academics. Many academics are of the opinion that by introducing an element of reasonableness, not only undermines the entire purpose of introducing a strict product liability regime (faultless liability), but it also dilutes the current strict product liability regime introduced in terms of section 61 of the CPA.[179] Loubser and Reid argue, that by allowing distributors and retailers the opportunity to defend themselves by proving that they were not at fault, ultimately undermines the entire strict product liability which section 61 is striving to achieve.[180] Loubser and Reid perfectly summarizes the issue at hand, by stating that section 61(4)(c) "reintroduces negligence through the backdoor".[181] It is

[176] Council Directive 85/374/EEC of 25 July 1985.
[177] Consumer Protection Act 1987.
[178] Botha and Joubert "*Does the Consumer Protection Act 68 of 2008 provide for strict product liability? - A comparative analysis*" 2011 THRHR 305 318.
[179] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 61-11.
[180] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 61-11.
[181] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 61-11.

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argued that by applying the 'reasonableness test' in determining whether retailers and distributors were negligent in discovering a defect, ultimately regresses the product liability system closer to that of the Aquilian liability (fault-based) system.[182] Botha and Joubert are of a similar opinion to that of Loubser and Reid. They argue that the overall purpose of section 61 of the CPA is to hold all parties to the supply chain strictly liable, by reintroducing negligence in terms of section 61(4)(c), not only is the entire purpose of section 61 undermined but it will lead to a situation where only manufacturers and importers are held strictly liable, which can be viewed as unfair.[183]

Gowar is of the opinion that the defense captured in terms of section 61(4)(c) of the CPA, seems to place consumers in a worse position than what they would have been in under the common law liability system.[184] Gowar argues that in order to circumvent the reintroduction of a fault-based liability system, courts should implore a purpose method of interpretation.[185] Gowar states that the CPA should be interpreted in a manner which acknowledges the fact that the CPA was promulgated to protect consumers in South Africa and thus should be interpreted to benefit the consumer.[186] Thus, Gowar states that the strict product liability regime should be the preferred method of application, as this method best captures the aims and objectives of the CPA.[187] Additionally, Gowar believes that the defense captured in terms of section 61(4)(c) should be applied with caution, in order to avoid situations wherein consumers have no form of redress available to them.[188]

Zinta Strydom refers to arguments raised by Davidow, in which Davidow argues that section 61(4)(c) of the CPA defeats the purpose and intention behind the promulgation of section 61 (strict product liability).[189] Additionally, she states that the intention behind the Department of Trade in suggesting strict liability, was so that all parties to the supply chain

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[182] Loubser and Reid "Section 61" in Naudé and Eiselen (eds) "*Commentary on the Consumer Protection Act*" (2014) Juta p 61-11.
[183] Botha and Joubert 2011 THRHR 318.
[184] Gowar "*Product liability: a changing playing field*?" 2011 Obiter 521 535-536.
[185] Gowar 2011 Obiter 535-536.
[186] Gowar 2011 Obiter 535-536.
[187] Gowar 2011 Obiter 535-536.
[188] Gowar 2011 Obiter 535-536.
[189] Strydom *A critical analysis of strict product liability in South Africa (LLM-Dissertation, University of Pretoria,2012)* 111-112.

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could possibly be held liable. Moreover, she states that the introduction of strict liability was to achieve a greater degree of accountability and responsibility on parties to the supply chain, this is however negated by the fact that strict liability is technically not possible in the case of distributors and retailers, due to the existence of section 61(4)(c).[190] Finally, Zinta refers to Davidow's argument that the primary point of concern with section 61 of the CPA and specifically section 61(4)(c) of the CPA, is that it is ultimately a negligence enquiry. Therefore, giving parties to the supply chain (distributors and retailers) an unjustifiable escape route as well as defeating the purpose and intention behind establishment of strict liability.[191]

4.5. Conclusion

Considering South Africa's devastating past, the CPA is a highly important and necessary legislative instrument within South Africa. The recognition of consumer rights as well as striving to protect and promote vulnerable groups of persons, serves as an integral cog in correcting South Africa's past misfortunes (Apartheid). With regards to the strict product liability regime introduced in terms of section 61 of the CPA, it is evident that a provision such as this was needed within South Africa's consumer realm. Especially, in light of the fact that the past common law position governing product liability did not effectively hold suppliers accountable due to the onerous obligation placed on consumers to prove the element of fault. Thus, in general, the introduction of strict liability in terms of section 61 is in my opinion a step in the right direction. It will not only provide consumers with an effective form of redress but also hold suppliers to a higher standard of accountability.

In relation to the SCA's judgement in the case of *Eskom Holdings v Halstead-Cleak* [192] as well as their adoption of a narrow definition of 'consumer', I am in full disagreement. I believe that by interpreting the term 'consumer' as to not include innocent bystanders who are also not privy to the contract, can prove to be a detrimental slippery slope. It could

[190] Strydom *A critical analysis of strict product liability in South Africa (LLM-Dissertation, University of Pretoria,2012)* 111-112.
[191] Strydom *A critical analysis of strict product liability in South Africa (LLM-Dissertation, University of Pretoria,2012)* 111-112.
[192] 2017 (1) SA 333 (SCA).

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possibly result in a situation where innocent parties suffer harm and are required to prove the onerous obligation of fault, in order to have a claim in terms of the law of Delict, which is highly unlikely. Thus, it could result in a situation wherein persons receive no protection and no effective forms of redress. Moreover, I am an advocate for the Constitutional arguments raised by academics. I believe that by not allowing this category of persons the protection afforded in terms of the CPA, unfairly infringes on their rights to equality as well as their right to justice. In my opinion, in light of the fact that the CPA strives to protect consumers in South Africa, specifically vulnerable groups of persons, having a broad definition of 'consumer' can only prove to be beneficial. By not allowing innocent third parties the protection afforded in terms of the CPA, can be viewed as a regression in consumer protection, as the common law position effectively afforded 'consumers' more protection. Therefore, in order for the CPA to achieve its full applicatory potential, a broad interpretation of 'consumer' should be warranted, as it will only result in suppliers being held to a higher degree of accountability as well as a broader array of persons ('consumers') enjoying the protection afforded in terms of the CPA.

In my opinion, the defense captured in terms of section 61(4)(c) of the CPA, has several problematic qualities. Most notably, is the introduction of the 'reasonableness' element. In my opinion, not only does this element cause a regression to the common law position governing product liability (having to prove 'fault'), but it also completely defeats the purpose and policies underlying the introduction of strict liability, as captured in terms of section 61 and 3 of the CPA. Moreover, I believe that this defense will be abused by unscrupulous distributors and/or retailers, giving them an unreasonable method of escaping product liability. In my opinion, the defenses afforded to parties in the supply chain in terms of section 61(4), is a necessity. However, I do believe that the specific defense captured in terms of section 61(4)(c) should be reworked in such a manner as to not regress the strict product liability regime back to that of a fault-based liability system.

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5. Chapter 5: The Australian position governing Product Liability

5.1. Introduction

The Australian position governing product liability is one which can be considered as a hybrid system of laws, comprising of both the Australian common law as well as several legislative instruments, most notably the sections within the Australian Consumer Law ("ACL") found within schedule 2 of the Competition and Consumer Act of 2010[193]. There are many similarities between the position governing product liability in Australia and that of the position captured in terms of the Consumer Protection Act ("CPA") and South African common law. The Australian position governing product liability has much like that of the South African position, recently changed from that of a fault-based liability system to one where the proof of negligence is not required (strict liability system). Although there are many similarities between the two systems of product liability, there also exists important differences. This chapter will primarily focus on the differences between the two product liability systems, to identify and then possibly use some solutions and remedies drawn from the Australian position, for the betterment of South Africa's product liability system.

Therefore, it should be noted that expanding upon Australia's entire product liability regime is not feasible, as doing so will form a dissertation in its own right. Instead, focus will be placed on the extent of the ACL's application as well as the statutory defense available to manufacturers, commonly referred to as the 'risk development defense'. As identified in the previous chapter, these two topics regarding product liability have proved to be practically burdensome within South Africa and thus by consulting the Australian position regarding these topics, this chapter will be able to identify possible solutions and recommendations, to resolve the problems faced within South Africa's consumer realm. Thus, an in-depth analysis of both the risk development defense as well as the application (specifically, regarding possible claimants) of the ACL will be provided. Thereafter, I will provide an opinion on the topic at hand, specifically focusing on the possible

[193] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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recommendations and solutions which can be drawn from the Australian position, to possibly improve the practicality of South Africa's position governing product liability.

5.2. Introduction to Australia's Product Liability Regime

Australia has a very comprehensive legislative framework of laws which govern product liability and product safety in general. The primary and most notable legislative instrument which governs product liability in Australia, is captured within schedule 2 of the Competition and Consumer Act 1972[194], known as the Australian Consumer Law ("ACL"). This position much like that of the position in South Africa, originated from the Australian common law as well as the Trade Practices Act 51 of 1974 [195]("TPA"). In terms of the Australian common law, product liability could be established in terms of the law of contract (breach of contract) or the law of torts (Delicts).[196] Additionally, however, prior to the ACL as it is known today, the TPA prescribed rules which governed product liability as well. Therefore, before the ACL came into effect, there existed multiple sources of law which governed the position regarding product liability and consumer regulations in general. It should be noted however, that the ACL is verbatim that of the TPA and thus, any case law which dealt with provisions of the TPA will still prove to be relevant. It was only in 2011 when the ACL as it is captured today came into effect.[197] This piece of legislation replaced the rules stipulated within the TPA and became the single national law which governed consumer related topics. The ACL is applicable to all the states and territories in Australia and each state and/or territory has promulgated legislation to put the ACL into effect.[198] Product liability in Australia today, is regulated by Parts 3-5 of the ACL, which allows people to hold manufacturers strictly liable for supplying defective products which have caused people to suffer a loss.[199]

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[194] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[195] 51 of 1974.
[196] Bianco Modern *Trends in Products Liability* (Masters-Dissertation, University of South Africa, 2002) 143.
[197] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 221.
[198] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[199] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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Although, product liability in Australia is regulated in terms of the ACL, the previous common law is still provided for in terms of section 131C of the ACL.[200] In terms of this section, consumers are still able to bring a claim against the manufacturer or supplier in terms of the common law (Contracts or Torts) as opposed to bringing a product liability claim in terms of ACL provisions. Thus, section 131C of the ACL preserves consumer's common law rights and much like the position in South Africa, allows for the common law to exist and operate parallel to that of the legislative position.[201] However, similar to that of the position in South Africa, majority of persons elect to bring a claim in terms of the ACL as opposed to bringing a claim in terms of the law of Torts. The reason being the insurmountable burden placed on victims to establish fault (negligence) on behalf of the manufacturer/supplier.[202] However, the option to bring the claim in terms of the Australian common law is still available, one of the primary reasons as to why persons might elect to bring a claim in terms of the common law as opposed to the ACL, is that there exists more restrictions on the amount of damages which can be claimed in terms of the ACL than that of the common law position.[203]

Before, critically exploring the provisions which govern product liability as captured in terms of sections 138 to 141 of the ACL, it is highly important to expand upon the definition of a 'safety defect', as this concept serves as the crux to product liability claims in Australia. A 'safety defect' is defined in terms of section 9(1) of the ACL, as products which are not as safe as persons are generally entitled to expect them to be.[204] Thus, if a person is entitled to expect that a product is not as safe as it should be, that said product is said to contain a 'safety defect'. Section 9(2) of the ACL, however, sets out relevant circumstances which must be taken into account in the determining the extent of the good's safety. These circumstances range from the manner and purposes for which the product was marketed to the time at which the manufacturer supplied the product to them.[205] It should be noted however, that the list of circumstances found in terms of

[200] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[201] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[202] Hughes "*Thinking Product Liability in Australia*" 2004 ELRS (31) 18.
[203] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 222.
[204] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[205] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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section 9(2) of the ACL is not a closed list, as the products nature and the community's knowledge of the product also serve as safety factors taken into consideration.[206] Before, continuing it should be noted that for the purposes of this dissertation, a 'safety defect' and a 'defective product' are interchangeable and refer to the same thing.

5.3. <u>The Australian Product Liability Regime - Scope of Application</u>

The general application of the ACL extends to all states and territories in Australia.[207] With regards to claims of product liability, the ACL sets out specific sections which cater for a variety of different 'losses' which the claimant could possibly suffer. Section 138 of the ACL caters for 'injured individuals' who have suffered harm as a result of a defective product (defective product refers to goods which contain a safety defect within them).[208] Section 139 of the ACL caters for individuals who are not 'injured individuals', but rather persons other than 'injured individuals' who have suffered harm because of a defective product.[209] Finally, sections 140 and 141 of the ACL, caters for persons who have not personally suffered harm to their person, but rather their moveable and immovable property has suffered harm as a result of a defective product.[210] In terms of chapter 1 of the ACL, a 'consumer' is defined as any person who purchases a product or service valued at less than $40000. Additionally, 'consumer' is defined in such a manner as to also include persons who purchase a product or services for a value higher than $40000, but this product or service must be one which is ordinarily used or consumed within personal, domestic, or household capacity.[211] Although a detailed definition of 'consumer' is provided for in terms of the ACL, it is however irrelevant for the discussion regarding the strict product liability regime captured in terms of part 3-5 of the ACL. The reason as to why it is irrelevant with regards to product liability, is due to the fact that the provisions which cater for product liability within the ACL, expressly state that either 'injured

[206] Explanatory Memorandum to the TPAB (1991) at par 21.
[207] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[208] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[209] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[210] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[211] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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individual's' and/or 'persons other than injured individual's' may institute product liability claims. Therefore, expressly making no reference to consumers instituting product liability claims, rendering the term irrelevant.[212]

From the above, a conclusion can be drawn that the provisions concerned with product liability within the ACL are not limited to persons who fall within the definition of 'consumer'. Instead, these provisions find a broad application, as they are available to any persons who are considered to be injured individuals as well as persons other than injured individuals, effectively extending the product liability provisions to innocent bystanders who have suffered harm as a result of a defective product.[213] Moreover, the term 'individual' is broad enough as to include persons who are dependents of breadwinners who has suffered harm as a result of a defective product as well as persons who simply used the product and did not partake in the transaction of the product (innocent third parties).[214] Additionally, it should be noted that there exists a type of safety net for possible claimants, captured in terms of section 149 of the ACL. This section enables claimants who are unable to institute a claim themselves, to rely on the Australian Competition and Consumer Commission (the regulatory body which enforces the ACL) to institute the claim on their behalf. This section states that an injured person may upon written consent to the Australian Competition and Consumer Commission, enable the Commission to commence a product liability claim on their behalf.[215]

Section 138 of the ACL caters for injured individuals who have suffered harm as a result of a defective product. This section states that a manufacturer of goods can be held liable if it is shown that, firstly, the manufacturer supplied the goods within his or her trade or commerce. Secondly, that the goods which they had supplied did in fact contain a safety defect and finally, that the 'individual' had suffered harm (an injury) as a result of the safety defect.[216] It should be noted that the legislature intentionally used the term 'individual' as opposed to 'persons', to indicate that this provision is restricted to natural persons.[217]

[212] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[213] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[214] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[215] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[216] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[217] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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Additionally, it has been pointed out by academics such as Coorey, that not only manufacturers who have directly supplied products to individuals will be held liable, instead manufactures can also be held liable if they had supplied products to suppliers who then re-supplied the product to individuals.[218]

Section 139 of the ACL provides persons other than injured individuals, with the right to hold manufacturers liable who have supplied defective products which have caused them to suffer harm.[219] This section states that a manufacturer will be held liable for compensation, if the following factors are present: Firstly, the manufacturer has supplied the product within his or her trade or commerce. Secondly, the product which they had supplied contains a safety defect within it. Thirdly, as a result of the safety defect, a person other than the individual who had suffered personal injury, suffers harm. The harm which the person suffers can be due to another person suffering an injury or death. Finally, it should be noted that the loss which the person suffers cannot come about as a result of an existing business or professional relationship between the individual suffering personal injury or death and that of the person.[220] Thus, persons who suffer a loss due to the injury or death of a business partner are not included in the protection afforded in terms of section 139 of the ACL. Instead, it has been showcased in case law, specifically, the case of *Stegenda v J Corp Pty Ltd*[221], which deals with section 139's former counterpart (Section 75AE of the TPA), that this section is specifically aimed at protecting persons who are dependent on individuals who have been injured or killed.[222]

The ACL further caters for persons whose movable as well as immovable property has been destroyed or damaged as a result of a safety defect contained within the product they were supplied. This liability can be established in terms of section 140 and 141 of the ACL, respectively. Section 140 of the ACL states that a person may claim from a manufacturer, provided the following can be proven: Firstly, it must be established that the manufacturer had supplied the product within his or her trade or commerce. Secondly,

[218] Coorey *Australian Consumer Law* (2015) 594.
[219] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[220] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[221] 1999 ATPR 41-695.
[222] 1999 ATPR 41-695.

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the goods which they had supplied, contains a safety defect within it. Thirdly, due to this safety defect, the persons other personal, domestic, or household goods are destroyed or damaged. Fourthly, the persons goods which were destroyed or damaged must have been used or consumed or intended to be used or consumed. Finally, it must be shown that as a result of his or her goods being destroyed or damage, the person had suffered a loss.[223] It should be noted however, that this section is not limited to only 'consumer goods' but instead all goods in general, except those goods used for business purposes.[224]

Section 141 of the ACL caters for persons whose immovable property (land, buildings and or fixtures) has been damaged or destroyed because of a safety defect. The requirements which need to be satisfied are the same as those in terms of section 140. The only difference is however that section 141 only protects those person's whose property which is used for private use is destroyed or damaged.[225] Therefore, reemphasizing the fact that section 141 of the ACL is not applicable in situations where immovable property which is used for non-private purposes is destroyed or damaged.

It should be noted that the ACL differentiates between actions brought against the manufacturer for supplying a product which contains a safety defect and a manufacturer which supplies a product which does not comply with specific consumer guarantees. The abovementioned sections, namely: sections 138,139,140 and 141 of the ACL caters for injured individuals and persons other than injured individuals who have been personally injured or killed or their respective movable and immovable property has been destroyed or damaged as a result of a manufacturer supplying them with a product which contains a safety defect within it.[226] In relation to manufactures which supply products which do not contain a safety defect within it, but instead a product which does not comply with consumer guarantees, the ACL caters for persons who are considered 'affected

[223] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[224] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[225] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[226] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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persons'.[227] It should be noted however, that the term 'affected persons' is broad enough as to include innocent third parties who are also not privy to the contract in question.[228]

Moreover, the ACL differentiates between product liability actions brought against the manufacturers of products and the suppliers of products who do not comply with consumer guarantees.[229] As stated above, any affect person may bring a claim against the manufacturer of a product which has not complied with consumer guarantees. However, with regards to bringing an action against a supplier who has supplied a product which does not comply with specific consumer guarantees, one needs to turn to section 259 of the ACL.[230] This section states that a 'consumer' may hold a supplier liable if that said supplier had supplied the 'consumer' with a product which does not comply with specific consumer guarantees.[231] To hold the supplier liable, they must have supplied the product within their ordinary trade or commerce. The ACL defines 'supply' as to include the sale, exchange, lease, or higher purchase of a product.[232] In terms of the wording of section 259 of the ACL, it is evident that only 'consumers' as defined in terms of the ACL, may hold suppliers liable for supplying products to them which do not comply with the implied consumer guarantees. Thus, actions against suppliers for the non-compliance with consumer guarantees is restricted to those persons who fit the definition of consumer as defined within the ACL.[233]

In conclusion, it is evident that the ACL provides for a variety of different situations in relation to claims relating to defective products. As found above, the ACL provides for injured individuals as well as persons other than injured individuals, to hold manufacturers liable for supplying products which contain a safety defect within them. Furthermore, the ACL provides for affected persons in relation to goods, to be able to hold manufacturers liable for supplying a product which does not comply with implied consumer guarantees. Finally, the ACL caters for consumers specifically, in respect to holding suppliers liable

[227] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[228] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[229] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[230] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[231] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[232] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[233] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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for supplying products which do not comply with the implied consumer guarantees. From this, it can be concluded that the ACL affords a broad array of persons with the necessary redress, protection, and rights, in relation to cases of product liability. These persons range from the actual consumer to that of an innocent third party who is also not privy to the transaction.

5.4. The development risk defense vs section 61(4)(c) of the CPA

Similar to that of the statutory defense found in terms of section 61(4)(c) of the CPA, the ACL affords manufacturers with the 'development risk defense'.[234] This statutory defense can be found in terms of section 142(c) of the ACL and provides for the following: A person who has suffered some form of a loss as a result of a defective product, cannot hold the manufacturer liable, if the manufacturer can prove that the defect contained within the product could not have been discovered due to the non-existent state of technical or scientific knowledge which was required for the manufacturer to discover the defect at the time of the product's supply.[235] Basically, this defense states that if the manufacturer can prove that he or she did not possess the necessary scientific or technical knowledge at the time he or she supplied the defective goods, then they may not be held liable. This defense stems directly from the defense captured in terms of Article 7(e) of the EU Product Liability directive[236]; however, the Australian statutory defense proves to be less burdensome on the manufacturer. This is due to the fact that according to the defense captured in terms of the EU Directive, the manufacturer would have to prove a lack of both scientific and technical knowledge, whereas in terms of the ACL, the manufacturer would only have to prove a lack of either technical or scientific knowledge.[237]

Section 147(1) of the ACL provides possible claimants who do not know the identity of the manufacturer of the defective goods, the opportunity to ascertain this information via a written notice to each supplier known by the claimant.[238] Additionally, it is then held in

[234] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[235] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[236] Art 7(e) of the Directive 85/374/EEC.
[237] Art 7(e) of the Directive 85/374/EEC.
[238] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').

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terms of section 147(2) of the ACL, that if upon 30 days after these suppliers have received these written notices and the claimant still does not know the identity of the defective good's manufacturer, then it will be deemed that all suppliers who received a written notice and failed to respond to the notice, are to be deemed the manufacturers for the purposes of the claimants claim.[239] This is important for the discussion at hand as it is further stated in terms of section 147(2), that this deeming provision will not be applicable in instances where the statutory defense captured in terms of section 142(c) (risk development defense) is utilized.[240] Therefore, it can be concluded that the defense captured in terms of section 142(c) of the ACL is only available to the actual manufacturers of the product, as the suppliers will not be deemed to be the manufacturers if the risk development defense is being relied upon.[241]

Similarly to that of the defense found in terms of section 61(4)(c) of the CPA, the development risk defense captured in terms of section 142(c) of the ACL is shrouded in controversy and the topic of much academic debate.[242] Many concerns relating to the risk development defense are centered around whether it re-introduces an element of fault in the form of negligence as well as being concerned with identifying exactly as to what, how and by whom the state of technical and/or scientific knowledge should be established.[243] It was held in the case of *European Commission v United Kingdom*[244] that there exists three important components of this defense and that by elaborating upon these components, some of the above-mentioned concerns may be resolved. The first component relates to the scientific knowledge at the time the defect was undiscoverable.[245] The court's opinion in the above-mentioned case is that one needs to look at the "most advanced level of research which has been carried out at any given

[239] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[240] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[241] Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law').
[242] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 212-213.
[243] Stapleton "*Restatement (Third) of Torts: Product Liability: An Anglo-Australian Perspective in International Torts: A Comparative Study"* 2000 WLJ 383.
[244] 1997 3 CMLR 923.
[245] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 215.

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time"[246] rather than looking at the majority view of the scientific community. The justification for the court's opinion was that scientific knowledge is volatile and subject to much debate, conflict, and doubt, therefore, most of the scientific community's view is constantly changing and thus not an effective indicator to establish the scientific knowledge at the time of the defect's discovery.[247]

The second component relates to the accessibility of the scientific or technical knowledge. It is stated that, it does not matter as to whether the relevant necessary technical or scientific knowledge existed at the time of the products supply, what is relevant is whether the manufacturer had access to this information or not. The court in the case of *European Commission v United Kingdom* [248]held that, reasonable interpretation is required in relation to the accessibility of the technical and scientific knowledge, with specific regards being paid to the opportunities for this knowledge to rotate to the manufacturer.[249]

The third and final component relates to the 'discoverability' of the defect in the product being supplied.[250] This component of the defense has proved to be the most debated topic amongst academics and courts. The debate boils down to whether a narrow interpretational or reasonable interpretational approach should be adopted when dealing with the discoverability of the defect. The court in of *European Commission v United Kingdom* [251] clearly set out the defense in basic terminology, they stated that it would have to be proven that it would be impossible for the manufacturer to believe that the product was defective, given the "most advanced scientific and technical knowledge objectively and reasonably obtainable and available" to him or her.[252] From the above-mentioned description of the risk development defense, there are two interpretational

[246] 1997 3 CMLR 923.
[247] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 215 – 216.
[248] 1997 3 CMLR 923
[249] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 216.
[250] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 216.
[251] 1997 3 CMLR 923
[252] 1997 3 CMLR 923, 935.

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approaches one can adopt, namely: the reasonable approach or the narrow approach.[253] The narrow approach takes the stance that if the relevant technical or scientific knowledge merely exists in the world, then the defense cannot be relied upon. Thus, by virtue of the relevant knowledge's existences, the defense is excluded.[254] The reasonable approach is not as strict as the narrow approach and affords manufacturers with a greater degree of leniency in the defense's application. The reasonable approach introduces an element of reasonableness and achieves this by applying a reasonable man (manufacturer) test. The approach simply entails asking whether a reasonable manufacturer in the given circumstance would have discovered the defect or not, given the state of technical and scientific knowledge accessible to him or her. If the answer is yes, then the manufacturer may not rely on the defense.[255] Although the above-mentioned components were set out by the European Court of Justice, they still prove relevant to the risk development defense as captured in terms of section 142(c) of the ACL. With regards to the approach adopted by Australian jurisprudence, there is no explicit reasoning for it, but it has been indicated that the reasonable approach is adopted by Australian courts.[256]

There have been very few cases which have dealt with the application of the risk development defense in Australia. Two noteworthy cases wherein which the defense was considered include: *Peterson v Merck Sharpe & Dohme Pty Ltd ("Peterson")* [257]and *Ryan v Great Lakes Council ("Ryan")*[258]. It should be noted that both cases were appealed in the cases of *Merck Sharpe and Dohme Pty Ltd v Peterson* [259]and *Graham Barclay Oysters Pty Ltd v Ryan*[260] respectively, wherein the appeal courts delivered additional commentary on the risk development defense. The first case which arose out of the series

[253] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 216 – 217.
[254] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 216.
[255] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 217.
[256] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 217.
[257] 2013 FCA 447.
[258] 1999 FCA 177.
[259] 2011 284 ALR 1.
[260] 2000 177 ALR 18.

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of cases named above was that of *Ryan v Great Lakes Council* [261]and the subsequent appeal case of *Graham Barclay Oysters Pty Ltd v Ryan*[262]. The most notable findings from this case, was the statements made by the court in the appeal case of *Graham Barclay Oysters Pty Ltd v Ryan*[263]. The court held that the scientific and technical knowledge referred to in terms of the defense, must be ascertained in terms of an objective test rather than one which is subjectively based on the knowledge of the manufacturer. Therefore, one must look at the objective scientific knowledge or technical knowledge of the manufacturer as opposed to the actual knowledge which the manufacturer had at the time of the product's supply (subjective).[264] Moreover, the court held that the time at which this technical or scientific knowledge must be assessed, must be at the time at which the goods were supplied by the manufacturer in question.[265]Moreover, this case is important as it sets the precedent for recognizing the risk development defense application in cases relating to manufacturing defects. With regards to the *Peterson*[266] case, the court held that the risk development defense should not consider the contextual circumstances in which the product exists (presentation of the product or its reasonably intended use) but instead, should focus on contemplating the existence of a defect which is capable of being discovered, given the current state of scientific and technical knowledge.[267]

Doubts regarding the strict liability nature of Australia's product liability regime has arisen within a few cases dealing with the risk development defense. Notably, it was stated within the case of *ACCC v Glendale*[268]that goods will be considered to have a safety defect regardless as to whether the manufacturer was aware of the defect, as long as the state of scientific and technical knowledge at the time enabled the manufacturer to discover the defect. However, the court in the same case held that the relevant product liability

[261] 1999 FCA 177.
[262] 2000 177 ALR 18.
[263] 2000 177 ALR 18.
[264] Coorey 603.
[265] Coorey 603.
[266] 2010 ALR 266.
[267] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 214.
[268] 1998 40 IPR 619.

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provisions will not be applicable if the scientific and technical knowledge at the time was of such a nature as to not enable the manufacturer/supplier to discover the defect.[269]

It is evident within the few cases dealing with the risk development defense, that the nature of the strict product liability provisions captured within the ACL are in direct conflict with the nature of the risk development defense. As stated previously, the risk development defense does in fact introduce an element of reasonableness, in the manner of whether a reasonable manufacturer at the time of the defective product's supply, would have discovered the defect given the state of scientific or technical knowledge. This reasonable element captured within the defense raises similar difficulties as the defense captured within section 61(4)(c) of the CPA, which is ultimately whether the defense introduces a fault based (negligence) liability system through the backdoor. Additionally, it raises the important question as to whether the nature of the risk development defense can be reconciled to operate within the strict liability regime created by the relevant ACL product liability provisions.

It should be noted however, that there is a tremendous lack of jurisprudence concerning the operation of the risk development defense within Australia. Which seems to be indicative of the fact that the defense has very little practical impact within Australia's consumer realm.[270] Moreover, this lack of case law results in a situation wherein the practical inner workings of the defense are yet to be elaborated upon and/or commented upon, which renders the defense to some degree practically irrelevant until further pretendant is set.

5.5. Conclusion

In conclusion, the position which governs product liability in Australia is one which can be categorized as a highly effective and comprehensive legal framework of rules and regulations. In my opinion, the ACL has clearly and explicitly catered for a large variety of

[269] 1998 40 IPR 619.

[270] Tsui *A critical analysis of Pharmaceutical Manufactures' Product Liability claims under the Australian Consumer Law: Interpretation, Operation and Reform* (LLD-Thesis, Queensland University of Technology, 2016) 283.

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persons, which is evident by virtue of the wording captured in terms of sections 138 to 141 of the ACL. Unlike that of the position in South Africa, there is very little ambiguity surrounding the application of the product liability provisions found within the ACL. Instead, the ACL clearly sets out which provisions of product liability regime cater for which group of persons, which the Australian legislature has done consistently. It is evident that the ACL's product liability provisions apply to a wide variety of persons. This spectrum of application ranges from the 'consumer' as it is narrowly defined, to the innocent third party 'dependent', who had suffered harm as a result of a defective product. As basic as the idea might be, in my opinion, the most important thing which can be drawn from the ACL's applicatory position, is the clarity at which the Australian legislature has set out each provision's application. They have very clearly and expressly set out the ACL's specific application, which leaves no room for any type of disputes relating to the possible ambiguous nature of the ACL's application. Additionally, a further important factor which can be drawn from their position is the broad net of application which the ACL product liability provision's cast, the application extends to such a degree as to accommodate for all types of possible claimants.

With regards to the risk development defense, it is clear that the defense as it is captured within the Australian context holds similar complexities and difficulties as that of the defense captured within section 61(4)(c) of the CPA. It, however, does take on a different application and perspective, specifically relating to the requirements of showcasing a lack technical and scientific knowledge. However, it simply boils down to an objective reasonable manufacturer test, which is very much similar to the defense within the South African context. Moreover, more Australian jurisprudence concerning the risk development defense is required, to fully elaborate upon its practical impact within Australia's consumer realm. Therefore, in relation to the risk development defense, I believe that there are more similarities than differences between the defense captured within section 61(4)(c) of the CPA and the risk development defense, thus, more precedent and commentary is required in order to make a more comprehensive juxtaposition between the two defenses.

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6. Chapter 6: Conclusions and Recommendations

6.1. Conclusion

Before sufficiently addressing this dissertation's overarching aim, which is determining the effectiveness of the product liability regime as it is captured within the South African context today (section 61 of the CPA), it is first necessary to highlight the important points which have been raised throughout this research paper as well as address the subsidiary research questions.

6.1.1. First research question

The first research question of this dissertation was to determine the position which governed product liability in South Africa, prior to the introduction of the CPA. This question was accurately answered in chapter two of this paper. The following notable points should be re-emphasized in relation to this question: Firstly, that prior to the introduction of the CPA, product liability was established in terms of the common law. Specifically, in terms of the law of Delict or in terms of contractual principles.[271] In terms of the law of Delict, all elements of a Delict must first be proven in order to establish product liability. In terms of contractual principles, product liability can be established within the contract itself, or by way of breach or misrepresentation within the contract's context. Furthermore, it has been highlighted within chapters 2 and 3, that the shift to a stricter product liability regime as captured in terms of the CPA was completely justified. The primary justification was the insurmountable burden faced by consumers in establishing the element of fault in their respective product liability claims. It has been made evident, that as a result of the difficulties faced by consumers in proving the element of fault, that the prior existing product liability position was not effective. Jurisprudential debates coupled with the new Constitutional dispensation edged the South African legislature forward in eventually promulgating the CPA, specifically provisions contained within the CPA to cater for the mentioned common law shortfalls. It should be noted however, that the common law position still does exist within South Africa and does

[271] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LL. D-Dissertation, Stellenbosch University, 2017) 36.

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operate in conjunction with and parallel to the provisions of the CPA. Therefore, consumers within South Africa may still enjoy their common law rights as well as common law routes of redress.

6.1.2. Second Research question

The second research question of this dissertation is to determine what the current position governing product liability is in South Africa, with specific reference to the CPA and some notable interpretational concerns highlighted by South African academics as well as the South African judiciary. This question has been sufficiently answered within chapters 3 and 4 of this research paper. Some notable points raised within these chapter's include the following: Firstly, it should be reemphasized that the introduction of the CPA served as a tremendous positive step in the field of consumer law in South Africa. Its explicit spirit and purpose, showcase the recognition of and importance of consumer rights in South Africa. Additionally, its overarching purpose being to protect vulnerable people as well as historically disadvantaged people, is especially positive when placed against the backdrop of South Africa's devastating past. With regards to the specific provisions of the CPA, it is evident that the legislature had promulgated a highly comprehensible legislative framework, in which consumers in South Africa enjoy a wider degree of consumer related rights as well as are afforded a wider degree of protection and pool of redress. In relation to the provisions which cater specifically for product liability cases in South Africa, it is evident that the insurmountable burden of establishing the element of fault (negligence) has now been resolved, with the introduction of 'strict' product liability as captured in terms of section 61 of the CPA.

The new product liability regime does not require consumers to prove the element of fault on behalf of the supplier, which not only makes establishing product liability easier for the consumer, but additionally deters unscrupulous suppliers as they are now held to a higher degree of accountability. The legislature in my opinion, has successfully encapsulated the position on product liability in South Africa. The position, defenses and forms of redress have clearly been laid out within the CPA, making it more comprehendible and legally certain within South Africa. From a theoretical standpoint, the CPA as a whole and specifically those provisions which cater for product liability in South Africa, is effective.

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The practicality of the application of this legislative framework has however, proved to be a newly originated obstacle in the way of establishing a successful product liability claim. Specifically, this dissertation has highlighted two primary practical concerns or obstacles in the way of a successful product liability claim. The first, has clearly been shown to be a point of concern within South African jurisprudence. Specifically, it has been highlighted within the case of *Eskom holdings v Halstead-Cleak*[272], that a court's narrow interpretation of the term 'consumer', can have a highly detrimental impact on not only the application of the strict product liability regime, but also a negative impact on the consumer landscape within South Africa as a whole. Although, it was the South African judiciary which narrowly interpreted the term 'consumer', it is still the fault of the legislature for using wording within the CPA which can be argued to be ambiguous in nature and therefore capable of being interpreted in a multitude of ways. If a narrow interpretation of 'consumer' is utilized, then only persons who meet this strict definition of 'consumer' are afforded the protection of section 61 of the CPA. This can prove to be extremely dangerous, especially in situations where innocent third-party bystanders, who are also not privy to the contract, fall victim to a defective product. It results in a situation wherein they are unable to seek redress in terms of section 61 and should thus attempt to establish a product liability claim within the law of Delict. Which has been previously showcased to hold very little weight, as attempting to prove the element of fault (negligence) on behalf of the supplier is viewed as an insurmountable burden/obstacle. Ultimately, the result will be a situation wherein a victim of a defective product has no real rights of recourse against the supplier. It can be argued however, that if courts do in fact interpret section 61 as being applicable to 'consumers' in the broad sense of the word (including innocent bystanders), then section 61 will be highly effective and efficient.

The second, most notable obstacle which has arisen as a result of the newly introduced product liability regime, is the defense captured in terms of section 61(4)(c) of the CPA (known as the risk development defense in Australia). In general, the defenses afforded to parties in the supply chain in terms of section 61(4), is in my opinion a positive aspect of the CPA. A balance needs to be struck between vulnerable consumers and parties to

[272] 2017 (1) SA 333 (SCA).

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the supply chain who also have an interest in the matter at hand. Parties to the supply chain are deserving of protection. The CPA has successfully provided them with this protection, by affording them with possible defenses in order to escape being unfairly/unjustly held accountable for product liability. The specific defense captured within section 61(4)(c) has however, in my opinion gone a step too far. It has re-introduced an element of reasonableness (negligence) within the product liability regime, which the legislature has explicitly tried to remove with the promulgation of section 61 of the CPA. I concur with notable academics, in believing that this defense has possibly re-introduced the element of fault through the backdoor. If this defense is successfully implemented, then parties are left with the same insurmountable obstacle in front of them, which is the common law requirement of establishing negligence.

Both practical concerns which have been highlighted within this research paper results in the same situation. The situation is that consumers are left with practically no protection and no routes of redress when victimized by a party to the supply chain. The answer to its effectiveness, is simply more complex than a yes or no answer. On the one hand, section 61 of the CPA is highly effective for those who meet the judicial interpretational scrutiny of the term ‘consumer’, as well as where the defense captured within section 61(4)(c) is not relied upon. On the other however, if the defense is utilized or courts do in fact interpret consumer in such a way as to exclude the application of section 61, then it is evidently not effective as it is not applicable. An additional factor which has complicated the determination of effectiveness, is the fact that there is very little judicial precedent on the matter at hand.

Taking into account all of the above-mentioned conclusions, I am of the opinion that from a theoretical standpoint, the newly introduced product liability regime is effective. Practically however, there are some evident concerns and obstacles which first need to be addressed and resolved, for it to be fully effective. It is, however, very effective in certain specific situations (if the victim is a consumer in the narrow sense of the word), therefore, my conclusion is that it is unclear at present whether the product liability regime is effective or not. Additional judicial deliberation, judgements and academic debate are

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required in order to fully deliver a decisive yes or no answer to the overarching research question of this research paper.

6.2. Recommendations

6.2.1. Third Research Question

The final research question of this dissertation is to determine the Australian position on product liability and how the Australian position can possibly be used to alleviate some of the evident concerns relating to South Africa's position governing product liability. Additionally, the Australian position is to be used as a comparative element in this dissertation, to juxtapose against the South African position, to aid as a further factor in determining the effectiveness of South Africa's current product liability regime. The answer to this final research question can be found in chapters 5 and 6 of this dissertation.

Firstly, it should be noted that the recommendations which will be made, are drawn from the position on product liability in Australia as well as contains my opinion, made in light of the practical flaws contained within the South African position governing product liability. The Australian position governing product liability is comprised of elements found within the Australian common law and primarily the ACL. There exists both notable similarities and differences between the Australian position governing product liability and that of the South African position. These similarities and notable differences can be found within chapter 5 of this research paper. The differences between the two positions will be used to extrapolate possible recommendations, in an attempt to reconcile the evident defects captured within the South African position.

The first and primary recommendation, is for the South African legislature to reword section 61 of the CPA or to explicitly provide courts with the method as to how the provision's application should be interpreted. Specifically, when reference is made to the term 'consumer'. In my opinion, doing this will eliminate the ambiguity surrounding the application of the CPA and specifically the application of section 61 of the CPA (product liability). Moreover, by rewording or using more consistent and concise language, the

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legislature can prevent the judiciary from interpreting the CPA in such a manner as to give rise to certain practical absurdities. Specifically, the court's interpretation of the term 'consumer'. Additionally, a further recommendation which can be drawn from the Australian position governing product liability, is the broad definition given to the term 'consumer'. I would recommend that the definition of consumer is explicitly broadened as to include a variety of persons, the reason being is to avoid a situation wherein innocent parties fall victim to a defective product and are left with no formal protection, as they do not fall within the explicit narrow definition of a 'consumer'. Alternatively, the legislature can explicitly in writing state the manner in which courts should interpret the term 'consumer' (in a broad fashion).

With regards to the defense captured within section 61(4)(c) of the CPA, my recommendation is to remove the reasonable element from the provision entirely. This is evidently easier said than done, but the idea is that instead of determining whether the retailer's or distributor's discovery was reasonable or not, the courts could possibly make this determination by looking at a wide range of factors. Rather than implementing a reasonable man test, the determination could be left solely to the discretion of the courts. It could be argued that this is possibly an unrealistic recommendation; a more realistic recommendation would be to remove the defense entirely. As I'm of the opinion that the other defenses captured within section 61(4) of the CPA are more than sufficient to provide parties to the supply chain with an effective pool of defense.

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