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**PRODUCT LIABILITY: THE COMMON LAW AND THE CONSUMER PROTECTION
ACT 68 OF 2008**

By

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DECLARATION

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2. I declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SUMMARY

The main purpose of this dissertation is to discuss the influence of the Consumer Protection Act 68 of 2008 (“CPA” or “the Act”) on product liability in South Africa whilst taking into account the common law position which finds application in situations where the CPA does not apply. Under the South African common law, the only recourse available to consumers who suffer harm or sustain an injury as a result of a defective product, is a claim under the law of contract or the law of delict. Claims under both the law of contract and law of delict unfortunately have its shortcomings, most notably the consumer under the law of contract has to prove that a breach of warranty occurred and that a contractual nexus existed between the parties. Whereas under the law of delict the consumer is required to prove fault on the part of the supplier of the defective goods, which in most cases proved to be a difficult or impossible task and as a result the consumer is left without any effective recourse. The court in *Wagener v Pharmicare* was also not prepared to impose strict product liability on the producer but left it to the legislature to do so.

The legislature answered the call with the enactment of section 61 of the CPA, which has introduced a so-called strict product liability regime for harm caused by defective goods. Section 61 of the CPA states that the producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or as a consequence of supplying any unsafe goods a product failure defect or hazard in any goods or the inadequate instructions or warning provided to the consumer pertaining to any hazard arising from or associated with the use of any goods irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. Many academics have applauded the CPA in this respect. However, the defences available to a supplier in terms of the CPA have led to some criticism.

Section 2(2) of the CPA also provides that foreign and international law may be incorporated when interpreting and applying the CPA and as section 61 of the CPA shares similarities with the European Directive on Product Liability of 1985 (“EU Directive”), it is accordingly useful to consider the application and interpretation thereof.

The final conclusion drawn from this dissertation, is that the CPA makes provision for a modified strict product liability regime and could in more than one instance be regarded as defective in itself. It is however contented that the CPA is a step in the right direction and future interpretations by our courts of section 61 are welcomed.

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND TO STUDY

Basson¹ remarks that the twenty first century holds the prospect of products of increasing technological sophistication appearing in the world market. By referring to “technological sophisticated products”, reference is specifically made to products such as electronic commerce and workflow management being increasingly utilised through the Internet with South Africans exposed thereto in their capacities as consumers.² Since the late 1950’s, the complexity of industrial society had resulted in mass production, with limited contact by the distributor or retailer with the production process or any quality control executed pertaining to the goods. The legal protection available to consumers in this regard was being questioned at that stage as the retailer or distributor was seen as nothing more than conduit pipes in the production of goods and the consumer found it difficult to claim damages caused by the defective goods, simply because fault was not always present in the production process.³

Prior to the enactment of the Consumer Protection Act 68 of 2008 (herein after the “CPA” or “the Act”) product liability claims could be found in the South African common law either under the law of contract or the law of delict. Section 2(10) of the CPA also provides that no provision of the Act must be interpreted to exclude any right which the consumer may have under the common law. The question of whether the CPA and the common law apply in conjunction with each other and whether the common law could be disregarded in circumstances when the Act is applicable, will be briefly discussed. It is noted that for interpretation purposes, the ‘buyer of defective goods’ as referred to in our common law ,will be referred to as the ‘consumer’ under the CPA.

As mentioned above, the South African common law provides for different manners in which liability may arise which, amongst others, includes a breach of contract or from delict. A claim under the law of contract requires, amongst others, a breach of the contractual relationship between the parties, and if no such contractual link exists, the consumer could still claim damages under the law of delict. One of the challenges in a product liability claim for damages on the basis of delict is that the consumer who suffered damages would, as a minimum, have to prove negligence on the part of the producer.⁴ It is however difficult to prove negligence where the product is complex and the consumer does not have access to the know-how and the workplace of the producer.⁵

¹ Basson (2001) *SAIIE* 85.

² *Ibid.*

³ Davis (1979) *CILSA* 206.

⁴ ‘Producer’ for the purpose of this dissertation will be used interchangeably with the term ‘manufacturer’.

⁵ Glover 195.

The need for a strict product liability regime in South Africa through legislation, as proposed in *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*⁶, was heeded by the legislature with the enactment of the CPA, and specifically by introducing the burden of liability through section 61 of the CPA as national legislation.

The CPA was implemented in two phases, the first phase is known as the “early effective date”⁷ and the second phase as the “general effective date”.⁸ It is noted that the sections of the CPA which relate to product liability have been in operation since the early effective date whereas the majority of the provisions only came into operation on the general effective date. This in itself already highlights the importance and the need for product liability provisions in the CPA.

At first glance however it seems that the CPA has changed the South African product liability regime from fault- based product liability to strict product liability as negligence is no longer an element to be successful with a product liability claim under section 61 of the CPA. Loubser & Reid rightfully so remark that it’s imperative that the legislative strict product liability regime should however remain consistent with our existing common law framework as far as possible.⁹

Part H of Chapter 2 of the Act is also relevant to product liability claims since it deals with the consumer’s fundamental right to fair value, good quality and safety. Part H of the CPA provides for rules and remedies pertaining to defective goods, amending common law rights and remedies of consumers significantly.¹⁰

1.2 RESEARCH PURPOSE

The main purpose of this dissertation is to discuss the influence of the CPA on product liability in South Africa whilst taking into account the common law position which finds application in situations where the CPA does not apply. The strict liability regime introduced by the CPA clearly followed the EU Directive as guiding document when section 61 of the CPA was drafted and given the fact that it has been in operation since 1985. The EU

⁶ 2003 2 ALL SA 167 (SCA).

⁷ In terms of Schedule 2, Item 2(1) of the Act, Chapters 1 and 5, section 120 and any other provision authorising the Minister to make regulations, and this Schedule, take effect on the date that is one year after the date on which this Act was signed by the President i.e. 24 April 2009.

⁸ In terms of Schedule 2, Item 2(2) of the Act, any provision of the Act not contemplated in item 2(1) of Schedule 2 takes effect on the date that is 18 months after the date on which the Act was signed by the President i.e. 31 March 2011.

⁹ Loubser & Reid (2006) *Stell LR* 417.

¹⁰ S55 of the CPA contemplates that the manufacturer has a general duty to provide safe and quality goods whereas section 56 introduces an implied or *ex lege* warranty of quality. See chapter 3 of this dissertation for a more comprehensive discussion.

Directive and relevant court cases are also discussed and analysed to address potential problems in the South African position and also has to provide guidance when interpreting the CPA.

To summarise, the purpose of this dissertation is therefore to consider:

- The common law position with regard to product liability where the CPA is not applicable;
- The influence of the CPA on the relevant common law principles with regard to product liability; and
- A comparative study of the EU Directive in an attempt to address potential problems and complexities introduced by the CPA with regards to product liability.

1.3 METHODOLOGY

This dissertation involves an examination of literature from primary sources such as legislation and case law as well as secondary sources such as books, journals and legal publications. The study is primarily an analysis of the relevant South African literature and legislation. A brief comparative study of the provisions of the EU Directive has been undertaken in an attempt to address possible problems in the South African product liability position.

1.4 SUMMARY OF PRELIMINARY CHAPTERS

Chapter 1: Introduction

This chapter consists of an introduction of the dissertation, the research purpose and the proposed delineation of the dissertation. It begins by providing background regarding the research purpose as well as a brief summary of the literature and research related to this aim. The introduction narrows the focus of the study and provides a brief rationale for why this particular topic was chosen.

Chapter 2: The position where the Consumer Protection Act 68 of 2008 is not applicable (common law position)

This chapter sets out the common law position with regards to product liability. The law of contract and the common law of sale, where the seller of the goods is strictly liable to the buyer for any latent defect in the goods, is discussed in this chapter. The framework of delictual liability, where no contractual relationship between the parties exist, is also focussed on in this chapter. This chapter also focusses on relevant case law relating to product liability.

Chapter 3: The position in terms of the Consumer Protection Act 68 of 2008

One of the most significant changes which has been introduced by the CPA in the context of product liability was section 61 where some form of strict product liability was introduced. An overview of the CPA with regards to product liability is given in this chapter, taking into account the purpose and application of the Act and looking at relevant definitions as well as the circumstances in which the Act will apply. Part H of Chapter 2 of the CPA will also be discussed as this deals with the consumer's fundamental right to fair value, good quality and safety which are central to product liability claims.

Chapter 4: Comparative position in terms of the EU Product Liability Directive

Section 2(2)(a) of the CPA provides that foreign and international law is to be considered when interpreting the CPA. It is noted that the product liability framework introduced by the CPA appears to closely follow the EU Directive. The EU Directive introduced a strict liability framework for member states just before the turn of the twenty first century. It is for this reason that a comparative study is undertaken in this chapter to establish the European position relating to product liability and to identify solutions where any ambiguities and/or loopholes identified in the CPA can be filled.

Chapter 5: Conclusion and recommendations

This chapter contains a summary of the South African common law position with regards to product liability as well as the influence of the CPA on our common law. It is also established in this chapter that the CPA is not an unqualified strict liability model and the ambiguities identified in this dissertation should be addressed by the legislature. The importance of the continual development of the common law in the area of product liability is therefore emphasised.

1.5 DELINEATIONS AND LIMITATIONS

The concept of product liability is undeniably wide and varied. It is therefore beyond the scope of this dissertation to clarify every aspect of product liability and this dissertation therefore only considers the aspects referred to above. It is specifically noted that the common law as well as the statutory position with regards to defective products forms part of this dissertation but the history thereof is not discussed in detail as it is not the focus point of this document.

CHAPTER 2: THE POSITION WHERE THE CONSUMER PROTECTION ACT, 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

2.1 INTRODUCTION

This chapter contains a brief explanation of the development of the South African common law on product liability as developed by our courts over time. This chapter sets out the common law as currently applicable in instances where the CPA does not apply.¹¹ The common law position in the law of contract as well as the law of delict will be separately discussed in this chapter. The shortcomings of the common law will also be discussed to enable an understanding of the introduction of the CPA provisions that relates to product liability.

The purpose of this chapter is not to provide a complete historical account on the matter, but rather to highlight key developments in the South African common law. The law will be discussed in various sub-sections before being analysed collectively. This chapter will therefore ultimately consider the South African common law position on product liability with reference to the most important court cases in this field.

This chapter also concentrates on particular elements of common law liability for product defects which are important for future interpretations and application of section 61 of the CPA.

2.2 THE MEANING OF PRODUCT LIABILITY

Product liability can be defined as “the liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any person affected by the defective product”.¹² This liability in the form of harm to a consumer could result from a defective product provided to the consumer and be as a result of either a relationship established through a contract or delict¹³ and is discussed in more detail in this chapter.

2.3 THE MEANING OF LATENT DEFECT

In line with the above definition of product liability, it is clear that the concept of ‘defect’ is fundamental to the application of product liability. The first point of departure would therefore always be to determine if the product is indeed defective and what the nature of the defect is.

¹¹ Section 2(10) of the Act states that no provision of this Act must be interpreted as to preclude a consumer from exercising any rights afforded in terms of the common law.

¹² McQuoid-Mason 65.

¹³ Botha & Joubert (2011) *THRHR* 306.

*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*¹⁴ is generally considered as the *locus classicus* regarding the requirements for a latent defect. In this case the plaintiff (who is also the manufacturer) supplied bricks to the defendant which were efflorescent and crumbled due to the fact that the bricks contained harmful quantities of magnesium sulphate. The court defined a latent defect as follows: "...an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used".¹⁵

Under the common law of sale, the seller has the duty to warrant the buyer against *latent*¹⁶ defects in the product sold.¹⁷ There is a difference between latent and patent defects in that latent defects cannot readily be noticed or discovered by a diligent person, whereas a patent defect will be noticed by a diligent person.¹⁸ The nature of the defect would therefore determine whether it is latent or patent.¹⁹ The criterion however is whether a reasonable person would have noticed the defect after inspection of the product sold.²⁰ This is an objective test which evaluates the usefulness of the product sold and requires no expert knowledge on the part of the buyer.²¹

The Supreme Court of Appeal in *Odendal v Ferraris*²² referred to the judgement of *Glaston House (Pty) Ltd v Inag (Pty) Ltd*²³ wherein a broad view was taken of what constituted a latent defect and the court held that a latent defect is not limited to a physical defect and confirmed that in the broad sense any material imperfection preventing or hindering the ordinary or common use of the product sold, constitutes a defect.²⁴

In summary, defects may relate to any one or a combination of the following:²⁵

- The quality of the product;
- The manufacturing process or actual design of the product;
- The absence of sufficient warnings as to dangerous features of the product; or
- The absence of adequate instructions as to the safe and proper use of the product.

¹⁴ 1977 3 SA 671 (A).

¹⁵ *Supra* 683H.

¹⁶ Own emphasis.

¹⁷ Nagel *ea* 222.

¹⁸ Nagel *ea* 223.

¹⁹ *Supra*.

²⁰ Neethling & Potgieter 223.

²¹ Barnard (2012) *De Jure* 457.

²² 2009 4 SA 313 (SCA) 121.

²³ 1977 2 SA 846 (A) 866F; The court held that the existence of a valuable sculpture which had been embedded in a dilapidated building and precluded the re-development for which the property had been bought, was a latent defect.

²⁴ 2009 4 SA 313 (SCA) .

²⁵ Van Niekerk & Schulze 121.

2.4 LAW OF CONTRACT: DEFECTIVE PRODUCTS

2.4.1 Background

A contract based on South African law is an agreement, and is based on consensus between legal subjects with contractual capacity. This contract is legal, physically possible and complies with the prescribed formalities and which is reached with the intention of creating legal obligations with subsequent rights and duties.²⁶ Therefore if a contract exists between the consumer and the manufacturer, liability for latent defects in the product sold will be of a contractual nature.²⁷ A claim under the law of contract would therefore require a breach of the contractual relationship between the buyer and supplier of the goods.²⁸

In summary under the common law, contractual liability for the sale of a defective product generally arises on the basis of a:

- Breach of a warranty (express or implied) that the product is sold free from defects,²⁹ or
- A misrepresentation by the seller that the product is free from defects.³⁰

2.4.2 Express and implied warranties

A warranty can be described as a contractual undertaking by a manufacturer or producer that a certain fact relating to the performance or quality of the product is or will be as it is stated or promised to be.³¹ One of the duties of a seller, as a party to the contract of purchase and sale, is to warrant the buyer against latent defects in the products sold. A warranty can be given either by operation of law (as *naturale*) or contractually (as *incidentale*)³² and should be distinguished from one another as the buyer's remedy is influenced by the type of warranty provided.³³

When a warranty is included contractually it can be done expressly or tacitly³⁴ and the buyer can then base his claim on a breach of the warranty. In practice however, express product warranties are usually limited by the party providing the warranty and the buyer has little or no negotiating powers in this situation and this is most applicable in the twenty first century.

²⁶ http://en.jurispedia.org/index.php/Introduction_to_the_law_of_contract_za.

²⁷ Botha & Joubert (2011) *THRHR* 307.

²⁸ Botha & Joubert (2011) *THRHR* 382.

²⁹ Glover 195.

³⁰ Loubser & Reid 23.

³¹ Loubser & Reid 25; A warranty is a contractual term by which the seller assumes absolute or strict liability for the proper performance to the extent that he cannot rely on impossibility of performance or absence of fault to escape liability.

³² Nagel *ea* 222.

³³ *Ibid*; Barnard (2012) *De Jure* 546.

³⁴ *Ibid*; Barnard (2012) *De Jure* 457.

An implied warranty against latent defects, which applies automatically by operation of law, forms part of every contract of sale unless it is specifically excluded by the so-called *voetstoots*-clause³⁵ and the buyer can institute one of the two *aedilician* remedies.³⁶ He is however not entitled to also claim damages under the *aedilition* remedies. As will be noted in the next chapter, the CPA has introduced a range of new implied terms and a decrease in the number of circumstances where parties may exclude statutory terms as well implied terms in terms of our common law.³⁷ This is also in line with the purpose of the CPA to provide vulnerable consumers with adequate protection.

If the seller makes certain representations regarding the product being sold during pre-contractual negotiations and these are later incorporated into the contract, it also constitutes a warranty.³⁸ If the seller therefore delivers a product that is not in line with the promised qualities, the warranty provided is breached and the buyer will have the general remedies for breach of contract at his disposal.³⁹

2.4.3 Remedies for latent defects

a) *Aedilician* Remedies

A consumer may claim restitution with the *actio redhibitoria* or he may claim a *pro rata* reduction in the purchase price with the *actio quanti minoris* where there is a breach of warranty against latent defects and no express or tacit guarantee has been given to the consumer. These remedies will also not be available where the warranty is expressly excluded.⁴⁰ These remedies can also be instituted where the seller fraudulently conceals the defect, guarantees the presence of good or bad characteristics and can also be instituted where a false *dictum et promissum*⁴¹ was made to the buyer.⁴² The buyer will in these cases seldom use the *aedilician* remedies, since the buyer cannot claim consequential damages or any other damages with these actions.

Should the buyer successfully institute the *actio redhibitoria*, the parties will be placed in the same position they would have been in had they not concluded the contract.⁴³ This essentially means that the purchase price will be paid back to the buyer, while the product

³⁵Glover 151.

³⁶ This is discussed in more detail under paragraph 1.4.2.

³⁷ Kriek C (2017) 42.

³⁸ Loubser & Reid 25.

³⁹ Nagel *ea* 223.

⁴⁰ Barnard J (2013) LLD 363.

⁴¹ In *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A), a *dictum et promissum* was defined as a declaration made by the seller during negotiations with regard to the quality and characteristics of the thing sold that turns out to be false and which is something more than mere recommendation or praise. The exaggerated statement or opinion made by the seller is to encourage the consumer to buy the *merx* but it is not intended to form part of the contract between the parties.

⁴² Nagel *ea* 226-227.

⁴³ Barnard (2012) *De Jure* 458.

sold will be claimed back by the seller.⁴⁴ A court would have to examine if the latent defect is serious enough to render the product sold unfit for the purpose it was intended for.⁴⁵

The *actio quanti minoris* can be instituted for each and every latent defect that existed at the time of conclusion of the contract between the parties.⁴⁶ A reduction in the purchase price may be claimed where a *dictum et promissum* was made; the defect is immaterial; or where the buyer decides to keep the product.⁴⁷ To succeed with the reduction in the purchase price, the buyer must prove that the product sold was defective at the date of the conclusion of the contract and should also establish the exact amount by which the purchase price should be reduced.⁴⁸ The reduction in the purchase price is equal to the difference between the price paid for the product by the buyer and the actual value of the product with the defect at the time when the contract is concluded.⁴⁹ Cornelius specifically notes that the *actio quanti minoris* is not a claim based on breach of contract and consequently then not a claim for contractual damages.⁵⁰

b) The *actio empti*

The buyer can cancel the contract entered into with the *actio empti* and is able to claim consequential damages where an express or tacit warranty against latent defects was given or in instances of misrepresentation by the seller.⁵¹ The *actio empti* is also at the buyer's disposal where the seller promised the existence of certain characteristics in the product sold or that certain bad characteristics are absent.⁵² This remedy can thus be instituted where the product sold does not comply with the warranty provided by the seller.

Consequential damages can be claimed if a breach of contract occurred and the defect is serious enough to justify the cancellation of the contract and to claim damages. A voetstoots clause can be inserted in the contract to exclude the application of the *actio empti* and the *actio empti* is generally not regarded as being *redhibitorian* in nature and can therefore be used as an alternative to the *redhibitorian* remedies.

In summary, the *actio empti* can therefore be instituted on the following grounds:⁵³

- Where the seller gives an express or tacit warranty to the buyer;
- The seller fraudulently conceals the defect in the product sold;
- The seller is a merchant seller or the manufacturer of the product sold;

⁴⁴ Nagel *ea* 227.

⁴⁵ *De Vries v Wholesale Cars* 1986 (2) SA 22 (O); *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C).

⁴⁶ *Truman v Leonard* 1994 (4) SA 371 (SE).

⁴⁷ Barnard (2012) *De Jure* 459.

⁴⁸ Cornelius (2013) *De Jure* 868.

⁴⁹ *Phame v Paizes* case 397.

⁵⁰ Cornelius (2013) *De Jure* 870.

⁵¹ Barnard J (2012) *De Jure* 456.

⁵² *Ibid.*

⁵³ Nagel *ea* 224.

- The seller warrants the presence of good or the absence of bad characteristics in the product sold.⁵⁴

2.4.4 The position of the merchant seller (dealer) and manufacturer

It is a well-established legal principle in our common law that a merchant seller or manufacturer incurs liability where a latent defect is present in the product sold.⁵⁵ As discussed above, in terms of the law of purchase and sale, one of the obligations of the seller is to deliver the said product without any defects.⁵⁶

Where the seller is also a merchant seller or dealer, he will be liable for damages (including consequential damages) in respect of latent defects in the product.⁵⁷ The merchant seller had to profess in public to have been the dealer at the time of the conclusion of the contract and to have expert knowledge and skills regarding the product that was sold.⁵⁸ This is based on the writing of the 18th century French jurist Pothier⁵⁹ where the buyer could recover consequential loss suffered resulting from a latent defect even if the manufacturer is unaware of the defect.⁶⁰ However, in *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*⁶¹, as discussed in more detail hereinafter, the court interpreted the so-called Pothier rule as *also*⁶² requiring the merchant seller to publicly profess to have the attributes of skill and expert knowledge in relation to the specific product sold. This made it more difficult for the buyer to succeed with a claim based on a latent defect in the product.

A manufacturer on the other hand should warrant the skill of their art.⁶³ If a manufacturer sells an item with a latent defect, he is liable for all damages suffered and does not have to profess in public to have special knowledge of the goods sold.⁶⁴ Neither negligence nor ignorance of the defect will succeed as a defence for the manufacturer against such a claim

⁵⁴ *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); These warranties are found where a product is bought for a specific purpose, and where the buyer notifies the seller of this specific purpose. For example, if a bull is bought for breeding purposes, and the buyer specifically informs the seller of this purpose, the buyer will be able to institute the *actio empti* against the seller where the bull is found to have been sterile at the time of conclusion of the contract.

⁵⁵ Botha & Joubert (2011) *THRHR* 307.

⁵⁶ Maleka (2009) *SA Merc LJ* 580.

⁵⁷ Barnard (2012) *De Jure* 462.

⁵⁸ *Ibid.*

⁵⁹ "There is one case, in which the seller even if he is absolutely ignorant of the defect in the thing sold, is nevertheless liable to a reparation of the wrong which the defect caused the buyer in his other goods; this is the case where the seller is an artificer, or a merchant who sells articles of his own make, or articles of commerce which it is his business to supply. The artificer or tradesman is liable to a reparation of all the damage which the buyer suffers by a defect in the thing sold in making use of the thing for which it was destined, even if such artificer or tradesman were ignorant of the defect. For example, if a cooper or dealer in casks sells me some casks, and in consequence of defects in any of the casks the wine which I put in them is lost, he will be liable to me for the price of the wine which I have lost" – *Traite du Contrat de Vente* par 214.

⁶⁰ LAWSA Vol 5(1) 'Contract' para 92.

⁶¹ 1964 3 SA 561 (A).

⁶² Own emphasis.

⁶³ Kerr 218.

⁶⁴ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Limited* 1964 (3) SA 651 (A).

brought by the buyer. It is noted that the initial position was that only the manufacturer would be held liable for consequential damages as a result of the defect in the product sold.

A discussion of the following cases will illustrate the circumstances in which a merchant seller or manufacturer can be liable for damages under the common law of contract. Lotz and Van der Nest⁶⁵ makes the point that there is no uniformity in the interpretation of the common law in terms of latent defects in the sale of products and recommends legislative reform to deal with this matter. This statement will be made clear in the discussions below.

Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and another⁶⁶

In this case, the appellant, K, sold a toxic pesticide to the respondents, B, who jointly functioned as sorghum farmers whom sprayed pesticide on the sorghum because of the plant lice infection they were battling with.⁶⁷ After applying the pesticide supplied by K, the crop died and the respondents suffered damages as a result of this.⁶⁸

The respondents argued that it was an implied term of the contract that the pesticide was fit for the purpose it was purchased for, as well as being free from latent defects.⁶⁹ Their cause of action was based on the Pothier rule, and they argued that K was liable for consequential damages caused by the latent defect as K was a merchant seller whose business it was to deal in toxic pesticides and it should have knowledge of the products it sells.⁷⁰ K denied the existence of the implied warranty and pleaded that the respondents specifically requested the pesticide that was bought and subsequently used.⁷¹ The respondents successfully applied for the striking out of K's aforementioned plea in the Court *a quo* and K appealed against this decision.

The appeal involved the enquiry whether a merchant, who sells goods in which it is his business to deal, is merely on that account liable for consequential damages caused to the buyer by a latent defect in the thing sold of which the merchant seller was unaware.⁷² The Supreme Court of Appeal formulated the following rule relating to a merchant seller's liability for defects in the goods sold:

Liability for consequential damage caused by the latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold. Whether a seller falls within the category mentioned will be a question of

⁶⁵ Lotz & Van der Nest (2001) 219-246.

⁶⁶ 1964 3 SA 561 (A).

⁶⁷ *Id* 547.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

fact and degree, to be decided from all the circumstances of the case. Once it is established that he does fall within the category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it.⁷³

In summary, the court altered the original so-called Pothier rule by introducing the requirement that the merchant seller's knowledge or skill related to the specific kind of goods sold should have been publicly professed.

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd⁷⁴

The appellant, H, manufactured and sold bricks to the respondent, R, who in turn was building and engineering contractors. R used the bricks to build a factory and upon completion of the factory, it appeared that some of the walls had to be demolished and rebuilt because the bricks sold by H were defective. R averred that it was a term of the contract that the bricks be delivered free from any defect which was not apparent upon a reasonable examination of the sample which H supplied. R's case was based on the rule that a merchant seller and therefore a *manufacturer seller*⁷⁵ is liable for consequential damages even though the seller was ignorant of the fact that the goods sold were defective.⁷⁶

The court *a quo* held that H was liable for consequential damages sustained by R as a result of the implied warranty against latent defects. The court further indicated that the *manufacturing seller*⁷⁷ was in no worse position than an ordinary seller who has expressly warranted against the occurrence of a defect.⁷⁸

The Appellate Division dismissed the appeal and confirmed that H, having been the manufacturer as well as the seller of the bricks, was liable for consequential damages sustained by R as a result of a breach of the implied warranty against latent defects.⁷⁹

The question whether liability of the manufacturer for consequential damages arising from a latent defect is founded upon a breach of contract or delict, was expressly left open by the court.

Langeberg Voedsel Bpk v Sarculum Boerdery Bpk⁸⁰

⁷³ *Supra* note 66 at 553.

⁷⁴ 1977 (3) SA 670 (A).

⁷⁵ Own emphasis.

⁷⁶ *Supra* note 64 at 661.

⁷⁷ *Id* at 672.

⁷⁸ *Id* at 671.

⁷⁹ *Id* at 672.

⁸⁰ 1996 2 SA 565 (AA).

In this case it was shown that a merchant seller who professed to have attributes of skill and expert knowledge of the goods sold and delivered, can be held liable for latent defects in the goods sold.

The appellant, L, was a processor and canner of fruit and vegetables, and supplied seed to S which had to be planted by S, and afterwards L would purchase the crops in unprocessed form from S.⁸¹ L itself prescribed to S the cultivar of fruit and vegetables to be produced, provided the seed and S's crop failed due to a latent defect in the seed supplied by L.

S, the plaintiff in the court *a quo*, successfully sued the respondent for consequential damages. On appeal the parties were in agreement that the liability of S for consequential loss resulting from a latent defect of which he was unaware depended on whether S was a merchant seller and whether he professed to have attributes of skill and expert knowledge in relation to the goods sold.⁸²

The court ruled that the mere fact that S's trade in seed was limited to the sale of seed to the producers and not to the general public clearly did not deprive S of the status of merchant trader. The court further ruled that the mere fact that S sold seeds implied that it publicly professed to have the required knowledge and skill to qualify as an expert in the sale of seeds.⁸³ The court further argued that S's conduct from all indications created the impression that he had the expertise and therefore the judgement of the Court *a quo* was upheld.

Judge Schultz however criticised the rule in the *Kroonstad-case* and pointed out that in modern commerce the merchant seller is not really in a position to assess the safety of the packaged product:⁸⁴

The merchant is denied the opportunity to see, feel or to smell the produce that passes through his hands. He can as little as examine the metal in the bearings as the beans in the tin or the chip in the computer. It seems to me cumbrous, wasteful and uncertain of result, and therefore unjust, to require a buyer to prove and a seller to resist in case after case the proposition that the latter publicly professes to have attributes of skill and expert knowledge in relation to particular goods.

⁸¹ *Id* at 566.

⁸² *Ibid.*

⁸³ *Supra* note 80 at 570C-H.

⁸⁴ *Id* at 572.

Ciba-Ceigy (Pty) Ltd v Lushof Farms (Pty) Ltd⁸⁵

The appellant, C, was a manufacturer of a herbicide and sold it to the respondent, L, for the eradicating of weeds in pear orchards. L used the herbicide according to C's direction and suffered damage in respect of his pear crop. L instituted action against C in the Court *a quo* on the basis that the latter's defective product caused the damage to his crops.

The court ruled that L was entitled to claim consequential damages due to the appellant's breach of the contractual warranty.⁸⁶ It was further ruled that a contractual nexus between the manufacturer and the buyer is not required, as the liability in question was viewed as product liability.⁸⁷ The court held that: "Manufacturers who distribute a product commercially, which, in the course of its intended use, as a result of a defect, causes damage to the consumer thereof, act wrongful according to the legal convictions of the community".⁸⁸

At a closer look, it is apparent that that this was an application of the maxim *res ipsa loquitur*⁸⁹ as it is often difficult to prove that the manufacturer was indeed at fault.⁹⁰ The court in *Bayer South Africa (Pty) Ltd v Viljoen*⁹¹ however stressed the importance that this doctrine should only be used where it is appropriate in view of the facts of the case.

A clear distinction was also made between the grounds for the merchant seller and manufacturer's liability with regards to latent defective products sold: the merchant seller's liability stemmed from the breach of contractual warranty, while the manufacturer's related liability was grounded on the law of delict. The result was that the both the merchant seller and manufacturer were held to be jointly and severally liable.⁹² The Supreme Court of Appeal once again ruled that the Pothier rule applies to the merchant seller.

D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd⁹³

Briefly, the facts of the case were that the respondent seller's primary business was to manufacture lime products for the building industry. The by-product of its principal activity was dolomitic aggregate and sand, which the appellant bought. He used these by-products in the manufacture of concrete products, including concrete pipelines. The appellant claimed more than R13 million from the respondent, the sum it had incurred as liability from

⁸⁵ 2002 2 SA 447 (SCA).

⁸⁶ *Id* at 473 & 476.

⁸⁷ *Id* at 470.

⁸⁸ *Ibid*.

⁸⁹ The facts speak for themselves. This maxim is applied where a conclusion of negligence can be drawn from the facts which are usually embodied in the occurrence itself while the cause of the occurrence is not known [Alheit (2006) *CILSA* 291].

⁹⁰ Neethling & Potgieter (2002) *TSAR* 582.

⁹¹ 1990 2 SA 647 (A) 661-662.

⁹² Barnard (2012) *De Jure* 463.

⁹³ 2006 3 All SA 309 (SCA).

its customers as a result of defective concrete pipes which it had manufactured using the by-products it bought from the respondent.

The Supreme Court of Appeal *inter alia* considered whether the respondent also manufactured the aggregate and sand which it sold to the appellant and in dealing with the concept of “manufacturing seller”, the Judge referred to the Court *a quo* who held that the respondent’s production of aggregate and sand could not have required expert skill and knowledge as required by Pothier.⁹⁴

The Supreme Court of Appeal further criticised the Kroonstad-case⁹⁵ for expanding the Pothier Rule. The Court subsequently held that:

A manufacturing seller is liable for consequential loss caused by the defective product even if he is ignorant of the latent defect, this in effect means that the seller need not be skilled in the manufacturing of the goods, nor need he have publicly professed skills or expertise in this regard.⁹⁶

Therefore, the respondent was liable for consequential damages caused by the defective aggregate and sand that was sold to the appellant.

A buyer who suffers harm as a result of the defective product, will however in terms of the common law not be able to institute a claim against the manufacturer or distributor in the absence of a contractual link between the buyer and the manufacturer or distributor.⁹⁷

2.5 LAW OF DELICT: DEFECTIVE PRODUCTS

2.5.1 Introduction

The law of delict⁹⁸ is applicable where no contractual relationship between the parties exists and the buyer suffers damage caused by the defective product. As mentioned earlier, the law of contract only governs actions by a buyer in a direct contractual relationship with the seller.⁹⁹ In instances where no such contractual relationship exists, a buyer would have to institute a claim in terms of the law of delict.¹⁰⁰ There is therefore one important difference between the law of contract and delict and that is that the parties are in a position to regulate, limit or expand by arrangement among themselves, the consequences of any prospective breach.

⁹⁴ *Ibid* at 10.

⁹⁵ See fn 64.

⁹⁶ See fn 94.

⁹⁷ Botha & Joubert (2011) *THRHR* 305.

⁹⁸ A delict is an unlawful act or omission, causing damage or harm to the aggrieved person.

⁹⁹ Loubser & Reid 414.

¹⁰⁰ Jacobs *ea* (2010) *PER* 382.

Historically, the term product liability has been confined to the law of delict, with fault being a necessary element to found liability.¹⁰¹ The common law position with regards to product liability despite being underdeveloped, is fairly clear that all the elements of a delict, including fault, must be present for liability of the manufacturer to be established.

2.5.2 Remedies: The *Aquilian* Action

In South Africa, the delictual remedy provided for by the common law when harm is caused by a defective product is the fault-based *Actio Legis Aquilae*. The court also regards product liability as being within the field of the *Aquilian* action.¹⁰²

Delictual liability requires proof of both wrongfulness and fault, together with proof of conduct, causation and harm. The buyer must establish that harm was caused wrongfully, and that the producer was negligent in causing the harm. In the context of product liability, fault essentially means negligence, since it would be highly unlikely in this context for a producer to intentionally cause harm to consumers.¹⁰³ Under this system, as a general rule, he who claims has the burden to prove it, thus proving all five these delictual elements rest on the consumer. The elements of the *Aquilian* action will be discussed in more detail below.

i) Conduct

In the context of manufacturer's liability, the relevant judicial conduct is the voluntary control and supervision exerted over, and organisation of the complex process of industrial production.¹⁰⁴ In layman's terms conduct means an act or omission.¹⁰⁵ Conduct on the part of the manufacturer may therefore merely be a case of negligently causing harm to another, rather than failure to act.

ii) Causation

There must be causal link between the conduct of the manufacturer and the damage caused by its defective product. Whether such a causal link exists is a factual question to be answered and should be proved on a balance of probabilities. The mere existence of a defect is not sufficient, it must have a specific harmful result which must have a causal connection to the defect.

iii) Harm and damages

¹⁰¹ Loubser and Reid (2006) *Stell LR* 431.

¹⁰² Neethling & Potgieter 335.

¹⁰³ Loubser & Reid 39.

¹⁰⁴ De Jager (1978) *THRHR* 353.

¹⁰⁵ Omission is where one fails to act positively to prevent harm to another.

The law of delict recognises two categories of harm i.e. patrimonial damages and non-patrimonial damages.¹⁰⁶ It is specially noted that non-patrimonial harm caused by a product defect is not recoverable with the *Acquilian* action.

iv) Fault

It is, as a rule, very difficult to prove fault on the part of the manufacturer – either because fault is simply not present in the production process or the prejudiced party cannot obtain proof of fault as the technological process is complicated.¹⁰⁷ A buyer wishing to claim damages arising from harm caused by a defective product, also needs to prove fault on the part of the manufacturer in order to be successful with a product liability claim.¹⁰⁸ In the context of product liability, the element of fault is usually negligence, as it would be a rare scenario where a manufacturer intentionally harmed consumers by putting defective products out on the market.¹⁰⁹

Negligence entails the duty “to avoid reasonably foreseeable harm” and it is generally accepted that the test for negligence involves two concepts: foreseeability and preventability (duty of care). The following objective test therefore applies when a court has to establish negligence: “Could a reasonable producer/manufacturer under the particular circumstances have reasonably foreseen the likelihood that his act could cause damage and/or injury, and could he have taken reasonable steps to prevent it?” This statement reflects the classic formulation of the test for negligence by Holmes JA in *Kruger v Coetzee*¹¹⁰.

In general, a manufacturer acts negligently if he deviates from the care that a reasonable person in his position would have exercised, and if the loss were reasonably foreseeable and preventable.¹¹¹

v) Wrongfulness

Wrongfulness in our law lies either in the infringement of a subjective right or in the breach of a legal duty.¹¹² The test for wrongfulness involves the standard of the legal convictions of the community or the *boni mores*.¹¹³

Within the framework of product liability the wrongfulness enquiry focuses on the existence and breach of a legal duty not to cause harm or damage to the consumer.¹¹⁴ According to the legal convictions of the community the manufacturer has a duty to reasonably prevent

¹⁰⁶ Neethling & Potgieter 229.

¹⁰⁷ Neethling & Potgieter at 338

¹⁰⁸ Gowar (2011) *Obiter* 524.

¹⁰⁹ Kriek C (2017) 70.

¹¹⁰ 1966 2 SA 428 (A) 430.

¹¹¹ *Freddy Hirsh Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA).

¹¹² Neethling & Potgieter 336.

¹¹³ Gowar (2011) *Obiter* 522-523.

¹¹⁴ Neethling & Potgieter 317 .

defective products from reaching the market, or staying in the market, and infringing the interest of consumers.¹¹⁵ The court confirmed in *Ciba-Geigy*¹¹⁶ that the causing of damage by a defective product is in principle wrongful as it is a violation of its legal duty to take reasonable steps to prevent defective products from entering or remaining in the market and infringing the interests of consumers.¹¹⁷ This in essence means that there must be a defect in the product before wrongfulness on the part of the manufacturer can be established.¹¹⁸ If there is no defect, damage arising from a product cannot, as far as the manufacturer is concerned, be regarded as *contra bonos mores* or wrongful.¹¹⁹

In *Freddy Hirsh Group (Pty) Ltd v Chickenland (Pty) Ltd*¹²⁰, the court confirmed that the negligent causation of pure economic loss¹²¹ is not regarded as *prima facie* wrongful, as wrongfulness depends on the existence of a legal duty. The burden of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. The court explained that: “A manufacturer has a general duty to take steps to ensure that defective products do not reach the market or, if they do, to withdraw them from the market or to take other steps to ensure that no harm ensues from the presence of the product on the market”.¹²²

2.5.3 Application of the *Actio Legis Aquiliae*

The need for Reform - *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*¹²³

The court in the *Wagener*-case in essence dealt with the extent to which a manufacturer can be held strictly liable in delict for unintended harm caused by a defective product where there is no contractual nexus between the manufacturer and the injured person.¹²⁴

The appellants had both undergone surgery and had become paralysed after being injected with a local anaesthetic called Regibloc which was manufactured and marketed by the respondent. The appellants pleaded that, contrary to the respondent’s legal duty as a manufacturer, the anaesthetic injected was unsafe for use because it resulted in bodily

¹¹⁵ Van der Walt (1972) *THRHR* 241.

¹¹⁶ 2002 2 SA 447 (SCA).

¹¹⁷ *Id* at 470: The Court formulated it as follows: “It is actually self-evident that, according to the legal convictions of the community, a manufacturer acts incorrectly and therefore wrongfully if he makes a product available which in the course of its designated use, and due to a defect, causes damage to the consumer thereof.”

¹¹⁸ Gowar (2011) *Obiter* 523.

¹¹⁹ Neethling & Poghieter 337.

¹²⁰ 2011 4 SA 276 (SCA) 38.

¹²¹ In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 465 the judge referred to pure economic loss as “loss that does not arise directly from damage to the plaintiff’s person or property but rather in consequence of the negligent act itself, such as profit and loss, being put to extra expenses or the diminution in the value of property”.

¹²² See Fn 116.

¹²³ 2003 (4) SA 285 (SCA) – hereinafter “*Wagener*-case”.

¹²⁴ *Wagener*-case 3.

harm. An alternative claim was that the anaesthetic was defective due to the negligent manufacture thereof by the respondent. The respondent excepted to the main claim, alleging that, as the main claim failed to allege fault in the manufacture of the product and instead purported to rely on strict liability of the manufacturer, it failed to disclose a cause of action. This exception was upheld and the appellant appealed with the leave of the Court *a quo*.¹²⁵

The Supreme Court of Appeal indicated that it must be accepted, on the facts, that: “The Regibloc was manufactured by the respondent, that it was defective when it left the respondent’s control, that it was administered in accordance with the respondent’s accompanying instructions, that it was this defective condition which caused the alleged harm and that such harm was reasonably foreseeable”.¹²⁶ The court also accepted that the respondent was under a legal duty, in delict, to avoid reasonably foreseeable harm resulting from the defectively manufactured Regibloc and that such duty was breached when the Regibloc was injected.¹²⁷

The essential enquiry before the Supreme Court of Appeal was therefore whether liability attached to the manufacturer, even if the breach of duty occurred without fault on its part.¹²⁸ The appellants argued that for various reasons, the common law remedy by which to protect and enforce the appellants’ constitutional right to bodily integrity namely the *Aquilian* action for damages was inadequate to achieve those end goals.¹²⁹ They further argued that the court had already attached strict liability for consequential damages arising out of defective merchandise to a merchant seller who professes expert knowledge in relation to such goods in the *Kroonstad*-case and that it required no more than a decision of legal policy, and a modest shift in principle to extent such liability to the manufacturer in the circumstances of the present matter.¹³⁰

The appellant contented that one of the major reasons why fault should not be a requirement in a case such as this is that fault is most often extremely difficult to prove.¹³¹ It was further submitted that a consumer has no knowledge of, or access to, the manufacturing process to establish negligence in relation to the making of the item or substance which has allegedly caused the injury complained of.¹³²

The respondent in turn argued that the *Kroonstad*-case was of no assistance because it concerned a warranty imposed by the law of sale.¹³³ It was further submitted that it would

¹²⁵ *Ibid.*

¹²⁶ *Wagener*-case at 7.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Wagener*-case at 171.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

be illogical and unworkable to impose strict liability on a case by case basis and that it would bring a fundamental change in the law which would be contrary to the principle of *stare decisis*.¹³⁴ Counsel further pointed out that even if strict liability were imposed, a plaintiff would still have to prove that the product concerned was defective when it left the manufacturer.¹³⁵ Against the backdrop of these circumstances, it was submitted that proving fault was really no more difficult than proving defectiveness.¹³⁶

The appeal court then held that, in evaluating the parties' arguments, the following two factors had to be kept in mind: (1) the right which the appellants seek to protect and enforce is constitutionally entrenched and (2) the same right has always existed as common law and to succeed with an action, proof of fault at least in the form of negligence has always been a requirement.¹³⁷

The court, in illustrating the dilemma involved in the function of trying to legislate judicially in this complex field, raised the following questions:¹³⁸

- What products should be included or excluded when it comes to determining the extent of the liability?
- Should a manufacturer include X, the maker of a component that is part of the whole article manufactured by Y; and which is liable if the component is defective?
- Does defect mean in the making process only or, in the case of a designed article, also a defect of design? Should it include the failure, adequately or at all, to warn of possible harmful results?
- Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control?
- What relevance should the packaging have - should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examinations were made?
- Is a product defective if innocuously used on its own but which causes damage when used in combination with another's product?
- What defences should be available?
- Should the damages recoverable be exactly the same as in the case of the *Aquilian* claim or should they be limited, as in some jurisdictions, by excluding pure economic loss or by limiting them to personal injury?

¹³⁴ *Wagener*-case at 172.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Wagener*-case at 173.

The court remarked that the questions enumerated cannot be answered on the basis of what has arisen and been debated, and thus the appeal was not upheld.¹³⁹ The court therefore officially ruled out the development of the common law to recognise a form of strict product liability and ruled that if strict liability is to be imposed, it is the legislature that must do it.¹⁴⁰

This judgement is also in line with *Union Government v Sykes*¹⁴¹ where the plaintiff claimed damages from the Railways for a fire caused on his land by the escape of sparks from a locomotive's spark arrester already more than a century ago. The plaintiff had to prove fault on the part of the defendant, an impossible task, as may be gathered from the judgement. The plaintiff lost his case but Somoman, JA, who also held against the plaintiff, added:

It is not with regret that I have come to this conclusion, as my sympathies are entirely with the plaintiff. The Railways are administered by the Government, in the public interest, and it seems to me only fair that private persons whose farms are injured by sparks from engines should be compensated at public expense. That is however a matter for the legislature to deal with.¹⁴²

2.6 CONCLUSION

It is established that although a consumer who suffered damages as a result of a defective product can institute a claim either under the law of contract or the law of delict. In both instances this have proved to be a daunting task. Under the law of contract, the consumer first has to prove that there is a contractual relationship between the parties and that an express, tacit or implied warranty relating to the quality of the product was given. Under the law of delict, the consumer has to prove all five elements of a delict, including fault which is usually the stumbling block to consumers to succeed with a claim against the manufacturer as this is *inter alia* time-consuming, costly and require technical knowledge of the manufacturing process. Eliminating the burden of having to prove that the manufacturer acted negligently will be to the advantage of the consumer. As indicated by the Court in the *Wagener* case, should our common law be developed to recognise a form of strict product liability, it was up to the legislature to do so. The legislature has indeed answered the call with the enactment of the CPA and the position will be discussed in the next chapter.

¹³⁹ *Wagener*-case at par 17-18.

¹⁴⁰ *Wagener*-case at par 18.

¹⁴¹ 1913 AD 156.

¹⁴² *Id* at 187.

CHAPTER 3: THE POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

3.1 INTRODUCTION

It has been observed worldwide that the design, manufacture and distribution of products are activities that occupy the centre stage for the wealth and welfare of society.¹⁴³ As a matter of fact, owing to the unpredictable nature of man-made products, this at times may result in death, disease or injury for a wide range of parties, for example workers in factories or along distribution channels, users of defective products and third parties like consumers and innocent bystanders.¹⁴⁴ It is therefore necessary to ensure that a country's legal system provides its people with an effective system of redress.¹⁴⁵

As indicated in the previous chapter, until the enactment of the CPA, a consumer who was injured or suffered damages because of defective goods, could only institute an action under the law of contract or delict. A consumer's claim would only succeed under the law of delict if he successfully proved that the producer or distributor was at fault. The Supreme Court Appeal in the *Wagner v Pharmacare*¹⁴⁶ case also confirmed that fault was a requirement for such a product liability claim to be successful and confirmed that it was up to the legislature to impose strict liability.

Therefore, prior to the introduction of the CPA, parliament had not given proper consideration to product liability issues and South Africa did not have a strict product liability regime.¹⁴⁷ The CPA has now changed the South African product liability regime from fault based to a so-called strict product liability regime (no fault liability). Most of the provisions of the CPA came into effect on 31 March 2011¹⁴⁸ (including Chapter 2 dealing with fundamental consumer rights), however section 61, the strict product liability provision in terms of the CPA, has been in operation since 24 April 2010¹⁴⁹ and appears to have broadened the scope of liability in the interest of consumers.

An overview of the CPA with regards to product liability is given in this chapter, taking into account the purpose and application of the Act and looking at relevant definitions as well as the circumstances in which the Act will apply. As section 53, 55 and 56 of Part H of the CPA is central to product liability claims, these are also discussed in detail. The interpretation by our courts of section 61 is also discussed. The scope of liability for damages arising from

¹⁴³ Van Eeden 237.

¹⁴⁴ Van Eeden 367.

¹⁴⁵ Gowar (2011) *Obiter* 522.

¹⁴⁶ 2003 (4) SA 285 SCA par 38.

¹⁴⁷ Van Eeden 424.

¹⁴⁸ GG 33581 GN 917 of 23 September 2010.

¹⁴⁹ Schedule 2, Items 2(1) and (2) of the CPA.

product defects under the CPA are furthermore be compared to pre-existing common law remedies.

3.2 POLICY CONSIDERATIONS FOR A STRICT PRODUCT LIABILITY REGIME

The initial global move towards strict product liability in tort emerged from the landmark decision in the Supreme Court California, *Greenman v Yuba Power Products Inc*¹⁵⁰ where the court acknowledged that:

Although strict liability has been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, the refusal to permit the manufacturer to define the scope of its own responsibility for defective products makes it clear that the liability is not one governed by the law of contractual warranties but by the law of strict liability in tort.¹⁵¹

The judge in this case also stressed the fact that manufacturers are best placed to absorb the risks of injury and to spread the costs, either by means of insurance or by adjusting the prices of their products.¹⁵²

Greater consumer protection all around the world was the reason for the shift towards strict product liability.¹⁵³ In South Africa, the court in the case of *Wagner & Cuttings v Pharmicare*¹⁵⁴ confirmed that fault was still necessary to prove in order to be successful with a product liability claim and indicated that strict liability should be imposed by the legislature as single instances of litigation could not possibly provide for the depth and breadth of investigation, analysis and determination necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability.¹⁵⁵ Following the *Wagner* judgement, it was clear that the time had come for product liability reform in South Africa.¹⁵⁶

McQuoid-Mason¹⁵⁷ also formulates a substantial number of commercial reasons in favour of the implementation of strict product liability. He further argues that the concept of fairness and justice, which is also emphasised by the Constitution of South Africa, may form the basis for the development of a: “New boni mores to assist the development of the common law

¹⁵⁰ 377 P2d 897 (1963) 901.

¹⁵¹ *Ibid* at 901.

¹⁵² *Ibid*.

¹⁵³ Kriek C (2017) 21.

¹⁵⁴ 2003 4 SA 285 (SCA).

¹⁵⁵ *Wagner*-case at par 37.

¹⁵⁶ Kriek C (2017) 22.

¹⁵⁷ McQuoid-Mason 108-110.

to protect vulnerable consumers against dangerous or defective goods, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract.”¹⁵⁸

3.3 PURPOSE AND POLICY OF THE CPA

The preamble to the CPA identifies the need to ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace. It therefore intends to:¹⁵⁹

- promote and protect the economic interests of consumers;
- improve access to, and the quality of, information that is necessary for consumers to make informed choices according to their individual wishes and needs;
- protect consumers from hazards to their well-being and safety;
- develop effective means of redress for consumers;
- promote and provide for consumer education;
- facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- promote consumer participation in decision-making process concerning the marketplace and the interests of consumers.

The purposes of this Act, as outlined in section 3, are:

To promote and advance the social and economic welfare of consumers in South Africa by *inter alia* establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; promoting fair business practices; providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.¹⁶⁰

The following persons are specifically mentioned as vulnerable consumers in the CPA:¹⁶¹

- low-income persons or persons comprising low-income communities;
- consumers who live in remote, isolated or low-density population areas or communities;
- consumers who are minors, seniors or other similarly vulnerable consumers; or

¹⁵⁸ *Id* at 109.

¹⁵⁹ Preamble to the CPA.

¹⁶⁰ S 3(1) CPA.

¹⁶¹ S 3(1)(b) CPA.

- consumers whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.

It is evident from the above that the aim of the CPA is to protect vulnerable consumers and Barnard¹⁶² rightly so states that when interpreting the CPA, the golden rule should be to determine which interpretation and approach would be most beneficial to the consumer. Du Preez also concludes that the more vulnerable the consumer is, the more protection is required.¹⁶³ The aforementioned should always be kept in mind when dealing with and interpreting the provisions of the CPA, and in particular section 61 thereof.

3.4 INTERPRETATION OF THE CPA

The interpretation of the CPA is dictated by section 2 of the Act which should always be interpreted in such a way as to give effect to the purposes set out in section 3 of the CPA.¹⁶⁴

Another very important provision of the CPA is section 2(10), which stipulates that no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. In effect, this means that a consumer who suffers harm as a result of defective goods, has both the common law remedies and legislative remedies at his disposal and the consumer is in effect granted a larger scope of remedies.

It should also be remembered that when interpreting the CPA, a person, court or Tribunal may consider appropriate foreign and international law, international conventions, declarations or protocols relating to consumer protection and any decision of a consumer court, ombud or arbitrator in terms of the CPA to the extent possible.¹⁶⁵ These interpretation rules are closely related and point to the golden rule, to interpret the CPA in a manner that grants the consumer the greatest protection possible.¹⁶⁶

Section 76(1) of the CPA deals with the powers of the courts to enforce consumer rights under the CPA and provides as follows:

In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may—

- (a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;

¹⁶² Barnard J (2013) 159.

¹⁶³ Du Preez (2009) *TSAR* 63.

¹⁶⁴ S 2(1) CPA.

¹⁶⁵ S 2(2) CPA.

¹⁶⁶ Also see S 4(3) of the CPA.

- (b) make any order specifically contemplated in this Act; and
- (c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act.

Kriek¹⁶⁷ concludes that it would appear from these provisions that the statutory remedies afforded by the CPA are intended to co-exist with the common law remedies and cannot limit or restrict the scope of existing common law protection afforded to consumers. If this is the case, liability for damages caused by defective goods may arise from breach of contract and/or delict and/or section 61 of the CPA, depending on the facts of each case.¹⁶⁸ It is also important to note that the requirements for the liability of merchant sellers (law of contract) and manufacturers (law of delict) for latent defects in terms of our common law remain in place where the CPA does not find application.

3.5 APPLICATION AND SCOPE OF THE CPA

Section 5(1) of the CPA provides that the Act applies “to-

- (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
- (b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless-
 - (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
- (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
- (d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5)”.

The following transactions are *inter alia* excluded from the ambit of the CPA¹⁶⁹:

- Transactions for the supply or promotion of goods or services to the state;
- Transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, exceeds or is equal to the threshold value determined by the Minister in terms of section 6;¹⁷⁰

¹⁶⁷ Kriek C (2017) 296.

¹⁶⁸ *Ibid.*

¹⁶⁹ S 5(2) CPA.

- Transactions that fall within an exemption granted by the Minister in section 5 (3) and (4).

Furthermore, in terms of section 5(5) of the CPA, even if any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the provisions of the CPA, those goods are subject to section 61, and the consumer would therefore still be able to rely on section 61 in order to hold the producer, importer, distributor or retailer liable for damage arising from a defective product if the transaction is exempted by section 5(2); 5(3) and 5(4).¹⁷¹ This however raises the question whether the different role players within the supply chain could institute claims against one another. The writer submits that on the face of it, this would indeed be possible and given the far-reaching consequences that defective products could have, the supply chain would be able to use section 61 if it suffered damages as a result of a defective product.

3.6 IMPORTANT DEFINITIONS

Section 1 of the CPA contains the following important definitions and all other definitions that require more discussion will be discussed under that relevant section:

“Consumer”, in respect of any particular goods or services, means-

- (a) a person¹⁷² to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).

“Goods” include:

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;

¹⁷⁰ The Minister of Trade and Industry has by notice in the Government Gazette No 34181, dated 1 April 2011 determined the monetary threshold to the size of the juristic person is R2 million.

¹⁷¹ S 5(5) CPA; Also see Gowar (2011) *Obiter* 256.

¹⁷² The definition of a person includes a juristic person.

- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and
- (e) gas, water and electricity;

The word “include” indicates that this is not a closed list and van Heerden¹⁷³ argues that for purposes of product liability, liability may potentially attach to a wider range of goods than those expressly mentioned in the definition above.

“Juristic person” includes-

- (a) a body corporate;
- (b) a partnership or association; or
- (c) a trust as defined in the Trust Property Act, 1988 (Act 57 of 1988);

“Supplier” means a person who markets any goods or services and “supply”, when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration or when used in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

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

“Transaction” means-

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

¹⁷³ Van Heerden *Product Liability Notes 2*.

“**Ordinary course of business**” is not defined in the Act but it has been the subject of interpretation in respect of, inter alia, insolvency matters. The court in *Eskom v Haelstead-Cleak*¹⁷⁴ when interpreting the meaning of “ordinary course of business” referred to *Van Zyl & others NNO v Turner & another NNO*¹⁷⁵, where the court found that the test for establishing a meaning for ‘ordinary course of business’ is an objective one and that regard must be had to all the circumstances, including the actions of both parties to the transaction. The test for determining whether a contract falls within the ordinary course of a party’s business is whether the conclusion of the contract falls within the scope of that business and whether the transaction is one with commonly-used terms that ordinary businessmen would normally have entered into in the circumstances.¹⁷⁶

The National Consumer Tribunal in the recent case of *Doyle v Killeen and others*¹⁷⁷ also had to consider the definition of ‘ordinary course of business’. In this case, the consumer, D, bought a house through an estate agent and two days later experienced roof leaks. The consumer then replaced the roof and instituted action against the previous home owner as well as the estate agent jointly and severally. As the definition of ‘transaction’ in terms of the CPA refers to a person acting in the ‘ordinary course business’, D averred that the respondents did act in the ‘ordinary course of their business’ and the provisions of the CPA are applicable.¹⁷⁸

In order to establish the meaning of ‘ordinary course of business’, the Tribunal¹⁷⁹ referred to *Gazit Properties v Botha N.O.*¹⁸⁰ where the Court concluded:

This means that one first has to have regard to the nature of the obligation in terms of which the disposition or payment was made. This was made clear by *Van Winsen JA in Hendriks NO v Swanepoel* 1962 (4) SA 338 (A) at 345B when he said the following: ‘Die Hof benader die vraag of ‘n transaksie in die gewone loop van sake geskied het, objektief wanneer hy hom afvra of, in ag genome die voorwaardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvente besigheidsmense aangegaan sou word’.

The Tribunal held firstly that, based on the facts presented, that this was a once-off transaction and the seller had not sold the property in the ordinary course of business and

¹⁷⁴ *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 10.

¹⁷⁵ 1998 (2) SA 236 (C) para 34.

¹⁷⁶ *Amalgamated Banks of South Africa Bpk v De Goede en ‘n ander* 1997 (4) SA 66 (SCA) 75-8.

¹⁷⁷ (NCT/12984/2014/75(1)(b) CPA) [2014].

¹⁷⁸ *Id* at 8.

¹⁷⁹ *Id* at 16.

¹⁸⁰ (873/10) [2011] ZASCA 199.

secondly that the fact that an estate agent marketed the property on behalf of the seller did not make the estate agent a representative of the seller.¹⁸¹

From the above definitions in the CPA, the preamble and purpose of the Act, it is clear that the main objective of the Act is to protect vulnerable consumers.

3.7 FRAMEWORK FOR STRICT PRODUCT LIABILITY

Product liability falls within Chapter 2, Part H of the CPA that provides for the protection of the consumer's fundamental right to fair value, good quality and safety. It is also for this reason that section 61 cannot be discussed in isolation and therefore consideration is also given to sections 53, 55 and 56 of part H of the CPA.

3.7.1 Section 55: Consumer's right to safe, good quality goods

The producer, importer, distributor or retailer each warrant that the goods comply with the requirements and standards contemplated in section 55.¹⁸² Goods bought at an auction are excluded from the operations of section 55, and although section 56 does not also refer to this exclusion, but given the fact that section 56 only applies to goods that do not meet the requirements in terms of section 55, the remedies in terms of section 56 will not be applicable to goods bought at an auction.¹⁸³ The consumer may however be able to bring a claim against the auctioneer or the seller in terms of the common law based on misrepresentation.¹⁸⁴

Section 55(2)(a) states that every consumer has the right to receive goods that are reasonably suitable for the purposes for which they are generally intended. Under the common law, an imperfection in the goods sold will be actionable where it may be described as an abnormal quality or attribute which destroys or impairs the utility of the *res vendita* for the purpose for which it was sold or commonly used.¹⁸⁵ These remedies are however only available in the law of sale and have therefore been extended to parties outside the contractual relationship by the CPA.¹⁸⁶

Section 55(2)(b) requires that the goods are of good quality, in good working order and free of any defects.¹⁸⁷ De Stadler¹⁸⁸ adds that the only additions made to the standard contemplated in section 55(2) by the inclusion of the requirement 'free of any defects' are

¹⁸¹ See fn 176.

¹⁸² S 56 CPA.

¹⁸³ De Stadler in Naude & Eiselen (eds) 55-3.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ De Stadler in Naude & Eiselen (eds) 55-2.

¹⁸⁷ The definition is set out in S 53(1)(a) of the CPA and is discussed in more detail hereunder.

¹⁸⁸ De Stadler in Naude & Eiselen (eds) 55-10,

the introduction of the concept 'safety' and the requirement of materiality in respect of 'manufacturing defects' and the consumer will therefore also be entitled to the remedies under section 56(2) if the goods are unsafe.

Section 55(2)(c) requires that the goods be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply. This is a material departure from the common law as the *aedilition* remedies are only available in respect of defects which are present at the time of conclusion of the contract and the burden of proof is on the purchaser.¹⁸⁹ Under section 56(2) the CPA, the consumer can however institute action within 6 months after delivery of any goods to the consumer. The consumer is therefore afforded additional rights as to the quality of the goods at the time when the consumer receives the goods.¹⁹⁰

Finally, section 55(2)(d) provides that the goods also need to comply with any relevant standards set under the Standards Act¹⁹¹ or any other public regulation. A consumer would therefore be able to rely on the provisions of the Standards Act as well as section 55 and 56 of the CPA.

Section 55(3) confirms that if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire the goods, or the use to which the consumer intends to apply those goods and the supplier (a) ordinarily offers to supply such goods; or (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has the right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.¹⁹²

Barnard remarks that the wording of section 55(3) of the CPA looks similar to that of the Pothier rule¹⁹³, but that it is not and should not be regarded as a confirmation thereof.¹⁹⁴ De Stadler¹⁹⁵ also remarks that section 55(3)(b) closely resembles the rule developed in *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*¹⁹⁶ in respect of liability of a merchant seller for consequential loss and that guidance can be taken from the way the court interpreted the wording of the test set out in this case.

Barnard concludes that:

¹⁸⁹ De Stadler in Naude & Eiselen (eds) 55-11.

¹⁹⁰ *Id* 55-6.

¹⁹¹ 29 of 1993.

¹⁹² S 55(3) CPA.

¹⁹³ The Pothier rule however has two requirements, both of which must be present in order to found a claim for damages: (1) the seller must be a merchant seller; and (2) must have publicly professed to have expert skill and knowledge.

¹⁹⁴ Barnard J (2013) 393.

¹⁹⁵ De Stadler in Naude & Eiselen (eds) 55-15.

¹⁹⁶ 1964 (3) SA 561 (A).

Section 55(3) is therefore only applicable if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods and the supplier ordinarily offers to supply such goods or acts in a manner that is consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.¹⁹⁷

It is noted that the remedies under the CPA is more limited as under the common law, as under the common law a consumer will not have to prove that the seller ordinarily sells the goods in question or that the seller behaved like an expert in the circumstances where goods are being sold for a specific purpose which is made known to the seller.¹⁹⁸

Section 55(4) provides that in determining whether any particular goods satisfied the requirements of section 55(2) or (3), *all the circumstances of the supply*¹⁹⁹ of those goods must be considered, including but not limited to:

- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of those goods;
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced or supplied.

Section 55(5) states that for greater certainty in applying section 55(4), (a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and (b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.²⁰⁰ At common law the nature of the goods or the class to which they belong has always played a significant role in determining whether a particular impairment is actionable or not.²⁰¹ The reason for the inclusion of 'patent' goods in section 55(5)(a) is questioned by De Stadler as this is not in line with international conventions, it is inconsistent with the definition of 'defect' in section 53 and it is also not consistent with the common law position.²⁰²

¹⁹⁷ *Ibid.*

¹⁹⁸ De Stadler in Naude & Eiselen 55-17.

¹⁹⁹ Own emphasis.

²⁰⁰ S 55(5) CPA.

²⁰¹ De Stadler in Naude & Eiselen (eds) 55-9.

²⁰² *Id* at 55-25.

Section 55(6) provides that ss 55(2)(a) and (b) will not be applicable to a transaction if the consumer ‘(a) has been expressly informed that the particular goods were offered in a specific condition; or (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition’. If the supplier has notified the consumer in terms of section 55(6), the consumer would still be able to rely on the provisions of section 55(2)(c) or (d).²⁰³

3.7.2 Section 56: The implied warranty of quality

In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be.²⁰⁴ The CPA has thus introduced an implied or *ex lege* warranty of quality which supplements the right to safe quality goods in terms of section 55. This implied warranty therefore extends beyond the boundaries of contractual privity.²⁰⁵

This implied warranty imposed by subsection (1) and the right to return goods as set out in subsection (2) are each in addition to any other implied warranty or condition imposed by the common law, this Act or any other public regulation.²⁰⁶

It is also in addition to any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.²⁰⁷ It should be noted that this warranty as provided for in section 56 is subject to section 55(6) and will not apply to a transaction “if the consumer has been expressly informed that particular goods were offered in a specific condition and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.”²⁰⁸ Section 55(6) therefore makes provision for two separate defences for the supplier and this is confirmed by the use of the adjunct ‘or’ instead of ‘and’.²⁰⁹

Section 56(2) further provides that the consumer may request that goods be repaired, replaced or refunded within 6 months after delivery of the goods should it fail to satisfy the requirements and standards contemplated in section 55. De Stadler²¹⁰ is of the opinion that the inclusion of the 6 month limitation is problematic as it contradicts section 55(2)(c) and

²⁰³ De Stadler in Naude & Eiselen (eds) 55-5.

²⁰⁴ S 56(1) CPA.

²⁰⁵ De Stadler in Naude & Eiselen (eds) 56-2.

²⁰⁶ S 56(4)(a) CPA.

²⁰⁷ S 56(4)(b) CPA.

²⁰⁸ S 55(6) CPA.

²⁰⁹ De Stadler in Naude & Eiselen (eds) 56-3.

²¹⁰ *Id* at 56-5.

she argues that 6 months will not always be a 'reasonable period of time'. Barnard²¹¹ also adds that the 6 month period in which to claim a refund can be beneficial but also disadvantageous depending on the type of goods.

In terms of section 56(4), the implied warranty and the right to return the goods are each in addition to '(a) any other implied warranty or condition imposed by the common law, the CPA; any other public regulation; or (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be'. Barnard²¹² is of the opinion that even though these consumer remedies will no longer be available after 6 months, the implied warranty of quality remains an implied term of the consumer sale indefinitely. The consumer would therefore be able to institute the common law remedies after the 6 month period. It is also noted that these common law remedies may not be excluded by way of agreement between the parties.²¹³ The writer agrees with Barnard in that the 6 month period is unfair and warrants legislative amendment.²¹⁴

Also, unlike section 61, section 56 does not provide expressly that the liability will be joint and severally if one or more members of the supply chain is liable, and suppliers can therefore contractually regulate this risk between themselves.²¹⁵ Section 56 does not provide for a claim for damages as this is regulated by section 61.

3.7.3 Section 61: Liability for damage caused by goods

3.7.3.1. Introduction

The common law position on product liability has been amended by the CPA in that a consumer no longer has to prove fault, at least in the form of negligence, on the part of the producer or manufacturer in order to succeed with a claim for damages suffered as a result of defective products. Section 61 of the CPA is indented to protect consumers from harm caused by defective products and provides as follows: (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or as a consequence of –

- (a) supplying any unsafe goods;
- (b) a product failure, defect or hazard in any goods; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

²¹¹ Barnard J (2013) 469.

²¹² Barnard J (2013) 470.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ De Stadler in Naude & Eiselen (eds) 56-2

The producer or importer, distributor or retailer can therefore be held liable for harm caused by defective goods irrespective if negligence could be established on their part. To further investigate this section it is imperative to look at the definitions provided in the CPA for each of the parties that can be held liable in terms of section 61.

The requirement of negligence is disregarded to create strict product liability, the question whether the harm or defect was reasonably foreseeable or discoverable is no longer relevant as under the common law.²¹⁶ However by imposing strict liability, the elimination of fault does not mean that all risk of harm is automatically transferred to the manufacturer or supplier – an assessment of reasonableness is still required.²¹⁷

3.7.3.2. Supply Chain

A ‘producer’ means a person who grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business.²¹⁸ If a person, by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that he is a producer, such person will also be regarded as a producer in terms of the CPA.²¹⁹

An ‘importer’ is a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.²²⁰

A ‘distributor’ is a person who, in the ordinary course of business is supplied with those goods by a producer, importer or other distributor and in turn, supplies those goods to either another distributor or to a retailer.²²¹

A ‘retailer’ on the other hand is a person who, in the ordinary course of business, supplies those goods to a consumer.²²²

These categories of persons are liable jointly and severally²²³ and this is also in line with the common law position. In the case of a once-off sale and an individual selling second hand

²¹⁶ Loubser & Reid (2006) *Stell LR* 422.

²¹⁷ *Ibid.*

²¹⁸ S 1 CPA.

²¹⁹ S 1 CPA.

²²⁰ S 1 CPA.

²²¹ S 1 CPA.

²²² S 1 CPA.

goods privately, the seller would be exempt from liability under section 61 as the goods are not supplied in the ordinary course of business. Loubser and Reid are of the opinion that the producer, importer, distributor or retailer could still be held liable after the private once off transaction took place.²²⁴

3.7.3.3. Section 53: What is a defect?

Although there is no need for the consumer to prove fault, a key feature of section 61 is that the consumer will have to prove not only that the product caused the alleged harm, but also that the product was *defective*.²²⁵ The concept of defectiveness is not as straightforward as will be seen below.²²⁶ In order to comprehend the provisions of the CPA dealing with defective goods and product liability, the following definitions of the different defects as set out in section 53 are important:

- (1) In this Part, when used with respect to any goods, component of any goods or services –
- (a) **“defect”** means-
- (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect; or
 - (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;
- (b) **“failure”** means-
- (i) The inability of the goods to perform in the intended manner or to the intended effect;
- (c) **“hazard”** means a characteristic that-
- (i) has been identified as, or declared to be, a hazard in terms of any other law; or
 - (ii) eristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances; and
- (d) **“unsafe”** means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.”

²²³ S 61(3) CPA.

²²⁴ Loubser & Reid in Naude & Eiselen (eds) 61-3.

²²⁵ Own emphasis.

²²⁶ Loubser & Reid in Naude & Eiselen (eds) 53-9.

As seen above, section 53(1)(a) makes provision for two definitions of a 'defect'. From a logical point of view, Loubser & Reid find it difficult to understand why the definition of 'defect' has been drafted in this way as the definition involves a number of alternatives, and there is little reason why a consumer would not simply rely on what in the circumstances appear to be the lowest of the vague and general standards contained in the definition, to convince a court that the goods or components are insufficiently 'acceptable', 'useful', 'practicable' or 'safe', whatever judicial meaning can be ascribed to these terms.²²⁷

In order to amount to a defect for purposes of section 53, there must be proof of an imperfection in the manufacture that would render the goods less acceptable than persons generally would be reasonably entitled to expect in the circumstances or characteristics of the goods or components that render the goods or components less useful, practicable or safe than a consumer would generally be reasonably entitled to expect in the circumstances.²²⁸

Loubser & Reid are of the opinion that section 53 tends to lean back to a standard of reasonableness ("consumer expectation test"), and suggest that a general standard of reasonableness assessed with hindsight should be applied instead of the consumer expectation test.²²⁹ They further suggest that the linking of defectiveness and wrongfulness on the basis of a general criterion of reasonableness will promote clarity, predictability and coherence in product liability cases.²³⁰

The definition of a 'defect' by referring to 'components' makes it clear that the definition includes manufacturing defects. Manufacturing defects or failures concern the physical processes of manufacturing, assembling, packaging, inspecting and testing goods and in assessing the existence of a manufacture defect there is generally a limited scope for any kind of value judgement, because simply a question of finding a deviation from the intended product standard.²³¹ Van Heerden however points out that the definition does not make express provision for design defects and recommends that the same should specifically be included by the legislature for avoidance of any doubt.²³²

Barnard²³³ further remarks that the definition in section 53 of the CPA seems to be a confirmation of the definition given in *Holmdene Brickworks (Pty) Ltd v Roberts Construction*

²²⁷ See Loubser & Reid in Naude & Eiselen (eds) 53 for a comprehensive analysis and discussion.

²²⁸ Van Eeden 375.

²²⁹ Loubser & Reid (2006) *Stell LR* 427-428.

²³⁰ Loubser & Reid (2006) *Stell LR* 426.

²³¹ Loubser & Reid in Naude & Eiselen (eds) 53-10.

²³² Van Heerden *Product Liability Notes* 4.

²³³ Barnard (2012) *De Jure* 465.

*Co Ltd*²³⁴ and also added that the legislature could also have included the proviso in terms of section 55(5)(a)²³⁵ for greater certainty from the outset as part of the definition of a defect. Naude²³⁶ points out that according to section 55(5) it is irrelevant whether the defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods and that this is obviously a departure from the common law rules on the *aedilician* remedies, which require that the defect must be latent, that is, not visible upon reasonable inspection.

3.7.3.4. Suppliers

For the purpose of section 61, a supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer.²³⁷ It is noted that ‘supplier’ has been omitted from the supply chain and perhaps creates the impression that they do not fall within the ambit of section 61(1). Melville,²³⁸ Van Eeden²³⁹ and Barnard²⁴⁰ are of the opinion that the supplier of services should also be regarded as the supplier of those goods to the consumer. Jacobs *ea*²⁴¹ is also in agreement with the aforementioned writers but argues that section 61(2) attempts to impose strict liability on suppliers as well, as consumers often do not have a choice of the type of goods installed by the supplier. Loubser and Reid refer to other jurisdictions all of which include ‘suppliers’ of goods and services as liable for strict liability.²⁴² An amendment by the legislature may be necessary to include suppliers or to specifically exclude suppliers from the ambit of product liability.

3.7.3.5. Causation

The supply chain is liable for damage ‘caused wholly or partly as a consequence of’ a product defect relating to goods. Loubser & Reid²⁴³ state that this section relieves the consumer of the onus of proving that the producers etc. were negligent, but this wording does not remove the requirement that a causal link be established between the product defect and the harm suffered. The CPA does not make express provision should a consumer suffer harm as a result of a manufacturing defect and it is recommended that in such an instance the courts should be allowed to draw an inference that product was defective and

²³⁴ 1977 3 SA 671 (A).

²³⁵ It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods.

²³⁶ Naude (2011) *SA Merc LJ* 340.

²³⁷ S 61(2) CPA.

²³⁸ Melville 26.

²³⁹ Van Eeden 64.

²⁴⁰ Barnard J (2013) 441.

²⁴¹ Jacobs *ea* (2010) *PER* 384.

²⁴² Loubser & Reid in Naude & Eiselen 61-8.

²⁴³ *Id* at 61-5.

that said product caused the harm.²⁴⁴ Loubser & Reid are also of the opinion that issues of factual causation raise substantial difficulties where the alleged harm is not a direct injury but a medical condition said to have been caused by a defective product.²⁴⁵

3.7.3.6. Harm

Harm for which a person may be held liable in terms of section 61 includes '(a) a natural person's death; (b) disease or injury; (c) any physical damage to any movable or immovable property; and (d) any economic loss which may result from this harm'.²⁴⁶

Otto argues that not all consequential damages will be claimable under section 61(5)(d) but only to the extent that such damage was caused by harm as set out in subsection (a) – (c).²⁴⁷ It is however submitted that a consumer may still be able to claim consequential damages, other than those mentioned above, in terms of a breach of a tacit warranty even if the breach of a tacit warranty is not mentioned under section 61(5). Naude²⁴⁸ points out that if a consumer suffers harm due to defective goods, he would have a claim for damages regardless of the provisions of section 55(6). Barnard²⁴⁹ is further of the opinion that the harm, as contemplated in section 61(5), should not be equated to damages. Any claim for pain and suffering, loss of amenities of life, or other non-patrimonial damage will still be required to be brought under the law of delict, where fault will be a requirement.²⁵⁰

In terms of section 61(6) a court can still assess whether any harm has been proved and adequately mitigated and then determine the extent and monetary value of any damages, including economic loss or apportion liability among persons who are found to be jointly and severally liable. It is suggested that a procedure for direct access to a court should be provided for separately in the CPA in future. Loubser & Reid²⁵¹ state that the problem with applying apportionment in strict liability cases is that apportionment is normally based on comparative degrees of fault, whereas fault is not assessed for purposes of strict liability. Also, no apportionment to the consumer has been provided for in the CPA as apportionment can only be done among persons who are found to be jointly and severally liable²⁵² and it is argued that the fault of the consumer should be taken into account where he did not act as a reasonable consumer. Kriek²⁵³ also notes that this provision does not provide any guidance as to the basis for apportionment.

²⁴⁴ *Id* at 61-6.

²⁴⁵ *Id* at 61-7

²⁴⁶ S 61(5) CPA.

²⁴⁷ Otto 2011 541.

²⁴⁸ Naude (2011) *SA Merc LJ* 345.

²⁴⁹ Barnard J (2013) 410.

²⁵⁰ Gowar (2011) *Obiter* 528.

²⁵¹ Loubser & Reid in Naude & Eiselen (eds) 61-28.

²⁵² S 61(5)(c) CPA.

²⁵³ Kriek C (2017) 497.

3.7.4 Defences in terms of the CPA

At first glance, it seems as if the CPA imposes strict liability,²⁵⁴ however section 61(4) contains the following defences:

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

Botha & Joubert²⁵⁵ remark that the main differences between the jurisdictions that have adopted strict product liability regimes and South Africa, however, lie in the defences available against strict liability, specifically section 61(4)(c). Botha & Joubert²⁵⁶ further add that at first glance it seems that the legislator is in fact imposing strict liability on the persons listed but submitted that section 61(4)(c) creates a dilemma as it appears that the manufacturer (producer) and importer are specifically excluded from the application of this defence and that strict liability is imposed on them. Some argue that non-manufacturers should be held strictly liable because they will likely be able to seek indemnification from manufacturers and will suffer minimal harm if they are not at fault. The use of a reasonableness test that evaluates the conduct of distributors and retailers, and removes liability for risks which could not reasonably have been anticipated, brings the 'strict' liability of section 61 back closer to the standards of the *Aquilian* action, in which the duty to take

²⁵⁴ Botha & Joubert (2011) *THRHR* 313.

²⁵⁵ *Ibid.*

²⁵⁶ Botha & Joubert (2011) *THRHR* 316.

into account known and foreseeable risks is built into the formulation of the general duty towards the consumer.²⁵⁷ It is also specifically noted that section 61(4)(c) only refers to ‘distributors’ and ‘retailers’ but does not mention ‘producers’ or ‘importers’, and it should be interpreted that this defence is only available to distributors and retailers.²⁵⁸

Gowar²⁵⁹ suggests that in order to avoid relapsing into the old fault based system, a court would need to apply a purposive method of interpretation which means that this section must be interpreted in order to give effect to the overall purpose of the CPA, which is to the benefit of the vulnerable consumer. Barnard²⁶⁰ recommends that any defence raised by retailers or distributors in terms of section 61(4) should be interpreted strictly against them and the marketing of the goods should always be taken into account.

Section 61(4) provides for certain defences, from this it is thus clear that product liability in terms of the CPA is not absolute. It is also noted that liability in terms of section 61 cannot be excluded and that an agreement that purports to do so is null and void in terms of section 51(1)(b). This section should therefore be interpreted with caution and to the advantage of the consumer.

3.7.5 Consumer Redress Avenues

A consumer, in terms of the CPA, has the following avenues to follow should it wish to exercise its rights in terms of the CPA:

National Consumer Goods & Services Ombudsman (“CGSO”): The CGSO is established in terms of section 82(6) of the CPA and accredited by the Minister of Trade and Industry as the industry ombud of the Consumer Goods and Services Industry.²⁶¹ If a consumer has an unresolved complaint against a supplier, the consumer may first attempt to have it resolved by means of alternative dispute resolution with the assistance of the CGSO.²⁶² The CGSO gives the supplier the opportunity to resolve the complaint, failing which the CGSO will help the parties to reach an agreed settlement. In the relatively few cases that the supplier refuses to co-operate or the CGSO is unable to resolve the matter, it may be referred to the National Consumer Commission, which has the legal power to investigate the complaint and impose a compliance notice on the supplier.²⁶³

²⁵⁷ Loubser & Reid in Naude & Eiselen (eds) 61-11.

²⁵⁸ *Id* at 61-14.

²⁵⁹ Gowar (2011) *Obiter* 521.

²⁶⁰ Barnard J (2013) 477.

²⁶¹ <http://www.cgso.org.za/what-we-do/>.

²⁶² <http://www.cgso.org.za/where-we-fit-in/>.

²⁶³ <http://www.cgso.org.za/where-we-fit-in/>.

The National Consumer Commission (“NCC”): The NCC as established under section 85 of the CPA is the primary regulator of consumer-business interaction in South Africa, and was created by government under the auspices of the Department of Trade and Industry (“DTI”), to ensure economic welfare of consumers.²⁶⁴ The NCC’s mere existence in terms of the CPA, which it administers, is to promote a fair, accessible and sustainable marketplace for consumer products and services, establish norms and standards relating to consumer protection, to provide for improved standards of consumer information, prohibit unfair marketing and business practices, promote responsible consumer behaviour, and to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements.²⁶⁵ This simply means that the NCC registers and assesses complaints, investigates alleged misconduct by businesses, refers individual complaints to Alternate Dispute Resolution (“ADR”) agencies for resolution, and represents consumers in the Consumer Tribunal amongst other things.²⁶⁶

National Consumer Tribunal (“NCT or Tribunal”): The NCT is an independent adjudicative entity, deriving its mandate from the National Credit Act²⁶⁷, and has jurisdiction to hear, *inter alia*, matters arising from the CPA. The NCT may be approached in the following instances:

- When a matter is referred by the NCC after it had completed the investigation²⁶⁸;
- Where a consumer has obtained leave from the NCT to refer a matter to it directly after receiving a notice of non-referral from the NCC²⁶⁹; or
- Where a matter has been transferred from a consumer court to the NCT in terms of section 73(3) or 75(2) of the CPA.

Only the Tribunal can impose a fine upon a supplier for contravening the provisions of the CPA and a decision by the Tribunal has the same status as one made by the High Court of South Africa.²⁷⁰ In terms of section 117, the standard of proof before the Tribunal or before a consumer court in terms of the CPA, is on a balance of probabilities. It is noted that to date, there have been no reported decisions by the NCT regarding section 61.

3.7.6 Interpretation of section 61 by the CGSO

²⁶⁴ <http://www.thencc.gov.za/content/about-ncc>.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ 34 of 2005.

²⁶⁸ S 73(2) CPA.

²⁶⁹ S 75(1)(b) CPA.

²⁷⁰ <http://www.thenct.org.za/mandate>.

A decision by the CGSO titled “Injury caused by defective sandal”²⁷¹ involved a complainant that fell in February 2015 because of a sandal that was allegedly not safe to wear on the road and as a result she fell and hurt her knee and toe. The supplier denied liability as it was of the opinion that this was not a quality issue and that the shoes showed a fair amount of wear and tear and that it can therefore not be held liable for the incident. The incident was also referred to the supplier’s insurer and it rejected the claim and did not provide the complainant with a copy of their investigation. The complainant then referred the matter to the CGSO.

The CGSO considered all the evidence presented by both the complainant and the supplier and accordingly arranged the return of the complainant’s shoes to the supplier to be inspected to see if there was any manufacturer’s defect in the shoes that could have caused the complainant to fall. The supplier then provided the CGSO with the following information:²⁷²

- a) The inspection report completed when the shoes were received, the report indicated that the necessary quality checks were done before it was sent to the various stores and that the shoes passed the checks and tests performed on the shoes;
- b) There had been no other instances where the shoes have been returned; and
- c) The supplier’s quality department confirmed that there has been a considerable amount of wear and tear on the shoes, especially the back of the heel tip and the forepart of the sole bottom. On both areas, the moulded grip lines and grip pattern has worn away. This would result in the sandal being less able to grip on wet smooth surfaces. It will however on normal pavement concrete or tar road surfaces still perform for its normal intended walking purpose.

The CGSO’s findings were as follows:

Taking into account that there are various contributory factors that can cause one to fall it is of paramount importance that we determine with certainty that the shoes were defective and that the defect caused the complainant to fall before we can instruct the store to take responsibility for the complainant’s injury. In this instance we have not received any proof that the shoes are defective and the reports returned from the supplier indicate that the shoes do not have any flaws and are not defective. Based on the facts of this case, the information and evidence furnished to this office and on the principles of reasonableness and fairness, there is no reasonable prospect of this office making a recommendation in the complainant’s favour.²⁷³

²⁷¹ (201503-0183) [2015] ZACGSO 3 (18 August 2015).

²⁷² *Ibid*, under assessment.

²⁷³ *Ibid*.

The CGSO in the case above confirmed that the supplier will be liable irrespective of whether negligence can be established but that a consumer must however still prove that the product had some sort of flaw that made it unsafe or otherwise defective in terms of the definitions set out in the CPA and that the damage was caused wholly or partly by this defect. What is noteworthy from the case above is the CGSO's finding that the defect should be determined with certainty, it is argued that this burden of proof on the consumer could potentially be cumbersome. The CGSO also referred to principles of reasonableness and fairness to which one can come to the conclusion that this is indeed not a regime of absolute strict liability.

Another complaint heard by the CGSO in 2014 titled "Burns caused by drain cleaner: Warnings adequate" involved a complainant that spilled drained cleaner on his foot and sustained severe chemical burns as a result of this.²⁷⁴ The complainant requested that the warning label be clearly marked and also requested a full refund on all medical bills paid thus far, and to be compensated for pain and suffering.

The distributor denied liability for the consumer's injuries on the grounds that:

- a) the label on the product contained adequate warnings of the dangers of the product and explicit, standard advice on the remedial action to be taken;
- b) the complainant failed to read the label and to take precautions and by implication the injuries were his own fault.

The CGSO specifically considered sections 2(9), 22(2), 58(2), 53(1)(c), 61(1) of the CPA as well as the SANS 10234 and SANS 10625²⁷⁵. The first issue the CGSO had to consider was whether the warnings were adequate in order for the claim to fall within the ambit of section 61(1)(c) of the CPA. The provisions of section 58(3) of the CPA were also applicable in this case as it provide that a person who packages any hazardous or unsafe goods must display on or within that packaging a notice that meets the requirements of section 22, and any other public standards (SANS10234 and 10265). The CGSO, having considered the observations of the distributor's expert report in this regard and having examined the photographs of the product's container, was satisfied that the warnings are adequate and complied with the prescribed standards.

The second consideration before the CGSO was whether the harm was caused wholly or partly as a consequence of supplying unsafe goods²⁷⁶ or as a result of a hazard²⁷⁷ in the goods. The CGSO noted that these subsections appear to be alternatives to section 61(1)(c),

²⁷⁴ (20131220550) [2014] (29 April 2014). Available online: http://www.cgso.org.za/wp-content/uploads/2017/04/Compendium-of-cases_20_APRIL_2017.pdf?87ab66&87ab66.

²⁷⁵ The SANS referred to relates to hazard symbols, hazard statements, signal words and pictograms that were required to appear on labels.

²⁷⁶ S 61(1)(a) CPA.

²⁷⁷ S 61(1)(b) CPA.

as is evidenced by the use of “or” between subsection sections 61(1)(b) and (c) and raised its concern that:

This could give rise to an absurd result in that the suppliers of hazardous goods such as petrol, paint stripper, pool acid and pesticides would be liable for all injuries or losses suffered no matter what precautions they took or warnings they gave. This would very soon result in suppliers discontinuing the supply of such products.²⁷⁸

The CGSO added that this problem is however to some extent averted by the requirement that a claimant must, in terms of section 61(1), prove that the harm was caused wholly or partly by the supply of the goods or the hazard. The CGSO found that although the supply of the hazardous product enabled the harm to occur, the action of the complainant of failing to read/ ignoring the warnings, dropping flakes of drain cleaner on his unprotected foot and failing to immediately wash it with water was the immediate or proximate cause of the harm caused. The CGSO was of the view that the complainant was not able to prove a claim against either the distributor or the supplier for the injuries he suffered on any of the possible causes of action set out in section 61(1) of the CPA.

What is clear from the findings above is that the CGSO took the consumer’s conduct into consideration. Kriek²⁷⁹ is of the opinion that the main issue highlighted by the CGSO is the difficulty presented by the numerous alternate and seemingly overlapping definitions of product defectiveness contained in section 61(1). She further offers one solution in that when courts assess defectiveness in terms of section 61(1)(a) or (b), the general “fairness” and “sustainable” consumer market principles underlying the CPA’s purposes would dictate that a product be considered in its entirety as this would necessitate consideration of the adequacy of instructions or warnings accompanying the product irrespective whether section 61(1)(c) is pleaded.²⁸⁰ This would also be consistent with the general reasonableness considerations applied in context of wrongfulness in delictual claims.²⁸¹

3.7.7 Consideration of section 61 by our courts

There have been only two reported court judgements to date regarding the application and interpretation of section 61, namely the High Court and Supreme Court of Appeal judgements in the *Halstead-Cleak* cases,²⁸² which are discussed in more detail below.

²⁷⁸ http://www.cgso.org.za/wp-content/uploads/2017/04/Compendium-of-cases_20_APRIL_2017.pdf?87ab66&87ab66.

²⁷⁹ Kriek C (2017) 430.

²⁸⁰ *Ibid.*

²⁸¹ Kriek C (2017) 431.

²⁸² Kriek C (2017) 432.

In *Halstead-Cleak v Eskom Holdings Ltd*²⁸³, the plaintiff, while cycling came into contact with a low hanging live power line on the footpath and suffered severe electrical burns as a result of coming into contact with the line. The defendant, Eskom, was in control of all power lines not falling under the control of the local authority. The plaintiff therefore sued Eskom for damages arising from the injuries sustained during the contact with the live power line. The parties agreed that the only matter for the court to decide on would be the issue of whether the defendant was strictly liable for the harm caused by the power line based on section 61 of the CPA.

The court considered section 61 as well as section 53 of the CPA in-depth. The court also specifically referred to the following definitions as provided for in the CPA: Consumer, distributor, goods, market, producer, supplier and supply. Furthermore it referred to section 25 of the Electricity Act that provides as follows:

In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury shall be presumed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.

Eskom argued that the CPA is about consumerism and the protection of consumers and that if the plaintiff had suffered electrical burns in the course of utilising the supply of electricity to his home, or otherwise in the course of him using the electricity, the CPA would have been applicable and thus contented that section 61 of the CPA was not applicable in this case.²⁸⁴ Eskom further argued that an innocent third party who is not a “consumer” in terms of section 1 of the CPA, cannot claim redress as this would also be contrary to the spirit and purpose of the CPA.²⁸⁵

The following questions were considered by the court *a quo*:²⁸⁶

- a) Whether “goods” or “services” as defined in the CPA is applicable? The court considered the definition and in terms of section 1(e) of the definition of “goods” in the CPA, electricity was specifically included in the definition and it was therefore accepted that electricity causing harm constitutes “goods” for purposes of section 61.
- b) In what capacity did the defendant stand in relation to the goods? The court considered and applied the definitions of “producer”, “retailer” and “supplier” and

²⁸³ [2015] ZAGPPHC 632.

²⁸⁴ *Eskom*-case 13.

²⁸⁵ *Eskom*-case 14.

²⁸⁶ *Eskom*-case 17-18.

the court came to the conclusion that the consumer did have a claim in terms of the CPA.

- c) In what capacity did the plaintiff stand in relation to the defendant and the goods? The court referred to the wording of section 61(5) and stated that in terms of this section it is clear that liability arises not only in respect of consumers as defined in the CPA or consumers in the general sense, but also to “any natural person”²⁸⁷. The court concluded that the plaintiff did not have to be a “consumer” as defined in section 1 in order for him to institute an action in terms of the CPA.
- d) Was the electricity defective as defined by section 53(1)? The court discussed the definition of a defect²⁸⁸ and concluded that in the context of electricity being conducted along a line which is not required or used to supply any electricity to any consumer, this constitutes “goods or results of the services less acceptable than persons generally would be reasonable to be entitled to expect in the circumstances”.²⁸⁹ The court also added that “logic accordingly dictates that the defendant cannot introduce a source of danger and thereafter seek exoneration when injury is caused as a result thereof”.²⁹⁰

The court remarked that it was notable that the defendant neither pleaded nor adduced any defence to substantiate the non-applicability of the CPA. The court was accordingly satisfied that the plaintiff had succeeded to prove that the defendant was 100% liable in terms of section 61 to the plaintiff for the injuries he sustained.²⁹¹

In the writer’s opinion, the court caused confusion by referring to ‘any natural person’ and whether this constituted sufficient grounds for extending the application to bystanders that suffered harm. Loubser & Reid explain that the reference to ‘natural person’ was possibly made to indicate that harm in the form of death or injury cannot be suffered by a juristic person and further substantiated this argument by referring to section 61(5)(c) that is not linked to a natural person.²⁹² Before this judgment was handed down, Neethling and Potgieter had already argued that because the CPA is aimed at protecting consumers only, it is likely that innocent bystanders who are not users will still need to rely on the ordinary delictual principles of common law.²⁹³ The harm must have been caused as a result of a consumer transaction as specifically mentioned in sections 5(1), 5(2) and 5(5) of the CPA and it is clear in this case that there was no agreement between the parties. Kriek²⁹⁴ also argues that if the legislature intended to extend the scope of section 61 to persons other than those falling within the category of “consumer”, it would have expressly done so.

²⁸⁷ S 61(5)(a).

²⁸⁸ S 53(1).

²⁸⁹ Eskom case 18.

²⁹⁰ *Ibid.*

²⁹¹ Eskom case 19.

²⁹² Loubser & Reid in Naude & Eiselen (eds) 61-4.

²⁹³ Neethling & Potgieter 374.

²⁹⁴ Kriek C (2017) 438.

Eskom subsequently appealed this judgement²⁹⁵ and the Supreme Court of Appeal,²⁹⁶ in its judgement referred to the principles of statutory interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁹⁷ and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*²⁹⁸. It was held that statutory interpretation is aimed at “determining the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being”. Furthermore that “a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results”. The aforementioned should be taken into consideration when interpreting section 61 and other applicable provisions of the CPA.

The SCA had to consider the following items and concluded that:

- a) In view of the fact that section 61 is part of Chapter 2 of the CPA (Fundamental Consumer Rights), it is clear that harm caused must be to a “natural person”, as required by section 61(5)(a), in his capacity as a “consumer”. The SCA was of the opinion that this was the only possible business-like interpretation and that the reference made to “natural person” is clearly to distinguish it from “person” which could also include a “juristic person”.
- b) The SCA specifically highlighted the fact that when establishing the meaning of “consumer”, there must be a transaction to which a consumer is party to, or the goods are used by another person following that transaction.²⁹⁹ The SCA noted that the High Court lost sight of the fact that there should first be a supplier and consumer relationship, before Eskom could be held strictly liable for harm caused. The SCA held that:

In this instance the respondent was not a consumer vis-à-vis Eskom as:

- (a) the respondent did not enter into any transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom’s business; and
 - (b) the respondent was not utilising the electricity, nor was he a recipient or beneficiary thereof.³⁰⁰
- c) The supply of unsafe electricity also presupposes that Eskom sold the electricity in the ordinary course of business for consideration. The respondent and Eskom were not in a consumer, producer or supplier relationship in respect of the electricity that

²⁹⁵ Eskom Holdings Limited v Halstead-Cleak ZASCA [2016] 150 (herein after “Eskom SCA-case”).

²⁹⁶ Herein after “SCA”.

²⁹⁷ 2012 (4) SA 593 (SCA) par 18.

²⁹⁸ 2016 (1) 518 par 27.

²⁹⁹ Eskom SCA-case 7.

³⁰⁰ Eskom SCA-case 11.

caused the harm to the respondent and Eskom could therefore not have supplied the goods in its ordinary course of business.³⁰¹

- d) It could also not be found that the harm the respondent suffered was as a result of the electricity itself failing, or that the electricity had a defect as required by section 61(1)(b) of the CPA.³⁰² Failing in this context would have meant that the electricity was unable to perform in its intended manner. The electricity also did not have a defect as the electricity, in the context of the case, did not suffer from a material imperfection in the manufacture of it and neither did the electricity have a characteristic that rendered it less useful or safe than a person would generally expect in the circumstances.³⁰³
- e) The electricity did not possess a characteristic that presented a significant risk of injury to any person when the goods were utilised and could therefore not be regarded as unsafe.³⁰⁴ The SAC was clear that the respondent was not utilising the electricity when he was harmed.³⁰⁵

The SCA held that section 61 of the CPA would not create strict liability on the part of a supplier of electricity if the plaintiff is not a consumer vis-à-vis it. The appeal decision was however not handed down without criticism.³⁰⁶ Loubser & Reid³⁰⁷ is however not in agreement with the SCA's conclusion regarding the interpretation of defectiveness of the electricity. They argue that the judgement does not offer any real assurances in differentiating between the two definitions of "defect" in section 53(1)(a) or the other definitions of "hazard", "unsafe" and "failure". Loubser & Reid³⁰⁸ further argue that it is not the generation of the electricity, but rather the manner and place of distribution of the electricity, being along a low-hanging line across a footpath, which would render the electricity dangerous. The authors further argued that the definition of defect under section 53(1)(a)(i) was not applicable in this case but rather section 53(1)(a)(ii) and Eskom should be liable as a distributor of electricity in a manner and in circumstances that rendered it less safe than persons would generally be entitled to expect. The writer hereof also agrees with Loubser & Reid as the electricity was distributed via a low hanging line, thereby exposing persons to harmful effects, and rendered the electricity less safe than a person would generally be entitled to expect.

The SCA also did not refer to the definition of unsafe in section 53(1)(d) which includes a 'characteristic' in the goods that presents 'an extreme risk of personal injury or property

³⁰¹ *Ibid.*

³⁰² *Eskom SCA-case 11-12.*

³⁰³ *Eskom SCA-case 11.*

³⁰⁴ *Eskom SCA-case 12.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Loubser & Reid in Eiselen (eds) 53-3; 53-4.

³⁰⁸ *Ibid.*

damage to the consumer or to other persons'.³⁰⁹ The writer agrees with Loubser & Reid in that the SCA should also have considered this section as electricity is already included in the definition of 'goods' and the fact that the electricity line was low hanging, in itself is a characteristic of electricity that presents an extreme risk of person injury or property damage to the consumer or to other persons. Section 53(1)(d) also specifically refers to 'any other persons' therefore an innocent bystander would be able to rely on the provisions of the CPA, and more specifically on section 61 to hold Eskom strictly liable.

Although case law regarding section 61 is limited, it is likely that this section would be used in future by consumers who suffer harm as a result of defective goods. The reason however for limited cases being heard by our courts could be as a result of section 69(d) which states that a person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

3.8 CONCLUSION

It was clear from the *Wagner* case that if strict liability had to be imposed, it was up to the legislature to do so. There has been a global shift towards strict product liability and South Africa has followed this trend by the enactment of the CPA, in particular section 61 thereof. The purpose of the CPA should always be kept in mind when interpreting the provisions thereof. The golden rule should always be to interpret the CPA in such a way that is most beneficial to the vulnerable consumer.

The importance of section 2(10) should be emphasised, and the effect thereof is that a consumer who suffers harm as a result of defective goods, has both the common law remedies and legislative remedies at his disposal and the consumer is in effect granted a larger scope of remedies. Section 76(1) also substantiates this interpretation.

The CPA will only be applicable in instances as set out in section 5 of the CPA, and these should always first be referred to. It is noteworthy that the exclusions from the CPA as provided for in section 5(5) are subject to section 61. This raised the question whether the different role players within the supply chain could institute claims against one another. On the face of it, this would indeed be possible and given the far-reaching consequences that defective products could have, the supply chain would be able to use section 61 if it suffered damages as a result of a defective product.

As indicated, section 53, 55 and 56 is central to product liability claims, and these were discussed in detail. It was evident that in certain instances these provisions have amended the common law position and in other instances confirmed the common law position.

³⁰⁹ Loubser & Reid in Naude & Eiselen (eds) 53-4.

The remedies as provided for in section 55 are only available in the law of sale under the common law and have therefore been extended to parties outside the contractual relationship by the CPA. The requirement in section 55(2)(c) is a material departure from the common law as the *aedilition* remedies are only available in respect of defects which are present at the time of conclusion of the contract and the burden of proof is on the purchaser. Under section 56(2) the CPA, the consumer can however institute action within 6 months after delivery of any goods to the consumer. The consumer is therefore afforded additional rights as to the quality of the goods at the time when the consumer receives the goods. Even though the wording of section 55(3) of the CPA looks similar to that of the Pothier rule, it is not and should not be regarded as a confirmation thereof.

The CPA has also introduced an implied or *ex lege* warranty of quality in terms of section 56 which supplements the right to safe quality goods in terms of section 55. This implied warranty therefore extends beyond the boundaries of contractual privity. The 6 month period as provided for in section 56(2) is problematic as it contradicts section 55(2)(c) and she argues that 6 months will not always be a 'reasonable period of time'. The consumer would be able to institute the common law remedies after the 6 month period and the common law remedies may not be excluded by way of agreement between the parties as provided for by the CPA.

The requirement of negligence has been disregarded by section 61 to create strict product liability, the question whether the harm or defect was reasonably foreseeable or discoverable is no longer relevant as under the common law. These parties as mentioned in the supply chain are liable jointly and severally and this is also in line with the common law position. The consumer is however still required to prove that the harm suffered was as a result of the defective goods supplied by any one of the parties in the supply chain.

The definition of a 'defect' in terms of the CPA is problematic and it is suggested that the legislature only includes one definition.

At first glance it seems that the legislator did in fact impose strict liability on the persons listed in section 61(1) but it is submitted that section 61(4)(c) creates a dilemma as it appears that the manufacturer (producer) and importer are specifically excluded from the application of this defence and that strict liability is imposed on them. Section 61(4)(c) also only refers to 'distributors' and 'retailers' but does not mention 'producers' or 'importers', and it should be interpreted that this defence is only available to distributors and retailers. The test for defectiveness is one of reasonableness as the court would have to consider what persons generally would 'be reasonably entitled to expect in the circumstances'. A value judgement would have to be made and therefore it cannot be said that the product liability provided for in terms of section 61 is absolute. Despite the same apparent problematic tests finding their way into the CPA, there is one important difference between



the CPA and its counterparts in other jurisdictions in that section 2(1) of the CPA specially states that the CPA and all its provisions are to be interpreted in a manner that gives effect to the purposes of the CPA.

CHAPTER 4: COMPARATIVE POSITION IN TERMS OF THE EUROPEAN UNION

4.1 INTRODUCTION

The framework chosen for South Africa appears to follow closely the European Council Directive on Product Liability of 1985 (“the Directive” or “EU Directive”)³¹⁰. Neethling, Potgieter & Visser rightly so state that the field of strict product liability is still in its infancy in South Africa and it is therefore essential that comparative law be considered.³¹¹ The Directive has been widely adopted by countries within the European Union and it is therefore appropriate to consider the provisions under the Directive in order to draw parallels to the CPA, to ascertain what shortcomings have been seen to date and to determine the potential outcomes which may be adopted by South African Courts.³¹²

In terms of section 2(2)(a) of the CPA, our courts may, when interpreting or applying the CPA, consider appropriate foreign and international law. The Constitution of the Republic of South Africa also states that when the Bill of Rights is being interpreted, a court may consider foreign law.³¹³

General safety requirements for any product placed on the market, or otherwise supplied or made available to consumers was not provided for in the EU Directive. It was for this reason that Directive 2001/95/EC on General Product Safety was introduced and the purpose of this directive is to ensure that products placed on the EU market are safe.³¹⁴

A comparative study is undertaken in this chapter to establish the European position relating to product liability and to identify potential solutions where any ambiguities and/or loopholes identified in the CPA can be rectified. An overview of the provisions relating to the liability for defective goods are also considered.

4.2 EUROPEAN DIRECTIVE ON PRODUCT LIABILITY

The promulgation of the EU Directive on 25 July 1985 can be seen as one of the most important events in the history of product liability law in Europe. The EU Directive required all European Union Member States to issue conforming strict liability laws in line with the provisions of the Directive. The United Kingdom first implemented the Directive, followed by Germany. France was the last Member State to implement the Directive.

³¹⁰ Council Directive 85/374/ECC of 25 July 1985.

³¹¹ Neethling & Potgieter 336.

³¹² Gowar (2011) *Obiter* 529.

³¹³ S 39 Constitution of the Republic of South Africa.

³¹⁴ Article 1 of the Product Safety Directive.

The main purpose of the EU Directive is to ensure consumer protection against damage caused to health or property by a defective product and also to reduce the disparities between national laws. The Directive was amended in 2000 to include agricultural products³¹⁵ and this was done in an attempt to restore consumer confidence in the safety of these products. This was the first piece of legislation introduced in the EU concerning a producer's liability for harm caused by defective products.

4.2.1 Parties Liable

Article 1 of the Directive provides for strict product liability and states that the producer shall be liable for damage caused by his defective product. The definition of "producer" is comprehensive and means the manufacturer of a finished product, producers of raw material or component part as well as any person who is presented as a producer by putting his name, trade mark or other distinguishing feature on the product.³¹⁶ Consumers prefer to sue the manufacturer of a finished product as they often lack the expertise to trace a possible defect in one of the component parts.³¹⁷ This in effect means that the producer will be liable for damage caused by a defect in connection with the finishing of the goods, as well as defects in any component part of the product.³¹⁸

The following are also deemed as producers: Any person who imports into a community a product for sale, hire, lease or any form of distribution in the course of his business. This provision is to the advantage of consumers as this will allow them to sue the importer rather than pursuing unnecessary lawsuits against producers established outside the EU.³¹⁹ If the producer of the product cannot be identified, each supplier of the product shall be treated as the producer thereof unless he informs the injured person, within a reasonable time, of the identity of the producer or the person who supplied him the product. The same shall apply in the case of imported products. This is ultimately to the advantage of the consumer, as the identified supplier cannot escape liability if the consumer is not in a position to determine who the producer of the product where.

The Directive is not applicable to service providers but it does not preclude national law from holding a person liable for using defective products while providing services.³²⁰

4.2.2 Burden of proof

³¹⁵ Council Directive 1999/34/EC.

³¹⁶ Article 3(1) Directive.

³¹⁷ Ueffing 379.

³¹⁸ *Ibid.*

³¹⁹ *Id* at 380.

³²⁰ *Centre Hospitalier Universitaire de Besancon* C-495/10.

It is important to note that article 4 of the Directive provides that the injured person shall be required to prove damage, the defect and the casual relationship between the defect and damages suffered. Interesting to note that even though the European Commission³²¹ found that it was often difficult to prove that a product is defective because of the product's complexity, the cost of obtaining an expert witness and/or the lack of access to essential information and after considering various views, it did not recommend any amendments to article 4.

With reference to a case in Belgium, the claimant suffered injuries because a soft drink bottle exploded and the court ruled in favour of the claimant despite the fact that he did not provide evidence as to what specific defect that caused the bottle to explode.³²² The district court was prepared to infer a defect from the fact that a reasonable person would not expect a bottle to explode.³²³ In another case in France, the glass screen of a fire place exploded and injured the claimant as a result of the explosion. Here the district court was also prepared to infer a defect *and a causal link*³²⁴ for the damage caused without the cause having been proved. The defect and causal link was inferred on the basis that the product failed in a way that defeated legitimate consumer expectations.

The EU Directive further provides that whenever two or more persons are found liable for the same damage, each one of them will be jointly and severally liable.³²⁵ The party that indemnifies the injured consumer has the right to contribution claims against the others in proportion to the risk attributable to them.³²⁶

4.2.3 Product

In order to found product liability under the EU Directive, the injured party has to prove that the product that caused the harm was indeed defective. A product in terms of Article 2 of the EU Directive means physical property and goods as opposed to land or rights in or to real property³²⁷ and further includes primary agricultural products.³²⁸

4.2.4 Defect

In terms of the EU Directive, a product is defective when it does not provide the safety that a person is entitled to expect, taking all circumstances into account, including the presentation of the product; the use to which it could reasonably be expected that the

³²¹ Article 21 Directive.

³²² *Riboux v SA Schweppes Belgium* 21.11.96, Civ. Namur, 5e. Ch.

³²³ *Ibid.*

³²⁴ Own emphasis.

³²⁵ Article 5 Directive.

³²⁶ Article 5 Directive.

³²⁷ Article 2 Directive.

³²⁸ Agricultural products was included by Directive 1999/34/EC.

product would be put; and the time when the product was put into circulation.³²⁹ The Directive further provides that a product is not defective for the sole reason that a better product is subsequently put into circulation.³³⁰ Weatherill³³¹ remarks that the fundamental issue raised under article 6 of the Directive is that it ensures that the focus is on the condition of the product whereas under a fault-based product liability regime, the focus is on the supplier's conduct. According to Loubser & Reid defectiveness, according to this definition in article 6, relates exclusively to safety rather than quality, and safety must be gauged by reference to an objective standard of what a consumer is entitled to expect.

The consumer expectation test is therefore inherent in the above definition and gives rise to a subjective element of the concept of the defect and makes no distinction between defects in production, design and a lack of warning or instruction provided to the consumer.³³² Loubser & Reid³³³ submit that these phrases seem to indicate a negligence standard based upon the reasonableness of the manufacturer's design and warning choices.

It is interesting to note that should injury or damage arise from nuclear accidents or damages covered by international conventions ratified by Member States, the EU Directive will not be applicable.

The High Court of England and Wales³³⁴ in *A v National Blood Authority* considered the concept of defectiveness in detail where 114 people contracted Hepatitis C after they received a blood transfusion containing a virus. The court came to the conclusion that blood producers and medical practitioners were aware of the potential risk of the virus when doing blood transfusions since 1970 but no screening tests were available at the relevant time. The court held that the product was not defective due to it being unsafe but it had to consider whether the general public knew of and accepted the risk of infection. The court held that the claimants were legitimately entitled to expect that the blood was free of infections and therefore the blood was defective. The court further, in reaching its decision, held that "all circumstances" as provided for in the definition of a defect were limited to "relevant circumstances".

In *Richardson v LRC Products Limited*³³⁵ the claimant brought an action under the Consumer Protection Act 1987 for personal injury suffered when a condom, manufactured by the defendant, failed and she fell pregnant. She claimed that the condom was defective as it had been weakened by ozone damage when it was stored in the defendant's factory. The

³²⁹ Article 6(1) Directive.

³³⁰ Article 6(2) Directive.

³³¹ Weatherill *EU Consumer Law and Policy* (2005) 137

³³² Ueffing 382.

³³³ Loubser & Reid in Naude & Eiselen (eds) 53-5..

³³⁴ [2001] 3 All ER 289.

³³⁵ [2000] Lloyds Rep. Med. 280.

Court then held that it would not be proof of a defect itself if the condom had a mere fracture in it. The Court also added that condoms do from time to time fail and that persons generally do not expect them to always work 100 percent.

In *Hufford v Samsung Electronics*³³⁶ the Court confirmed that a claimant is not required to prove the precise cause of the defect and held that a claimant does not have to specify or identify with accuracy or precision the defect in the product, it is enough for him to prove the existence of the defect in broad or general terms.

A concept “put into circulation” has been problematic in the interpretation thereof and the matter was referred to the European Court of Justice³³⁷ by Denmark in the case of *Veedfald v Arhus Amstkommune*³³⁸. In this case, the claimant had been in hospital waiting for a kidney transplant, the kidney had been removed from the donor and prepared for transportation through “flushing” it with a liquid specifically manufactured for this purpose. The fluid however was defective and the kidney could not be used for the said transplant and the claimant accordingly instituted a claim for damages against the hospital. The ECJ³³⁹ held that the definition of defectiveness must be interpreted in accordance with the aim and purpose of the Directive and that the hospital could only rely on its defence where:³⁴⁰

- a person other than the producer has caused the product to leave the process of manufacture;
- the product is used contrary to the producer’s intention; or
- where the manufacturing process is not yet complete.

The ECJ accordingly held that the product (the kidney) had been put into circulation and the hospital was held liable.

In another instance, the English courts also referred the issue of when a product is “put into circulation” to the ECJ. In this case, the claimant had suffered injuries after receiving a vaccination and claimed that the injuries were caused by a defect in the vaccine. The producer had sent the vaccine to the distributor, who sold the vaccine to the UK Department of Health and delivered it to a hospital. The vaccine was sent to the distributor 10 years ago, and the question of when the vaccine was put into circulation became significant. The court held that a product is put into circulation when it leaves the production process operated by the producer and enters the marketing process in a form in which it is offered to the public.

³³⁶ [2014] EWHC 2956 (TCC).

³³⁷ Herein after “ECJ”.

³³⁸ Case C-2013/99 (10 May 2001).

³³⁹ *Declan O’Byrne v Sanofi Pasteur MSD Ltd and Sofani Pasteur SA* Case C-127/07 (9th February 2006)

³⁴⁰ *Ibid.*

On 5 March 2015, the ECJ³⁴¹ issued a preliminary ruling on two issues arising under the Directive. Briefly, the facts of the case were that BSC, a company who manufactures and sells pacemakers and cardioverter defibrillators, discovered that a component used to hermetically seal the pacemakers may experience gradual deterioration which could affect the device's efficiency. It also discovered that the defibrillators had shown that a magnetic switch in them could remain stuck in the closed position. In both instances BSC informed the treating physicians of the possible above mentioned issues and offered to replace the products for the patients affected. The patients received replacement devices and the patients' insurer sued BSG. The following two questions were addressed by the court:

- a) Can article 6(1) of the Directive be interpreted to mean that a product is already defective if other products in the same group have significantly increased the risk of failure even though the defect has not yet been detected in the device which has been implanted? The court referred to the definition of a "defect" which provides that the product is defective if it does not provide the safety which the public at large is entitled to expect taking all the circumstances into account. The court held that the devices implanted in this case, may be regarded as defective products without a defect having to be proved in each individual device.
- b) If yes, do the costs of the operation to replace the devices constitute damage caused by a personal injury for purposes of article 1 and article 9(a) of the Directive? The court ruled that in light of protecting consumer health and safety, the above must be given a broad interpretation. It further held that, in the case of defective medical devices, compensation for damage must cover the costs relating to the replacement of such a defective product.

4.2.5 Harm and Damages

Damage arises in the case of death, personal injury, damage or destruction to property, provided that the property is ordinarily intended for private use or consumption and was used by the injured person mainly for his own use or consumption.³⁴² Member States may however determine compensation for non-material damage that an injured person may seek.³⁴³

The EU Directive further forbids a producer from limiting its liability to an injured person by way of a contract.³⁴⁴ It is clear from the definition that damages only relate to the "consumer" or "consumer property". Article 16 of the EU Directive however permits Member States to choose to place a limit of not less than 70 million Euros on the total

³⁴¹ Cases C-503/13 and C-504/13.

³⁴² Article 9 Directive.

³⁴³ Article 11 Directive.

³⁴⁴ Article 12 Directive.

liability of a producer for damage resulting from death or personal injury and caused by identical items with the same defect.

4.2.6 Defences

The supplier shall be exempted from all liability pursuant to the Directive if it establishes that:³⁴⁵

- (a) He did not put the product into circulation;
- (b) Having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation or that defect came into being afterwards;
- (c) The product was neither manufactured or distributed by him in the course of his business;
- (d) The defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- (e) The state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) In the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Member States can decide at their own discretion whether to implement the defence provided for in subsection (e) (the so called “development risk defence”) in their national legislation.³⁴⁶ According to the Commission, the producer has to be able to prove that it was absolutely impossible for anyone to discover the defect.³⁴⁷ This had been described as one of the most controversial provisions in the Directive as it may be regarded as re-admitting fault based liability through the back door.³⁴⁸

Since the Directive works towards uniformity within the EU, it seems unfair that Member States are given the choice to implement this defence or not. On the other hand, if this is to the benefit of the consumer, it is in line with the objectives of the Directive.

The Directive further provides for contributory negligence in which the liability of the producer may be reduced or disallowed when the damage is caused both by a defect in the product and by the fault of the injured person.³⁴⁹ Article 8(1) however provides that the contributory fault by third parties should be regulated by national legislation.

³⁴⁵ Article 7 Directive.

³⁴⁶ Article 15(b) Directive.

³⁴⁷ O.J. No. C93,49 (1988).

³⁴⁸ Loubser & Reid (2006) *Stell LR* 446.

³⁴⁹ Article 8(2) Directive.

4.2.7 Other relevant provisions of the Directive

In terms of article 10 of the Directive, national legislation should provide for a minimum period of 3 years for the recovery of damages and this limitation shall begin to run from the day on which the plaintiff became aware, or should have become aware of the damage, defect and identity of the producer. Article 10 further provides that the plaintiff's claim will expire within 10 years starting from the date on which the product causing damage was put into circulation.

The Directive shall not affect any rights which an injured person may have according to the rules of law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is issued.³⁵⁰ The ECJ confirmed that article 13 does not permit the maintenance of another product liability system other than the one provided by the Directive and must be interpreted as not precluding the application of other systems of contractual or non-contractual liability based on other grounds such as fault or a warranty in respect of latent defects.³⁵¹ The rights referred to must also be construed as referring to a specific scheme limited to a specific sector of production.³⁵² Thus as per the CPA in South Africa, consumers in the European Union may continue to institute claims under the law of contract and law of delict, as the case may be.

Article 21 of the Directive requires the European Commission to present a report on its application to the Council every 5 years. The last report was issued on 8 September 2011, in which the Commission maintained the balance between the interest of consumers and producers and noted that there was insufficient evidence to justify a formal review.

The purpose of the European Commission is to follow developments in case-law by the EU Court of Justice, examine the information and complaints received, and report on the application of the Directive. As the Directive has not been subject to any evaluation since its adoption, the Commission has decided to conduct an evaluation on the Directive, which will be supported by an external study.³⁵³ The evaluation will involve an evidence-based assessment of whether the EU Directive is "fit for purpose", particularly where new technological developments are concerned and will be assessed according to the following criteria: Effectiveness (have the objectives been met?); efficiency (were the costs involved reasonable?); coherence (does the Directive complement other actions or are there contradictions?); relevance (is EU action still necessary?) and EU added value (did the

³⁵⁰ Article 13 Directive.

³⁵¹ *Commission v France* [2002] ECR I-3827.

³⁵² *Ibid.*

³⁵³ https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en.

Directive provide clear added value or could similar changes have been achieved at national level?).³⁵⁴

4.3 Conclusion

The Directive aims to implement a common minimum level of consumer protection while safeguarding fair competition and promoting the free movement of goods within the common market by harmonising previously divergent national laws. It is clear that the Directive and the CPA share similarities and that both were mainly introduced due to the need for greater consumer protection. Prior to the introduction of the Directive, Member States had each developed their own product liability systems and it was made clear by the courts that this should not be in conflict with the provisions as set out in the Directive. As in South Africa, a consumer can still institute an action under the law of contract or delict if damages were suffered as a result of a defective product. Even though a consumer no longer has to prove negligence, under the Directive and CPA, he still has to prove that the harm was caused due to a defect in the goods supplied.

A consumer may institute action against the producer under the Directive, the definition of producer is wide and in line with the supply chain provided for in the CPA. The Directive does however make provision that should the consumer be unable to identify the producer, he may institute action against any person who supplied those goods. What is interesting is that the supply of services must specifically be provided for by the Member States whereas the CPA provides that the supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as the supplier of those goods to the consumer.

With regards to defectiveness as per the Directive and the CPA, the “consumer expectation test” is inherent to the definitions provided in both instances. There have been a few cases in the Member States’ courts and the interpretation of defectiveness seems to vary. Both the Directive and CPA make provision for the so called “risk development” defence and it is submitted that by the inclusion of this defence, negligence comes in through the back door. It is for this reason that the product liability regimes in both instances are not absolute.

It is also clear based on the fact that the European Commission decided to evaluate the Directive, that the Directive is not without fault and changes to the Directive are expected this time around, especially to make provision for information and technology requirements.

³⁵⁴ *Ibid*

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This dissertation considered and evaluated the implementation of section 61 as well as section 53, 55 and 56 of the CPA and how this influenced a consumer's common law position for harm suffered as a result of defective goods. In order to answer the above, it was necessary to first establish the common law position in respect of product liability. From this discussion, it was obvious that the consumer is not sufficiently protected under the common law and therefore the introduction of strict product liability by section 61 of the CPA was necessary.

Policy considerations for a strict product liability regime, the purpose and policy of the CPA, interpretation of the CPA, application and scope as well as relevant definitions of the CPA were also discussed. As section 61 of the CPA falls within the ambit of Chapter 2, Part H of the CPA, sections 53, 55 and 56 and its implications were also discussed. These provisions of the CPA were discussed to determine the influence of the CPA on the common law. It was confirmed that certain provisions of the CPA was in line with the common law whereas other provisions of the CPA amended the common law position. Lastly, provisions that contained ambiguities were also pointed out.

As section 2(2)(a) of the CPA provides that our courts may, when interpreting or applying the CPA, consider appropriate foreign and international law, the provisions of the EU Directive were also considered in an attempt to address possible problems and to provide guidance on the interpretation of certain provisions of the CPA.

5.2 Summary of Findings and Recommendations

5.2.1 Defects

- a) In order to be successful with a product liability claim, the product that caused harm has to be defective. The concept and definition of 'defectiveness' is therefore central to the application of product liability under the common law as well as the CPA.³⁵⁵
- b) The definition of a defect involves a number of alternatives, and there is little reason why a consumer would not simply rely on what in the circumstances appear to be in his favour in a particular case.
- c) The definition of a 'defect' in terms of section 53 by referring to 'components' makes it clear that the definition includes manufacturing defects. The definition does not

³⁵⁵ See 3.7.3.3 & 4.2.4 above.

however make express provision for design defects as provided for in the EU Directive and it is recommended that this specially be included.³⁵⁶

- d) In terms of the common law, the test for defectiveness is whether a reasonable person would have noticed the defect after inspection of the product sold. It is an objective test which evaluates the usefulness of the product sold and requires no expert knowledge on the part of the buyer.³⁵⁷
- e) A court would have to examine if the latent defect is serious enough to render the product sold unfit for the purpose it was intended for. In terms of the CPA, a consumer does not have to prove that the defect was 'serious'.³⁵⁸
- f) The test as provided for in section 53 however requires proof of the nature of the imperfection or characteristic, and the state of the goods without the imperfection or characteristic that people would 'reasonably be entitled to expect' in the circumstances. Section 53 therefore suggests that a general standard of reasonableness assessed with hindsight should be applied (reasonable expectation test).³⁵⁹
- g) The EU Directive also applies the 'reasonable expectation' test and it seems to re-introduce negligence as a value judgement in order to determine whether a product was defective. Fault is not eliminated in its totality due to the 'consumer expectation' test that is implied in the CPA and the EU Directive, and it can therefore not be said that these product liability regimes provide for absolute strict liability.³⁶⁰
- h) In terms of section 55(5)(a) of the CPA it is irrelevant whether the defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods.³⁶¹ This is a departure from the common law rules on the *aedilician* remedies, which require that the defect must be latent.³⁶² Also at common law the nature of the goods or the class to which they belong has always played a significant role in determining whether a particular impairment is actionable or not.

5.2.2 Implied Warranties

- a) The CPA has introduced a statutory right to consumers to receive goods that are safe and of good quality³⁶³. Under the common law of sale, the seller only has the duty to

³⁵⁶ See 3.7.3.3 & 5.2.1 above.

³⁵⁷ See 4.2.4 above.

³⁵⁸ See 2.4.3 above.

³⁵⁹ See 3.7.3.3 above.

³⁶⁰ See 4.2.4 above.

³⁶¹ See 3.7.1 & 3.7.3.3 above.

³⁶² See 2.3 above.

³⁶³ See 3.7.1 above.

warrant the buyer against latent defects in the goods sold. The CPA has therefore provided the consumer with additional protection.³⁶⁴

- b) Confusion has unfortunately been caused by section 55(2)(b) that requires goods to be durable and useable for a reasonable period of time as reference to 'reasonable time' is vague.³⁶⁵
- c) Section 56(2) further provides that the consumer may request that goods be repaired, replaced or refunded within 6 months after delivery of the goods should it fail to satisfy the requirements and standards contemplated in section 55.³⁶⁶ The inclusion of the 6 month limitation is problematic as it contradicts section 55(2)(c) will not always be a 'reasonable period of time'. These rights in terms of section 56 is additional to the protection afforded to the consumer under the common law and is welcomed. The 6 month period is unfair and should be amended by the legislature.
- d) The remedies provided for in section 56(2) will no longer be available after 6 months, but the implied warranty of quality remains an implied term of the consumer sale indefinitely.³⁶⁷ The consumer would therefore be able to institute the common law remedies after the 6 month period. The common law remedies may not be excluded by way of agreement between the parties.³⁶⁸

5.2.3 Remedies

- a) In terms of section 2(10), no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. This means that a consumer who suffers harm as a result of defective goods, has both the common law remedies and legislative remedies at his disposal and the consumer is in effect granted a larger scope of remedies.³⁶⁹
- b) In terms of the common law, consequential damages can be claimed with the *actio empti* if a breach of contract occurred and the defect is serious enough to justify the cancellation of the contract and to claim damages.³⁷⁰
- c) The *actio quanti minoris* can be instituted for each and every latent defect that existed at the time of conclusion of the contract between the parties.³⁷¹ Under the CPA, the consumer does not have to prove that the goods were defective at the time of conclusion of the contract.³⁷²

³⁶⁴ See 2.4.2 above.

³⁶⁵ See 3.7.2 above.

³⁶⁶ See 3.7.2 above.

³⁶⁷ See 3.7.1 & 3.8 above.

³⁶⁸ See 3.7.1 & 3.8 above.

³⁶⁹ See 3.4 & 3.8 above.

³⁷⁰ See 2.4.3 above.

³⁷¹ See 2.4.3 above.

³⁷² See 3.7.3.3 above.

- d) A buyer who suffers harm as a result of the defective product will in terms of the common law, not be able to institute a claim against the manufacturer or distributor in the absence of a contractual link between the buyer and the manufacturer or distributor.³⁷³
- e) It is concluded the remedies provided for in the CPA are intended to co-exist with the common law remedies and the CPA does not limit or restrict the scope of existing common law protection afforded to consumers.³⁷⁴

5.2.4 Delictual

- a) The law of delict is applicable where no contractual relationship between the parties exists and the buyer suffers damage caused by the defective product.³⁷⁵
- b) The delictual remedy provided for by the common law when harm is caused by a defective product is the fault-based *Actio Legis Aquilae*. Under this system, as a general rule, he who claims has the burden to prove it, thus proving all five these delictual elements rest on the consumer.³⁷⁶
- c) It is also important to note that the requirements for the liability of merchant sellers (law of contract) and manufacturers (law of delict) for latent defects in terms of our common law remain in place where the CPA does not find application.³⁷⁷

5.2.5 Law of contract and the right to receive safe, good quality goods

- a) A claim under the law of contract requires a breach of the contractual relationship between the buyer and supplier of the goods.³⁷⁸
- b) A contractual liability for the sale of a defective product generally arises on the basis of a breach of a warranty or a misrepresentation that the goods are free from defects.³⁷⁹
- c) An implied warranty against latent defects forms part of every contract of sale unless it is specifically excluded by the *voetstoots*-clause.³⁸⁰ The consumer is not entitled to also claim damages under the *aedilition* remedies.
- d) Section 55(2)(a) states that every consumer has the right to receive goods that are reasonably suitable for the purposes for which they are generally intended for.³⁸¹ Under the common law, an imperfection in the goods sold will be actionable where it

³⁷³ See 2.4 above.

³⁷⁴ See 3.4 above.

³⁷⁵ See 2.5 above.

³⁷⁶ See 2.5 above.

³⁷⁷ See 3.4 above.

³⁷⁸ See 2.4 above.

³⁷⁹ See 2.4 above.

³⁸⁰ See 2.4.2 & 2.4.3 above.

³⁸¹ See 3.7.1 above.

may be described as an abnormal quality or attribute which destroys or impairs the utility of the *res vendita* for the purpose for which it was sold or commonly used.³⁸²

- e) Remedies in terms of the CPA has extended to parties outside a contractual relationship and the consumer is therefore afforded additional rights as to the quality of the goods at the time when the consumer receives the goods.³⁸³
- f) Section 55(2)(c) requires that the goods be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply.³⁸⁴ This is a material departure from the common law as the *aedilition* remedies are only available in respect of defects which are present at the time of conclusion of the contract and the burden of proof is on the purchaser. Under section 56(2) the CPA, the consumer can however institute action within 6 months after delivery of any goods to the consumer.³⁸⁵
- g) Section 55(3) of the CPA looks similar to that of the Pothier rule, but that it is not and should not be regarded as a confirmation thereof.³⁸⁶
- h) Section 55(3)(b) closely resembles the rule developed in *Kroonstad*-case in respect of liability of a merchant seller for consequential loss and guidance can be taken from the way the court interpreted the test in this case.³⁸⁷

5.2.6 Section 61: Liability for damage caused by goods

- a) **Interpretation:** It has been established that the aim of the CPA is to protect vulnerable consumers and when interpreting the CPA, the golden rule should be to determine which interpretation and approach would be most beneficial to the consumer.³⁸⁸
- b) **Application of the CPA:** The CPA is not applicable between two juristic persons with a turnover of more than R2 million per annum. The fact that section 5(5) provides that if goods are supplied within the Republic to any person in terms of a provision that is exempt from the application of the CPA, those goods, and the importer or producer, distributor and retailer of those goods are subject to the provisions of section 61 of the CPA. It is argued that the parties within the supply chain could institute a claim against each other in terms of section 61. The legislature would have to clarify this position as the CPA's purpose is ultimately to protect vulnerable consumers.
- c) **Application of section 61:** The producer or importer, distributor or retailer can therefore be held liable for harm caused by defective goods irrespective if negligence

³⁸² See 2.3 above.

³⁸³ See 3.7.1 above.

³⁸⁴ *Ibid.*

³⁸⁵ See 3.7.2 above.

³⁸⁶ See 3.7.1 above.

³⁸⁷ *Ibid.*

³⁸⁸ See 3.4 above.

could be established on their part. These parties in the supply chain are liable jointly and severally and this is also in line with the common law position.³⁸⁹

- d) **'Supplier'** has been omitted from the supply chain mentioned and creates the impression that they do not fall within the ambit of section 61(1).³⁹⁰ An amendment by the legislature may be necessary to include suppliers or to specifically exclude suppliers from the ambit of product liability to avoid any confusions. The CPA however makes provision that suppliers of services who use defective products could also be held liable in terms of section 61. Services, on the other hand, are specifically excluded in the EU Directive.³⁹¹
- e) **Consumer:** As confirmed in the Eskom case, only 'consumers' can institute an action in terms of section 61 and innocent bystanders are excluded from claiming damages as a result of a defective product under this section and such parties would have to rely on the remedies provided for under the law of contract and delict.³⁹²
- f) **Negligence:** The requirement of negligence is disregarded under the CPA to create strict product liability, the question whether the harm or defect was reasonably foreseeable or discoverable is no longer relevant as under the common law. Under the common law, negligence entails the duty 'to avoid reasonably foreseeable harm'.
- g) **Wrongfulness:** Within the framework of product liability under the CPA as well as our common law, wrongfulness focuses on the existence and breach of a legal duty not to cause harm or damage to the consumer.
- h) **Causation:** The consumer still has to prove that there is a causal link between the product defect and the harm suffered, this is also in line with our common law.³⁹³
- i) **Harm:** In terms of section 61(6) a court can assess whether any harm has been proved and adequately mitigated and determine the extent and monetary value of any damages, including economic loss or apportion liability among persons who are found to be jointly and severally liable.³⁹⁴ It was stated that the problem with applying apportionment in strict liability cases is that apportionment is normally based on comparative degrees of fault, whereas fault is not assessed for purposes of strict liability.³⁹⁵ The EU Directive makes provision for apportionment of damages between the producer and the consumer.³⁹⁶ The CPA however does not make provision for this

³⁸⁹ See 3.5 above.

³⁹⁰ See 3.7.3.4 above.

³⁹¹ See 4.2.1 above.

³⁹² See 3.7.7 above.

³⁹³ See 3.7.3.5 above.

³⁹⁴ See 3.7.3.6 above.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

and it is argued that if the consumer did not act reasonably and were also at fault, he should not be entitled to claim 100% of the damages suffered.

- j) **Defences:** The CPA as well as the Directive makes provision for a number of defences which the supplier can rely on in order to escape liability.³⁹⁷ The most controversial defence is set out in section 61(4)(c) of the CPA, in that another backdoor is opened for the distributor and retailer to escape liability if they can prove that it was unreasonable to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to their role in the marketing of the goods. Thus, product liability in terms of the CPA is not absolute.³⁹⁸ It is also not sure why the legislature only provided this recourse to the distributor and retailer and not to the producer and importer as well. The CPA does not incorporate the so called 'development risk' defence as included in the Directive. There is however also very limited case law in the EU which is either an indicator that this defence is not often used successfully or the cases are unreported.³⁹⁹ The Member States have the option to incorporate this defence into their national legislation and it is interesting to note that only 2 Member States did not incorporate this defence into their national legislation. It is therefore submitted that the inclusion thereof in the CPA would not have added value.
- k) The CPA provides that courts can only be approached if all other remedies available to that person in terms of national legislation have been exhausted.⁴⁰⁰ It is recommended that the CPA be amended to make provision that a party who wants to institute an action under section 61 can directly approach our courts.

5.3 Conclusion

Before the enactment of the CPA, product liability was regulated only under the law of contract and the law of delict and it is clear that the consumer did have little or no redress in the event that he could not prove the existence of a contractual link with the producer or could not prove fault, at least in the form of negligence, on the part of the producer. Our courts have dealt with various cases and in each instance, it was confirmed that fault was a requirement for a claim to be successful under the law of delict. The court in the *Wagner v Pharmicare*-case⁴⁰¹ dealt expressly with the delictual elements, and very well illustrated the dilemma courts would face if strict product liability was to be developed one court case at a time and not imposed by the legislature with a clear set of guidelines.

It is evident from the provisions of the CPA that its ultimate purpose in respect of product liability is to protect the vulnerable consumer and to provide sufficient redress to a consumer that suffered harm as a result of a defective product. The CPA specifically states

³⁹⁷ See 3.7.4 & 4.2.6 above.

³⁹⁸ See 3.7.4 above.

³⁹⁹ See 4.2.6 above.

⁴⁰⁰ See 3.7 above.

⁴⁰¹ 2003 (4) SA 285 (SCA).



that its provisions should be interpreted in such a way as to give effect to the purposes set out in section 3 of the Act. This is a very unique provision that provides extra protection to the consumer should there be any doubt about their rights. This right should always be kept in mind when dealing with the CPA.

The final conclusion drawn from the review forming the subject matter of this dissertation, is that the CPA makes provision for a modified strict product liability regime and could in more than one instance be regarded as defective in itself. It is however contented that the CPA is a step in the right direction and future interpretations by our courts are welcomed.

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