

**A critical analysis of Product Liability under the Consumer Protection Act  
68 of 2008**

**By**

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## **DECLARATION**

I, PURNEL GANGIAH, DO HEREBY DECLARE THAT UNLESS SPECIFICALLY INDICATED TO THE CONTRARY IN THIS TEXT, THIS DISSERTATION IS MY OWN ORIGINAL WORK WHICH IS MADE AVAILABLE FOR PHOTOCOPYING AND FOR INTER-LIBRARY LOAN. THE DISSERTATION HAS NOT BEEN SUBMITTED TO ANY OTHER UNIVERSITY IN FULL OR PARTIAL FULFILMENT OF THE ACADEMIC REQUIREMENTS OF ANY OTHER DEGREE OR OTHER QUALIFICATION.

SIGNED AT DURBAN ON THE 21<sup>ST</sup> DAY OF DECEMBER 2015

SIGNATURE: -----

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## **ABSTRACT**

Product liability can be described as a situation where a supplier is held accountable to a consumer for the supply of defective goods. The concept of product liability has its roots in the common law. Under the common law, consumers could use the law of delict or the law of contract to sue for defective goods that were supplied to them,. However, the common law exhibited various shortcomings in terms of the protection afforded to the consumer. For example, a consumer was required to prove fault on the part of a supplier of defective goods, which placed a difficult burden upon a consumer seeking to obtain redress for such defective goods. Circumstances often arose where a consumer was unable to discharge the burden. As a result, a consumer was often left without any effective remedy.

The Consumer Protection Act 68 of 2008, in order to remedy this situation, provides the consumer with greater protection by no longer requiring a consumer to prove fault on the part of a supplier. A strict liability regime has therefore been created. Many academics have applauded the Act in this respect. However, the defences available to a supplier in terms of the Act have exposed the Act to some criticism. What remains to be seen is how the courts will interpret and apply this strict liability regime and how they will apply the defences. However, this is yet to be seen as no judgments on the operation of a product liability claim made in terms of the Act have been reported. This may soon change as two consumers have recently launched a claim against Builders Warehouse for the supply of allegedly defective ladders. An analysis of the Builders Warehouse case is therefore useful in order to understand what approach South African courts will adopt to the application of the provisions of the Act, particularly in light of the fact that the Act is influenced by the European Directive on product liability, thereby enabling us to see whether the South African law will follow the European lead.

Furthermore certain recommendations are made for reform on effective ways that consumers can enforce their rights.

# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

Product liability can be defined as the power that enables a consumer to claim from the supplier for the harm caused by a defective product.<sup>1</sup> Specifically, product liability relates to the law that deals with the sale of defective products. A product is considered to be defective when it contains a material imperfection that renders the product less acceptable or useful in circumstances where the product is ordinarily used.<sup>2</sup> A material imperfection can be described as the quality of the product being flawed.<sup>3</sup> Therefore, due to the existence of the flaw that exists in the product, a consumer would thus suffer harm. Harm can refer to physical and/or economic harm.<sup>4</sup> Physical harm refers to injury, illness, death or physical damage to property whilst economic harm focuses on economic loss as a result of physical harm.<sup>5</sup> These broad definitions will possibly allow for a wide range of situations to fall into the category of product liability.

Product liability cases have been an on-going concern as there are South African cases relating to product liability claims stemming from the early 1990's.<sup>6</sup> It is likely that product liability cases will gain popularity in the production sphere due to the growing needs of society as well as various technological advancements. This is probable as the growing needs of society and technological advancements will increase the production line. The concept of product liability must be understood by both suppliers and consumers in order to have a more efficient supply-chain as this would allow for consumers to enjoy safe quality goods whilst suppliers would not face loss of profits due to the production of defective goods. The notion of product liability could arise for a number of reasons such as increased consumer demand. It may be that the supplier's production has increased over the years and it is now engaging in mass production. Thus, as a result of such mass production, some defective products may slip through the safety measures. However, such reasoning does not justify the harm that a consumer can face as a result of defective goods.

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<sup>1</sup> C Campbell & D Campbell *International Product liability* 5 ed (2011) E2-96.

<sup>2</sup> Consumer Protection Act 68 of 2008 section 53.

<sup>3</sup> E Karana, O Pedgley & V Rognoli *Materials Experience: fundamentals of materials and design* (2013) 147.

<sup>4</sup> EV Eeden *Consumer Protection Law in South Africa* (2013) 377.

<sup>5</sup> M Loubser & E Reid *Product Liability in South Africa* 2 ed (2012) 1.

<sup>6</sup> For example *Kroonstad Westelike Boere Ko-op Vereeniging v Botha* 1964 (3) SA 561 (A) 571. The case is discussed in Chapter 2.

The law on product liability provides for a supplier to bear accountability for such action, namely the supply of defective goods. The liability for defective goods stems from the common law,<sup>7</sup> specifically the law of delict and the law on contract. However, product liability provisions have made their way into the Consumer Protection Act.<sup>8</sup> Whilst the notion of product liability may appear to affect only the supplier and consumer relationship, its effects are far worse than a damaged relationship between the consumer and the supplier as the supply of defective goods can affect various sectors of the economy. An example of a possible affected sector is the insurance sector; insurance companies many have to pay out large claims made by the business in the event that defective goods were supplied to the consumer and led to the consumer facing harm.<sup>9</sup>

## **1.2 Rationale for the study**

It is apparent that the supply of defective goods can have a negative impact on the consumer market as it can lead to situations where there is distrust or loss of confidence between the supplier and the consumer.<sup>10</sup> The Consumer Protection Act should thus serve as an effective tool in regulation and, ultimately resolving, such situations. Therefore, an in-depth understanding of the provisions relating to product liability is required.

Despite the implementation of the Consumer Protection Act, there are no published judgments dealing with product liability.<sup>11</sup> As a result, the current law on product liability has been considered either in isolation without reference to case law or with case law that stems from the past approach, namely the common law. In other instances, the current law on product liability has been considered in light of international approaches to serve as an indicator of possible outcomes in product liability cases.

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<sup>7</sup> Common law refers to “Law established by court decisions rather than by statutes enacted by legislatures.” The definition is available at <http://www.thefreedictionary.com/common+law>, accessed on 28 August 2015.

<sup>8</sup> Act 68 of 2008 hereafter referred to as the Consumer Protection Act/Act. The law relating to product liability will be fully discussed in Chapter 2.

<sup>9</sup> The effect of defective goods is explained later on in this Chapter, specifically page 8-9.

<sup>10</sup> K Ross „Recall Effectiveness: A Hot Topic“ available at [http://www.productliabilityprevention.com/images/DRI\\_Recall\\_Fall\\_2009\\_10.3.09\\_.pdf](http://www.productliabilityprevention.com/images/DRI_Recall_Fall_2009_10.3.09_.pdf), accessed on 28 March 2015.

<sup>11</sup> „The Consumer Protection Act No 68 of 2008 (CPA): Section 61: Injuries and defective goods“ available at <http://www.legaladviceoffice.co.za/2015/03/the-consumer-protection-act-no-68-of-2008-cpa-section-61-injuries-and-defective-goods/>, accessed on 22 May 2015.

This is about to change as a matter has recently been instituted, arising out of the supply of allegedly defective products in terms of the Act, by two consumers against a home improvement and building material business, Builders Warehouse.<sup>12</sup>

The purpose of the dissertation will be to critically analyse product liability under the Consumer Protection Act, with reference to the Builders Warehouse case.<sup>13</sup> The South African case of Builders Warehouse will possibly allow for a more suitable and relevant analysis on the law and more specifically for understanding on how the courts approach interpreting and applying the law. Therefore this case could be of great significance as it has the ability to create a precedent for other product liability cases. The setting of a positive precedent would lead to clarity on the law relating to product liability and contribute towards upholding the protection provided for in the Consumer Protection Act.

### **1.3 Aims and objectives**

The aim of the dissertation is to analyse product liability in light of the Consumer Protection Act. The common law will be reviewed in order to understand the approach adopted by the courts. Moreover, case law will be applied to show the applicability of product liability law. Therefore, the overall objectives are as follows:

- To critically evaluate the South African law relating to the liability for the sale of defective goods;
- To examine the influence of foreign product liability law on South African law;
- To evaluate the rights and recourses available to a consumer in terms of the Consumer Protection Act;
- To determine the possible difficulties faced by the consumer when enforcing such rights in the Consumer Protection Act;
- To provide recommendations to deal with the difficulties of enforcing consumer rights under the Consumer Protection Act.

### **1.4 Research methodology**

The research will be conducted by means of desktop research. The Consumer Protection Act will be analysed. In addition, case law will be considered in order to understand how product

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<sup>12</sup> Andrew Doig & Riaan Beeslaar v Builders Warehouse. The actual citation of the case is unknown as the case is pending at court. Therefore the case will be referred to as the Builders Warehouse case.

<sup>13</sup> The Builders Warehouse case will be fully discussed in Chapter 3.

liability has developed thus far and in order to establish the historical context that gave rise to the need for change. In particular, the Builders Warehouse case will be analysed as it is the most recent case; it is the first case under the new consumer protection regime and has the potential to establish a precedent.

Foreign case law will also be examined as this will provide some insight into, and an understanding of, the approaches used by other countries. A wide range of literature, in the form of books, journals and dissertations will be referred to. These materials provide useful insight on the discussion that currently exists around product liability. Furthermore, a range of newspaper articles will be consulted as Builders Warehouse is a well-known business and the possible precedent that may be set by this case has drawn a vast amount of public attention.

## **1.5 Literature review**

### **1.5.1 Brief history of consumer law**

„The consumer who was once the king of the market had become the victim of it.“<sup>14</sup>

In the past, South African consumers did not receive adequate protection in the consumer market.<sup>15</sup> The inadequacy of protection is illustrated by the market failures that existed relating to goods. Some examples of the market failures were the various problems that arose from defective products or services, as well as information gaps between the supplier and the consumer.<sup>16</sup> It has been said that the past, that is, prior to the Consumer Protection Act, that the body of consumer law was outdated.<sup>17</sup> The common law principles<sup>18</sup> relating to consumer law that were in place before the advent of the Consumer Protection Act did not adequately reflect the growing demands of an increasingly dissatisfied consumer lobby. Moreover, after World War II, it became apparent that the South African legal system was disconnected from businesses and low-income consumers.<sup>19</sup> It is possible that the detrimental effects of World War II had made their way into the consumer market as the market is connected to various sectors.

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<sup>14</sup> S Sahoo „Consumer Protection-Problems and Prospects“ 2009 *SSRN Electrical Journal* 17-18.

<sup>15</sup> I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* 3 ed (2012) 34.

<sup>16</sup> *Ibid.*

<sup>17</sup> C Foss „Consumer Protection laws outdated“ available at

<http://www.radionz.co.nz/news/business/247437/consumer-protection-laws-outdated-foss>, accessed on 2 July 2015.

<sup>18</sup> Common law will be discussed in Chapter 2.

<sup>19</sup> Eeden (see note 4 above) 370.

As an example, a poor consumer market can negatively affect the economy as there would be a decrease in profits and this would possibly affect the stability of the flow of money in the economy. Due to such disconnection, situations arose where unsafe products had been supplied, thus endangering the lives of people and often such people did not have any recourse.<sup>20</sup> This led to consumers not being recognised as important role-players in the consumer market. It is apparent that without consumers, there would be no retail economy and the supply chain would be adversely affected, thus affecting the economy at large. Such a statement is justified when recognition of the retail sector in the economy is acknowledged.<sup>21</sup>

In the past, the practice of buying and selling of goods and services was a simple matter and consumers could regulate as well as inspect the products that they were buying by themselves.<sup>22</sup> However, with the introduction of modern technology, consumers are less informed and equipped to understand the nature of the products that they are paying for.<sup>23</sup> Modern technology would lead to products being produced at an advanced level and due to factors such as age, race and education levels, consumers are less informed.<sup>24</sup> Thus, due to advancements in the market, proper protection measures must be in place in order to create a balance between the supplier and the consumer.<sup>25</sup> Therefore, consumer protection must develop rapidly in order to keep pace with modifications of the market. For example, many transactions take place online, so there must be more adequate protection for consumers who purchase online. It was apparent that consumer protection lagged significantly behind technological innovation and required not just gradual development, but a leap forward.

Failing to take such a leap forward would have resulted in many unsatisfied and unprotected consumers who would be left with goods that were either defective or goods that were less than a reasonably expected standard or goods that were simply not supplied at all. If there was no effective system in place, there could be consequences for a society where there are diverse consumers who have different desires. Therefore, regulation needed to reflect the

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<sup>20</sup> Ibid.

<sup>21</sup> See K Mansoori „Retail Industry Development and Impact of Technology“ 2010 *Pankaj Mehra* 4-5.

<sup>22</sup> C Scott & J Black *Cranston's Consumers and the Law* 3 ed (2000) 1.

<sup>23</sup> *Langenberg Voedsel Bpk v Sarculum Boedery Bpk* 1996(2) SA 565 (A) 572.

<sup>24</sup> For example, an iPhone has many more advancements than the ordinary Nokia phone that was available 10 years ago. A person with minimal education may not be able to understand the advanced features that are associated with the iPhone.

<sup>25</sup> W Jacobs, PN Stoops & R Van Niekerk „Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis (2010) 13(3) *Potchefstroom Electronic Law Journal* 328-353.

diverse needs that exist.<sup>26</sup> By doing so, it would allow for a well-balanced consumer-supplier relationship. This in turn, would strengthen the economy.

In addition, necessary consumer protection in place would allow for the preserving of community values as the community would expect fair dealing and honesty from businesses.<sup>27</sup>

The Consumer Protection Act was enacted and its enactment was said to have fulfilled the rights of the historically disadvantaged persons and provide participation of all consumers in the economy.<sup>28</sup> If this is true,<sup>29</sup> then the Act has been a major advancement on past approaches. An example of such advancement relates to the issue of product liability. In the past, consumers could only rely on the common law to seek recourse for defective goods. The common law had various shortcomings such as the burden of proof, which was placed upon consumers. The Consumer Protection Act has significantly departed from the old common law situation and has, using the same example of product liability, adopted a strict liability approach.<sup>30</sup> This allows for the burden of proof to be shifted onto the supplier. It can be said that South Africa has followed an approach that creates express consumer protection measures which place great emphasis on consumer goals.<sup>31</sup> Therefore, it has adopted a consumer protection regime that is not a by-product or subsidiary element of other government policy goals.<sup>32</sup> In other words, it is clear that South Africa has made consumer protection a primary focus as opposed to it being connected to mere financial matters or even labour issues. Whilst consumer issues can have a negative impact on finances, the effect on consumers has also been recognised, for example, the harm that a consumer could face.

### **1.5.2 Benefits of the Consumer Protection Act**

The benefits of the new Act have been overstated and perhaps deliberately sensationalised. It has been said that some people are of the view that; „if they get sick from eating a sandwich,

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<sup>26</sup> CF Hemphill *The Consumer Protection Handbook- A Legal Guide* (1981) 3-4.

<sup>27</sup> D Oughton & J Lowry *Consumer Law* 2 ed (2000) 19.

<sup>28</sup> K Govinden „One step forward, two steps back“ (2014) *Without Prejudice* 35-36.

<sup>29</sup> Whilst the Consumer Protection Act has been around for years, its effectiveness will possibly only be apparent once various aspects have been considered in light of litigation. For example, whether or not the courts will take a stand and afford the consumers protection that is found in the Act.

<sup>30</sup> Strict liability refers to fault without proof. This definition can be found at S Baldwin, F Hare, FE McGovern *The Preparation of a Product Liability* (1998) 97.

<sup>31</sup> N Campbell „Consumer Protection Guide for Lawyers“ (2011) *Law Society of South Africa* 100-101.

<sup>32</sup> *Ibid.* This indicates that consumer protection has not been treated as a secondary goal, instead it has primary attention.

they can retire“.<sup>33</sup> However, this is not true. The application of the provisions of the Act is not like winning the lotto. Whilst the Act focuses on protecting the consumer, it still acknowledges the role of a supplier.<sup>34</sup> This is vital as stringent legislation can lead to the hampering of a supplier’s business. The Consumer Protection Act attempts to create a balance between the two parties. In terms of business practices, the Act has been revolutionary as it has the ability to change the way people do business.<sup>35</sup> Moreover, the Act is said to focus on a fair, accessible and sustainable market, and the production of goods and services for their intended purpose.<sup>36</sup> In addition, a primary focus of the Act is the safety of the consumers.<sup>37</sup> This creates an assumption that the Act places emphasis on liability for defective goods. Therefore, the law relating to product liability is of significance.

### 1.5.3 Product liability law

„No one uses a product expecting it to break or fail; when a product's defect becomes apparent, it can take the user by surprise“.<sup>38</sup> Hence, it is clear that defects in products can create vast implications. In some situations, the unequal power relationship between the supplier and the consumer leads to the consumer feeling awed and intimidated when they wish to seek recourse against a supplier from whom they have acquired goods that are less than satisfactory.<sup>39</sup> In order to sustain a continued competitiveness industry, product liability safety regimes need to be in place.

A supplier’s reputation for good quality products can be damaged by a mere single production of defective goods.<sup>40</sup> Thus, the financial component of the supplier’s business can be negatively affected. The task of holding suppliers liable for defective goods serves as an incentive for suppliers to produce reasonably suitable goods.<sup>41</sup> The ability to create good quality goods is an important component in business practices. Therefore, due to the

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<sup>33</sup> R Ronaldo „Watch your back! It’s the Consumer Protection Act“ (2011) *Food Review* 11-12.

<sup>34</sup> D Strachan „The Consumer Protection Act and SMEs: Significant Challenges“ (2011) *SA epublications* 14-15.

<sup>35</sup> A Straton „Okay South Africa, the Consumer Protection Act is in your hands“ available at <http://mype.co.za/new/okay-south-africa-the-consumer-protection-act-is-now-in-your-hands/3687/2011/04>, accessed on 7 July 2015.

<sup>36</sup> M Davey „A summary of the Consumer Protection Act 68 of 2008“ (2010) available at <http://www.meumannwhite.co.za/news-details/25/>, accessed on 22 April 2015.

<sup>37</sup> S Monty „Liability of the supplier in terms of the Consumer Protection Act“ (2010) *Milk & Juice* 33-37.

<sup>38</sup> „Dangerous and Defective products“ available at <http://www.christophermellino.com/practice-areas/products-liability-overview/>, accessed on 22 April 2015.

<sup>39</sup> J Goldring, L Maher & J McKeough *Consumer Protection Law* 4 ed (1993) 3.

<sup>40</sup> DA Floudas „Some Aspects of Liability for Defective Products in England, France and Greece after Directive 85/374/Eec“ (1995) (*Some parts of this paper were presented in New Orleans in February*) 1-3.

<sup>41</sup> RJ Hunter, HJ Amoroso & H Shannon „A Primer on the law in the United States: Part III Scope of Liability in Product Liability Case“ (2012) 2(4) *International Journal of Learning & Development* 8-9.

unfavourable consequences that defective goods can cause, product liability laws are vital. The Consumer Protection Act makes provision for such laws.

However, merely having the provisions in place is insufficient; it is vital that the application of such provisions take place. This will enable one to determine the effectiveness of the current product liability law.

#### **1.5.4 Effect of defective goods**

The impact of defective goods within the industry relates to that of product recalls. A product recall can be described as the process that involves retrieving and replacing defective goods.<sup>42</sup> It is probable that such a task would incur great loss to a business. A defective item is unable to attract any profit. Moreover, the cost involved in making that particular product cannot be recovered. Additionally, the negative impact of product recall on a business's reputation can affect its sales. Consumers could possibly associate negative connotations with such a product and refrain from purchasing it. It could lead to situations where businesses are stuck with unwanted stock. It has been said that zero defects have zero effects.<sup>43</sup> Businesses should strive towards creating defect free goods. As a result, effective development in the market would take place, ensuring a competitive market. This would be beneficial to the consumer as the consumer would have a wide range of products at competitive prices to choose from. Moreover, a consumer would not have to face the detriment caused by defective goods.

The seriousness of a defect is illustrated in the Consumer Protection Act as the Act makes provision for liability of defective goods resulting in not only injury but also death. An example of an injury is a child that is playing with a defective toy. The toy would be assumed to be safe as it would have a label stating the age group suitability. Moreover, it is unlikely that a child would exercise caution whilst playing with such a toy. Thus, a toy with a defect such as a spring that is not placed properly can severely affect a child. For example, the loose spring may injure the child in the eye. The child could face physical injury as well as possible emotional distress. In terms of death, an example could be a defective ladder. A consumer may be involved in the building sector and be required to climb a height. Using a defective ladder could result in the consumer falling from such a height, causing death. Therefore,

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<sup>42</sup> T Nath „How Do Recalls Affect A Company?“ available at <http://www.investopedia.com/articles/investing/010815/how-do-recalls-affect-company.asp> Free Newsletters, accessed on 23 July 2015.

<sup>43</sup> S Parashar & AK Parashar „Goal of Modern Industries: Zero Defects, Zero Effect“ (2015) 3 (2) *International Journal of Engineering Research and General Science* 317-321.

defective goods can have far reaching consequences on the lives of consumers.<sup>44</sup> As a result of the injury sustained, the consumer's life could be permanently altered; the injury may cause the consumer to become disabled which would affect the consumer's occupation. Therefore, the consumer would face personal injury as well as financial loss. Due to such financial loss, a business may be liable to pay compensation to the consumer.

In order for a business to protect against having to compensate a consumer for the loss that has occurred, it is probable that the business would have the necessary insurance benefits in place.<sup>45</sup> This could be difficult for a small business as that would mean an increase in expenses. Such an increase could make it difficult for the small business to stay afloat. Moreover, insurance companies would possibly have to pay out large sums of money, thus making the costs of premiums higher. It has been said that businesses would have to take out additional cover to allow for extensive grounds of liability.<sup>46</sup> Thus, the costs of goods would possibly increase. Whilst the price of products is affected by various factors, the consequence of increased pricing due to higher insurance cover seems almost unfair to the consumer. The consumer has to bear the burden of paying such prices so that a business is shielded in the event that the business supplies defective goods. It is unfortunate that the consumer bears the burden as the supply of defective goods is an act that the business is responsible for and has the means of avoiding such a situation. On the other hand, producing high-quality goods may result in more costs being incurred.<sup>47</sup> This is problematic in situations where consumers cannot equate high quality goods with high prices.<sup>48</sup> As a result, businesses could face a loss in sales.

It is clear that defective goods give rise to a number of monetary issues. However, despite the various forms of redress, a consumer can obtain damages only from the court. It is unlikely that a supplier would simply admit fault, and award the consumer with damages. Instead, it is likely that the supplier would put up a fight. Thus, there could be a prolonged court case. This can result in expensive litigation and is time-consuming. Therefore, in the interim, consumers

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<sup>44</sup> „Top 10 Ways to Protect Yourself From Counterfeiting and Piracy“ available at [http://trade.gov/press/press\\_releases/2007/top10-stopfakes\\_041007.pdf](http://trade.gov/press/press_releases/2007/top10-stopfakes_041007.pdf), accessed on 17 July 2015.

<sup>45</sup> See AP Liebenberg „An evaluation of South African professional indemnity insurance in light of the insurance crisis in 1985-6“ 1995 *Research paper unpublished* 17-20, where liability claims are discussed.

<sup>46</sup> A Costa „The impact of the Consumer Protection Act On insurance“ available at [www.insurancegateway.co.za/download/1254](http://www.insurancegateway.co.za/download/1254), accessed on 22 May 2015.

<sup>47</sup> M Maher, C Stickney & R Weil *Managerial Accounting: An Introduction to Concepts, Methods and Uses* 11 ed (2011) 113.

<sup>48</sup> G Lowery „Consumers don't always equate higher prices with quality“ available at <http://phys.org/news/2009-10-consumers-dont-equate-higher-prices.htm>, accessed on 24 July 2015.

may find it difficult to continue with their ordinary way of living. Moreover, the supplier would have to focus on the case rather than on the actual business.

Therefore, defective goods giving rise to product liability has a wide-range of consequences, making prevention as opposed to remedial action more suitable.

## **1.6 Structure of the dissertation**

Chapter 1 provides the background information relating to product liability. In addition, the purpose of the dissertation is discussed. The rationale for the analysis of the topic is set out, indicating the importance of the dissertation. The goals as well as the research questions reveal the approach that the dissertation follows.

Chapter 2 provides a comprehensive discussion of the journey of the law on product liability in South Africa. The dissertation provides clarity on the historical position of product liability under the common law and then the position under the Consumer Protection Act. The discussion sets out the differences between such approaches as well as the need for product liability protection under the Act.

Chapter 3 goes on to critically analyse the South African law relating to product liability. Specifically, the chapter looks at the biggest move from the common law to the Consumer Protection Act, which is the strict-liability regime. The chapter considers whether such a regime is actually necessary. The Builders Warehouse case serves as the foundation for such an analysis. Each party's rights are considered as well as the applicability of defences that can be raised. The issue of curial forums is also addressed in order to understand the approach that the consumers are following in this case. By engaging in such an analysis, the application of the law is explained and understood. Furthermore, calculated assumptions on the outcome of the case are thus possible.

Chapter 4 takes the form of a comparative analysis. Foreign law is examined in order to understand the approaches that have been adopted in other countries. The influence of these approaches on the South African consumer law is established. Engaging in such an analysis assists in determining the possible shortcomings that exist with the various approaches. An understanding of the possible shortcomings enables the dissertation to make meaningful recommendations.

Chapter 5 contains the conclusions and recommendations. This chapter serves as a summary on the findings of law. It also contains the key aspects that were discussed regarding the

Builders Warehouse case. Recommendations are also made which deal with effective ways in which consumers can enforce their rights.

The recommendations also attempt to serve as a useful precedent for other product liability cases. It is hoped that consumers would thus be able to fully understand their rights and the enforceability thereof.

## CHAPTER 2: THE SOUTH AFRICAN LAW ON PRODUCT LIABILITY

### 2.1 Introduction

In South Africa, there has been growing concern over product liability. There have been various decisions reported in the courts relating to this.<sup>49</sup> The development of the law on product liability can be traced back to the common law. In terms of the common law, a consumer could sue the supplier using the law of contract or the law of delict.<sup>50</sup> Therefore, this chapter will discuss both approaches namely the law of delict and contract as well as the remedies under the common law that are available to a consumer who has faced harm from the defective product. The shortcomings of the common law will also be discussed in order to enable an understanding of the introduction of the product liability provisions under the Consumer Protection Act. The relevant provisions of certain aspects of product liability under the Consumer Protection Act will also be noted and the route that a consumer can follow to obtain redress will be included. In addition, other relevant legislation relating to product liability will be discussed. The aim of the chapter is to outline the applicable provisions in order to provide a basis for the analysis of these provisions in the following chapter.

### 2.2 Contract law

In terms of contract law, a contract has to be concluded between the supplier and the consumer.<sup>51</sup> In order for contractual liability to take place, there must be a breach of an express or implied warranty that the product is free from defects. A breach could arise where a supplier does not recognise such warranty. Warranties are representations that have been made by the supplier that refer to the reliability as well as the suitability of a product.<sup>52</sup> However, such representations are based on a factual context rather than a puffing statement.<sup>53</sup> For example, if a supplier had provided their personal opinion of a product, this is likely to constitute puffing as opposed to a warranty. Thus, there is no legal obligation that arises from puffing.

In particular, an express warranty can be described as an affirmation of a fact or promise that is made by a supplier to a consumer about the product; such an affirmation thus becomes a

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<sup>49</sup> Some of the case law will be discussed in this chapter.

<sup>50</sup> There were instances where a claim could be instituted using both the law of contract and the law of delict. See *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* (2011 (4) SA 276 (SCA); [2011] 3 All SA 362 (SCA)) [2011] ZASCA 22; 20/10 (17 March 2011).

<sup>51</sup> RH Christie & V McFarlane *Christie's The Law of Contract* 5 ed (2006) 269.

<sup>52</sup> K Chapman & MJ Meurer „Efficient Remedies for Breach of Warranty“ (1989) 5(1) *Law and Contemporary Problems* 10.

<sup>53</sup> DG Owen *Products Liability Law* (2005) 157. Puffing can be described as a statement that is made, which is not based on fact.

part of the contract.<sup>54</sup> For example, a supplier could affirm certain characteristics of products, meaning that, upon use of the product by the consumer, the product should perform in accordance of the affirmation. Therefore, liability would arise where such a product does not meet the affirmation that was made by the supplier to the consumer.

On the other hand, an implied warranty arises from a tacit term that forms a part of the contract. A tacit term is implied by the circumstances or mutual intention of the parties to the contract.<sup>55</sup> An implied warranty generally relates to products being fit for the purpose for which such a product is sold.<sup>56</sup> An example is that a consumer who purchases a washing machine from a supplier would have an implied warranty that such a washing machine would effectively wash clothes as that would be the ordinary purpose of the machine. Thus, liability would arise if the washing machine does not meet the ordinary purposes for which it was intended.

In addition, a breach of a contract obligation can arise from a misrepresentation made by the supplier to the consumer regarding a product being free from defects. According to Climpson,<sup>57</sup> a misrepresentation can be described as a false statement of a material fact made by one party to induce another party to enter into the contract. Thus, a supplier could mislead a consumer into thinking a product can perform certain functions and in turn the consumer is induced into entering the contract. This would constitute a misrepresentation that gives rise to contractual liability. This is possible as contracts are meant to be entered into in good faith.<sup>58</sup> Therefore, contract liability could arise in the above-mentioned situations. In the absence of a contract, a consumer could use the law of delict to sue the supplier for the supply of the defective goods.<sup>59</sup>

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<sup>54</sup> SJ Burnham *Contract Law for Dummies* (2011) 159.

<sup>55</sup> JTR Gibson & CJ Visser *South African Mercantile and Company Law* 8 ed (2003) 80.

<sup>56</sup> WA Joubert *The Law of South Africa: 24. Sale and Consumer Credit to Seduction* (1986) 87.

<sup>57</sup> S Climpson, „The Impact of Misleading and Deceptive Conduct on Contracts for the Sale of Land“ 2011 *Sydney NSW* 2-3.

<sup>58</sup> AM Louw „Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can We Banish the Law of the Jungle, While Avoiding the Elephant in the Room?“ (2013) 68 *Potchefstroom Electronic Law Journal* 47-49.

<sup>59</sup> MM Botha „Does the Consumer Protection Act 68 of 2008 provide for strict product liability? – A Comparative Analysis“ (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 309-312.

### 2.3 Law of delict

The particular action in delict is considered to fall under the Aquilian action.<sup>60</sup> The elements of a delict have to be proved. These elements are as follows: an act/ conduct, wrongfulness, fault, causation and damage.<sup>61</sup>

Conduct can take the form of an act.<sup>62</sup> Therefore, a supplier performs an act by supplying the product to the consumer. In terms of wrongfulness, the act performed by the supplier must be wrongful. In order to determine wrongfulness of a conduct, a court would adopt a test that is known as the „legal convictions of the community test“ or the „*boni mores* test“.<sup>63</sup> According to Van Heerden JA, when a supplier allows potentially harmful goods to form part of its circulation, the supplier is possibly encroaching on the rights of a consumer. Thus, a supplier has a legal duty to refrain from doing so.

In the case of *Ciba-Geigy v Lushof farms*,<sup>64</sup> a farmer had purchased pesticide for the purpose of combatting weeds. However, the pesticide caused physical damage and resulted in failure of the crops. The court found the manufacturer to be liable as the manufacturer did not conduct conclusive tests and was thus negligent.<sup>65</sup> The element of wrongfulness was explained in the case. It was said that: „A manufacturer who distributes a product commercially which, in the course of its intended use, and as a result of the defect, causes damage to the consumer thereof, acts wrongfully and thus unlawfully according to the legal convictions of the community“.<sup>66</sup> Therefore, the element can be described as determining the defectiveness of a product.

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<sup>60</sup> Aquilian action is derived from Roman law. It is an action that enables a person who has suffered damage to recover compensation. This definition is available at „You & Your Rights“ available at <http://www.legalcity.net/Index.cfm?fuseaction=RIGHTS.article&ArticleID=7059794>, accessed on 7th May 2015.

<sup>61</sup> J Basson „The South African Law on "Products Liability" - Quo Vadis?" (2011) 12(1) *The South African Journal of Industrial Engineering* 87-88. This chapter aims to outline the important elements and not provide an in-depth study on the law of delict.

<sup>62</sup> CG Van der Merwe & JE Du Plessis *Introduction to the Law of South Africa* (2004) 282.

<sup>63</sup> S Oliver „Legal guidelines for the collection of information in the competitive intelligence process in South Africa“ (2003) 5(4) *South African Journal of Information Management* 6-7.

<sup>64</sup> *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA).

<sup>65</sup> A case summary can be found at S Bester „Courts“ approach to product liability claims and the impact of the CPA“ available at <http://www.polity.org.za/article/courts-approach-to-product-liability-claims-and-the-impact-of-the-cpa-2015-06-19>, accessed on 25 June 2015.

<sup>66</sup> *Ciba-Geigy* (note 64 above) 64-66.

A product is considered to be defective when it fails to meet the safety expectations of a consumer.<sup>67</sup> Moreover, it can be defective where there are inadequate instructions and information provided in relation to the dangerous product.<sup>68</sup>

In terms of fault, a consumer had to prove fault, either in the form of intention or negligence on the part of the supplier.<sup>69</sup> Intention could relate to a supplier knowingly engaging in wrongful conduct.<sup>70</sup> In terms of negligence, this could be where a supplier failed to reasonably foresee harm.<sup>71</sup> In particular, it means that the supplier failed to apply the reasonable amount of care that an ordinary person would have done in those circumstances.<sup>72</sup> For example, with certain products, a supplier would possibly have to undertake certain tests prior to placing the product on to the market. Thus, a failure to do so may constitute harm.

Consequently, a consumer would have to prove that the product was defective as it was wrongfully manufactured and that, as a result of the defective product, the consumer suffered harm. In terms of the harm element, a supplier's conduct would have to have caused harm to the consumer. Thus, the harm must have been caused by the supplier's wrongful conduct therefore causing damage to the consumer. Furthermore, the causation element focuses on there being a link between the supplier's conduct and the harm or damage that the consumer suffered.<sup>73</sup>

## 2.4 Remedies for an aggrieved consumer

Under the common law, a consumer is entitled to *Aedilitian* remedies.<sup>74</sup> For instance, a consumer would be entitled to cancel the contract and return to the position prior to contract or the position had the contract been properly concluded.<sup>75</sup> Such an option is taken when the breach of contract is serious.<sup>76</sup> In less serious circumstances, a consumer is entitled to a reduction in the purchase.<sup>77</sup> The position of less serious circumstances is known as *actio*

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<sup>67</sup> R Korzec „Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test“ (1997) 2(2) *Boston College International and Comparative Law Review* 228-230.

<sup>68</sup> WP Statsky *Torts: Personal Injury Litigation* (2010) 5 ed 357.

<sup>69</sup> R Doms, „Product liability and the Consumer Protection Act“ available at <http://www.doms.co.za/fpc25/index.php/articles/specific-topic-notes/product-liability-and-the-consumer-protection-act>, accessed on 1 July 2015.

<sup>70</sup> OJ Herstein „Responsibility in Negligence: Why the Duty of Care is not a Duty to Try“ (2010) 127 *Cornell Law Faculty Publications* 403-404.

<sup>71</sup> JD Wittenberg *Products Liability Recreation & Sports Equipment* 2 ed (2005) 5-5.

<sup>72</sup> Loubser & Reid (see note 5 above) 95.

<sup>73</sup> JM Burchell *Principles of Delict* (1993) 169.

<sup>74</sup> R Sharrock *Business Transactions Law* 8 ed (2011) 297.

<sup>75</sup> L Mulcahy & J Tillotson *Contract Law in Perspective* 4 ed (2004) 234.

<sup>76</sup> Sharrock (see note 74 above) 723.

<sup>77</sup> M Kurer *Warranties and Disclaimers: Limitation of Liability in Consumer-related Transactions* (2002) 14.

*quanti moris*.<sup>78</sup> It focuses on the idea that, had the consumer been aware of the defect, the consumer would not have purchased the product at the paid price. However, where the consumer would not have purchased the product, it is referred to as *actio redhibitoria*.<sup>79</sup>

A further form of recourse is a claim for consequential loss. This relates to the loss suffered as a result of the defect.<sup>80</sup> Consequential loss could be claimed in certain circumstances, such as where the seller professed to have expert skills or knowledge about the product or the supplier is the manufacturer of the product.<sup>81</sup> A consumer would be able to claim for such remedies using the court process. This refers to a consumer approaching a court in order to obtain recourse.

## **2.5 Shortcomings of common law**

It is clear that there was protection in place for product liability situations. However, such protection attracted various shortcomings. For example, with contract law, the usefulness was rather limited as there needed to be a contract between the consumer and the supplier.<sup>82</sup> The approach of contract law can be described as limited as it is unlikely that a supplier would conclude a contract with the consumer confirming the non-existence of a defect in the product. Moreover, there is the concept of privity of contract that only allows for those who have undertaken contractual obligations under the contract to obtain recourse.<sup>83</sup> This is problematic in a situation where one did not purchase a product, but instead received the product as a gift. Additionally, the aspect of implied contractual terms could be problematic as a consumer and supplier could interpret terms differently.

Furthermore, it is clear that when the route of delict was taken, fault had to be proved. This can be seen as an unnecessary burden placed on consumers as it can be assumed that an ordinary consumer would not understand the technicalities of a manufacturing process.<sup>84</sup> Such a burden makes it difficult for a consumer to obtain the necessary information and

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<sup>78</sup> EM Dlamini „Consumer Protection in Swaziland: A Comparative Analysis of the Law in South Africa and The United Kingdom“ (Unpublished LLM thesis, University of KwaZulu-Natal, 2012) 102.

<sup>79</sup> Ibid 333.

<sup>80</sup> CP Thorpe & JCL Bailey *Commercial Contracts: A Practical Guide to Deals, Contracts, Agreements and Promises* 3 ed (1999) 135.

<sup>81</sup> Basson (See note 61 above) 89.

<sup>82</sup> B Rubinstein „The Consumer Protection Act – A New Liability“ (16 March 2011) available at <http://www.polity.org.za/article/the-consumer-protection-act-a-new-liability-2011-03-16>, accessed on 28 March 2015

<sup>83</sup> F Mohamed „Privity of Contract – Exceptions and Circumventions of the Rule“ (2012) *Academia* 1-2.

<sup>84</sup> NC Bianco „Modern Trends in Product Liability (unpublished LLM thesis, University of South Africa, 2002). 156. For example, if a consumer was of the opinion that a defective ladder was purchased from the supplier, it is unlikely that an ordinary consumer would understand the process involved in the manufacture of the ladder. Therefore, it would be difficult to prove fault of the supplier.

evidence to prove to a court that the supplier had been deficient in some way during the manufacturing process. Furthermore, a consumer would experience further cost as an expert would be required to demonstrate such fault of the supplier.<sup>85</sup>

The concept of foreseeability of the harm also created a burden upon the consumer. This is seen in the case of *Doornbult v Bayer South Africa*,<sup>86</sup> where a claim resulted from defective herbicide as the herbicide caused waxy maize, so the crop had failed. The claim was nonetheless unsuccessful due to the lack of evidence in proving negligence. The court found that the manufacturer did not have a duty to test the product against every possible climate condition or soil. Moreover, the manufacturer could not have reasonably foreseen the harm.<sup>87</sup>

A further shortcoming of the common law approach relates to the route of seeking redress. A consumer was expected to appear in a civil court for such redress.<sup>88</sup> The use of a civil court possibly attracted high costs, thus making many product liability claims unfeasible.<sup>89</sup> Moreover, it was affirmed that the consumer remedies were limited as a consumer was entitled to consequential loss only in certain situations.<sup>90</sup> Woker asserts that whilst consumer's remedies were located in receiving reduction prices or refunds, it was often the case that such compensation would not be adequate for the loss suffered.<sup>91</sup> Additionally, consequential loss could only be obtained in certain circumstances, thus limiting a consumer's remedy.

The limitation of obtaining consequential loss was illustrated in *Kroonstad Westelike Boere Ko-op Vereeniging v Botha*,<sup>92</sup> the case dealt with the supply of pesticide that caused damage to the consumer's crop.<sup>93</sup>

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<sup>85</sup> P Gwindima „A critical evaluation of the laws that apply to product labelling in South Africa“ (unpublished LLM thesis, University of KwaZulu-Natal, 2014) 40.

<sup>86</sup> *Doornbult Boerders (EDM) Bpk v Bayer South Africa (EDM) & Ciba Geigy (Edm) Bpk* (1979) TPD (unreported) Case no: 5452/1976.

<sup>87</sup> A case summary can be found in Loubser & Reid (see note 5 above) 49.

<sup>88</sup> C Van Heerden & J Barnard „Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion“ (2013) 6(3) *Journal of International Commercial Law and Technology* 429-432.

<sup>89</sup> T Woker „Access to redress for consumers: rights without redress are meaningless rights“ (2014) *Paper presented at the International Consumer Law Conference in Pretoria* 20-29.

<sup>90</sup> JM Otto, CM Van Heerden & J Barnard „Redress in terms of The National Credit Act and The Consumer Protection Act for Defective Goods Sold and Financed in terms of an Instalment Agreement“ (2014) 26 *SA Mercantile Law Journal* 254.

<sup>91</sup> T Woker „Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act“ (2010) 31 no 2 *Obiter* 217-231.

<sup>92</sup> *Kroonstad* (note 6 above).

<sup>93</sup> *Kroonstad* (note 6 above) 571A-572A.

Claiming for consequential loss was limited as it was said that; in instances where the seller publicly professes to be skilled in the product, „the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it“.<sup>94</sup> Therefore, the merchant was held liable for the damage caused by the pesticide.

Thus, the common law approach was inadequate as an important aspect of the modern consumer market is having basic standards for product liability cases.<sup>95</sup> In addition, a vital factor in the creation of a supply culture is that of safety from defective goods.<sup>96</sup> Hence, there was a need for greater consumer protection. Thus, the Consumer Protection Act was enacted. As stated from the outset of the dissertation, the Consumer Protection Act has provisions that deal specifically with defective goods. Therefore, it is important to fully state such provisions before embarking on an analysis of the application of such provisions.

## **2.6 Consumer Protection Act provisions**

### **2.6.1 Right to safe, good and quality goods**

In terms of s55 of the Act, a consumer has a right to safe, good quality goods.<sup>97</sup> Therefore, every consumer has the right to receive goods that are reasonably suitable for the purpose for which they are generally intended.<sup>98</sup> Furthermore, the goods must be of good quality, in working order and free from defects.<sup>99</sup> However, such rights are not applicable in transactions where the consumer has been expressly informed that particular goods were offered in a specific condition and the consumer has expressly agreed to accept goods in that order or knowingly acted in a manner that is consistent with accepting goods in the specific condition.<sup>100</sup> A consumer also has a right to receive goods that will be useable and durable for a reasonable period of time.<sup>101</sup> With regards to this right, the normal use of the goods as well as the surrounding circumstances must be taken into account.<sup>102</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> Botha (see note 59 above) 312.

<sup>96</sup> Eeden (see note 4 above) 370.

<sup>97</sup> Consumer Protection Act section 55 (1); such a section does not apply to auctioned goods as per section 45.

<sup>98</sup> Consumer Protection Act section 55 (2) a.

<sup>99</sup> Consumer Protection Act section 55 (2) (b).

<sup>100</sup> Ibid.

<sup>101</sup> Consumer Protection Act section 55 (2) (c).

<sup>102</sup> Ibid.

Moreover, the goods must be in compliance with the standards that are set out in the Standards Act<sup>103</sup> and any other public regulation.

The section creates an additional right in situations where the consumer has specifically informed the supplier concerning the particular use of the goods for which the consumer wishes to use them.<sup>104</sup> Where the supplier ordinarily offers to supply such goods and acts in a manner that indicates knowledge of the use of such goods, a consumer thus has the right to expect that the goods are reasonably suitable for that specific purpose.<sup>105</sup>

The Consumer Protection Act does not provide definitions of concepts such as quality goods. However, various situations have been listed in order to determine whether the above requirements have been satisfied.<sup>106</sup> These situations take into account aspects such as:

- the manner and purpose that the goods were marketed, packaged and displayed; this includes consideration of any instructions and warnings relating to the use of goods;<sup>107</sup>
- the range of things that might reasonably be anticipated to be done with goods or in relation to the goods;<sup>108</sup>
- the time relating to when the goods were produced and supplied.<sup>109</sup>

It is further stated that there is no distinction with regard to whether a product failure or defect was patent or latent.<sup>110</sup> It is also irrelevant whether such failure or defect could have been detected by a consumer prior to taking delivery of the product.<sup>111</sup> Moreover, the fact that better goods have subsequently become available by the same or another supplier does not create an inference that the initial product is defective or has a failure.<sup>112</sup>

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<sup>103</sup> Standards Act 8 of 2008. As per s2 (a), one of the purposes of the Act is to provide a legal framework for the development, promotion and maintenance of South African National Standards in the Republic and the rendering of conformity assessment services and related activities. Consumer Protection Act section 55 (2).

<sup>104</sup> Consumer Protection Act section 55 (3).

<sup>105</sup> Consumer Protection Act section 55 (3) (a) & (b).

<sup>106</sup> Consumer Protection Act section 55 (4).

<sup>107</sup> Consumer Protection Act section 55 (4) (a).

<sup>108</sup> Consumer Protection Act section 55 (4) (b).

<sup>109</sup> Consumer Protection Act section 55 (4) (c).

<sup>110</sup> Consumer Protection Act section 55 (5) a.

<sup>111</sup> Ibid.

<sup>112</sup> Consumer Protection Act section 55 (5) (b).

### 2.6.2 The implied warranty

S56 of the Act creates an implied warranty of quality.<sup>113</sup> Any transaction or agreement that deals with the supply of goods to the consumer by the producer, importer, distributor or retailer gives rise to such warranty.<sup>114</sup> The implied warranty creates the idea that the goods supplied are in accordance with the standards set out in s55.<sup>115</sup>

### 2.6.3 Liability for damage caused by goods

The section that primarily deals with defective goods is s61. In terms of this section, a producer, importer or distributor can be held liable for any harm caused wholly or partly as a result of various consequences.<sup>116</sup> Liability for harm is located in death, injury or illness of any natural person, any loss or physical damage to any property (movable/immovable) as well as any economic loss that arises due to the harm.<sup>117</sup>

The various situations giving rise to harm are as follows. Firstly, there is the situation where there has been a supply of unsafe goods.<sup>118</sup> Goods are considered to be unsafe when such goods as a result of a defect, hazard or failure present an extreme risk of personal injury or property damage to the consumer or another person.<sup>119</sup> Secondly, there is the situation where there is a product failure, defect or hazard in goods.<sup>120</sup> A product is considered to be a failure when it is unable to perform or create its intended effect.<sup>121</sup> A hazardous good refers to a characteristic that has been identified as a hazard or declared as hazardous in terms of any other law.<sup>122</sup> A product is considered to be defective when it contains a material imperfection that renders the product less acceptable or useful in circumstances where the product is ordinarily used;<sup>123</sup> and when it contains any characteristic that renders the product less useful or safe than what a person is reasonably entitled to.<sup>124</sup> Thirdly, there is the situation where there are inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods.<sup>125</sup> The concept of an instruction and that of a warning have been stated separately as there is a distinction between the two.

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<sup>113</sup> Consumer Protection Act section 56.

<sup>114</sup> Consumer Protection Act section 56 (1).

<sup>115</sup> Ibid.

<sup>116</sup> Consumer Protection Act section 61(1).

<sup>117</sup> Consumer Protection Act section 61 (5) (a)-(d). Harm refers to physical and/or economic harm.

<sup>118</sup> Consumer Protection Act section 61 (1) (a).

<sup>119</sup> Consumer Protection Act section 53 (1) (d).

<sup>120</sup> Consumer Protection Act section 61 (1) (b).

<sup>121</sup> Ibid.

<sup>122</sup> Consumer Protection Act section 53 (1) (c).

<sup>123</sup> Consumer Protection Act section 53 (1) (a) (i).

<sup>124</sup> Consumer Protection Act section 53 (1) (a) (ii).

<sup>125</sup> Consumer Protection Act section 61 (1) (c).

An instruction makes a consumer aware on how to use the product, thus avoiding risks. However, a warning brings certain risks to the consumers' attention. Despite the distinction, it is clear that both concepts serve as a tool to ensure the consumers' safety.<sup>126</sup>

The Consumer Protection Act allows for liability to arise regardless of whether the harm stemmed from negligence.<sup>127</sup> Moreover, if there is more than one person who is liable, such persons will be found jointly and severally liable.<sup>128</sup> However, there are certain circumstances where liability will not arise. Such circumstances are as follows:<sup>129</sup>

- the unsafe product characteristic, failure, defect or hazard that resulted in harm is wholly attributable to compliance with any other public regulation;<sup>130</sup>
- the alleged unsafe product characteristic, failure, defect or hazard did not exist at the time it was supplied to that person by the person alleged to be liable or it was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person;<sup>131</sup>
- the claim for damages is brought more than three years after the death or injury of the harmed person, the earliest time at which a person had knowledge of material facts about illness, the earliest time at which a person with an interest of any property had material knowledge of the facts about loss or damage to property, or the latest date on which a person suffered any economic loss as a result of harm.<sup>132</sup>

The above-mentioned circumstances make it clear that the Act makes provision for practical circumstances where liability cannot arise. For example, certain defects could arise when products are not used in accordance with the manner it was intended to. Therefore, a supplier cannot be held liable for the harm that stems from the non-compliance as it is up to the consumer to use the product in the intended manner. A further example is that defects in products could exist after the product was supplied. Therefore, the consumer could have brought about the defect and it would thus not be fair to hold a supplier accountable. In addition, the Act allows for a reasonable time that a claim must be brought. It would not be

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<sup>126</sup> Bureau of National Affairs „Product Safety and Liability Reporter“ 33(2) (2005) 212.

<sup>127</sup> Consumer Protection Act section 61.

<sup>128</sup> Consumer Protection Act section 61 (3).

<sup>129</sup> Consumer Protection Act section 61 (4).

<sup>130</sup> Consumer Protection Act section 61 (4) (a).

<sup>131</sup> Consumer Protection Act section 61 (4) (b).

<sup>132</sup> Consumer Protection Act section 61 (4) (d).

practical to allow for claims for damages from defective goods to be older than three years as it is possible that the dynamics of the product could have changed.

The Consumer Protection Act creates a further defence for only a distributor or retailer. The defence states that, having regard to the role of the distributor or retailer in marketing the goods to consumers, it is unreasonable to have expected the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard.<sup>133</sup> Moreover, there is a provision enabling the court to use its discretion in assessing whether any harm has been proven and adequately mitigated, to determine the extent and monetary value of any damages, economic loss included, and to apportion liability among persons who are found to be jointly and severally liable.<sup>134</sup>

## **2.7 Other applicable legislation**

### **2.7.1 Constitution of the Republic of South Africa<sup>135</sup>**

There are various rights contained in the Constitution that can be evoked in a product liability situation. In terms of s10, „Everyone has inherent dignity and the right to have their dignity respected and protected.“<sup>136</sup> Moreover, the right to life is recognised in the Constitution.<sup>137</sup> Therefore, suppliers must acknowledge such rights when placing goods for public consumption. The production of good quality goods creates the assumption that a supplier respects a consumer and is thus upholding the consumer’s dignity. In addition, ensuring that goods do not contain defects contributes towards upholding a consumer’s right to life. It has been noted earlier on that the harm stemming from a defective good could result in injury or death. Thus, if such a situation occurred, a consumer’s right to life would be infringed. The right to bodily integrity is also applicable; specifically, the right to security in and control over one’s body.<sup>138</sup> This is as a result of the injury being inflicted upon the consumer’s body which the consumer does not have any control over. For example, a consumer who uses a defective good loses some control over their body. Furthermore, the Constitution recognises one’s right to an environment that is not harmful to health or well-being.<sup>139</sup> Thus, a supplier must engage in the production of goods that are free from defects. Additionally, one has the right to any information that is held by another person and that is required for the exercise or

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<sup>133</sup> Consumer Protection Act section 61 (4) (c).

<sup>134</sup> Consumer Protection Act section 61 (6).

<sup>135</sup> The Constitution of the Republic of South Africa Act 108 of 1996 hereafter referred to as the Constitution.

<sup>136</sup> Constitution of the Republic of South Africa Act section 10.

<sup>137</sup> Constitution of the Republic of South Africa Act section 11.

<sup>138</sup> Constitution of the Republic of South Africa Act section 12 (2).

<sup>139</sup> Constitution of the Republic of South Africa Act section 24.

protection of any rights.<sup>140</sup> Therefore, it is possible that a consumer has this right in terms of information regarding a product. Thus, a supplier must refrain from infringing such right by providing warning signs or risks that are associated with the product.

### **2.7.2 Occupational Health and Safety Act<sup>141</sup>**

There are some provisions contained in the Act pertaining to manufactured goods; this is clear in s10. The provisions read as follows; „Any person who designs, manufactures, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements“. <sup>142</sup>

Moreover, in terms of s3:

Any person who manufactures, imports, sells or supplies any substance for use at work shall ensure, as far as is reasonably practicable, that the substance is safe and without risks to health when properly used,<sup>143</sup> and take such steps as may be necessary to ensure that information is available with regard to the use of the substance at work, the risks to health and safety associated with such substance, the conditions necessary to ensure that the substance will be safe and without risks to health when properly used and the procedures to be followed in the case of an accident involving such substance.<sup>144</sup>

Whilst such provisions relate to products being used at work, they are also applicable to product liability situations as it may be that some products were purchased for work consumption. There is no distinction between work use and private use of goods. For example, products such as tools could be used for working purposes by a builder or by an ordinary consumer for private use.<sup>145</sup> Therefore, the above-mentioned provisions reinforce the importance of producing safe goods.

## **2.8 Route for redress in terms of the Consumer Protection Act**

Whilst having legislation in place is vital, such legislation must provide for redress as this would give effect to the applicable rights. The Consumer Protection Act provides for a

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<sup>140</sup> Constitution of the Republic of South Africa Act section 32.

<sup>141</sup> Occupational Health and Safety Act 85 of 1993 hereafter referred to as Occupational Health and Safety Act.

<sup>142</sup> Occupational Health and Safety Act section 10 (1).

<sup>143</sup> Occupational Health and Safety Act section 10 (3).

<sup>144</sup> Ibid.

<sup>145</sup> Whilst a business could be classified as a consumer, the Consumer Protection Act has a threshold of R1 million.

process of redress. S69 discusses the various options that a consumer can use to enforce a right from the Act.

These options are as follows;

- the matter can be directly referred to the Tribunal if such a direct referral is permitted by the Act or by the particular dispute;<sup>146</sup>
- the matter can be referred to the applicable ombud with jurisdiction.<sup>147</sup> However, the supplier would have to be subject to the jurisdiction of that ombud;<sup>148</sup>
- where the supplier is not subject to the jurisdiction of that ombud, the matter can be referred to the applicable industry ombud provided that the supplier is subject to such industry code.<sup>149</sup> The industry code must be accredited in terms of the Act;
- apply to the consumer court of the province that has jurisdiction over the matter, if such court exists, subject to the law establishing or governing the court;<sup>150</sup>
- refer the matter to an Alternative Dispute Resolution agent provided for in terms of s70 of the Act;<sup>151</sup>
- File -a complaint with the Commissioner;<sup>152</sup>
- Approach the court only if all other remedies available to that person have been exhausted.<sup>153</sup>

Moreover, in terms of the Constitution, „everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.“<sup>d54</sup> Therefore, in order to give recognition to the above-mentioned right, there must be effective redress. Thus, the

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<sup>146</sup> Consumer Protection Act section 69 (a).

<sup>147</sup> Consumer Protection Act section 69 (b). An ombud with jurisdiction refers to a statutory ombud or an ombud created for an industry by statute. Specifically, jurisdiction would refer to the ombud having the power to hear the matter. For a further explanation see, Woker „Access to redress for consumers: rights without redress are meaningless rights“ (2014) *Paper presented at the International Consumer Law Conference in Pretoria* 38.

<sup>148</sup> Ibid.

<sup>149</sup> Consumer Protection Act section 69 (c) (i). An industry code is a standard to which the business must adhere to. However, the business is only subject to the industry code if the business has chosen to join such code. For a further explanation see, Woker „Access to redress for consumers: rights without redress are meaningless rights“ (2014) *Paper presented at the International Consumer Law Conference in Pretoria* 44.

<sup>150</sup> Consumer Protection Act section 69 (c) (ii).

<sup>151</sup> Consumer Protection Act section 69 (c) (iii).

<sup>152</sup> Consumer Protection Act section 69 (c) (iv); Section 71 procedure to be followed.

<sup>153</sup> Consumer Protection Act section 69 (d). The other remedies are discussed below. An Example of a remedy is approaching the National Consumer Tribunal.

<sup>154</sup> Consumer Protection Act section 34.

various mechanisms available to provide such redress must strive to deal with the consumer's matter in an efficient and an effective way.

### **2.8.1 National Consumer Tribunal**

When a matter is referred to the Tribunal, the hearing must be conducted in accordance with the requirements of the Act and an applicable order may be made.<sup>155</sup> The Tribunal may impose administrative fines for prohibited or required conduct. The fine may not exceed 10% of the wrongdoer's turnover during the preceding year or R1 million.<sup>156</sup>

A number of factors must be taken into consideration when determining an appropriate administrative fine. Such factors include:<sup>157</sup>

- the nature, duration, gravity and extent of the consequences;<sup>158</sup>
- any loss or damage suffered as a result of the contravention;<sup>159</sup>
- the behaviour of the respondent;<sup>160</sup>
- the market circumstances in which the contravention took place;<sup>161</sup>
- the level of profit derived from the contravention;<sup>162</sup>
- the degree to which the respondent has co-operated with the Commissioner and Tribunal;<sup>163</sup>
- whether the Respondent has previously been found in contravention of the Consumer Protection Act.<sup>164</sup>

### **2.8.2 National Consumer Commissioner**

A person may file a complaint with the Commissioner alleging that another person has acted inconsistently with the Act.<sup>165</sup> The Commissioner can initiate a complaint regarding prohibited conduct on his or her own motion or upon direction from the Minister or upon request by the provincial consumer protection authority, another regulatory body or an accredited consumer protection group.<sup>166</sup> Upon investigating, the Commissioner can issue a

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<sup>155</sup> Consumer Protection Act section 75.

<sup>156</sup> Consumer Protection Act section 112 (2) (a).

<sup>157</sup> Consumer Protection Act section 112 (3).

<sup>158</sup> Consumer Protection Act section 112 (3) (a).

<sup>159</sup> Consumer Protection Act section 112 (3) (b).

<sup>160</sup> Consumer Protection Act section 112 (3) (c).

<sup>161</sup> Consumer Protection Act section 112 (3) (d).

<sup>162</sup> Consumer Protection Act section 112 (3) (e).

<sup>163</sup> Consumer Protection Act section 112 (3) (f).

<sup>164</sup> Consumer Protection Act section 112 (3) (g).

<sup>165</sup> Consumer Protection Act section 71.

<sup>166</sup> Consumer Protection Act section 71 (a) & (b).

notice of non-referral if the complaint is found to be frivolous or vexatious or does not allege any type of facts that allow for a remedy under the Act, or if in terms of the Act, referral is prohibited.<sup>167</sup> A non-referral would mean that the consumer cannot take the matter to the tribunal. On the other hand, the matter can be referred to various places such as an alternative dispute resolution, a consumer court and another regulatory body.<sup>168</sup>

Such referral allows for an attempt of the parties to resolve the disputes. In situations where the Commissioner alleges that there has been conduct that is not in line with the Consumer Protection Act, the matter must be referred to the National Prosecuting Authority.<sup>169</sup> However, if the Commissioner believes that the party has engaged in prohibited conduct, then the matter can be referred to the Equality Court or referred to the court of the province.

Moreover, a referral to the Tribunal can be issued if the Commissioner believes matters can be dealt with expeditiously and fully.<sup>170</sup> Alternatively, a draft consent order can be made. An example of a draft consent order would be a consumer and a supplier reaching an agreement regarding the issue at hand. Moreover, the Commissioner is enabled to issue a compliance notice.<sup>171</sup> An example of a compliance notice would be a notice ordering the supplier to refrain from engaging in a certain conduct.

### **2.8.3 Powers of the court**<sup>172</sup>

In terms of s76 of the Consumer Protection Act, a court can order a supplier to alter or discontinue any conduct that is inconsistent with the Act, make any order that is specifically contemplated in the Act and award damages against a supplier.<sup>173</sup> Such damages would be awarded for collective injury to all or a class of consumers.<sup>174</sup> Generally, the damages are to be paid on any terms and conditions that the court considers to be just, equitable and suitable to achieve the purposes of the Act.<sup>175</sup> Therefore, whilst the Tribunal has the authority to hear matters, a consumer must proceed to court in order to obtain damages.<sup>176</sup> Therefore, despite various routes available to a consumer, it can be assumed that a consumer would ultimately

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<sup>167</sup> Consumer Protection Act section 72 (a).

<sup>168</sup> Consumer Protection Act section 72 (b). An example is the Provincial Consumer Protection Office. The office provides consumers with information and advice.

<sup>169</sup> Consumer Protection Act section 73 (b).

<sup>170</sup> Consumer Protection Act section 73 (c).

<sup>171</sup> Ibid.

<sup>172</sup> Such powers are in addition to any other that is made under the Consumer Protection Act or any other law.

<sup>173</sup> Consumer Protection Act section 76 (a) & (b).

<sup>174</sup> Consumer Protection Act section 76 (c).

<sup>175</sup> Ibid.

<sup>176</sup> Woker (see note 89 above) 20.

proceed to court if an agreement cannot be reached between the supplier and the consumer. Whilst, it is beneficial to have a number of redress options available to a consumer, this range of options may lead to situations where a consumer is uncertain as to which route should be followed. Moreover, undergoing a lengthy process in order to ultimately receive compensation for damages could be detrimental and thus defeat the essence of redress.

## **2.9 Conclusion**

Despite the development of the common law, the above-mentioned definitions relating to product liability remain largely unchanged. Whilst product liability law has existed from the era of the common law, a number of problems are faced by the consumer. Thus, a reform of the law was required to deal with such problems. It is clear that the Consumer Protection Act has provided detailed provisions on the quality of goods that are expected to be supplied. It also enables one to grasp the various situations that give rise to liability as well as the circumstances that allow for an escape from such liability. Moreover, the Consumer Protection Act has allowed various routes of redress for a consumer.

It is clear that the Act has dedicated a fair amount of discussion on product liability. This chapter focused on identifying the relevant sections of the Act that pertain to product liability the following chapter will fully analyse the sections of the Act in light of the Builders Warehouse case. Moreover, the adoption of a strict liability approach under the Act will be examined.

## CHAPTER 3: AN ANALYSIS ON THE SOUTH AFRICAN REGIME OF STRICT LIABILITY

### 3.1 Introduction

The law applicable to product liability has been described in Chapter 2, in which it was highlighted that under the common law, specifically the law of delict, a consumer would bear the brunt of proving fault on the part of the supplier. Chapter 2 also highlighted the issues posed by such burden. Whilst the Consumer Protection Act imposes strict liability upon the supplier, it is useful to consider the development of the strict liability regime, by understanding its evolution and development, as some of the benefits of the shift to a strict liability regime will become apparent. It is important to emphasise this aspect of product liability as the shift in regime is possibly one of the greatest deviations from common law. Moreover, despite the dedicated provisions relating to product liability in the Consumer Protection Act, the common law still remains an alternative route that a consumer can rely upon. Thus, the following discussion will enable one to determine whether the change of regime was in fact necessary. Furthermore, such an analysis is relevant as there has not been any decided case of product liability under the Consumer Protection Act as yet. Therefore, the application of the strict liability approach on defective goods has not yet been seen in practice.

This chapter will also provide an analysis of the law by using the Builders Warehouse case as a foundation. The analysis in terms of this particular case will prove useful as it is the first case of product liability that will be heard using provisions from the Consumer Protection Act. Despite the case pending at court, the discussion will allow an understanding of how the provisions can apply. Thus, it will serve as a tool for future product liability cases. Coetzee J commented in respect to South African product liability, in an earlier product liability case, *A Gibb & Son*<sup>177</sup> that the area is ‘a fertile field for academic research’. He thus ‘foresaw the possibility that the rather humble saligna scaffolding plank may still set this ball rolling one day’.<sup>178</sup>

Coetzee J was thus of the view that academic comment on product liability was lacking. Whilst there have been various comments in the literature dealing with product liability, the second section of the chapter takes a unique approach by basing the analysis on a recent case.

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<sup>177</sup> *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W) 440.

<sup>178</sup> *A Gibb & Son* (note 177 above) 461.

### 3.2 The common law<sup>179</sup>

An important case that discussed the issue of strict liability under the common law is the case of *Wagener v Pharmacare Ltd.*<sup>180</sup> The appellant in this matter had undergone a surgical procedure which required that he be given a local anaesthetic called the „Regibloc Injection“.<sup>181</sup> After the procedure, the appellant was „left with necrosis of the tissues and nerves underlying the site of the operation, and paralysis of the right arm“.<sup>182</sup> The appellant launched a claim against the manufacturer of the anaesthetic on the basis that it was defective.<sup>183</sup> The court had to determine whether or not the manufacturer should be held strictly liable for the defective anaesthetic.<sup>184</sup> Despite, the court finding that harm was wrongfully caused to the appellant, the manufacturer was not held liable as the appellant had failed to prove fault on the part of the manufacturer.<sup>185</sup>

The court did not impose strict liability, stating that, „if strict liability is to be imposed, it must be done so by the legislature“.<sup>186</sup> It is possible that the judges had recognised that imposing such a decision would create a precedent that would be in conflict with the law as it stood at that stage, namely the common law. This can be assumed by the following comment; „single instances of litigation cannot possibly provide the opportunity for the breadth and depth of investigation, analysis and determination that is necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability“.<sup>187</sup>

The comment illustrates that the decision in this case does not mean that the judges were not in favour of a strict liability regime; it merely means that they recognised the legislature’s role in evoking such a regime, considering that it was such an important step that it could not be taken on a case by case basis. Moreover, the case illustrated many arguments in favour of strict liability.

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<sup>179</sup> One of the most important decisions relating to product liability under the common law will be briefly discussed in this chapter as other common law cases have been discussed in Chapter 2.

<sup>180</sup> *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 ALL 940 SA (SCA) 167.

<sup>181</sup> *Wagener* (note 180 above) 2.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Wagener* (note 180 above) 4.

<sup>184</sup> *Wagener* (note 180 above) 1.

<sup>185</sup> *Wagener* (note 180 above) 39.

<sup>186</sup> *Wagener* (note 180 above) 38. It must be noted that the judiciary does not perform the function of creating law and by imposing strict liability; it could have been construed as a creation of law.

<sup>187</sup> *Wagener* (note 180 above) 37.

### 3.3 Arguments in favour of strict liability regime

The Constitution allows for the development of common law in order to bring it in line with the principles of the Bill of Rights.<sup>188</sup> Within the Bill of Rights, a person has the right to bodily integrity.<sup>189</sup> Thus, when such a right is infringed, the injured person should be entitled to compensation, usually in the form of damages, for such infringement. The Aquilian Action applicable in terms of the common law arguably does not provide for adequate protection in this regard.<sup>190</sup> The lack of a strict liability regime could thus be considered to be „weakness in an injured consumer's legal armoury“ because an ordinary person would face difficulty in understanding a manufacturing process as mentioned earlier.<sup>191</sup> Therefore, it is likely that many claims may fail due to the lack of the expert knowledge necessary to overcome this difficulty. Overcoming this extremely difficult hurdle has possibly deprived consumers of the adequate protection that they deserve.

This was illustrated by Schutz J<sup>192</sup> who made an interesting comment in an earlier judgment where he stated that; „our law on product liability could be perceived as lagging“. It is possible that it was considered to be lagging due to the inadequacy of the consumer protection for defective goods. He further commented on the unequal bargaining power that existed between parties.<sup>193</sup> Unequal bargaining power is apparent in the consumer's inability to prove fault of the supplier.

It has been argued that there are moral and economic reasons for evoking a regime of strict liability.<sup>194</sup> For example, it allows for an acceptable shift of loss from the consumer to the supplier. Such a loss could be shattering to a consumer; whereas to a manufacturer with deep pockets, it would be less detrimental.<sup>195</sup> This leads to the assumption that, whilst the approach may be seen one-sided and in favour of the consumer, it would not lead to grave consequences. A case of defective goods is likely to have worse results for the consumer than the supplier. For example, if the consumer suffered a significant injury rendering him or her unable to work, the impact of the defective goods could have the catastrophic potential to hinder the consumer's entire life. Thus a consumer who is not protected in such

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<sup>188</sup> Constitution of the Republic of South Africa Act section 39 (2).

<sup>189</sup> Constitution of the Republic of South Africa Act section 12 (2).

<sup>190</sup> *Wagener* (note 180 above) 9.

<sup>191</sup> *Wagener* (note 180 above) 12.

<sup>192</sup> *LangebergVoedselBpk n* (note 23 above).

<sup>193</sup> *Ibid.*

<sup>194</sup> E Reid & DP Visser *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 222.

<sup>195</sup> J Stapelton *Product Liability* (1994) 93-94.

circumstances is being significantly deprived. In contrast, whilst a supplier's reputation would possibly be damaged, as well as their finances to a certain extent, it is unlikely that this would hamper their entire business. Moreover, evoking the fear that a supplier could be held liable without the proof of fault could create a benefit as it would encourage suppliers to exercise extreme caution when supplying goods.<sup>196</sup> By exercising caution in the supply of goods, it is likely that there will be fewer defective goods in the market, therefore making the threat of litigation for defective goods minimal.

Such thinking was expressed by Prosser,<sup>197</sup> who stated that strict liability could lead to suppliers improving their goods, thus eliminating defective goods. He also highlighted other important reasons for evoking strict liability, such as, when a supplier places goods into circulation the supplier is inviting the use of such goods.<sup>198</sup> Therefore, if there are situations where the use of such goods leads to a disaster, the supplier should thus be liable. A further justification for a strict liability approach is the fact that when consumers are using defective products, they are helpless and thus the supplier should be held accountable.<sup>199</sup> The aspect of helplessness stems from the fact the consumer is unaware that the good is defective and is thus unable to guard himself or herself from the consequences of the defective good. This reinforces the idea that there should be equal bargaining powers of either party. Whilst suppliers are needed to provide the product, consumers are equally important as their purchases allow for the supplier to stay in business.

Strydom<sup>200</sup> asserts that strict liability; „enhances the regulation of product liability and inevitably contributes to ensuring that fewer defective products reach the consumer market due to increased standards of quality and safety and the implementation of better control and recall measures“. This suggests that a strict liability regime will eliminate defective goods. The prospect of being held strictly liable will also possibly hold suppliers to a higher standard of safety as it will alert the supplier to the benefits of avoiding a situation where defective goods cause harm to a consumer, as the supplier would face the burden of proof. Despite having the technical knowledge available, it could nonetheless be a stringent task to discharge this onus.

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<sup>196</sup> FJ Vandall „Applying Strict Liability to Professionals: Economic and Legal“ (1983) *Indiana Law Journal* 37-39.

<sup>197</sup> W Prosser 'Assault on the Citadel (Strict Liability to the Consumer)' (1960) 69 *Yale Law Journal* 112.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Z Strydom „A Critical Analysis of Strict Product Liability in South Africa“ (unpublished LLM thesis, University of Pretoria 2012) 39.

Therefore, the strict liability regime may be described as being preventive in nature as well as being a proactive regime. Being proactive in nature is useful as it has the ability to evade lengthy drawn out complicated cases. Therefore, a supplier would not have to split its focus between its business and litigation.

### **3.4 Section 61(4) (c) defence**

As mentioned previously, the Consumer Protection Act creates a defence that is afforded only to distributors and retailers. The defence states that, having regard to the role of the distributor or retailer in marketing the goods to consumers, it is unreasonable to have expected the distributor or retailer to have discovered the unsafe product's characteristic, failure, defect or hazard.<sup>201</sup> Such a broad defence may lead one to assume that the strict liability approach is a mere smoke-screen. On the one hand consumers are relieved of the burden of proof, creating the idea that their claim bears probable success, yet on the other hand, a supplier is afforded a defence that is a possible „catch-all“ situation defence.

Loubser and Reid<sup>202</sup> point out that distributors and retailers are able to defend themselves by merely showing that they are not at fault and that this undermines the strict liability approach. Furthermore, they argue that retailers are just like manufacturers in the sense that they supply goods to the public; thus any injuries sustained from the supply of defective goods should rest upon the retailer or distributor.<sup>203</sup> In essence, it can be said that the defence dilutes the purpose of strict liability as a remedy for consumers to hold suppliers liable for damages which they may suffer.<sup>204</sup>

Gowar<sup>205</sup> suggests that in order to avoid relapsing into the old fault-based system, a court would need to apply a purposive method of interpretation. The purposive method refers to an interpretation that gives effect to the overall purpose of the legislation.<sup>206</sup> This can be assumed as being the intention of the legislator as in s 2(1) of the Consumer Protection Act; it states that the Act is to be interpreted in a manner that gives effect to the purposes of the Act.<sup>207</sup> It is vital to remember that the purpose of the Consumer Protection Act is consumer protection, thus the Act should be interpreted in a manner that is beneficial to the consumer.

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<sup>201</sup> Consumer Protection Act section 61(4) (c).

<sup>202</sup> Loubser & Reid (see note 5 above) 173.

<sup>203</sup> Botha (see note 59 above) 317.

<sup>204</sup> Gwindima (see note 85 above) 49.

<sup>205</sup> C Gowar „Product liability: a changing playing field?“ (2011) 32(3) *Obiter* 521.

<sup>206</sup> S Hanson *Legal Method, Skills and Reasoning* 3 ed (2009) 148. There are various methods which a court can adopt in interpreting legislation and an example of such method is the purposive method.

<sup>207</sup> Consumer Protection Act section 2(1).

Therefore, application of the no-fault regime should take preference in order to capture the aims of the Act. Moreover, the application of the defence should be achieved with extreme caution ensuring that consumers are not left in a situation where they do not have any redress.

### **3.5 Case law under the Consumer Protection Act**

#### **3.5.1 The “Builders Warehouse case” general overview**

Builders Warehouse, a home improvement and building material business, are being sued by two consumers.<sup>208</sup> The consumers are Andrew Doig and Riaan Beeslaar who are suing Builders Warehouse.<sup>209</sup> Both consumers’ claims involve injuries sustained by them as a result of alleged defective ladders supplied by Builders Warehouse.<sup>210</sup>

#### **3.5.2 Information surrounding the consumer’s claim against Builders Warehouse (Plaintiff’s)**

The first consumer, Doig, is a SAA pilot; he alleges that he has sustained injuries to his spine and has not been able to return to work.<sup>211</sup> He alleges that he bought a 3.8m telescopic ladder from Builders Warehouse and that the ladder broke as he was descending it.<sup>212</sup> Doig has alleged that as a result of his injuries he expects that he will face difficulty with regards to the demands inherent in flying on international routes.<sup>213</sup> Moreover, it is argued that he will be limited to mere domestic flights within a period of five years.<sup>214</sup> As a result of these circumstances, it is alleged, his annual earnings will be reduced by 20 per cent and that he will face the deduction of his international allowance as well.<sup>215</sup>

Furthermore, due to his current physical state it is probable that he will be compelled to retire at an early stage.<sup>216</sup> Thus, he claims, he would be unable to earn income as a freelance pilot. Doig’s claim amounts to R14, 3 million for loss of earnings with a further R2 million in

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<sup>208</sup> F Schroeder „Pair injured in ladder fall sues for R18m” IOLNews available at <http://www.iol.co.za/news/crime-courts/pair-injured-in-ladder-fall-sues-for-r18m>, accessed on 27 February 2015. The information on the case is found in various articles as the case is pending court. The matter is to be heard at the North and South Gauteng High Courts.

<sup>209</sup> Ibid.

<sup>210</sup> „Consumers take on giant chain store” available at [www.pressreader.com/south-africa/the-independent-on.../TextView](http://www.pressreader.com/south-africa/the-independent-on.../TextView), accessed on 5 July 2015.

<sup>211</sup> S Thomas „Consumer Law: Retailers under fire” available at <http://www.financialmail.co.za/fmfox/2015/05/14/consumer-law-retailers-under-fire>, accessed on 15 May 2015.

<sup>212</sup> Ibid.

<sup>213</sup> See note 11.

<sup>214</sup> „02/07/15--05:02: Pair injured in ladder fall sues for R18m” available at [https://disqus.com/home/discussion/iol/pair\\_injured\\_in\\_ladder\\_fall\\_sues\\_for\\_r18m/newest/](https://disqus.com/home/discussion/iol/pair_injured_in_ladder_fall_sues_for_r18m/newest/), accessed on 25 July 2015.

<sup>215</sup> „Courts’ approach to product liability claims and the impact of the CPA” available at <http://www.polity.org.za/article/courts-approach-to-product-liability-claims-and-the-impact-of-the-cpa-2015-06-19>, accessed on 25 June 2015.

<sup>216</sup> See note 11.

respect of damages for pain and suffering.<sup>217</sup> His claim is against Builders Warehouse as well as Isaacson Ladders, which, it is alleged, is the importer or producer of the ladders.<sup>218</sup>

The second consumer is Beeslaar who is an I.T technician. He allegedly purchased a multipurpose and folding aluminium 3.7m ladder from Builders Warehouse.<sup>219</sup> He asserts that the ladder suddenly collapsed and as a result he severely injured his ankle.<sup>220</sup> He alleges that as a result of the injuries that he incurred, he cannot continue in his field of work as he is unable to meet the demands of his job.<sup>221</sup> His claim is for R16 million.<sup>222</sup> Beeslaar is of the view that the instructions on how to use the ladder and the warnings with regard to the hazards involved when using the ladder, were inadequate.<sup>223</sup>

### **3.5.3 Jurisdictional issue**

The route chosen by the consumers in this case has been criticised as the consumers are using the option of the court as a first resort.<sup>224</sup> This is an issue as s69 of the Consumer Protection Act provides for approaching a court as a last resort.<sup>225</sup> It is thus important to consider the routes that could have been chosen by Doig and Beeslaar. They should have considered other bodies such as; the Consumer Goods & Services Ombud, the National Consumer Commission (NCC) or the National Consumer Tribunal (NCT).<sup>226</sup> Whilst the NCC and NCT have been discussed in Chapter 2, the option of the Consumer Goods and Services Ombud must be examined.

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<sup>217</sup> Ibid.

<sup>218</sup> „Injured consumers put law to the test“ available at <http://www.pressreader.com/south-africa/the-independent-on-saturday/20150207/281711203071340/TextView>, accessed on 8 August 2015.

<sup>219</sup> S Colman „CPA highlights need for retailers to rethink liability risks“ available at <http://www.fanews.co.za/article/short-term-insurance/15/general/1217/cpa-highlights-need-for-retailers-to-rethink-liability-risks/17829>, accessed on 20 May 2015.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> F Schroeder „Injured Consumers put law to the test“ Weekend Argus available at [http://www.lyonsbriviklaw.com/cases\\_injuredconsumers.html](http://www.lyonsbriviklaw.com/cases_injuredconsumers.html), accessed on 27 February 2015.

<sup>223</sup> Ibid.

<sup>224</sup> See note 218.

<sup>225</sup> Consumer Protection Act section 69.

<sup>226</sup> Ibid.

### **3.5.3.1 Consumer Goods and Services Ombud (hereafter referred to as CGSO)**

The Ombud's office came into effect in March 2015, thus coming into force after the Consumer Protection Act.<sup>227</sup> This is possibly the reason why the Act does not have specified provisions for the Ombud.<sup>228</sup>

However, the Ombud is nonetheless set up in accordance with the Consumer Protection Act.<sup>229</sup> However, the CGSO can seek guidance from a Draft Sector Code which has also been drafted in terms of the Consumer Protection Act. The purpose of the code is as follows;

To set a minimum standard of conduct for the CGS industry when dealing with consumers, educate consumers as to their rights and redress available to them should a supplier breach the code, reduce and ameliorate any disadvantages experienced by consumers in accessing the supply of any goods or services; raise the standard of conduct in the CGS industry and promote fair business practices.<sup>230</sup>

Therefore, the CGSO enforces the Consumer Goods and Services Industry Code of Conduct by receiving and dealing with consumer goods complaints by a consumer free of charge and by investigating alleged contraventions.<sup>231</sup> This must be done as soon as reasonably possible, but within 36 months of the consumer becoming aware of the event resulting in the complaint.<sup>232</sup> However, any finding made by the Ombud must be ratified by the court or tribunal.<sup>233</sup> Thus, the consumers in the case of discussion could have referred their complaint to the Ombud, who would have possibly attempted to reach a settlement between them and Builders Warehouse. Additionally, with the consent of Builders Warehouse, a consent

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<sup>227</sup> J Kriege „Preventing the wool being pulled over consumers“ eyes: The consumer goods and services industry code of conduct and ombud“ available at <http://www.derebus.org.za/preventing-wool-pulled-consumers-eyes-consumer-goods-services-industry-code-conduct-ombud/>, accessed on 23 October 2015.

<sup>228</sup> It must be noted that “The Consumer Goods and Service Industry Code of Conduct and the office of the Consumer Goods and Services Ombud are the Industry Code and Ombud Scheme for the Consumer Goods and Services Industry are set up in accordance with and accredited in terms of section 82 (6) of the Consumer Protection Act 68 of 2008”.

<sup>229</sup> Resolving Consumer Goods Disputes Effectively and Independently“ available at <http://www.cgso.org.za/>, accessed on 4 October 2015.

<sup>230</sup> N Tesnaar „What does the CGSO mean for business owners?“ available at <http://www.seesa.co.za/posts-consumer/what-does-the-cgso-mean-for-business-owners.html/>, accessed on 23 October 2015. A copy of the draft is available at [www.gpwonline.co.za](http://www.gpwonline.co.za).

<sup>231</sup> „Consumer Goods & Services Ombud Fairplay between consumer & supplier“ available at [www.cgso.org.za/wp-content/uploads/.../cgso-brochure-march-2013.pdf](http://www.cgso.org.za/wp-content/uploads/.../cgso-brochure-march-2013.pdf), accessed on 2 October 2015.

<sup>232</sup> See note 227.

<sup>233</sup> „The new Consumer Goods and Services Code: How will it affect you?“ available at <http://logista.co.za/blog/?p=1800>, accessed on 22 October 2015.

including an award for damages could have been issued.<sup>234</sup> Thus, a lengthy case could have been avoided. However, since such a route was not utilised, the possible arguments by the consumers, and the defences of the supplier as well as the possible outcome of the case must be analysed.

#### **3.5.4 Arguments in favour of the consumer**

As mentioned previously, one of the allegations made by Beeslaar is that the instructions provided with the ladder were inadequate. Section 61(1)(c) of the Consumer Protection Act relates specifically to inadequate instructions or warnings<sup>235</sup> and this allegation thus bears some analysis.

In terms of this section, consumers would need to show that the goods are inherently hazardous or pose a significant risk. A ladder could pose a great threat as one is climbing a height and is thus relying on the ladder for support. In this particular scenario, a reasonable person would possibly consider a 3.7m or 3.8m ladder to be a high ladder as well as a complicated piece of equipment. It would therefore require additional instructions to other ladders and, in particular, if it was a folding or telescoping ladder, additional instructions on how to open, lock, use and fold the ladder safely would need to be included. Consumers need to examine the instruction manual provided and illustrate the inadequacy of the instructions. The consumers could also further emphasise that the warnings were insufficient. It is possible that the manual did not contain sufficient detail regarding the risks that could materialise and this is certainly a matter for evidence at trial.

Thus, an instruction refers to a notification to a consumer on how the product should be used.<sup>236</sup> This differs from a warning; an example of a warning relating to a telescopic ladder appeared in an online manual by Youngman, which states that the ladder will collapse if it is opened from the top unless the ladder is opened to extend to its full height.<sup>237</sup> It is apparent that this is an important warning that needs to be brought to the consumer's attention. It is probable that the consumers would not have to prove that the manuals were in fact consulted prior to using the ladder unless Builders Warehouse shows the adequacy of the instructions and that the necessary information was in fact provided for. Thus, if the manual was

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<sup>234</sup> Such finding must be in terms of s70 (1) of the Consumer Protection Act. The section states "With the consent of a complainant, a consent order confirmed in terms of subsection (3) (b) may include an award of damages to that complainant".

<sup>235</sup> Consumer Protection Act section 61 (1).

<sup>236</sup> S John, A Theodore & VH Mayer et al. *Product Liability* (2012) 4\_50.

<sup>237</sup> „Youngman Telescopic Ladder“ available at [www.youngmangroup.com/download/Telescopic+Loft+Ladder+Manual](http://www.youngmangroup.com/download/Telescopic+Loft+Ladder+Manual), accessed on 21 September 2015.

inadequate and the consumers failed to look at the manual, the supplier should nonetheless be liable because had the consumers looked at the manual, it would not have helped them in preventing the injuries. However, the consumers would need to consider the aspect of the manual possibly being consulted by a large number of consumers, specifically those consumers who did not suffer an injury. In the event, despite the manual being insufficient, it was still able to save such consumers. Therefore, it would be beneficial to consider other arguments.

The consumers could possibly raise other arguments as an alternative. Firstly, the consumers could raise s61(1)(a) which imposes strict liability for the supply of unsafe goods. The definition of unsafe goods must be reiterated.<sup>238</sup> As per the Consumer Protection Act, unsafe goods are defined as „as a result of a defect, hazard or failure, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons“.<sup>239</sup> Thus, the ladders would have had to present an extreme risk.<sup>240</sup> The word extreme indicates reaching a height or the highest degree.<sup>241</sup> It is probable that the risk associated with the ladders in question might be a higher risk than that associated with ordinary ladders.

The concept of unsafe goods is considered to overlap with s61(1)(b) as such a provision also deals with the notion of supplying goods that are not safe.<sup>242</sup> However, it has been said that s61(1)(b) has a less stringent test than s61(1)(a). Therefore, instead of the consumers having to meet the requirement of an extreme risk in s61(1)(a), they could rely on s61(1)(b) which is less onerous as it does not require the concept of extreme risk. However, it may be difficult to distinguish ordinary ladders from those in question. Moreover, there are higher ladders that exist that would possibly be construed as posing a greater risk so greater safety measures must be provided to the consumer.

In terms of s 61(1)(b), strict liability arises when harm has been caused as a result of a product failure, defect or hazard.<sup>243</sup> A positive aspect of this provision is that it is not required that goods be shown to be unsafe. In terms of the Builders Warehouse case, it is clear that harm has arisen as the consumers suffered injuries. The consumers could rely on the ladders being a product failure or possibly defective. Product failure would be relevant as the ladders

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<sup>238</sup> Consumer Protection Act section 61(1) (a).

<sup>239</sup> Consumer Protection Act section 53(1) (d).

<sup>240</sup> E Klink E „Consumer Protection Act“ 2010 *Benguela Health (Pty) Ltd* 8.

<sup>241</sup> Loubser & Reid (see note 5 above) 78.

<sup>242</sup> Ibid.

<sup>243</sup> Consumer Protection Act section 61(1) (b).

did not perform in the manner that they were intended to. It is probable that in purchasing ladders of that length the consumers intended to climb to a great height. However, the ladders did not allow them to reach such heights as they collapsed. This would be seen as a product failure if the collapse was as a result of the failure of the ladder. In terms of defectiveness, it is possible that the ladders contained a material imperfection. Furthermore, as a result of such an imperfection, the ladders possibly were not able to perform to the desired effect. The consumers may attempt to show that the ladders were hazardous. This might be difficult as ladders are not generally classified as hazardous and the use of a ladder does not pose a serious risk. It is only when the ladder is accompanied by a lack of instructions or warnings or if the ladder is defective that a significant risk becomes apparent. Whichever approach is adopted by the consumers, they are saved from having to prove fault on the part of the supplier due to the strict liability regime.

### **3.5.5 Defences available to Builders Warehouse**

As mentioned in the previous chapter, there are various defences which are available to the supplier. It is therefore possible that Builders Warehouse could escape liability by relying on one of the defences provided for in the Consumer Protection Act.

- **Defence 1: Risk attributable in terms of public regulation**

It is unlikely that Builders Warehouse will be able to rely on the risk being attributable in terms of public regulation as there is no regulation dealing with ladders.

- **Defence 2: Defect, failure or hazard did not exist in the goods at the time they were supplied**

The defence that the defect, failure or hazard did not exist in the goods at the time it was supplied is a potentially successful defence. It would count in Builders Warehouse favour that they supply a large number of ladders that are defect free; thus it is probable that such defect, failure or hazard would not have existed at the time of supply. This option may nonetheless be costly and time-consuming as it may require them having to conduct rigorous investigations into stock and follow up on already supplied stock to prove the non-existence of the alleged defect.<sup>244</sup>

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<sup>244</sup> L Mahabeer „South Africa: "Strictly" Speaking" available at <http://www.mondaq.com/southafrica/x/172162/Product+Liability/Strictly+speaking>, accessed on 20 September 2015.

- **Defence 3: Unreasonable to expect the retailer to have discovered the unsafe product characteristic, failure, defect or hazard**

This is possibly the most viable option. The defence states that a distributor or retailer can escape liability, if they can prove that it is unreasonable to expect that they could have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers. Builders Warehouse would qualify for such a defence as they are considered to be retailers.<sup>245</sup> The defence refers to the concept of reasonableness, thus it is probable that principles extrapolated from the Aquilian Action will bear some influence on the interpretation of the provision.

It is possible that courts may adopt an objective reasonable man standard in assessing this defence. If so, in many instances it would be unreasonable to expect the retailers to spot the defect. Specifically, it may be fair to conclude that it is unreasonable to expect Builders Warehouse to have discovered the two defective ladders out of a number of ladders.

According to Massmart; Builders Warehouse sells „in excess of 50 000 ladders a year“.<sup>246</sup> It is possible that each ladder must be of a certain standard but it is unlikely that each ladder undergoes individual testing. The time and cost implications of expecting a retailer to conduct further testing (assuming that the manufacturer tests the products before supplying to the retailer) on every product mass supplied to it, is inherently unreasonable. Even sample testing, when dealing with the vast numbers of retail goods that are traded annually is unreasonable and the retailer is entitled to rely upon representations (both explicit and implied) by manufacturers that goods supplied are free from defects. It is therefore probable that this defence will be successful.

### **3.5.6 Possible outcome of the case**

Despite the consumers alleging major injuries, it is unlikely that Builders Warehouse will simply acknowledge liability. If the courts were to hold Builders Warehouse liable and were thereafter to make substantial damages awards, it would in all likelihood open a flood-gate of similar cases which could result in stores facing severe financial losses. It might also lead to consumers bringing frivolous claims. Builders Warehouse has argued that they supply millions of ladders a year. It is thus unfortunate that two ladders out of the millions supplied were unsatisfactory (if indeed they were). It is probable that the Builders Warehouse defence,

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<sup>245</sup> „Get to Builders. Get it done!“ available at [www.builders.co.za/about-us/](http://www.builders.co.za/about-us/), accessed on 9 February 2015.

<sup>246</sup> Ibid.

specifically the above-mentioned defence three will succeed, considering that they are a retail store and their role in marketing the ladders to the consumer, it would not be reasonable for them to have detected the defect in the two ladders supplied – if there were indeed defects. On the other hand, it may be that the court will want to set a precedent that consumer protection should be guarded at all costs, by upholding the consumers’ rights in respect of product liability.

There is another possibility, which is for the matter to be settled between the parties. However if a settlement were it to be implemented, it would deprive suppliers and the consuming public alike of any useful indication of precisely how the courts intend approaching the strict liability provisions and the defences in the Consumer Protection Act.

### **3.6 Conclusion**

A consumer who has incurred damages as a result of the supply of defective goods has a choice to use the common law or the Consumer Protection Act approach when seeking redress. However, the common law has various shortcomings such as the burden of proof being placed upon the consumer. This was illustrated in the *Wagener*<sup>247</sup> case; the court did not find in favour of the consumer despite the consumer having been given a defective anaesthetic which caused him harm. Therefore, the lack of protection afforded to the consumer for defective goods was possibly dealt with in terms of the strict liability approach under the Consumer Protection Act. Thus, it is possible that the Act makes it easier for consumers to enforce their rights and bring about a product liability claim for defective goods.

However, some commentators are of the view that the Consumer Protection Act has left consumers worse off than they were under the common law.<sup>248</sup> Others have shed some doubt on the product liability provisions in the Act, mainly due to the defences available to distributors or retailers. Builders Warehouse for example, may be able to raise the defence that with regard to their role of marketing ladders to consumers, it is unreasonable to expect them to have detected the alleged defect. It is possible therefore that such a defence (and possibly others) will result in the consumer’s rights to be viewed as a smoke-screen.

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<sup>247</sup> *Wagener* (note 180 above).

<sup>248</sup> T Naude „Proposals for Amendment of Consumer Protection Bill“ available at <https://pmg.org.za/files/docs/080904naude1.doc>, accessed on 4 August 2015.

Nonetheless, the Consumer Protection Act was drafted by experts in the field and it strives to afford greater protection to the consumer.<sup>249</sup> It seems that the obvious choice when seeking redress would be the Consumer Protection Act route. The outcome of the Builders Warehouse case is anxiously anticipated as it will allow for a determination as to whether the Consumer Protection Act has achieved its objectives and also a determination on whether or not the Act can be applauded in terms of its effectiveness in product liability situations.

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<sup>249</sup> I Mattheus „The Effect of the Consumer Protection Act on the Voetstoets Clause in South African Law and Comparison to Belgium law“ (unpublished LLM thesis, University of Pretoria, 2014) 53.

## CHAPTER 4: FOREIGN LAW: THE EUROPEAN DIRECTIVE

### 4.1 Introduction

As was noted in the previous chapters, the Consumer Protection Act is fairly new as it was enacted in 2008. When developing legislation, legal frameworks of other bodies or countries are considered. Thus, the Council Directive 85/374/EEC of 25 July<sup>250</sup> on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products was consulted in the formation of the Consumer Protection Act. According to Gowar, the Consumer Protection Act is said to have many similarities to the European Directive.<sup>251</sup> Moreover, Whittaker<sup>252</sup> states that after the European Directive's enactment, it has been widely adopted. Thus, it is useful to consider the provisions under the Directive, to understand the application of the Directive in order to draw parallels with the Consumer Protection Act, to view how the Directive has been implemented in practice, to ascertain what shortcomings have been uncovered and to assess its effectiveness.

This will be beneficial as s2 of the Consumer Protection Act states that foreign law and international law may be incorporated when interpreting or applying the Act.<sup>253</sup> The Constitution of the Republic of South Africa states that when the Bill of Rights is being interpreted, a court may consider foreign law.<sup>254</sup> This serves as an indication that foreign law can have an influence on South African law, specifically in guiding the South African courts when the courts are faced with new areas of law that have seen little or no litigation with regard to those particular areas. It has been stated in an earlier chapter that product liability under the Consumer Protection Act has not yet had a case decided, whilst under the European Directive, there have been a number of cases decided. Due to the influence of the European Directive on the Consumer Protection Act, discussion of such case law will be helpful.

The aim of this chapter is to consider the relevant provisions under the European Directive. Thus, the application of product liability will be understood by discussing cases on product liability dealt with under the European Directive. Thereafter, links between the European Directive and the Consumer Protection Act will be made as this will enable an understanding of how the provisions in the Consumer Protection Act can be applied.

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<sup>250</sup> Hereafter referred to as European Directive/Directive

<sup>251</sup> Gowar (see note 205 above) 535. The similarities will be discussed later on in the chapter.

<sup>252</sup> S Whittaker *The Development of Product Liability* (2014) at 43.

<sup>253</sup> Consumer Protection Act section (2) (a).

<sup>254</sup> Constitution of the Republic of South Africa Act section 39.

Against this background, the chapter will briefly discuss the history on the European Directive. In addition, an overview of the provisions relating to the liability for defective goods will be considered. Within the overview, emphasis will be placed on product liability, defective goods and the defences available against product liability claims. The influence of the European Directive will also be examined. In particular, the concept of the consumer expectations tests and the development of risk defence will be considered.

#### **4.2 Brief history of the European Directive**

Prior to 1985, there were no adequate rules in place that dealt with product liability as a homogeneous entity.<sup>255</sup> For example, the International Convention on Conflict of Laws in liability cases was adopted by the Hague Convention on Private International law as the Convention allowed for a determination of liability stemming from the production of defective goods.<sup>256</sup> It was said that the Convention did not provide for which law should be applied when certain questions arose such as what types of products evoked liability.<sup>257</sup> Instead, the Convention merely allowed for the general law of conflict to be applied.<sup>258</sup> Thus, the scope of the Convention was narrow and greater protection covering a wide range of circumstances was still required.<sup>259</sup>

In the 1970s, a panel of experts focused on harmonising the law on product liability.<sup>260</sup> After much debate, the Strasbourg Convention was presented.<sup>261</sup> The Strasbourg Convention dealt with personal injury and death.<sup>262</sup> Various negotiations took place for about six years.<sup>263</sup> Thereafter, in 1985, the European Directive was adopted.<sup>264</sup> The Directive makes provision for satisfactory protection against damages that arise from defective products.<sup>265</sup> The Directive came into being due to the large number of divergent approaches that existed in law

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<sup>255</sup> Bianco (see note 84 above) 84.

<sup>256</sup> W Boger „The Harmonization of European Products Liability Law“ 1983 *Fordham International Law Journal* 2.

<sup>257</sup> Ibid.

<sup>258</sup> This refers to general laws being applied instead of having particular laws to deal with the matter.

<sup>259</sup> H Fischer „The Convention on the Law Applicable to Products Liability“ (1974) 20 *McGil Law Journal* 49.

<sup>260</sup> Campbell (see note 1 above) 535.

<sup>261</sup> D Fairgrieve *Product Liability in Comparative Perspective* (2005) 167.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> M Kleinman, W Matznetter & M Stephens *European Integration and Housing Policy* 2 ed (2005) 79.

<sup>265</sup> Commission of The European Communities „Green Paper Liability for defective products“ (1999).

in Europe.<sup>266</sup> Such divergence had the potential to distort competition in the market and affect the movement of goods.<sup>267</sup>

Moreover, a great deal of concern arose as a direct reaction to the disastrous consequences that were caused from the supply of defective medication to a number of pregnant mothers.<sup>268</sup> As a direct result of such medication, their children were born with defects, and a number of the victims were left without redress for such defects.<sup>269</sup> Therefore, in order to deal with such problems, liability without fault had to be introduced.<sup>270</sup> It was clear that there was a recognised need for product liability law as it would help regulate goods as well as ensure continued development of production.<sup>271</sup> Failure to introduce such law would have resulted in public outrage and would have had detrimental effects on the lives of more consumers.

The United Kingdom was the first to implement the Directive, followed by Germany.<sup>272</sup> France was the last member state to implement the Directive.<sup>273</sup> France displayed reluctance in adopting the Directive and only adopted the Directive once it was exposed to hefty penalties.<sup>274</sup> Harland<sup>275</sup> described the Directive as a document that was criticised for making too many concessions to producers. Therefore, it could be that Harland was of the view that the Directive made it difficult for suppliers to effectively conduct business with the threat of litigation for defective goods placed upon them. It is submitted that France was possibly weary of the Directive due to the effect that it could have on their supply chain. For example, holding suppliers against stringent legislation may hamper their ability of production. A steady flow of production is vital to a consumer market and it further enables growth in the

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<sup>266</sup> S Weatherill *EU Consumer Law and Policy* (2013) 172.

<sup>267</sup> T Τριδίμας & P Nebbia *European Union Law for the Twenty-first Century: Internal market and free movement community policies* (2004) 97.

<sup>268</sup> FO Kelsey „Thalidomide“ available at <http://www.sciencemuseum.org.uk/broughttolife/themes/controversies/thalidomide.aspx>, accessed on 1 July 2015.

<sup>269</sup> Loubser & Reid (see note 5 above) 9.

<sup>270</sup> Whittaker (see note 252 above) 104.

<sup>271</sup> LM Linger „The Products Liability Directive: A Mandatory Development Risks Defense“ (1990) 14(2) *Fordham International Law Journal* 478-479.

<sup>272</sup> CV Dam *European Tort Law* 2 ed (2013) 420 & 521.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> D Harland „The Influence of European Law on Product Liability in Australia“ (1995) 7(33) *Sydney Law Review* 341-342.

market. Nonetheless, within the European Economic Community, the Directive allows for a uniform basis of liability relating from defective goods.<sup>276</sup>

The European Directive can be seen as an important example to a wide range of jurisdictions. Whilst the Directive places the focus on consumer protection, it also places emphasis on levelling out the field between a consumer and a supplier.<sup>277</sup>

### **4.3 Overview of provisions of the European Directive**

#### **4.3.1 Product liability**

The Directive holds the producer liable for the damage caused by a defect in a product.<sup>278</sup>

The term „producer“ refers to the manufacturer of a finished product or of any raw material or component part as well as any person who is presented as a producer by putting their trade mark or any other distinguishing feature on the product.<sup>279</sup> Moreover, a person is considered to be a producer where such person has imported a product into the community.<sup>280</sup> In situations where the producer cannot be identified, the supplier will be held liable unless the supplier gives the injured party the identity of the producer within a reasonable time.<sup>281</sup> The Directive makes provision for joint and several liability, thus more than one party can be held liable for the defective goods.<sup>282</sup>

The product liability provisions have been commended because the defendant bears the burden of proof. Thus, the consumer receives greater protection in such circumstances. Stapelton<sup>283</sup> describes this as a tactical advantage and it is submitted that this description is correct as a consumer possibly does not understand the technicalities involved in the making of a product. On the other hand, if the burden of proof rested upon the consumer, it is likely that the consumer would be reluctant to bring about a product liability claim. Mottur<sup>284</sup>

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<sup>276</sup> PR Rodrigues & C Mann „The European Directive on products liability: The Promise Of Progress?“ 1988 *Georgia Journal of International and Comparative Law* 404-405. European Economic Community is known as the Common market. For more information, see „European Economic Community“ available at <http://www.infoplease.com/encyclopedia/history/european-economic-community.html>, accessed on 7 December 2015.

<sup>277</sup> Ibid.

<sup>278</sup> European Directive article 1.

<sup>279</sup> European Directive article 3 (1).

<sup>280</sup> European Directive article 3 (2).

<sup>281</sup> European Directive article 3 (3).

<sup>282</sup> European Directive article 5.

<sup>283</sup> J Stapelton „A Personal Evaluation of the Implementation of the EEC Directive (85/374/EEC) on Products Liability“ 1993 *Torts Law Journal* 95-97.

<sup>284</sup> AE Mottur „The European Product Liability Directive: A Comparison with U.S. Law, an Analysis of its Impact on Trade, and a Recommendation for Reform so as to Accomplish Harmonization and Consumer Protection“ 1994 *Law and Policy in International Business* 1-2.

describes the Directive as legislation that has „engendered a wide and varied debate among industry and consumer group“. It is possible that such debate is prevalent amongst suppliers as product liability claims could possibly cripple their reputation as well as incur great losses.

#### **4.3.2 Defective product**

A „product“ means physical property and goods, as opposed to land or rights in or to real property.<sup>285</sup> A product further includes a whole product, part of another product, or part of a fixture attached to real property.<sup>286</sup> In addition, the Directive was amended to include all movables even if incorporated into another movable or into an immovable.<sup>287</sup> Furthermore, products even include primary agriculture products. An example of this would be meat.

Defectiveness arises when a product does not provide the safety that a person is entitled to expect.<sup>288</sup> Specifically, defectiveness refers to a product being able to work in the manner that it has been intended, in other words its ordinary use. For example, a product such as a kettle is expected to perform its boiling function. When looking at the defectiveness of a product, the following circumstances must be taken into account; the presentation of the product, the use for which it could reasonably be expected that the product would be put and the time that the product was put into circulation.<sup>289</sup>

Damage arises where there has been death, personal injury or damage or destruction to property.<sup>290</sup> It must be noted that a product is not considered to be defective merely because a better subsequent product came into circulation.<sup>291</sup> A problematic component of the Directive is the concept „put into circulation“.<sup>292</sup> In terms of the Directive;

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which

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<sup>285</sup> European Directive article 2.

<sup>286</sup> Ibid.

<sup>287</sup> H Delaney & RV Zande „A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive)“ 2001 *National Institute of Standards and Technology* 2-7.

<sup>288</sup> European Directive article 6 (1). This can be described as the consumer’s expectation test which is discussed later on in the chapter.

<sup>289</sup> European Directive article 6 (1) (a)-(c).

<sup>290</sup> European Directive article 9.

<sup>291</sup> European Directive article 6 (2).

<sup>292</sup> „Patent Court, National Courts and EU Law: Opinion 1/09“ available at [http://eulaw.typepad.com/eulawblog/product\\_liability/](http://eulaw.typepad.com/eulawblog/product_liability/), accessed on 6th September 2015.

caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.<sup>293</sup>

However, the Directive does not define such a concept. In an attempt to deal with this, the Strasbourg Convention can be consulted. Paragraph 43 of the Convention states that „put into circulation“ can be defined as „the moment when the producer becomes liable under the convention, and so separates this type of liability from that which is provided by the ordinary rules of law“.<sup>294</sup> A further issue relates to when products have not yet reached the consumer but are nonetheless placed into circulation. However, within that period, the product is in fact defective. Ebers, Janssen and Meyers<sup>295</sup> suggest that it is possible that the legislature wanted to widen the supplier’s liability and make such suppliers liable despite the product not reaching the consumer unless the supplier can be exonerated by the fact that it is not probable that the defect existed at the time the product was put into circulation.

However, the definition is still open to ambiguity. Therefore, the Court Justice in the case of *Declan O’Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* attempted to provide clarity on the concept.<sup>296</sup> It was stated that „when it leaves the production process operated by the producer and it enters a marketing process in the form in which it is offered to the public in which it can be used or consumed“.<sup>297</sup> Therefore, it may be assumed that liability runs from the time that production has been completed and it is available for public consumption. Nevertheless, there are defences available to suppliers to shield against product liability.

#### 4.3.3 Defences

There are various circumstances in which product liability will not arise. Such circumstances are as follows:<sup>298</sup>

- that the producer did not put the product into circulation,<sup>299</sup> this would possibly refer to the producer not being responsible for the product going into the market;
- that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by the

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<sup>293</sup> European Directive article 11.

<sup>294</sup> „Council of Europe Treaty Series - Explanatory Reports“ available at <http://www.worldlii.org/int/other/COETSER/1977/2.html>, accessed on 7 December 2015.

<sup>295</sup> A Ebers, A Janssen & O Meyers *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress* (2009) 23.

<sup>296</sup> *Declan O’Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* Case C-127/04 (9<sup>th</sup> February 2006).

<sup>297</sup> *Declan O’Byrne* (note 296 above) 27-29.

<sup>298</sup> European Directive article 7.

<sup>299</sup> European Directive article 7 (a).

producer or that the defect came into being afterwards,<sup>300</sup> in other words, the defect could have existed in the product after the product was taken out of circulation;

- that the product was neither manufactured by the producer for sale or any form of distribution for economic purpose nor manufactured or distributed by the producer in the course of his business,<sup>301</sup> it may be that the product was not for the consumption of the consumer, moreover the product may not have formed part of the producer's business;
- that the defect was due to compliance of the product with mandatory regulations issued by the public authorities;<sup>302</sup>
- that the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered<sup>303</sup>“in this circumstance, it is possible that the defect in the product was beyond the scope of the producer's knowledge;
- in the case of a manufacturer of a component, that the defect was attributable to the design of the product in which the component had been fitted or to the instructions given by the manufacturer of the product.<sup>304</sup>

Stapelton<sup>305</sup> makes note of the fact that in some instances, a Member state is given the power of choice to decide what should be done in those particular instances. An example is the „development-risk defence“.<sup>306</sup> A Member state is given the choice to omit such a defence.<sup>307</sup> Therefore, this creates the impression that there could be a lack of uniformity as a Member state could possibly interpret something in a way that differs to another Member state. Despite the lack of uniformity, it is unfair for some states to adopt the defence whilst others simply omit it. Moreover, the Directive works towards achieving harmonisation and it is possible that the concept of harmonisation would be vetoed when the Directive allows for such diversities to occur.

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<sup>300</sup> European Directive article 7 (b).

<sup>301</sup> European Directive article 7 (c).

<sup>302</sup> European Directive article 7 (d).

<sup>303</sup> European Directive article 7 (e).

<sup>304</sup> European Directive article 7 (f).

<sup>305</sup> Stapelton (see note 283 above) 91.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

However, Fairgrieve<sup>308</sup> points out that the Directive is not to interfere with general liability rules that are already in existence. In other words, the general liability rules will possibly take preference when such rules are able to favour the consumer.<sup>309</sup> Therefore, it may be that even though the Directive is seen to allow for some variation; it does so only in situations where the consumer can benefit and this is in line with the objectives of the Directive that deal with protecting the consumer.

In an early European case, namely *Commission v United Kingdom*,<sup>310</sup> it was stated that „with the ever increasing complexity of manufacturing process, the risks associated with product defects multiplied and became difficult to avoid and it became clear that the system of liability founded on the producer’s fault was inappropriate to secure adequate protection“.<sup>311</sup>

It is clear that a product liability system needed to be implemented that ensured that a consumer would receive protection when a consumer is faced with defective goods. This is possibly why the system of product liability allowed for the consumer to be free from the heavy burden of proving fault. However, this does not mean that the Directive created provisions that were fully in favour of a consumer. This is clear from the number of defences that are available to the supplier. Therefore, the question that arises is whether or not such defences negate the very essence of the Directive, that is, the protection afforded to the consumer against defective goods. It is possible that the defences<sup>312</sup> would possibly cover most if not all situations.

Hunter et al.<sup>313</sup> have described the developmental risk defence, namely the defence that deals with the supplier not having scientific or technical knowledge of the defect at the time the product was put into circulation as a state-of-art defence. It is possibly referred to as a state-of-art defence as it has the ability to easily limit liability.<sup>314</sup> Whilst, the Directive does look at consumer protection, it also focuses on movement of goods in the consumer market.<sup>315</sup> Therefore, suppliers cannot trade under circumstances of fear when putting goods into circulation, as this may lead to a situation where they do not provide a wide range of goods.

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<sup>308</sup> Fairgrieve (see note 261 above) 9.

<sup>309</sup> Ibid.

<sup>310</sup> *Commission v United Kingdom* [1997] ECR I-2649, [1997] All ECR (EC) 481. [1997] 3 CMLR 923.

<sup>311</sup> *Commission* (note 310 above) 16.

<sup>312</sup> The defences have been listed earlier on, specifically page 45-46.

<sup>313</sup> R Hunter, LB Huntun & W Brussels „Should Europe's Product Liability Regime be Expanded?“ (2001) 29(17) *Analysis & Perspective*; 407-409. The defence is discussed later on in the chapter.

<sup>314</sup> Ibid.

<sup>315</sup> T Eger & HB Shufler *Research Handbook on the Economics of European Union Law* (2012) 211.

The immense fear of defective goods would possibly negatively affect their production. A wide range of goods operating in a free market is important as it allows for consumers to have a variety of goods to choose from at competitive prices. Therefore, whilst the market requires protection against defective goods, such protection must not affect other aspects of the market. For example, a supplier should not face such onerous legislation that prevents it from conducting its business in an efficient manner.

Viscusi<sup>316</sup> has singled out the defence that deals with compliance of public regulations. The importance of such a defence has been highlighted as it was said that such regulations reflect society's judgment.<sup>317</sup> In particular, it reflects what society would see as being acceptable risk. Therefore according to Viscusi, incorporating the views of the society helps achieve a balance between the consumer industry and the supplier industry; moreover, such a defence would assist the court.<sup>318</sup> Instead of a court having to determine whether or not the risk associated with the defective good is acceptable, a court could simply refer to public regulations. Whilst this defence would not relate to every situation, it would possibly be apparent in some situations therefore assisting the court on some occasions. Such assistance would thus enable some product liability cases to be speedily resolved.

The effectiveness of the provisions will be understood by considering whether or not consumer protection has increased after the implementation of the Directive. After a European Commission study that looked at the views of consumer representatives, it was concluded that the European Directive had increased the number of product liability claims, as well as the success of such claims.<sup>319</sup> Therefore, it is clear that the protection of the consumer has been advanced as consumers were given a foundation to sue for defective goods. The recognition of success of such claims serves as an indication that the provisions available to the consumer are effective.<sup>320</sup>

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<sup>316</sup> WK Viscusi „Reforming Product Liabilities“ (1991) *Journal of Forensic Economics* 159-161. This defence can be described as a defence that acknowledges certain defects in terms of public policy.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> J Meltzer, R Freeman & S Thomson „Product liability in the European Union: A report for the European Commission“ 2003 *European Commission Study* 3-5. See „Consumer protection in the internal market“ available at [http://ec.europa.eu/consumers/strategy-programme/policy-strategy/documents/consumer\\_policy\\_report\\_2014\\_en.pdf](http://ec.europa.eu/consumers/strategy-programme/policy-strategy/documents/consumer_policy_report_2014_en.pdf), accessed on 18 July 2015 for more information on the European Commission study.

<sup>320</sup> Whittaker (see note 252 above) 44.

The European Directive is to be construed in light of interpretive European methods.<sup>321</sup> Therefore, such Directives are said to be understood in a „European way“.<sup>322</sup> Moreover, the European Court of Justice has the final say in matters that arise.<sup>323</sup> The Directive has been described as having two objectives namely, a high level of consumer protection and the free movement of goods within the consumer market.<sup>324</sup> Therefore, it is likely that the courts will adopt an interpretation that allows for such objectives to be upheld.

#### **4.4 Influence of the European Directive on the Consumer Protection Act**

The above discussion on the main provisions of the Directive indicates that some of the provisions in the Consumer Protection Act are similar to those of the Directive. The specific similarities will become apparent in the discussion below. It will be useful to extract some of the important provisions and understand the application of such provisions.

##### **4.4.1 Consumer Expectation Test**

Both sets of law refer to a defect being „not what a consumer expects“. This is often referred to as a consumer expectation test. The test has been criticised as the scope and operation of it remains vague.<sup>325</sup> It involves the consideration of a consumer’s opinion; specifically whether the product „disappointed“ the consumer’s expectations.<sup>326</sup> Furthermore, consumers who are not familiar with the manufacturing process will not be able to form an educated opinion on what constitutes a satisfactory product.<sup>327</sup> Therefore, the operation of the test could lead to harsh results. It often occurs that consumers have different ideologies when it comes to products, thus determining the expectation of an ordinary consumer could lead to difficulties.<sup>328</sup>

The application of the test which failed to protect the consumer was illustrated in *Tesco Stores v Pollard*,<sup>329</sup> a case which involved a child that had swallowed dishwashing liquid. The bottle of the dishwashing liquid had a child resistant cap and so it had to be determined

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<sup>321</sup> K Lenaerts & JA Gutiérrez-Fon „To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice“ 2013 *EUI Working Papers* 29.

<sup>322</sup> C Twigg-Flesner *The Cambridge Companion to European Union Private Law* (2010) 246.

<sup>323</sup> T Karakamisheva „The European Court of Justice – European Supreme Court or Constitutional Court?“ 2015 *Academia* 3.

<sup>324</sup> L Bergkamp *European Community Law for the New Economy* (2003) 409.

<sup>325</sup> A Kysar „The Expectations of Consumers“ (2003) *Columbia Law Review* 1707-1708.

<sup>326</sup> *Ibid.*

<sup>327</sup> AD Twerski „From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation“ (1983) *Hofstra law review* 901-903.

<sup>328</sup> C Mason & J Simmons „Are they being served? Linking consumer expectation, evaluation and commitment“ (2012) 26 *Journal of Services Marketing* 227-237.

<sup>329</sup> *Tesco Stores v Pollard* [2006] EWCA Civ 393; (2006) 103(17) LSG 23.

whether the cap met the British standards or not. It was found that it did not. The court then applied the consumer expectation test and found that the product was as safe as persons were entitled to expect. Thus it was not considered to be a defective cap. Despite Tesco stores not meeting the British standard of safety, it nonetheless did not fall short of the consumer expectations test.<sup>330</sup>

On the other hand, the test has worked in the consumer's favour on some occasions. This is illustrated in *Abouzaid v Mothercare*,<sup>331</sup> a case in which the claimant had strapped up a sleeping bag with an elastic strap. The elastic strap had hit his eye causing him to lose his eyesight in one eye. The manufacturer was found to have failed to meet the consumer expectation test and thus was liable for the defect and the damages caused thereby. It was stated that; „where products are inherently dangerous and rely upon appropriate labelling if they are to be made safe, attention focuses on the actions of the producer in introducing warnings appropriate to the level of risk“.<sup>332</sup> Therefore, the court found that the manufacturer should have done more to avoid the accident. The manufacturer could have improved the design or have provided warning instructions to the consumer.<sup>333</sup>

#### 4.4.2 Developmental Risk Defence

Another similarity of the Directive to the Consumer Protection Act relates to the defences available to parties. In particular, the defence that relates to the party not being able to reasonably foresee the defect, in light of their role of marketing or placing the product in circulation.<sup>334</sup> Such a defence is commonly referred to the development risk defence. In other words, it means that it is so unreasonable to have expected the distributor or the retailer to have discovered the so-called risk in the goods at the time at which the goods were supplied, that it cannot be held liable.<sup>335</sup> However, whilst the Consumer Protection Act only affords the defence to distributors and retailers, the Directive extends the defence to producers as well. In applying the defence, it has been said that it should be viewed objectively.<sup>336</sup> Thus, the availability of the safety information must be taken into consideration.<sup>337</sup>

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<sup>330</sup> The summary of this case can be found in „Consumer Protection Act – and child safety caps“ available at <http://www.thompsons.law.co.uk/ltxt/lb0506-consumer-protection-act.html>, accessed on 3 July 2015.

<sup>331</sup> *Abouzaid v Mothercare* [2000] A11 ER (D).

<sup>332</sup> *Abouzaid* (note 331 above) 27.

<sup>333</sup> C Brennan *Tort Law Concentrate: Law Revision and Study Guide* 3 ed (2015) 121.

<sup>334</sup> M Karanikić „Development Risks“ (2006) *Annals International Edition* 123-124.

<sup>335</sup> Jacobs, Stoop & Van Niekerk (see note 25 above) 127.

<sup>336</sup> TK Hervey & JV McHale *Health Law and the European Union* (2004) 309.

<sup>337</sup> A McDougall & A McGregor „Interpretation of the Product Liability Directive“ 2006 *Ashurst* 1-3.

A possible shortcoming of the defence was illustrated in the case of *A v National Blood Authority*,<sup>338</sup> which involved a party that received a blood transfusion with contaminated blood. As a consequence the party had hepatitis C. The defence was unsuccessful despite the risk not being discoverable, on the basis that the risk was known to the authority.<sup>339</sup>

The reasoning was as follows;

The development risks defence was unavailable to the authority because the possible risk of infection was known to it. It was irrelevant that the authority could have done nothing to screen the blood and could not have refused to supply the blood or taken steps that would have prevented the claimants from becoming infected. The mere fact that the authority knew of the risk was enough to render the defence unavailable.<sup>340</sup>

Therefore, it is submitted that the court did not just consider ways in which defects can be avoided. In the above case, the court made a finding based on the knowledge that such experts should possess. It is possible that the court had adopted a wide approach to the Directive.

The defence has been successful in other circumstances such as in the case of *Scholten v Foundation Sanquin of Blood Supply*,<sup>341</sup> where the plaintiff had undergone surgery and received a blood transfusion which contained HIV-infected blood. Whilst the court found the blood product to be defective, liability was not imposed as the developmental risk defence was successfully raised. It succeeded because, during the screening, the contamination had not been picked up as the donor had the virus but not the infection at time of donation. Thus the court found that the contamination was impossible to detect at that time.<sup>342</sup>

#### 4.4.3 Strict liability

The European Directive has been interpreted as adopting a strict liability approach.<sup>343</sup> An example of the application of such an approach can be seen in *Fiorasi v Soc. Crino*,<sup>344</sup> a case

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<sup>338</sup> *A v National Blood Authority* [2001] 3 A11 ER 289.

<sup>339</sup> The following summary can be found at Loubser & Reid (see note 5 above) 71.

<sup>340</sup> KJ Parhoa & S Sayers „Case law lessons on defective products and the development risks defence“ available at <http://www.internationallawoffice.com/Newsletters/Product-Regulation-Liability/United-Kingdom/Kennedys/Case-law-lessons-on-defective-products-and-the-development-risks-defence>, accessed on 20 October 2015.

<sup>341</sup> *Scholten v Foundation Sanquin of Blood Supply* 3 February 1999, County Court of Amsterdam.

<sup>342</sup> The following summary can be found at Loubser & Reid (see note 5 above) 72-73.

<sup>343</sup> S Williamson „Compensation for Infected Blood Products: A and others v National Blood Authority and Another“ (2003) 7(5) *Electronic Journal of Comparative Law* 2-3.

<sup>344</sup> *Fiorasi v Soc. Crinos* Cass. civ. 15-7-1987 n. 6241, in Foro, 1998, I, 144. It is an Italian case but it is useful because the European Directive approach was adopted.

involving a medicine that had contained an infected blood product thus causing a defective medicine. The manufacturer was held strictly liable for failure to take appropriate measures to avoid damage resulting from a medicine product.<sup>345</sup>

Additionally, the Consumer Protection Act is said to create a regime of strict liability in terms of defective goods.<sup>346</sup> Therefore, a supplier could be held liable for a defective product without the consumer proving the fault of the supplier. Thus, the imposition of strict liability shifts the burden onto the supplier to show that they should not be held responsible for the consequences of the supply of defective goods as the consumer is no longer required to prove fault on the part of the supplier.

The concept of strict liability can be noted as being practical as it has been seen from the *Fiorasi*<sup>347</sup> case, that courts are able to apply such an approach in circumstances where the consumer has become a victim of defective goods.

#### **4.5 Conclusion**

It is clear that the European Directive and the Consumer Protection Act share many similarities. As with the Consumer Protection Act, the European Directive came into being as a result of the need for greater protection in the consumer market. Prior to the Directive, general laws were applied in product liability situations. It was nonetheless considered to be inadequate. After various negotiations, the Directive was adopted. The similarities between the Directive and the Act were illustrated in this chapter. The examples of such similarities can be seen in the strict liability approach as both allow for fault without proof. Moreover, the Directive makes provision for a „consumer expectations test“ which is also apparent in the Act as the Act makes reference to goods that a consumer can reasonably expect. Such reference captures the essence of what the test entails. In addition, the Directive allows for a developmental risk defence. The defence essentially deals with the unreasonableness of expecting the distributor or the retailer to have discovered the defect in the product. In terms of the Act, the defence in s61 (4) (c) is clearly influenced by the developmental risk defence

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<sup>345</sup> The summary can be found at „Overview Italy“ available at [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.biicl.org%2Ffiles%2F778\\_overview\\_italy.pdf&ei=3SaVcf0Clm9ygOom77gAw&usg=AFQjCNFhZ9tQ7dyzLjkWwOyq42YRq5ZFlw&sig2=0lKWTgISHkF4mZTQzsexMg&bvm=bv.96952980,d.ZGU](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.biicl.org%2Ffiles%2F778_overview_italy.pdf&ei=3SaVcf0Clm9ygOom77gAw&usg=AFQjCNFhZ9tQ7dyzLjkWwOyq42YRq5ZFlw&sig2=0lKWTgISHkF4mZTQzsexMg&bvm=bv.96952980,d.ZGU), accessed on 1 July 2015.

<sup>346</sup> A Gordon „The Consumer Protection Act 68 of 2008 and strict liability: Say it isn’t so?“ available at <http://www.mm3admin.co.za/documents/docmanager/a5cab770-04bb-435c-a872-bc5227ce5590/00033997.pdf>, accessed on 8 December 2015.

<sup>347</sup> *Fiorasi* (note 344 above).

as the section refers to a retailer or distributor not being liable in situations where it is unreasonable for them in their role of marketing the product to the consumer, to have discovered the defect.

Due to the similarity of the both approaches, the chapter went on to look at various cases in order to see the practicality of such provisions. From case law, the problematic provisions became apparent. The above-mentioned defence could be problematic for consumers who are bringing forward a product liability claim. The defence could possibly negate their protection. Hence, it is hoped that South Africa will be able to remedy such issues upon application of the product liability provisions in the Consumer Protection Act as the courts still await a case of product liability under the Act.

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

The principle of product liability allows for suppliers to be held accountable when they supply defective goods. Law enabling product liability is necessary as it serves as a safeguard to ensure that suppliers provide safe quality goods. However, in the past there was a lack of attention paid to product liability. Moreover, consumer protection in general was not a primary focus of many countries.<sup>348</sup> Whilst consumers were afforded some protection, it was scattered throughout various statutes making the enforcement of the limited protection it provided very difficult.<sup>349</sup>

The **first chapter**, therefore, examined the lack of consumer protection. Once one obtained an understanding of the inadequacy, the need for the enactment and implementation of the Consumer Protection Act became immediately apparent. For example, it became obvious that consumers were in need of further protection in situations where consumers' lives were endangered as a result of defective goods. On the other hand, the benefits of the Act had to be taken into account; it afforded the consumer protection against defective goods received from a supplier. Specifically, protection against defective goods is the most important aspect and, thus the need for product liability laws was considered. By the end of Chapter One, the researcher had outlined the purpose and the rationale of the dissertation.

Consumers have had protection for a number of years with respect to claims for defective goods. The history of the law relating to product liability was thus set out in the **second chapter**. This protection stemmed from the common law. However, the common law posed a number of difficulties for the consumer. The chapter highlighted some of these difficulties. For example, consumers could only receive consequential loss in limited circumstances. As a result there were many instances where consumers were not adequately protected. Once the common law approach had been fully examined, a discussion on the Consumer Protection Act took place. The Act has provisions that are directly applicable to product liability and these innovations have been highly praised by many commentators.<sup>350</sup>

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<sup>348</sup> D Swann Competition and consumer protection (1979) 307.

<sup>349</sup> Woker (see note 91 above) 217-231.

<sup>350</sup> For some commentary on the benefits of the Consumer Protection Act, see „Change in Consumer Protection Act will benefit the poor and disadvantaged“ available at <http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/consumer-protection-act.aspx>, R Du Toit „Some Advantages For Consumers Arising From The Consumer Protection Act“ available at <http://wagnerdutoit.co.za/article0014.html>, „An overview of the Consumer Protection Act“ available at

The Act also makes provision for the procedural route to be followed in order for a consumer to obtain protection from the provisions. It was necessary to consider the route to redress set out in the Consumer Protection Act, thus the chapter considered these avenues.

In the **third chapter**, the major change from the common law provisions to the Consumer Protection Act was examined. Specifically, the strict liability approach was analysed. It was therefore necessary to consider both the need for such an approach as well as the benefits derived from adopting it. The common law case of *Wagener*<sup>351</sup> was discussed in some detail as it is a landmark case in terms of judicial comment on strict liability. Furthermore, the chapter also considered the defence afforded to retailers and distributors by s61 (4) (c) of the Consumer Protection Act as it is relevant and important to consider whether the defence undermines the essence of strict liability. Isolating this aspect of product liability for close scrutiny was considered important as it could potentially be a problematic area that will require judicial intervention and interpretation.

Even though the Consumer Protection Act has been in force for years, the Builders Warehouse case will potentially be the first to demonstrate the application of the new product liability provisions. The third chapter further sought to analyse the case and consider the various ways in which the Act could be applied. As a result of the analysis, various shortcomings became apparent. A number of recommendations, aimed at addressing these shortcomings, can be made, and will be made towards the end of this chapter.

In analysing the application of the Consumer Protection Act, it was useful to consider foreign case law, specifically cases decided in terms of the European Directive. This was done in the **fourth chapter**, which illustrates that the Consumer Protection Act exhibits various influences which can be traced from the European Directive. Engaging in such an analysis enabled the researcher to consider how the Act's product liability provisions developed. In addition, the problematic parts were then exposed and analysed.

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<http://www.nortonrosefulbright.com/knowledge/publications/43213/an-overview-of-the-consumer-protection-act> and „Key Provision Of Consumer Protection Act 68 Of 2008“ available at <http://au6e12e.org/document/key-provision-of-consumer-protection-act-68-of-2008.pdf>.

<sup>351</sup> *Wagener* (note 180 above) 179.

Therefore, after careful consideration of the application of the Consumer Protection Act provisions on strict liability, with a view to improving such provisions, the following recommendations are proposed:

- Whilst the Consumer Protection Act makes provision for various routes of redress that a consumer may utilise, such routes may cause more harm than good. The process can lead to complications as there are many avenues that must be followed. The consumer may thus be engaging in a fruitless exercise when pursuing one route of redress when going to court is inevitable. Therefore, the Act should make provision for a court to be approached as a matter of first instance in such situations.
- Alternatively, since the Consumer Protection Act allows for the formation of provincial courts, all provinces should be encouraged to formulate such courts. This would be beneficial to the consumer, provided that (as it is assumed will be the case) consumer experts hear the matters. Such experts would have the knowledge and ability to resolve the matters correctly and in an efficient manner.
- In addition, specialised courts will help to lessen the backlog faced by ordinary courts by removing all consumer related matters from them. Therefore, if the Consumer Protection Act could recognise the consumer provincial court in its „true sense“, it would allow for matters to be speedily resolved. Moreover, it would allow for a simpler redress process.
- In order to reach an optimal level of effectiveness, effective recourse must be a focal point. Recourse will only be effective if it is quick and easy to obtain as this will ensure that consumers are not intimidated or dismayed by the process. Therefore, after an examination of the current remedial process and after gaining an understanding of its shortcomings, the legislature should enact and implement strategies designed specifically to deal with these shortcomings.
- Product liability is a concept that is possibly unknown to the vast majority of consumers. Thus, the government should create a number of campaigns that are focused on creating customer awareness of their rights. This will develop consumer knowledge. Moreover, they would serve as a reminder to businesses of what is expected of them. Placing the consumers“ rights and legitimate expectations in the public domain and making them common knowledge will serve as a mechanism that will exert pressure on businesses to comply. Furthermore, it would be beneficial to encourage businesses to adopt such campaigns as part of their corporate social

responsibilities. Doing so would allow consumers to acknowledge the business's commitments and thus possibly build a relationship of trust between the two parties.

- The Consumer Protection Act should also deal with the aspect of damages. This would prevent consumers from claiming absurd amounts that in all probability will not be paid out by the business. The Act should therefore put certain guidelines in place that will assist courts in determining damages as well as ensuring that fair compensation is achieved. Whilst compensation is important, it should not lead to a situation where a business can be financially crippled.
- Damages as a remedy serve as a benefit to an affected consumer. However, a damages award does not ensure that the conduct will not be repeated. Whilst the hard task of paying compensation may discourage repetition, it does not guarantee it. There should, therefore, be monitoring processes in place to ensure that businesses are producing appropriate goods. These processes could also serve as a learning curve for affected businesses.
- The Consumer Protection Act is said to create a strict liability regime. A safeguard that ensures that irrational results are not created is apparent in the defence created in s61(4)(c). However, the defence is possibly a „catch-all“ defence and will probably result in suppliers avoiding liability in most, if not, all circumstances. It appears, therefore, that the defence may negate the strict liability regime. The legislatures therefore need to re-work both aspects in order to ensure an even balance of protection for either party.

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# ANNEXURE 1: ETHICAL CLEARANCE FORM



28 May 2015

Ms Purnel Gangiah (211523186)  
School of Law  
Howard College Campus

Dear Ms Gangiah,

Protocol reference number: HSS/0551/015M

Project title: A critical analysis of Product Liability under the Consumer Protection Act 68 of 2008

### Full Approval – No Risk / Exempt Application

In response to your application received on 19 May 2015 the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....  
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Ms Franaaz Khan  
Cc Academic Leader Research: Dr Shannon Bosch  
Cc School Administrator: Mr Pradeep Ramsewak

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Humanities & Social Sciences Research Ethics Committee

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