



**UNIVERSITY OF  
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**INYUVESI  
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**Examining the rights of consumers who may have purchased defective vehicles**

**by**

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## **DECLARATION**

I, Pranisha Maharaj, hereby declare that this dissertation, unless specifically indicated otherwise, is my own work and that all references have been properly made. This dissertation has not been submitted to any university in full or partial fulfillment of the academic requirements of any degree or qualifications.

Signed at Durban on 28<sup>th</sup> January 2019.

Signature: \_\_\_\_\_

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## **Abstract**

My topic deals with the rights that consumers have if they are concerned that they may have purchased a defective vehicle. The main focus of my paper is to discover whether there is anything that consumers can do if they are in possession of vehicles which they suspect are defective, but where the defects have not yet manifested themselves. When vehicles are defective it becomes a great concern for consumers as the vehicles may pose a danger to their lives and also because many of them have taken out credit agreements in order to purchase their vehicles. There are various remedies under the common law and in terms of the Consumer Protection Act 68 of 2008 (CPA). The CPA provides certain rights to consumers who purchase defective vehicles. However, there are limitations when utilising these remedies.

It is also often the case that consumers do not want their vehicles any longer. However, they are unable to dispose of them because there is no re-sale market for such vehicles. A vehicle recall is the best option for consumers under such circumstances. The recall can be issued by the National Consumer Commission (NCC) if the manufacturer does not do so. However once the recall is issued there is no guarantee that consumers would be relieved of their vehicles completely. Sometimes the manufacturer may only repair the vehicles and return it back to consumers. This would depend on the seriousness of the defect in the vehicle.

The aim of this paper is to assist consumers and make them aware of what options are available to them if they may be in possession of a vehicle which they suspect is defective but where the defects have not yet arisen. This has become a major issue recently as there have been many reports of certain models of vehicles having defects and where a man had even lost his life a result of those defects.

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background

In recent times there have been an increasing number of reports of consumers who have purchased defective vehicles. For instance, in 2010 Honda recalled its Fit/Jazz vehicles as there was a defect in the master switch which could cause water to enter the power window switch leading to a fire.<sup>1</sup> Another example is the recall of certain Mazda vehicles in 2017 as there was a defect in the cars' air bags which could cause the airbags to malfunction.<sup>2</sup> Toyota also recalled certain vehicles in 2018 for defective airbags which could cause injury to the consumers.<sup>3</sup> Ford has recalled all its Ford Kuga vehicles as there were a number of reported cases in 2017 where the vehicles burst into flames as a result of defective parts.<sup>4</sup>

Driving a defective vehicle is a matter of significant concern to consumers for various reasons. The most obvious reason is that a vehicle with a serious defect may be dangerous for a consumer to continue driving. There have been a number of reported

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<sup>1</sup> Chang & Motsoeneng 'Honda recalls Fit/Jazz cars over window fault' 29 January 2010 available at <https://www.reuters.com/article/us-honda-recall/honda-recalls-646000-jazz-fit-city-cars-globally-idUSTRE60S27120100129> (accessed on 3 May 2018).

<sup>2</sup> Naidoo 'Mazda's defective airbag recall included 19,000 vehicles in SA' 21 July 2017 available at <http://www.infrastructurene.ws/2017/07/21/mazdas-defective-airbag-recall-includes-19000-vehicles-in-sa/> (accessed on 2 May 2018).

<sup>3</sup> Newswire 'Toyota SA to recall 730,000 vehicles over defective airbags' 26 January 2018 available at <https://www.all4women.co.za/1363001/news/south-african-news/breaking-toyota-sa-recall-730000-vehicles-defective-airbags> (accessed on 2 May 2018).

<sup>4</sup> Beckwith 'Ford recalls all Kugas in South Africa due to fires' 16 January 2017 available at <https://www.autocar.co.uk/car-news/new-cars/ford-recalls-all-kugas-south-africa-due-fires> (accessed on 2 May 2018).



cases where vehicles have caught alight and where a consumer even lost his life.<sup>5</sup> Then a vehicle is probably the second most expensive asset which a consumer may purchase and the vehicle is often purchased using a financial agreement entered into with a credit provider. This means that consumers cannot simply abandon their vehicles when they believe the vehicles are defective and then purchase another one.

The question this paper seeks to answer is what rights, if any, do consumers have if they suspect that their vehicles may be defective but where those defects have not yet manifested themselves and the manufacturer has not issued a recall of those vehicles.

Although there are common law remedies which are available to consumers if they are in possession of a latently defective product, it has been pointed out that these common law remedies are very limited and can be excluded by contract. Therefore there is very little protection in the common law for consumers against poor quality or dangerous goods and services.<sup>6</sup> The need to provide greater protection for consumers when it comes to defective products is one of the reasons why the legislature introduced the Consumer Protection Act 68 of 2008 (CPA).<sup>7</sup>

In circumstances where it is discovered that a particular model or make of vehicle is defective, the manufacturer may issue a recall of that make or model. However if the manufacturer fails to do this, the CPA now provides that the National Consumer Commission (NCC) can issue a mandatory product recall of products which are not safe for consumers.<sup>8</sup>

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<sup>5</sup> Dixon 'A man died when his car caught fire. It took a year and dozens more fires before Ford recalled the car' 17 January 2017 available at <http://www.latimes.com/world/africa/la-fg-southafrica-ford-kuga-fires-recall-20170117-story.html> (accessed on 2 May 2018).

<sup>6</sup> Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) 1.

<sup>7</sup> Woker TA 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer protection Act' 2010 31(2) *Obiter* 217.

<sup>8</sup> Conradie & Hofmeyr 'Product liability and safety in South Africa' 1 January 2018 available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/press-releases/downloads/Product-liability-and-safety-in-South-Africa-Overview-2018.pdf> (accessed on 23 November 2018).

## **1.2. Purpose of the study**

The purpose of this dissertation is to explore the rights that consumers have if they are concerned that they may have purchased defective vehicles. As a result of the introduction of the CPA, consumers who have purchased defective vehicles have certain clear rights. The critical issue is whether the CPA has extended any rights to consumers who merely suspect that their vehicles are defective. Therefore, the main issue which this dissertation is seeking to address, is what rights, if any, do consumers have when they suspect that their vehicle may be defective but where the defects have not yet manifested themselves. Given the fact that when the defect finally does emerge, there may be severe consequences for consumers, such as severe injury or even death, it is important for consumers to understand whether they have any rights even before the defect becomes obvious. A consumer who is driving a particular model, such as a Ford Kuga, who has heard reports about other Ford Kugas bursting into flames will understandably be very concerned about continuing to drive around in such a vehicle. Anecdotal information from the Motor Industry Ombudsman of South Africa (MIOSA) suggests that some people who own Ford Kugas have even resorted to driving around with fire extinguishers on their front seat.<sup>9</sup> This must be a very stressful situation for consumers to find themselves in. In summary therefore, the question which this paper seeks to answer is whether there is anything that consumers can do even before the defect manifests itself if consumers are of the view that their vehicles may be defective.

## **1.3. Research questions**

In order to answer the question of what consumers can do if they suspect that their vehicle may be defective, this dissertation will deal with the following research questions:

- (1) Are there any rights given to consumers in the common law if they suspect that they have purchased a defective vehicle?

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<sup>9</sup> Information supplied by my supervisor, Professor Tanya Woker.

- (2) How has the CPA improved matters for consumers who may have purchased defective vehicles?
- (3) What is a product recall and how can a product recall assist consumers?
- (4) Are there any steps that consumers can take to initiate a product recall when they believe that their vehicles may be defective and where the manufacturer or the NCC has failed to issue a product recall?

#### **1.4. Methodology**

This research will be undertaken by using a full desktop research method. Accordingly, this study will consist of an exploration of relevant journal articles, textbooks, website articles, the CPA and a study of relevant case law. These materials will be researched and analysed in order to formulate answers to the research questions presented above.

#### **1.5. Structure of this dissertation**

The first chapter is introductory. It consists of a background to the topic and the rationale behind the topic. This is followed by the research methodology that will be used as well as the research questions that this study aims to answer.

Chapter Two will discuss the various remedies under common law which consumers can utilise if they are in possession of a latently defective product. These remedies will be examined in order to see whether they provide any assistance to consumers who suspect that their vehicles are defective but where those defects have not yet arisen. The supply chain involved in the production of products will also be explained because any remedies that consumers have will be different depending on whether the consumer is dealing with the manufacturer, retailer, importer or distributor.

Chapter Three will consist of an overview of the relevant sections in the CPA which deal with products which are defective and again the relevant sections will be examined in order to see whether consumers who may have purchased defective products are afforded any rights.

Chapter Four focuses on product recalls. Such recalls have not been commonplace in South Africa therefore this chapter will include a comparative study. Accordingly, when and how recalls are issued in the United States of America and the United Kingdom will be explained in order to ascertain whether there are any lessons which can be learnt from these jurisdictions where product recalls are more common.

Chapter Five will provide certain conclusions and recommendations.

## **1.6. Conclusion**

Purchasing a motor vehicle is one of the most important (and most expensive) purchases that consumers will make in their lifetime. Buying the wrong vehicle can also have serious financial consequences for a consumer, especially where that vehicle is financed through a credit agreement. Therefore it is critically important for consumers to know what they can do if they believe they have purchased a defective vehicle. This mini-dissertation seeks to make a contribution to the literature on consumer rights by examining the rights which consumers have, if any, when they find themselves in the difficult position of owning a vehicle which may be defective. If they do not have any specific rights, this dissertation seeks to examine how the issue of a product recall may assist them and if there is anything that they can do to initiate a product recall.

## CHAPTER TWO

### THE COMMON LAW

#### 2.1. Introduction

In terms of the common law, there are remedies which are available to consumers if they are in possession of a defective product. These remedies fall under the law of contract and the law of delict.<sup>10</sup> There are also remedies available to consumers who have suffered consequential loss as a result of purchasing defective products. From the perspective of this dissertation, the question to be answered, in this chapter, is whether there are any common law remedies which are available to consumers who suspect that their vehicles may be defective but where the defects have not yet manifested themselves.

This chapter discusses the common law liability under the law of sale for retailers who sell vehicles to consumers which are defective. There will also be a discussion of the delictual liability of manufacturers and importers who form part of the supply chain of defective vehicles to consumers. Therefore, it is necessary to examine the supply chain involved in the supply of products in order to determine who is liable for the supply of the defective products. The key focus of this chapter is whether there are any common law rights which consumers have if they suspect that their vehicles may be defective.

#### 2.2. The supply chain

Manufacturers produce products in large quantities.<sup>11</sup> This is where raw materials and/or component parts undergo an industrial process.<sup>12</sup> It may also involve the assembling of various parts to make the product.<sup>13</sup> For instance, Toyota Motor Corporation was established in 1937 in Japan. Toyota produces motor vehicles which it then exports throughout the world. Therefore, Toyota is regarded as the manufacturer in the supply

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<sup>10</sup> C Kriek *The Scope of liability for Product defects under the South African Consumer Protection Act 68 of 2005 and Common Law - A comparative Analysis* (LLD thesis, Stellenbosch University, 2017) 36.

<sup>11</sup> Hornsby *Oxford Advanced Learners Dictionary* 6th ed (2000) 719.

<sup>12</sup> Loubser & Reid *Product Liability in South Africa* (2012) 122.

<sup>13</sup> *Ibid* 122.

chain. Importers purchase goods from another country and sell them in their own country.<sup>14</sup> Some Toyota motor vehicles which are referred to as completely built up (CBU) vehicles are imported from Japan and sold in South Africa.<sup>15</sup> Distributors are people or companies who supply goods to stores.<sup>16</sup> The manufacturers or importers of vehicles can be held liable for defective products in terms of the law of delict because they do not have a direct contractual relationship with consumers. Retailers are people or businesses that sell goods to the public.<sup>17</sup> For instance, a Toyota dealership is an example of a retailer. The retailer can be held liable in terms of the law of sale where the consumer can claim through contractual remedies from their direct sellers. Consumers are the people who buy goods and/or use services.<sup>18</sup> Suppliers provide goods and/or services to the consumer.<sup>19</sup> For instance, consumers would purchase vehicles from a car dealership who is supplied with those vehicles by a distributor, which in turn obtained that motor vehicle from an importer which received the vehicle from a manufacturer.

### **2.3. The law of sale**

A contract of sale is an agreement between the consumer and the seller, where the seller intends to deliver a thing with all its rights to the consumer and the consumer intends to pay a price for the thing.<sup>20</sup> For the purposes of this mini-dissertation, a problem arises when the goods sold by the seller do not meet the quality that consumers expect, either because the goods are defective or because they are unfit for their intended purpose.<sup>21</sup>

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<sup>14</sup> Hornsby *Oxford Advanced Learners Dictionary* 6th ed (2000) 600.

<sup>15</sup> Cokayne 'Quake aftermath to affect Toyota SA imports' 20 April 2016 available at <https://www.iol.co.za/business-report/companies/quake-aftermath-to-affect-toyota-sa-imports-2011867> (accessed on 18 December 2018).

<sup>16</sup> Hornsby *Oxford Advanced Learners Dictionary* 6th ed (2000) 339.

<sup>17</sup> *Ibid* 1005.

<sup>18</sup> *Ibid* 246.

<sup>19</sup> *Ibid* 1204.

<sup>20</sup> Nagel et al *Commercial law* 4th ed (2011) 193.

<sup>21</sup> Kerr *Kerr's Law of sale and lease* 4th ed (2014) 185.

From the perspective of this dissertation, when consumers decide to buy a vehicle, they usually visit a car dealership to do so.<sup>22</sup> If the consumer purchases the vehicle for cash, then there will be a contract which is concluded between the dealer and the consumer. However, when consumers are unable to pay the whole amount immediately, they would visit a financial institution for assistance.<sup>23</sup> This further complicates matters because under such circumstances a contract would be concluded between the motor dealership and the bank and the bank would be the owner of the vehicle until such time that the consumer pays off the loan which they have taken out in order to purchase the vehicle.<sup>24</sup> The bank would then in turn have a contract with the consumer who is the ultimate user and intended owner (once the purchase price is paid). Hence under a credit agreement, since the bank is the owner of the vehicle, the bank is the entity who can take action if the vehicle is defective. A full exploration of these issues is beyond the scope of this dissertation and so for purposes of this discussion, the consumer is regarded as the owner of the vehicle and the dealership is regarded as the seller.

There are common law rights and duties which flow from such a contract which apply to both parties involved.<sup>25</sup> Paying the purchase price for the goods purchased is the most essential duty of the consumer.<sup>26</sup> One of the most significant common law duties of the seller includes the duty to warrant against latent defects.<sup>27</sup> The consumer can institute a claim against the seller if the seller breaches this duty. Under the common law, a seller owes a duty to consumers to assume responsibility for latent defects in a product.<sup>28</sup>

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<sup>22</sup> Otto J, Van Heerden CM, Barnard J 'Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an installment agreement' (2014) 26 *SA Mercantile Law Journal* 247.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* 250.

<sup>25</sup> Nagel et al *Commercial law* 4th ed (2011) 210.

<sup>26</sup> *Ibid* 234.

<sup>27</sup> *Ibid* 222.

<sup>28</sup> T A Woker *Sale* (Unpublished lecture notes, University of KwaZulu Natal, 2018).

In the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd*,<sup>29</sup> the court described a latent defect as 'an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used.' In addition, such a defect is not visible or discoverable upon an inspection of the goods.<sup>30</sup> Thus, it is a latent defect.<sup>31</sup>

According to the case of *Odendaal v Ferraris*,<sup>32</sup> the above definition has been extended to include 'in a broad sense, any material imperfection preventing or hindering the ordinary or common use' of the goods. This extends to non-physical defects such as defects in building plans.

In the case of *Dibley v Further*,<sup>33</sup> the consumer argued that the presence of the graves on a farm rendered the farm latently defective. However, the court rejected this argument and stated that the graves did not destroy or impair the usefulness of the property or its ability to cultivate. An objective test was utilised which stated that the main factor in question must be one which destroys or impairs the usefulness of the thing for the purpose for which it is intended. Therefore, the graves were not regarded as latent defects.

From the above discussion it can be seen that the most important aspect that consumers can rely on is a breach of this warranty if the defects were latent that is that they were not obvious when the goods were inspected prior to the purchase and the defects were serious, in that they destroy the usefulness of the goods.

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<sup>29</sup> 1977 (3) SA 670 (A).

<sup>30</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd* 1977 (3) SA 670 (A).

<sup>31</sup> *Ibid.*

<sup>32</sup> 2008 (4) SA 529 (SCA).

<sup>33</sup> 1951 (4) SA 73 (C).



A consumer who wishes to institute a claim because of latent defects in the thing must prove the following:

- a) the goods contain a material defect;<sup>34</sup>
- b) the defect must be latent;<sup>35</sup>
- c) this latent defect was present at the time when the contract was concluded.<sup>36</sup>
- d) the consumer had no knowledge of the defect when the contract was concluded.<sup>37</sup>

The common law remedies for latent defects are only available to consumers if the requirements mentioned above are satisfied and the onus of proving these requirements rests on consumers of defective goods.<sup>38</sup> From the perspective of this dissertation, it is important to note that consumers must show that the goods are defective. This would pose a problem in cases where consumers are fearful that their vehicles are defective but where the defects have not yet arisen. In such circumstances, consumers will not be able to prove that their vehicles were defective at the time when the contract was concluded. This then means that consumers will not be able to rely on the remedies which consumers are entitled to under the common law. This could pose a major problem for them especially where they find themselves in a situation where they are afraid to drive around in a vehicle which could be defective and even pose a danger to their lives.

The warranty against latent defects flows naturally by operation of law and relates to all contracts of sale.<sup>39</sup> Where such warranty exists, the *aedilitian* remedies are available to

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<sup>34</sup> Havenga et al *General principles of commercial law* 7th ed (2010) 154.

<sup>35</sup> Havenga et al *General principles of commercial law* 7th ed (2010) 155.

<sup>36</sup> J Barnard *The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD thesis, University of Pretoria, 2013) 362.

<sup>37</sup> Ibid.

<sup>38</sup> Barnard J 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) *De Jure* 455.

<sup>39</sup> Barnard J 'The influence of The Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) *De Jure* 457.

consumers.<sup>40</sup> The *aedilician* remedies are the *actio redhibitoria* and *actio quanti minoris*.<sup>41</sup> According to Barnard, 'the *aedilician* remedies will be available where there is a breach of warranty against latent defects and no express or tacit guarantee is present in terms of the contract, nor is the warranty expressly excluded.'<sup>42</sup>

*Actio redhibitoria* is where the parties are put in the position that they would have been in if the contract was not concluded, by way of restitution.<sup>43</sup> Thus, the contract will be set aside. The contract will only be rescinded in circumstances where the defect was so serious, that if consumers were aware of it they would not have purchased it.<sup>44</sup> The consumer is entitled to the purchase price and all other reasonable costs incurred in relation to the goods.<sup>45</sup> The goods will have to be returned by the consumer unless it has been destroyed and the destruction must not be due to the negligence of the consumer.<sup>46</sup>

The *actio quanti minoris* is an alternative remedy to the *actio redhibitoria* where the defect is not so serious.<sup>47</sup> In terms of the *actio quanti minoris*, the consumer can claim a reduction in the purchase price.<sup>48</sup> According to Kerr, this remedy aims to place consumers in the position that they would have been in if they had knowledge that the thing was defective and where they would have bought it for a cheaper price.<sup>49</sup> Consumers can also claim a reduction in the purchase price where they choose to keep the defective goods or where they have lost their right to rescission.<sup>50</sup> The amount of the reduction can be calculated through a subtraction of the value of the defective goods sold and a similar

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<sup>40</sup> Ibid.

<sup>41</sup> Havenga et al *General principles of commercial law* 7<sup>th</sup> ed (2010) 155.

<sup>42</sup> Barnard J 'The influence of The Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) *De Jure* 455.

<sup>43</sup> Ibid.

<sup>44</sup> McQuoid-Mason et al *Consumer Law in South Africa* (1997) 52.

<sup>45</sup> Johan et al *The Law of Commerce in South Africa* (2014) 163.

<sup>46</sup> Ibid 163.

<sup>47</sup> Ibid 163.

<sup>48</sup> Kerr *Kerr's Law of sale and lease* 4<sup>th</sup> ed (2014) 217.

<sup>49</sup> Ibid.

<sup>50</sup> T A Woker *Sale* (Unpublished lecture notes, University of KwaZulu Natal, 2018).

thing which was defect free at the time which the contract was concluded.<sup>51</sup> Consumers lose their right to rescission in instances where the seller declines to take the property back and it deteriorates in the hands of the consumer.<sup>52</sup>

Where either an express or tacit warranty was given, consumers are entitled to utilise the *actio empti* remedy.<sup>53</sup> This remedy can be exercised by consumers to enforce their rights against the seller.<sup>54</sup> This remedy can be utilised in the following instances:<sup>55</sup>

- a) where the thing is delivered without good qualities or is defective. In the absence of the guarantee, the consumer can claim for damages or if the thing is seriously defective, the consumer can cancel the contract; or
- b) where the seller fraudulently conceals that the thing is defective or where the seller creates an inaccurate impression that the thing is of good quality. The consumer can claim for damages in such instances.

There are contractual remedies that are available to consumers who possess defective products. However, the contractual remedies under the common law also require proof that the product is defective. The onus of proof rests on the consumer to prove that the product was defective. In terms of the common law, the consumer has three years to raise the issue of latent defects. Thereafter, it is the manufacturer that would be able to dictate how the matter is resolved as indicated by the contract of sale or warranty. From the viewpoint of the discussion above, consumers do not have any contractual rights that they can utilise if they merely suspect that their vehicles are defective. Thus, they will not be able to return their vehicles and have their contracts set aside or claim a reduction of the purchase price, as discussed above.

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<sup>51</sup> Johan et al *The Law of Commerce in South Africa* (2014) 163.

<sup>52</sup> Bradfield & Lehmann *Principles of the Law of Sale and Lease* 3rd ed (2013) 82.

<sup>53</sup> Barnard J "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages" (2012) *De Jure* 459.

<sup>54</sup> Havenga et al *General principles of commercial law* 7th ed (2010) 156.

<sup>55</sup> Havenga et al *General principles of commercial law* 7th ed (2010) 156

In terms of the law, the seller must inform the consumer of any defects which he had knowledge of.<sup>56</sup> If the seller does not disclose the defects and sells the thing to the consumer, the consumer can institute a claim against the seller on the basis that the thing is defective, and that there was fraudulent non-disclosure.<sup>57</sup> The consumer can cancel the contract and/or claim for damages in terms of the *actio empti* remedy where the seller intentionally induced the consumer to enter into the contract.<sup>58</sup> In addition, the consumer can also have a claim for consequential loss for fraudulent non-disclosure which would fall under the law of delict.<sup>59</sup>

In the case of *Glaston House (Pty) Ltd v Inag (Pty) Ltd*,<sup>60</sup> the consumer purchased a dilapidated building from the seller. The building contained a cornice and pediment which was declared a monument. The seller was aware of this fact, but had not disclosed it to the consumer. The National Monument Council would only allow the building to be renovated if the monument was to be extracted carefully and erected into the new building. The court stated that the monument represented a form of defect as the building was purchased for a different purpose. The seller had a duty to disclose this defect to the consumer but did not, which then amounted to fraud. The consumer was entitled to consequential loss remedies as this would constitute additional costs on his part. The court held that the consumer can claim in terms of the law of delict, on the grounds of fraudulent misrepresentation.

In light of this discussion, it can be argued that if the supplier became aware that the vehicles which they supplied to the markets were defective and failed to take action to rectify the problem and to notify consumers of this fact, then it would be liable in terms of the law of delict for damages which the consumers suffer. In addition, this would amount to fraudulent non-disclosure of the defect in the vehicle. This would occur when the supplier keeps the defective vehicles on the market for sale even when they are aware of

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<sup>56</sup> Glover & Kerr *Kerr's Law of sale and lease* 4<sup>th</sup> ed (2014) 193.

<sup>57</sup> Ibid 193-194.

<sup>58</sup> Nagel et al *Commercial law* 4<sup>th</sup> ed (2011) 225.

<sup>59</sup> Glover & Kerr *Kerr's Law of sale and lease* 4<sup>th</sup> ed (2014) 185.

<sup>60</sup> 1977 2 SA 846 (A).

the defects. If consumers are in such a position, they can utilise the delictual remedies available and claim for damages from the manufacturer. However, once again consumers will have to show that their vehicle is defective to be able to rely on this remedy. Alternatively consumers will have to wait for the defect to manifest itself before they are able to claim their damages. These damages may be very severe which leaves consumers in a very difficult position.

#### **2.4. Consequential loss**

In terms of the common law, there are generally three instances where a consumer can claim for consequential loss from the actual seller of the goods. These include:<sup>61</sup>

- a) where the seller sold defective goods to the consumer without disclosing this fact to the consumer, knowing that they were defective.
- b) where the goods were defective, but the seller provided an express or tacit warranty or guarantee stating that the goods would be fit for its intended purpose.
- c) where the seller is regarded as an expert seller.

Furthermore, the consumer can recover consequential loss from a manufacturer for latent defects provided that the consumer bought the goods directly from the manufacturer.<sup>62</sup> The manufacturer is liable for consequential loss caused by a latent defect in the goods sold even if he is ignorant of the defect.<sup>63</sup>

In the case of *Holmdene Brickworks v Roberts Construction*,<sup>64</sup> Holmdene Brickworks manufactured bricks. Robert Construction purchased a number of bricks from Holmdene Brickworks. It appeared that the bricks had been defective. Consequently, some of the walls that Roberts Construction built had to be broken down and rebuilt. Accordingly,

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<sup>61</sup> Kerr *Kerr's Law of sale and lease* 4<sup>th</sup> ed (2014) 193.

<sup>62</sup> Loubser & Reid *Product Liability in South Africa* (2012) 27.

<sup>63</sup> *D and H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and Another* 2006 (3) 593 (SCA).

<sup>64</sup> 1977 (3) SA 670 (A).

Holmdene Brickworks were liable for Roberts Construction's consequential damages because they were the manufacturers of the bricks.

In the case of *Kroonstead Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha*,<sup>65</sup> a farmer lost his crops because the pesticide that he had purchased from the defendant was defective. The question which arose in this case was whether the merchant seller was liable for the consequential loss suffered by the farmer simply because it sold toxic chemicals. The court held that a seller is only liable for consequential loss if it is the manufacturer of the product or if it professes to be an expert seller of the product. The court held further that whether someone is regarded as an expert seller will be a question of fact. In this particular case the court held that the respondents were not expert sellers. They were mere conduits who sold the product. Therefore, they could not be liable for consequential losses.

From the above discussion it can be seen that the remedies which consumers who have bought defective products are entitled to are limited, in most instances to a return of the purchase price or a reduction in the purchase price. In a few limited instances consumers may be entitled to consequential damages. In most instances consumers are not really concerned about a return of the purchase price or a reduction in the price, especially when dealing with an inexpensive product. They are most concerned to be compensated for any consequential damages they have suffered. However, it must be noted that in the instance of a defective car where no serious damages have been suffered, most consumers would be content to receive their purchase price back.

## **2.5. The law of delict**

If there are no contractual remedies which consumers can utilise when they are in possession of a defective product, then there are delictual remedies which are available to them.<sup>66</sup> Every element of a delict must be present in order for the manufacturer to be held liable for a defective product.<sup>67</sup> The elements include conduct, wrongfulness, fault,

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<sup>65</sup> 1964 (3) SA 561 (A).

<sup>66</sup> Loubser & Reid *Product Liability in South Africa* (2012) 38.

<sup>67</sup> Neetling et al *Law of delict* (2006) 292.

causation and harm respectively.<sup>68</sup> The consumer must prove these elements.<sup>69</sup> This falls under the *Aquilian* action for the harm that was caused by the defective product.<sup>70</sup> The harm that was caused must have been wrongful and the manufacturer must have acted negligently.<sup>71</sup> The onus is on the consumer to prove that the manufacturer acted negligently.<sup>72</sup> It is more burdensome for the consumer to prove negligence if the product is imported.<sup>73</sup> A claim in delict may arise when any entity in the supply chain negligently caused harm to consumers.<sup>74</sup>

In the case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,<sup>75</sup> the appellant underwent surgery and received an anesthetic which was manufactured by the respondent company. After the operation, the appellant suffered complications in that she was partially paralysed. She sued the respondent for damages, in respect of the personal injuries that she had sustained as she claimed that the anesthetic was defective. It is evident that the respondent is under a legal duty in delict to avoid reasonably foreseeable harm.<sup>76</sup>

From the discussion above, a consumer who purchases a defective vehicle can claim for damages in terms of the law of delict from a manufacturer. A claim for damages includes injuries or damage that resulted from the use of the defective vehicle. However, the consumer has to prove that the vehicle is defective and that the manufacturer acted negligently. This is not possible in circumstances where the defects in the vehicle have not yet arisen. Consumers will not be able to show that they suffered any harm as a result of the defective vehicle because the defects have not yet manifested themselves and so

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<sup>68</sup> Midgley et al *The law of Delict in South Africa* (2012) 25.

<sup>69</sup> Gomar C 'Product liability: A Changing playing field?' (2011) 32(1) *Obiter* 522.

<sup>70</sup> Loubser & Reid *Product Liability in South Africa* (2012) 39.

<sup>71</sup> Ibid 39.

<sup>72</sup> Woker TA 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer protection Act' (2010) 31(2) *Obiter* 229.

<sup>73</sup> Ibid.

<sup>74</sup> Loubser & Reid *Product Liability in South Africa* (2012) 1.

<sup>75</sup> 2003 (2) SA 285 (SCA).

<sup>76</sup> *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (2) SA 285 (SCA).

the harm has not yet ensued. Thus, it can be noted that there are no remedies or rights under delict for consumers who have purchased vehicles which may be defective. The consumer will have to wait for the defects to manifest themselves in order to rely on the law of delict. This is a frightening reality as consumers have no choice other than to continue using their vehicles which could malfunction at any time. This is obviously of great concern for consumers who are aware of other motorists who have suffered as a result of purchasing a similar vehicle.

## **2.6. Conclusion**

The analysis done above indicates that there are various common law remedies which are available to consumers in circumstances where they are in possession of a latently defective product. However, these remedies are limited and can only be relied upon in certain specific circumstances. From the perspective of this dissertation, the main issue is that consumers will have to prove that the vehicle is defective. This poses a problem for consumers who merely have a suspicion that their vehicles are defective. Consumers cannot merely cancel their contracts and return their vehicles, simply because they do not want them any longer. In addition, they are unable to dispose of their vehicles because there is no re-sale market for such vehicles. Alternatively, consumers cannot just abandon their vehicles and buy new ones because most often they take out loans in order to obtain their vehicles. They will still be liable for the amount that they owe on their vehicles.

In the next chapter, the Consumer Protection Act 68 of 2008 (CPA) and the remedies which it provides to consumers if they are in possession of defective products will be examined in order to establish how the common law has been altered by the CPA. An important issue to consider is whether the CPA provides any further and better remedies for consumers who have purchased vehicles which they suspect may be defective.



## CHAPTER THREE

### THE CONSUMER PROTECTION ACT

#### 3.1. Introduction

There have been some important changes in the marketplace as a result of the introduction of the Consumer Protection Act 68 of 2008 (CPA).<sup>77</sup> There are eight fundamental rights which consumers have that also impact on the manner in which business is done, especially through contracts of sale.<sup>78</sup> The CPA pertains to a wide range of transactions which involve the supply of goods and services.<sup>79</sup>

In discussing the reasons why the CPA was introduced, Woker points out that if consumer protection measures, including measures to deal with defective products had not been introduced, the South African market would have continued to be susceptible to unsafe and substandard products.<sup>80</sup> Thus, South Africa's vulnerable consumers would have continued to be exploited.<sup>81</sup> The CPA is the first comprehensive statute which has been enacted for consumer protection in South Africa.<sup>82</sup> The CPA provides consumers with protection from exploitation and harm.<sup>83</sup> This Act contains certain rights for consumers and places substantial obligations on suppliers.<sup>84</sup> It also codifies part of the common law regarding consumer rights. However, the CPA has also altered the common law in various ways. As pointed out by Meville, consumers are now entitled to sue all those entities in the supply chain including manufacturers and other suppliers for damages or injuries

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<sup>77</sup> Barnard J 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages' (2012) *De Jure* 455.

<sup>78</sup> *Ibid.*

<sup>79</sup> Bradfield & Lehmann *Principles of the Law of Sale and Lease 3rd ed* (2013) 7.

<sup>80</sup> Woker TA 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer protection Act' (2010) 31(2) *Obiter* 231.

<sup>81</sup> *Ibid.*

<sup>82</sup> Havenga et al *General principles of commercial law 7th ed* (2010) 283.

<sup>83</sup> Melville *The Consumer Protection Act made easy 2nd ed* (2011) 2.

<sup>84</sup> *Ibid* 5.

which they have sustained as a result of using defective products and this is regardless of whether or not those entities were negligent.<sup>85</sup>

Basson states that the 21st century holds the possibility of an expansion in terms of technological sophistication which appear on the markets worldwide, therefore it is important that consumers are protected from unsafe products supplied to them.<sup>86</sup> In light of this dissertation, vehicles are being manufactured today with new additions and improvements to make them more reliable and efficient.<sup>87</sup> However, the advances in the design of vehicles also create concern regarding the safety of vehicles.

This chapter focuses on the supply of safe, good quality goods in terms of section 55 of the Act. In addition, section 56 which sets out the implied warranty of quality will be examined. Section 61 which deals with the liability of all those in the supply chain involved in the production and supply of defective goods will also be considered.

The main focus of this chapter is on the rights which consumers have under the CPA if they are in possession of vehicles which are defective. The question which this dissertation is seeking to answer is whether consumers who suspect that their vehicles may be defective have any rights in law to return that vehicle to their sellers. This chapter will focus on the CPA in order to establish whether the CPA, which has substantially altered the common law when it comes to the sale of defective goods, provides any remedies for consumers who wish to rid themselves of a vehicle if they do not want it because they suspect that it may be defective. As pointed out in Chapter One, consumers may become concerned about the vehicle they have purchased because they have become aware of reports in the media about other people who have been injured or who

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<sup>85</sup> Melville *The Consumer Protection Act made easy 2nd ed* (2011) 2.

<sup>86</sup> Basson J "The South African Law on Product Liability - Quo Vadis?" (2011) 12 (1) the *South African Journal of Industrial Engineering* 85.

<sup>87</sup> Skwirik 'How cars have changed over time?' available at [http://www.skwirik.com/p-c\\_s-4\\_u-293\\_t-712\\_c-2665/VIC/3/How-cars-have-changed-over-time/Transport-in-the-past/Out-and-about/Science/](http://www.skwirik.com/p-c_s-4_u-293_t-712_c-2665/VIC/3/How-cars-have-changed-over-time/Transport-in-the-past/Out-and-about/Science/) (accessed on 10 September 2018).

have died or suffered other damages because the same model has proved to be defective.

### **3.2. The definition of a defect**

Consumers have certain rights under the CPA in circumstances where they have been supplied with defective goods. Therefore it is important to consider what constitutes a defect and this can be established by having regard to the definition of a defect as set out in the CPA. According to section 53 (a), a “defect” is:

i) any material imperfection in the manufacture of goods or components, or in the performance of services that renders the goods or results of the service less acceptable than a person generally would be reasonably entitled to expect under the circumstances or;

ii) any characteristics of goods and components that renders the goods or components less useful, practicable or safe than persons would generally be entitled to expect in the circumstances.<sup>88</sup>

b) “failure” means the inability of the goods to perform in the intended manner or to the extended effect.

c) “hazard” means a characteristic that -

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

ii) presents a significant risk of personal injury to any person or damage to property when the goods are utilised.

d) “unsafe” means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.’

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<sup>88</sup> Section 53 (1) (a).

Loubser and Reid describe a “material imperfection” as a serious, substantial or important fault.<sup>89</sup> Kerr points out that it means a non-trivial imperfection.<sup>90</sup> The definition of defect is based on what the consumers would expect from products generally. It also includes components, which could be regarded as parts in a vehicle. Subsection (d) of this section states that the product must pose an extreme risk to persons or to property. This means that the imperfection must not be minor. For example, if the brakes or air bags are defective in a vehicle that would constitute a serious imperfection because such parts are essential for the vehicle to function effectively. Hence, consumer’s lives would be in danger if they use such vehicles.

### **3.3. Section 55 – The right to safe, good quality goods**

According to section 55 (2):

‘Every consumer has the right to receive goods that-

a) are reasonably suitable for the purpose for which they are generally intended;

b) are of good quality, in working order and free of any defects;

c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

d) comply with any applicable standards set under the Standards Act, 1993 (Act 29 of 1993) or any other public regulation.’

‘In addition to the right set out in Section (2) (a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier-

a) originally offers to supply such goods; or

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<sup>89</sup> Loubser & Reid *Product liability in South Africa* (2012) 63.

<sup>90</sup> Kerr *Kerr’s Law of sale and lease* 4<sup>th</sup> ed (2014) 243.

b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has the right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.’

‘In determining whether any particular goods satisfied the requirements of subsection (2) and (3), all of the circumstances of the supply of those goods must be considered, but not limited to-

a) the manner in which and the purposes for which the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of goods;

b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and

c) the time when goods were produced and supplied.’

‘Section 55 (5) stipulates that for greater certainty in applying subsection (4), it is irrelevant whether a product failure or a defect was latent or patent, or whether it could have been detected by the consumer before taking delivery of the goods.<sup>91</sup> The section also provides that a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.’<sup>92</sup>

‘According to Section 55 (6), subsection 2 (a) and (b) do not apply to a transaction if the consumer-

a) has expressly informed that particular goods were offered in a specific condition; and

b) has expressly agreed to accept the goods in that condition or knowingly acted in a manner consistent with goods in that condition.’

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<sup>91</sup> Section 55 (5) (a).

<sup>92</sup> Section 55 (5) (b).

Unlike the common law remedies which provide that the consumer has to prove that a defect existed when the contract was concluded, the CPA states that the consumer will have to prove that they had a right to be supplied with goods that are of proper quality as indicated by the Act.<sup>93</sup> Naude suggests that Section 55 (2) (c) is quite radical because it provides a new right which is not recognised under common law.<sup>94</sup> According to Naude, an *ex lege* right to continued good quality has been introduced into South African law for consumers.<sup>95</sup> The CPA applies to both latent and patent defects, unlike the common law which states that the defect must be latent for the remedies to apply. This indicates how the CPA has altered the common law to provide better protection for consumers under section 55. Thus, the CPA has significantly improved the rights of consumers who have suffered harm as a result of purchasing defective products. However, there are still certain requirements which consumers will have to prove if they are to be successful in a claim against a supplier. Accordingly, the consumer will have to prove that the vehicle was defective which is not possible in circumstances where the defects have not yet manifested themselves. From this it can be seen that those consumers who are merely concerned that their vehicle may be defective are not afforded any further rights under the CPA. They would have to wait until the defect manifested itself before they could take any action against an entity in the supply chain.

Once it has been discovered that the vehicle is defective, the next issue is what remedies are available to a consumer. The next paragraph will deal with the remedies when a supplier has breached the implied warranty of quality.

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<sup>93</sup> De Stadler *Consumer Protection Unlocked* (2013) 145.

<sup>94</sup> Naude T 'The Consumers right to safe, good quality goods and the implied warranty of quality under Section 55 of the Consumer Protection Act 68 of 2008' (2011) 23 *SA Mercantile Law Journal* 340.

<sup>95</sup> *Ibid.*

### **3.4. Remedies**

#### **3.4.1. Section 56 - Implied warranty of quality**

Section 56 (1) states that:

'In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and retailer each warrant that the goods comply with the requirements and standards as contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or retailer, as case may be.'

In addition, section 56 (2) provides that:

'Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty at the suppliers risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55 and the supplier must at the direction of the consumer, either –

- a) Repair and replace the failed, unsafe or defective goods, or
- b) Refund to the consumer the price paid by the consumer for the goods.'

According to section 56 (3):

'If a supplier repairs any particular goods or any component of any such goods and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or further failure, defect or feature is discovered, the supplier must –

- a) Replace the goods, or
- b) Refund the consumer the price paid by the consumer for the goods.'

Section 56 (4) states that:

'The implied warranty imposed by subsection (1) and the right to return goods set out in subsection (2) are each in addition to –

- a) Any other implied warranty or condition imposed by the common law, this Act, or any other public regulation, and
- b) Any express warranty or condition stipulated by the producer or importer, distributor or retailer, as case may be.'

Consumers have a choice regarding which option they choose.<sup>96</sup> For example, if a consumer purchases goods and it exhibits defects (within the meaning of defects as set out in the CPA) within the first six months of its delivery, then the consumer can choose whether to demand that new goods be given to them, to obtain a refund of the purchase price or to have the goods repaired.<sup>97</sup> However, it is not that simple when it comes to motor vehicles. The reason for this is because vehicles are expensive assets and if consumers returned all vehicles even with minor faults, such as a faulty windscreen wiper, then the supplier would face considerable loss.<sup>98</sup> In a complaint which the Motor Industry Ombudsman of South Africa (MIOSA) dealt with, they held that consumers cannot simply demand that their vehicle be replaced or that they be refunded.<sup>99</sup> MIOSA stated that the supplier can opt to repair the vehicle where the defects are not so serious, for example when the power steering is defective.<sup>100</sup> However, if the defects in the vehicle are of a very serious nature, such as when the brakes are defective, then the consumer could have a stronger case under section 56, where their vehicle could be replaced or where they could be refunded.<sup>101</sup> The defect in the vehicle must satisfy the definition in terms of

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<sup>96</sup> Ibid 347.

<sup>97</sup> Ibid.

<sup>98</sup> Claire 'When can a defective car be returned?' 18 October 2013 available at <http://www.sibergramme.co.za/blog/when-can-a-defective-car-be-returned> (accessed on 28 November 2018).

<sup>99</sup> Knowler W 'The CPA protects you – expect when it doesn't' 23 September 2013 available at <https://www.iol.co.za/dailynews/consumer/the-cpa-protects-you-except-when-it-doesnt-1581242>, accessed on 28 November 2018.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.



the Act.<sup>102</sup> This means that it must be material or significant.<sup>103</sup> The rules relating to return of the goods exist, regardless of what the manufacturer's warranty states.<sup>104</sup> This is because the CPA takes precedence over the manufacturer's warranty.<sup>105</sup>

The CPA has significantly altered the law when it comes to allowing consumers to set aside their contracts if they have purchased defective products. However, the product must be defective as indicated by the definition in section 53. This does not extend to products which may be defective. Consumers who are in possession of products which may be defective do not have any rights under the CPA. If consumers have a suspicion that their vehicles are defective, they cannot go back to the suppliers and say that they want to set their contracts aside. This is a critical issue as the consumers' vehicles could be a danger to them, but they will simply have to wait for the harm to ensue in order for them to have their contracts set aside. From this discussion, it can be seen that section 56 has limitations because it only applies to goods that have actually shown themselves to be defective and those goods must have been purchased within six months of their delivery for these remedies to apply.

### **3.4.2. Section 61 - Liability for damage caused by goods**

Liability for the supply of a defective product (commonly referred to as product liability) may arise when the product manufactured or supplied contains a defect, causing loss or damage to either a person or to property.<sup>106</sup> As discussed in Chapter Two, when a consumer suffers damages as a result of purchasing a defective product, the damages that they can claim from the actual seller of the goods are relatively limited and if they wish to claim from the manufacturer of the product they have to prove fault. Section 61

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<sup>102</sup> Meville NJ 'Advisory note 1 – Consumers rights regarding defective goods' 9 August 2013 available at <http://www.cgso.org.za/wp-content/uploads/2015/12/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-2.pdf> (accessed on 28 November 2018).

<sup>103</sup> Ibid.

<sup>104</sup> Meville NJ 'Advisory note 1 – Consumers rights regarding defective goods' available at <http://cgso.org.za/dl/cgso%20advisory%20note%20returns.pdf>, accessed on 28 November 2018.

<sup>105</sup> Ibid.

<sup>106</sup> Jackwell F 'Manufacturers beware' (2007) *Without prejudice* 31.

(1) has extended liability for defective products to a number of suppliers in the supply chain including the producer, importer, distributor and retailer of any goods.

In terms of this section these suppliers will be liable for any harm caused wholly or partly as a consequence of -

‘a) supplying any unsafe goods;

b) a product failure, defect, hazard in any goods; or

c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.’

Section 61 is one of the most controversial sections in the CPA because it introduces a modified version of strict product liability.<sup>107</sup> This means that the parties in the supply chain will be held liable irrespective of whether they were negligent or not.<sup>108</sup> In addition, ‘the consumer who suffers the damages or injury does not even have to be the person who originally entered into a transaction with the seller.’<sup>109</sup> Moreover, the consumer does not have to prove fault on the part of the supply chain.<sup>110</sup> This is referred to as a modified form of strict liability because there are certain defences (provided for in section 61 (4)) which those in the supply chain may be able to raise if consumers decide to hold a particular entity (such as the retailer rather than the manufacturer) liable for their damages. For example, those who purchased defective Kugas may decide to hold their particular dealer (retailer) liable for their damages and not proceed against the actual manufacturer of the car (Ford Motor Company).

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<sup>107</sup> Govinden K ‘One step forward, two steps back’ (2014) *Without prejudice* 36.

<sup>108</sup> Ibid.

<sup>109</sup> Melville NJ *The Consumer Protection Act made easy* 2nd ed (2011) 2.

<sup>110</sup> Loubser & Reid *Product Liability in South Africa* (2012) 57.

If more than one party in the supply chain is potentially liable for the defective product, then the consumer can choose to sue any one of them.<sup>111</sup> This means that each of the various parties in the supply chain will be jointly and severally liable for the defective product.<sup>112</sup> A consumer can bring a claim against anyone of the entities in the supply chain.<sup>113</sup> This makes it easier to institute a claim than under the common law where fault will have to be proved in terms of the law of delict.<sup>114</sup> The consumer can sue for a either a pro rata share or the whole amount.<sup>115</sup>

Product liability cases in South Africa have shown that there are varying degrees of harm suffered by people as a result of defective products.<sup>116</sup> The modified strict liability comprises of liability in two forms, that being physical harm and economic harm.<sup>117</sup>

According to section 61 (5) harm for which a person may be held liable in terms of this section includes -

- 'a) the death of, or injury to, any natural person;
- b) an illness of any natural person;
- c) any loss of, or physical damage to any property, irrespective of whether it is movable or immovable; and
- d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).'

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<sup>111</sup> Bowman Gilfillan 'Product liability in terms of the Consumer Protection Act, 2008' available at <http://www.saphysio.co.za/media/177130/mpc-product-liability-in-terms-of-the-consumer-protection-act.pdf>, accessed on 8 September 2018.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Kerr *Kerr's Law of sale and lease* 4<sup>th</sup> ed (2014) 251.

<sup>115</sup> Michalsons 'Product liability for damage caused by goods' 6 March 2011 available at <http://www.michalsons.co.za/blog/product-liability-for-damage-caused-by-goods/4584> (accessed on 9 September 2018).

<sup>116</sup> Gower C 'Product liability: A Changing playing field?' (2011) 32(1) *Obiter* 521.

<sup>117</sup> Van Eeden *Guide to the Consumer Protection Act* (2009) 247.

'A "producer" with respect to any particular goods, means a person who grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business.'<sup>118</sup> To be a producer a person must be involved in the production activity of any goods or services, which refers to marketing, in the form of promotion and supply.<sup>119</sup> The definition extends to the 'application of a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a).'<sup>120</sup> An example of a producer would be Toyota Motor Corporation as Toyota Motor Corporation is the one who manufactures vehicles and makes them available to dealers for consumers to purchase.

'An "importer" with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.'<sup>121</sup>

According to Loubser and Reid:

'the purpose of this provision is to ensure that the statutory product liability is extended to all goods sold within the Republic of South Africa and that consumers are not faced with difficulties when identifying foreign manufacturers or procedural difficulties when engaging with them in litigation.'<sup>122</sup>

In terms of the example given above, a consumer from South Africa who has purchased a Toyota vehicle in the Republic can institute a claim against Toyota in Japan if the vehicle is defective.

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<sup>118</sup> Section 1 of the Consumer Protection Act.

<sup>119</sup> Van Eeden & Barnard *Consumer Protection In South Africa* 2<sup>nd</sup> ed (2017) 393.

<sup>120</sup> Section 1 of the Consumer Protection Act.

<sup>121</sup> Ibid.

<sup>122</sup> Loubser & Reid *Product Liability in South Africa* (2012) 125.

As defined in Section 1 of the Act, ‘a “distributor”, in relation to any particular goods, means a person who, in the ordinary course of business is supplied with those goods by a producer, importer or other distributor, and in turn supplies those goods to either another distributor or a retailer.’ ‘A “retailer”, with respect to any particular goods, means a person who, in the ordinary course of business supplies those goods to a consumer.’<sup>123</sup> An example of a retailer would be a Toyota dealership which supplies vehicles to consumers for them to purchase.

In terms of Act, the retailer has a defence which includes that it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristics, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers.<sup>124</sup> An interesting aspect of this defence is that under the common law, if a retailer is an expert, it would be strictly liable for any damage which consumers suffer as a result of purchasing defective goods.<sup>125</sup> For example, if a consumer purchases a vehicle from a Toyota dealership and Toyota is regarded as an expert seller of the vehicles, then Toyota would be liable for the defective vehicles sold. It is possible to argue that a particular dealership which specialises in the sale of a particular model of vehicle such as a Toyota dealership is an expert because the dealership will usually employ people to advise consumers about the vehicle that they are purchasing.<sup>126</sup> The CPA has given retailers a defence in section 64 (1) (c) which does not make a distinction between ordinary retailers and expert retailers. Hence, the expert retailer has now been given a defence which they do not have under the common law. The only possible argument for consumers here would be that they can rely on section 2 (10) which provides that consumer’s common law rights must be preserved.

Manufacturers are strictly liable for any damages that consumers suffer as a result of defective goods and cannot rely on the defence set out in section 61 (4) (c). The only real defence that manufacturers may have is if the defect arose after the manufacture and

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<sup>123</sup> Section 1 of the Consumer Protection Act.

<sup>124</sup> Section 61 (4) (c).

<sup>125</sup> Kerr *Kerr’s Law of sale and lease* 4<sup>th</sup> ed (2014) 193.

<sup>126</sup> Melville *The Consumer Protection Act made easy* 2<sup>nd</sup> ed (2011) 104.

was not as the result of a manufacturing or design defect. For instance, the consumer drove the vehicle in such a terrible manner that it became defective subsequently.

From the above discussion it can be seen that the CPA has made it much easier for consumers to claim damages when they have suffered loss as a result of purchasing a defective vehicle. They also have more entities from which to claim their damages. However, consumers will still have to prove that the product caused harm and that the product was defective in terms of the definition set out in Section 53 (1) (a).<sup>127</sup>

From the perspective of this dissertation, it is important to note that this is a limitation for consumers especially if they are in a situation where they do not want their vehicles any longer because they merely suspect their vehicles are defective but where the defects have not yet manifested themselves. Under such circumstances, consumers will not yet be in a position to prove that the vehicle caused the harm or that it is defective. This poses a serious problem for consumers as they are often afraid to drive a vehicle which may be defective. As discussed in Chapter One, there have been a number of reported cases where Ford Kugas have burst into flames and one such instance where it even claimed the life of a man.<sup>128</sup> It is therefore understandable that consumers will become very concerned about wanting to continue driving the Ford Kugas that they have purchased. Another worrying factor for consumers is that a vehicle is one of the most expensive assets that is purchased in a person's lifetime, other than a house, as discussed in Chapter One of this dissertation. Thus, when a consumer discovers that other consumers are experiencing major difficulties with the same model of vehicle that they have, it becomes a great concern for them. Usually the vehicles have been purchased in terms of credit agreements, so it is very difficult for consumers to decide to simply abandon the goods and buy another one. They will have to continue to meet their obligations under those credit agreements.

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<sup>127</sup> Loubser & Reid *Product Liability in South Africa* (2012) 57.

<sup>128</sup> Business Tech 'Another Ford Kuga bursts into flames - the ninth car so far in 2017' 12 January 2017 available at <https://businesstech.co.za/news/general/150371/another-ford-kuga-bursts-into-flames-the-ninth-car-so-far-in-2017/> (accessed on 10 September 2018).

### **3.4. Conclusion**

The analysis above demonstrates that whilst the CPA has improved the rights of consumers when they have purchased defective goods and they now have a number of entities in the supply chain that they can hold responsible for any damages that they may suffer, any remedy which consumers may have rests squarely on their ability to prove that the vehicles that they purchased are defective. There is nothing in the Act which allows consumers to set aside their contracts or claim damages (such as the amount of money they have been paying to the credit provider) simply on the basis of a suspicion, however reasonable that suspicion may be that the vehicle which they are driving may be seriously defective. Consumers will have to prove that a defect existed in their vehicles in order for the remedies under the CPA to apply. It can be deduced that the Act has certain barriers for consumer protection and is only beneficial for consumers to a certain extent.

As a result of such problems faced by consumers, product recalls become important. It is also the best option for consumers who are in possession of vehicles which they suspect are defective, but where the defects have not yet arisen. The next chapter will discuss product recalls and how they assist consumers.

## CHAPTER FOUR

### PRODUCT RECALLS

#### 4.1. Introduction

In general terms, a product recall takes place when an entity withdraws products from the market because they may be defective or unsafe for consumers to utilise.<sup>129</sup> According to Barnard and Van Heerden, a product recall refers to the removal or correction of a marketed product, by a supplier who is in violation of state law, and where legal action can be taken by either a government agency or a state body.<sup>130</sup> There are various examples of products that have been recalled such as children's toys, appliances, food items, vehicles and medicines.<sup>131</sup> This is not an exhaustive list.

The most common reason why product recalls are issued is because products may be defective. This is why the issue of product recalls is such an important issue when consumers are concerned that the vehicles they have purchased may contain material and dangerous defects but which have not yet manifested themselves.

The types of defects associated with the products include the following:<sup>132</sup>

- 1) Manufacturing defect: the product was manufactured in a way that caused it to be dangerous to consumers. For example, when a part for a vehicle was not installed properly in a vehicle on the assembly line. This may cause the vehicle to be

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<sup>129</sup> Investopedia 'Product recall' 20 April 2018 available at:

[https://www.investopedia.com/terms/p/product\\_recall.asp](https://www.investopedia.com/terms/p/product_recall.asp) (accessed on 17 September 2018).

<sup>130</sup> Department of Trade and Industry, The Regulatory Debates, 7 March 2018, available at

<http://www.cgso.org.za/wp-content/uploads/2018/04/Final-Regulatory-Debates-March-2018.pdf> (accessed on 18 September 2018).

<sup>131</sup> Ahsan K 'Trend analysis of car recalls: Evidence from the US market' (2013) 4(4) *International journal of managing value and supply chains* 2.

<sup>132</sup> Legal Match 'What are product recalls?' 5 July 2018 available at: <https://www.legalmatch.com/law-library/article/what-are-product-recalls.html> (accessed on 1 October 2018).



defective and the vehicle would then pose a danger to everyone, including road users, the driver and passengers.

- 2) Design defect: the design of the product possesses some kind of danger or safety risk. For instance, a child's toy is designed with a sharp edge. This is unsafe and could cause harm to children. Similarly in a vehicle, the vehicle may have certain design features which turn out to be harmful. Design defects are said to be a leading cause of car accidents, especially in instances where the airbags are defective.<sup>133</sup>
- 3) Warning label defects: a warning label defect occurs when the warning label is defective because the label is missing, too small to read, misleading or difficult to understand. An example is government laws that require car manufacturers to have labels warning people about airbags.<sup>134</sup> In line with this, there is usually a warning in a car informing consumers not to put babies in their car seats on the front seat of the car because if the airbag activates in an accident, the child will be killed by the airbag, rather than the accident. Such a warning is critical for consumers because a new mom often puts her child next to her on the front seat of the car in the car seat thinking that she is acting responsibly.

This chapter focuses on what product recalls are and how they assist consumers. There will be a discussion on how product recalls are issued in the United States of America (USA), the United Kingdom (UK) and South Africa (SA). There have been many reports of product recalls in countries such as the USA and the UK. However, the concept of product recalls are fairly new in SA. For the purposes of this dissertation, vehicle recalls are the main focus. Thus, the process of recalling vehicles in the USA, the UK and SA will be explained.

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<sup>133</sup> Ken M Frankel 'Design defects are a leading cause of car accidents' available at <http://www.frankelinjurylaw.com/design-defects-are-a-leading-cause-of-car-accidents>, accessed on 20 November 2018.

<sup>134</sup> Quora 'Is there a law mandating airbag warning labels on car sun visors' 2013 available at <https://www.quora.com/Is-there-a-law-mandating-airbag-warning-labels-on-car-sun-visors> (accessed on 20 November 2018).

## **4.2. Product recalls in other jurisdictions**

As pointed out above, the issue of product recalls is a very recent introduction in South African law however, these have been relatively common in other jurisdictions. It is therefore useful to consider how and when these product recalls take place elsewhere in order to establish whether there are any lessons which can be learnt for SA. For this reason, product recalls in the USA and the UK will be considered. A company may discover problems with its products through a number of sources such as customer complaints, customer claims, news coverage, and regulatory agencies.<sup>135</sup> The decision to issue a recall depends on a number of factors such as whether the defects affect safety, the risk of physical harm to consumers, the involvement of regulatory agencies and the cost of the recall.<sup>136</sup>

### **4.2.1. The United States of America (USA)**

In the USA, there are certain agencies which are responsible for product recalls. These include:

- The Consumer Product Safety Commission (CPSC)
- The National Highway Traffic Safety Administration (NHTSA)

#### **4.2.1.1. Consumer Product Safety Commission (CPSC)**

In the USA, the Consumer Product Safety Commission (CPSC) is responsible for the safety of consumers generally. This commission is responsible for the regulation of the manufacture and sale of products utilised by the public.<sup>137</sup> The CPSC provides guidance on the general rules regarding product safety and when and how a product recall should

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<sup>135</sup> J E Simonsen and M Lippincott 'Product recalls and managing the risks of a defective product' 2018 available at [http://carrmaloney.com/elements/articles/PRODUCT\\_RECALLS.pdf](http://carrmaloney.com/elements/articles/PRODUCT_RECALLS.pdf) (accessed on 01 October 2018).

<sup>136</sup> Ibid.

<sup>137</sup> C S Balasubramaniam 'Products recalls in automobile industry – A comparison of international; practices versus India and emerging strategies' (2013) 2(2320-0076) *International monthly Referred Journal of Research in Management and technology* 54.

be issued.<sup>138</sup> There are also other federal agencies which have product safety and recall regulations that apply to specific categories of consumer products, over which the CPSC does not have jurisdiction.<sup>139</sup> The National Highway Traffic Safety Administration (NHTSA) is one such agency.<sup>140</sup>

#### **4.2.1.2. The National Highway Traffic Safety Administration (NHTSA)**

A manufacturer can voluntarily issue a recall or the NHTSA can issue a compulsory recall of the affected vehicles.<sup>141</sup> 'A vehicle recall may be issued when a manufacturer or the NHTSA discovers that a vehicle's equipment, car seat, or tyre creates an unreasonable safety risk or fails to meet the minimum safety standards.'<sup>142</sup> 'According to the United States Code for Motor Vehicle Safety (Title 49, Chapter 301), motor vehicle safety is defined as the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes non-operational safety of a motor vehicle.'<sup>143</sup> Thus, once the manufacturer or the NHTSA issues the recall, the manufacturer has to resolve the issues experienced by affected vehicle owners by repairing their vehicles, replacing

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<sup>138</sup> BakerMckenzie 'Global Product Recall handbook' 1 February 2018 available at [https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie\\_globalproductrecallhandbook\\_4thedition.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie_globalproductrecallhandbook_4thedition.pdf?la=en) (accessed on 05 October 2018).

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Sawaya Law Firm 'Recall rights: What rights do you have when your vehicle is recalled' September 2016 available at: <https://www.sawayalaw.com/2016/09/recall-rights-rights-vehicle-recalled/> (accessed on 03 October 2019).

<sup>142</sup> Safercar.gov 'Vehicle recalls: frequently asked questions' available at: <https://www.safercar.gov/staticfiles/rulemaking/pdf/Recalls-FAQ.pdf> (accessed on 03 October 2018).

<sup>143</sup> NHTSA 'Motor vehicle defects and safety recalls: What every vehicle owner should know' August 2017 available at <https://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf> (accessed on 05 October 2018).

them, offering consumers a refund, or in exceptional circumstances, repurchasing the vehicles.<sup>144</sup>

#### **4.2.1.2.1. The establishment of the NHTSA**

In respect of vehicle recalls in the United States, the National Highway Traffic safety Administration (NHTSA) plays an important role. The NHTSA is a federal agency that is responsible for the regulatory safety standards in vehicles that are manufactured and in matters dealing with the highway transportation system.<sup>145</sup> Its main aim is to reduce the number of injuries and fatalities caused by vehicle accidents and related costs.<sup>146</sup>

#### **4.2.1.2.2. The role of the NHTSA**

If a consumer suspects that their vehicle may be defective, they can report the matter to the NHTSA.<sup>147</sup> A complaint can be filed by contacting the Vehicle Safety hotline, by filing a complaint on the relevant website or sending a letter to the NHTSA.<sup>148</sup> After the NHTSA reviews the complaints that they have received, they may carry out an investigation.<sup>149</sup> Thereafter the NHTSA may issue a vehicle recall if it believes that it is necessary to do so.<sup>150</sup> Accordingly, consumer complaints can motivate a product recall to be issued where consumers suspect that their vehicles are defective but where the defects have not yet arisen.

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<sup>144</sup> Safercar.gov 'Vehicle recalls: frequently asked questions' available at:

<https://www.safercar.gov/staticfiles/rulemaking/pdf/Recalls-FAQ.pdf> (accessed on 03 October 2018).

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> NHTSA 'Motor vehicle defects and safety recalls: What every vehicle owner should know' August 2017 available at <https://www-odi.nhtsa.dot.gov/recalls/recallprocess.cfm> (accessed on 22 November 2018).

<sup>148</sup> Ibid.

<sup>149</sup> NHTSA 'Safety issues and recalls' 2018 available at <https://www.nhtsa.gov/recalls> (accessed on 22 November 2018).

<sup>150</sup> NHTSA 'File a vehicle safety complaint' available at <https://www.odi.nhtsa.dot.gov/VehicleComplaint/> (accessed on 22 November 2018).

There are four steps to the procedure that the NHTSA adopts. These are as follows:

- a) Screening: the NHTSA reviews the complaints that they receive from consumers who are concerned that their vehicles may be defective.<sup>151</sup> They also view other information which they have received and make a decision on whether or not to investigate the matter.<sup>152</sup>
- b) Analysis: the NHTSA carries out an analysis of any petitions for defective investigations.<sup>153</sup> Once the petition is granted then an investigation will begin.<sup>154</sup> However, where a petition is not granted reasons for such denial are published in the Federal Register.<sup>155</sup>
- c) Investigation: an investigation is opened by the NHTSA regarding safety defects.<sup>156</sup> The manufacturer is given the opportunity to present their views on the alleged defect.<sup>157</sup> Investigations are most often solved within twelve months from the date which they have begun.<sup>158</sup> The investigation is closed when the manufacturer is notified and a recall is recommended or when no safety related defect is identified.<sup>159</sup>
- d) Recall Management: 'the Recall Management Division (RMD) maintains the administrative records for all safety recalls, and monitors the recalls to ensure that

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> NHTSA 'Motor vehicle defects and safety recalls: What every vehicle owner should know' August 2017 available at: <https://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf> (accessed on 05 October 2018).

<sup>155</sup> NHTSA 'Safety issues and recalls' 2018 available at <https://www.nhtsa.gov/recalls> (accessed on 03 October 2018).

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> NHTSA 'Motor vehicle defects and safety recalls: What every vehicle owner should know' August 2017 available at <https://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf> (accessed on 05 October 2018).

<sup>159</sup> NHTSA 'Safety issues and recalls' 2018 available at <https://www.nhtsa.gov/recalls> (accessed on 03 October 2018).

the scope is appropriate and that recall completion rate and remedy is adequate.<sup>160</sup> The NHTSA reviews complaints from concerned vehicle owners and other information which they have been given.<sup>161</sup> Thereafter they decide whether or not to open an investigation.<sup>162</sup>

#### **4.2.1.3. Notification to consumers about recalls**

Once the manufacturer issues a recall of certain vehicles, consumers who have purchased those vehicles are notified of the recall in the mail.<sup>163</sup> There are various rights which consumers have if their vehicles are affected by the recall issued by the manufacturer which include:<sup>164</sup>

- a) Consumers should be notified of the recall in writing.
- b) Consumers should be notified how the problem will be resolved and the time it will take to remedy the problem.
- c) Repairs made to affected vehicles should be done at no cost to consumers.
- d) Relevant contact information should be made available to consumers.

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<sup>160</sup> NHTSA 'Motor vehicle defects and safety recalls: What every vehicle owner should know' August 2017 available at: <https://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf> (accessed on 05 October 2018).

<sup>161</sup> NHTSA 'Safety issues and recalls' 2018 available at <https://www.nhtsa.gov/recalls> (accessed on 03 October 2018).

<sup>162</sup> Ibid.

<sup>163</sup> Sawaya Law Firm 'Recall rights: What rights do you have when your vehicle is recalled' September 2016 available at <https://www.sawayalaw.com/2016/09/recall-rights-rights-vehicle-recalled/> (accessed on 03 October 2019).

<sup>164</sup> Ibid.

#### **4.2.1.4. Laws pertaining to defective vehicles in the USA**

Motor Vehicle Defects Law deal with the protection of vehicle owners.<sup>165</sup> If vehicles are defective, they should be repaired or replaced at no cost to the consumers.<sup>166</sup> In terms of Lemon Laws, if vehicles have been repaired a number of times, then the owner is empowered to have their vehicles replaced.<sup>167</sup> This would be a vehicle that either has a substantial defect or where an intolerable number of failed repairs have been conducted on the vehicle.<sup>168</sup> There are no laws which deal with circumstances where consumers suspects that their vehicles are defective, but where the defects have not yet manifested themselves. Thus, initiating a vehicle recall would be the most appropriate option for consumers who suspect that their vehicles may be defective. This can be done by filing a complaint with the NHTSA who can take action in such instances.

#### **4.2.2. Product recalls in the United Kingdom**

As in the USA, a product recall for safety reasons in the United Kingdom, is a precautionary action taken by manufacturers when they identify a significant safety issue with regards to a product that has been sold to consumers.<sup>169</sup> This action is taken where there is a design or construction defect which could cause serious injury or even death to consumers.<sup>170</sup> The manufacturer has to make arrangements to repair the affected

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<sup>165</sup> Find Law 'What is motor vehicle defect law?' 2018 available at <https://hirealawyer.findlaw.com/choosing-the-right-lawyer/motor-vehicle-defects.html> (accessed on 22 November 2018).

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Find Law 'How the new car Lemon Law can help you?' 2018 available at <https://consumer.findlaw.com/lemon-law/how-the-new-car-lemon-law-can-help-you.html> (accessed on 22 November 2018).

<sup>169</sup> DVSA 'A guide to safety recalls in the used vehicle industry' 14 April 2014 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf) (accessed on 11 October 2018).

<sup>170</sup> Ibid.

product, replace it or refund the consumer.<sup>171</sup> The manufacturer will also have to contact consumers who have purchased such products and where possible, publish a notice to announce the risks that those products pose and state what they intend to do to resolve the matter.<sup>172</sup>

The following legislation and agencies deal with product recalls:

- The General Product Safety Regulations 2005 (GPSR)
- The Driver and Vehicle Standards Agency (DVSA)
- The Vehicle Safety Branch (VSB)

#### **4.2.2.1. The General Product Safety Regulations 2005 (GPSR)**

The General Product Safety Regulations 2005 (GPSR) has been implemented into the United Kingdom law by the European Union's General Product Safety Directive 2001/95/EC.<sup>173</sup> If the supplier discovers that they have placed an unsafe product on the market or they have supplied such products to EU markets, they will have to inform the competent authorities in those affected countries and have those products removed.<sup>174</sup> There are certain product specific regimes which exist in the UK regarding recalls.<sup>175</sup> An example of this would be the motor vehicle industry.<sup>176</sup>

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<sup>171</sup> Gov UK 'Product recall' 23 June 2017 available at: <https://www.gov.uk/government/news/product-recall> (accessed on 11 October 2018).

<sup>172</sup> Ibid.

<sup>173</sup> BakerMckenzie 'Global Product Recall handbook' 1 February 2017 available at [https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie\\_globalproductrecallhandbook\\_4thedition.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie_globalproductrecallhandbook_4thedition.pdf?la=en), (accessed on 05 October 2018).

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.



#### 4.2.2.2. The Driver and Vehicle Standards Agency (DVSA)

The Driver and Vehicle Standards Agency (DVSA) is an executive agency of the Department for transport.<sup>177</sup> Suppliers are required to notify the DVSA of any issues which deal with products that may be unsafe and which may result in a recall.<sup>178</sup> The DVSA has published two codes of practice and separate guidelines regarding product safety.<sup>179</sup> These codes are:

- The Code for practice for Vehicles Safety Defects and Recalls: this code sets out what should happen when manufacturers become aware of potential safety defects in vehicles.<sup>180</sup>
- The Code of practice on safety defects and recalls in the vehicles aftermarket: this code sets out what should happen when manufacturers become aware of potential safety defects in aftermarket parts available for supply in the United Kingdom.<sup>181</sup>

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<sup>177</sup> DVSA 'A guide to safety recalls in the used vehicle industry' 14 April 2014 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf) (accessed on 11 October 2018).

<sup>178</sup> DVSA 'Manufacturers guide to recalls in the UK automobile industry' April 2014 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302389/manufacturers-guide-to-recalls-in-the-uk-automotive-sector.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302389/manufacturers-guide-to-recalls-in-the-uk-automotive-sector.pdf) (accessed on 11 October 2018).

<sup>179</sup> BakerMckenzie 'Global Product Recall handbook' 1 February 2018 available at [https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie\\_globalproductrecallhandbook\\_4thedition.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie_globalproductrecallhandbook_4thedition.pdf?la=en) (accessed on 05 October 2018).

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

#### **4.2.2.3. The Vehicle Safety Branch (VSB)**

The DVSA has a dedicated team, the Vehicle Safety Branch (VSB), which deals with safety defects and recall matters relating to the automotive industry.<sup>182</sup> The VSB will request that the producer and/or distributor begins an enquiry in circumstances where there is sufficient evidence that a safety defect exists and where a significant number of vehicles have been affected.<sup>183</sup> They have a safety recall database which they use to record information relating to recalls which have been issued by manufacturers.<sup>184</sup> The VSB must check that all those in the supply chain are informed of their responsibilities when it comes to safety recalls.<sup>185</sup>

#### **4.2.2.4. Laws regarding defective products in the UK**

In terms of the Consumer Rights Act 2015, consumers are entitled to return defective products within 30 days from which they purchased the product and they will also be refunded the amount paid.<sup>186</sup> If the product proves to be defective within six months from which it was purchased then it can be returned to the supplier for repairs or

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<sup>182</sup> DVSA 'A guide to safety recalls in the used vehicle industry' 14 April 2014 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf) (accessed on 11 October 2018).

<sup>183</sup> Ibid.

<sup>184</sup> Gov UK 'Vehicle Safety Branch Recall database' 12 December 2013 available at <https://data.gov.uk/dataset/18c00cf3-3bb2-4930-b30d-78113113aaa7/vehicle-safety-branch-recalls-database> (accessed on 22 November 2018).

<sup>185</sup> DVSA 'A guide to safety recalls in the used vehicle industry' 14 April 2014 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302344/guide-to-safety-recalls-used-vehicle-industry.pdf) (accessed on 04 December 2018).

<sup>186</sup> The Money Advice Service 'Your rights if something is wrong with your car' available at <https://www.moneyadvice.org.uk/en/articles/your-rights-if-something-is-wrong-with-your-car>, accessed on 22 November 2018.

replacement.<sup>187</sup> If the defect emerges within the six month period, the supplier is tasked with the burden of proof that the product was not defective when it was purchased.<sup>188</sup> After the six month period, the consumer will have to prove that a defect exists in the product and the consumer can choose if they want the product to be repaired, replaced or to obtain a partial refund.<sup>189</sup> From this discussion, it can be seen that the product has to be defective in order for the remedies under the legislation to apply. From the perspective of this dissertation, this causes problems for consumers in circumstances where they merely have a suspicion that their vehicles are defective. The law does not extend any protection to consumers who are concerned that products may be defective.

### **4.3. Product recalls in South Africa**

As discussed above, product recalls are new to South Africa but certain agencies and laws have been introduced to deal with the issue.

#### **4.3.1. The agencies responsible for product recalls**

There are two agencies which are responsible for product recalls in South Africa. These are:

- The National Regulator for Compulsory Specifications (NRCS)
- The National Consumer Commission (NCC)

##### **4.3.1.1. National Regulator for Compulsory Specifications (NRCS)**

The National Regulator of Compulsory Specifications Act,<sup>190</sup> deals with product specific specifications and standards which apply to a wide range of products, such as motor

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<sup>187</sup> Alcock 'How to complain; Bad service or dodgy goods? Don't take it lying down' 1 November 2017 available at <https://www.moneysavingexpert.com/shopping/how-to-complain/> (accessed on 22 November 2018).

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> 5 of 2008.

vehicles.<sup>191</sup> Before vehicles can be sold in South Africa, they need to pass the National Regulator for Compulsory Specifications (NRCS) homologation process, which includes safety critical considerations.<sup>192</sup> In addition, the Chief Executive Officer (NRCS) may issue a product recall for products that do not meet the required specifications.<sup>193</sup> This government authority can organise a recall for the affected products where the supplier has not already done so.<sup>194</sup>

#### **4.3.1.2. The National Consumer Commission (NCC)**

The NCC conducts investigations when it is of the view that suppliers have engaged in conduct which is prohibited under the CPA and it tries to resolve matters relating thereto.<sup>195</sup> The NCC can issue a product recall if upon investigation, it is found that the affected products are unsafe for consumers to utilise.<sup>196</sup>

#### **4.3.2. Applicable laws**

Laws relating to product recalls in South Africa can be found in the following:

- The Consumer Protection Act (CPA)

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<sup>191</sup> Van Eeden, Rabie & Van Wyk 'Getting the deal through; Product recall' available at <https://gettingthedealthrough.com/area/31/jurisdiction/2/product-recall-south-africa/>, accessed on 13 November 2018.

<sup>192</sup> CarMag 'How vehicle recalls work and who enforces them' 24 November 2017 available at <https://www.carmag.co.za/technical/technical/how-vehicle-recalls-work-and-who-enforces-them/> (accessed on 19 November).

<sup>193</sup> Van Eeden, Rabie & Van Wyk 'Getting the deal through; Product recall' available at <https://gettingthedealthrough.com/area/31/jurisdiction/2/product-recall-south-africa/> (accessed on 13 November 2018).

<sup>194</sup> Ibid.

<sup>195</sup> Credit Ombud 'Are you having a consumer dispute? Know the right ombud to approach' 2 June 2018 available at <http://www.creditombud.org.za/are-you-having-a-consumer-dispute-know-the-right-ombudsman-to-approach/> (accessed on 21 November).

<sup>196</sup> Department of Trade and Industry, The Regulatory Debates, 7 March 2018, available at <http://www.cgso.org.za/wp-content/uploads/2018/04/Final-Regulatory-Debates-March-2018.pdf> (accessed on 18 September 2018).

- The Consumer Product Safety Recall Guidelines (created in response to the CPA)

#### **4.3.2.1 The Consumer Protection Act (CPA)**

Section 60 of the CPA promotes safety monitoring and deals with product recalls which seek to rid the marketplace of goods which are unsafe or hazardous to consumers.<sup>197</sup>

Section 60 (1) provides that:

'The Commission must promote, within the framework of section 82, the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to –

- a) Receive notice of -
  - i) Consumer complaints and reports of product failures, defects or hazards;
  - ii) The return of any goods because of a failure, defect, or hazard;
  - iii) Personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect, or hazard; and
  - iv) Other indication of failure, defect or hazard in any particular goods or in any component of them, or injury or damage resulting from the use of those goods.
- b) Monitor the sources of information contemplated in paragraph (a) and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;
- c) Conduct investigations into the nature, causes, extent and degree of the risk to the public;
- d) Notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and

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<sup>197</sup> De Stadler 'Section 60' in Naude and Eiselen (eds) Commentary on the Consumer Protection Act (Original Service 2014) para 1.

e) If the goods are unsafe, recall those goods for repair, replacement or refund.’

According to subsection (2):

‘If the Commission has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code contemplated in subsection (1), the Commission by written notice, may require that producer to –

- a) Conduct an investigation as contemplated in subsection (1); or
- b) Carry out a recall programme on any terms required by the Commission.’

However, in terms of subsection (3), ‘the producer or importer affected by a notice issued in terms of subsection (2) may apply to the National Consumer Tribunal to have the notice set aside in whole or in part.’

Section 60 has been introduced into the CPA to create a change in mind set. Instead of focusing on a system of liability imposed on suppliers that introduce unsafe, defective or hazardous products into the market, the focus should be on detection and prevention.<sup>198</sup> In line with this, there are product recall guidelines which have been created in terms of section 60, which set out what suppliers must do when they become aware of a safety issue which requires the issuing of a product recall or when the NCC orders a mandatory product recall.<sup>199</sup> From this it can be seen that a product recall may be issued voluntarily by the supplier or at the request of the NCC.<sup>200</sup>

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<sup>198</sup> Gold L and Anderson A ‘Product recalls’ (2012) *Without Prejudice* 49.

<sup>199</sup> *Ibid.*

<sup>200</sup> Department of Trade and Industry, The Regulatory Debates, 7 March 2018, available at <http://www.cgso.org.za/wp-content/uploads/2018/04/Final-Regulatory-Debates-March-2018.pdf> (accessed on 12 October 2018).

#### 4.3.2.2. The Consumer Product Safety Recall Guidelines

According to the guidelines, the supplier is responsible for the supply of safe products for consumers to utilise.<sup>201</sup> Suppliers include all those in the supply chain, that is, manufacturers, importers, distributors and retailers.<sup>202</sup> Suppliers have the following general responsibilities when it comes to dealing with product recalls.<sup>203</sup> They must:<sup>204</sup>

- ‘conduct a comprehensive risk analysis of the safety hazard;
- stop distributing a product that has been identified for recall;
- cease producing or modifying the manufacturing process for a product that has been identified for recall;
- remove unsafe products from the marketplace;
- notify any relevant regulators;
- notify the public;
- notify international product recipients;
- notify others in the domestic supply chain;
- facilitate the return of recalled products from consumers;
- store and dispose of recalled products safely;
- have a written recall strategy/plan;
- maintain records and establish procedures that will facilitate a recall; and
- provide progress reports on the conduct of the recall to the Commission and relevant regulators.’

The aim of communicating with consumers about a recall is to safeguard against injuries which consumers could sustain through the use of unsafe products, by removing or

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<sup>201</sup> GN 490 of GG 35434, 13 June 2012, 6.

<sup>202</sup> Ibid 6.

<sup>203</sup> Ibid 7.

<sup>204</sup> Ibid 7.

rectifying such products.<sup>205</sup> Information regarding the recall should be placed on the supplier's website promptly.<sup>206</sup>

Manufacturers often try their best to resolve the issues which surrounds the reason for the recall, however sometimes the process can be hindered because they are unable to contact owners of affected vehicles or where there are not enough new parts to replace the defective ones.<sup>207</sup> This could result in a number of dangerous vehicles on the roads.<sup>208</sup> This is why the plan for public notification is fundamental and could impact directly on the outcome of the recall.<sup>209</sup> There are various methods which can be used to notify the public of a recall.<sup>210</sup> Barnard and Van Heerden state that, the method of public notification that will be most efficient will be determined by the specific consumer market and vulnerable consumers affected must be considered.<sup>211</sup> For instance, in the case of a vehicle recall, direct notification can be provided to affected vehicle owners, owners can be informed by placing information on the supplier's website, information can be made available to consumers on social media, recall posters or pamphlets can be presented at affected dealerships, advertisements can be featured on the television or even billboards can be presented along the roads which inform consumers about the recall.<sup>212</sup>

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<sup>205</sup> Ibid 13.

<sup>206</sup> Ibid 14.

<sup>207</sup> Polity 'Vehicle recalls: Corporate and consumer responsibilities' 18 May 2018 available at <http://www.polity.org.za/article/vehicle-recalls-corporate-and-consumer-responsibilities-2018-05-18> (accessed on 11 November 2018).

<sup>208</sup> Ibid.

<sup>209</sup> Department of Trade and Industry, The Regulatory Debates, 7 March 2018, available at <http://www.cgso.org.za/wp-content/uploads/2018/04/Final-Regulatory-Debates-March-2018.pdf> (accessed on 12 October 2018).

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.



According to the guidelines, when the supplier discovers that a product could be hazardous and that it may result in injury to a person, the supplier must conduct an investigation promptly.<sup>213</sup> The following steps should be followed for this assessment:<sup>214</sup>

- all available information about the potential hazard should be gathered and assessed;
- how the problem occurred must be identified;
- a comprehensive risk analysis must be conducted; and
- possible ways to address the safety related hazard must be considered and the supplier must decide whether the product can be repaired or modified.

Depending on the results of the risk analysis carried out by the supplier, there are various ways in which the supplier may opt to diminish a safety related hazard.<sup>215</sup> These include the following:<sup>216</sup>

- 'calling back or withdrawing of products from the market or distribution chain;
- requesting consumers or other suppliers:
  - i) to return products for refund, replacement or modification; or
  - ii) to contact the supplier to arrange for a replacement product or part to be sent to the consumer, or
- sending a service agent to a person's home or place of business to repair or modify a product; or
- requesting a service agent to repair or modify a product when it is next presented for servicing.'

From the perspective of this dissertation, vehicles which are found to be defective within the first six months of the sale of the vehicle should be replaced or repaired by the supplier or consumers should be refunded their purchase price. This is in line with section 56 of the CPA which gives the consumer a choice of remedy. If the defect emerges after the

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<sup>213</sup> GN 490 of GG 35434, 13 June 2012, 8.

<sup>214</sup> Ibid 8.

<sup>215</sup> Ibid 8.

<sup>216</sup> Ibid 8 & 9.

six month period, the supplier may elect to repair the vehicle at no cost to the consumer, but in more serious cases, the vehicles should be replaced.<sup>217</sup> This would be in line with the common law relating to latent defects which gives consumers three years in which to raise the issue of a latent defect. Vehicle warranties often include provisions which state that the manufacturer or seller is permitted to repair or replace any defective parts in the vehicle which they have sold.<sup>218</sup> As a result of the introduction of section 56 of the CPA, it is submitted that this can only apply if the defect emerges after the six month implied warranty period. However, it has been suggested that in circumstances where there is no way to repair the vehicle, the supplier should provide the consumer with some kind of compensation.<sup>219</sup> Again it is submitted that this can only apply if the defect emerges after the six month implied warranty period. In terms of the Ford Kuga saga, Ford has offered to pay owners for the financial losses that they had suffered as a result of the defective vehicles.<sup>220</sup> This was because the consumer's vehicles had already burst into flames and there was no way that Ford could repair it at this stage. It is often the case that suppliers will repair vehicles by replacing the defective parts with new parts. This is still a very scary thought for consumers as they will have to drive around in vehicles which they do not know for certain is defect free. Consumers are merely informed by suppliers that their vehicles have been fixed and it can be utilised. Accordingly, it is questionable whether these vehicles possess defects any longer. Vehicles are expensive assets which

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<sup>217</sup> Polity 'Vehicle recalls: Corporate and consumer responsibilities' 18 May 2018 available at <http://www.polity.org.za/article/vehicle-recalls-corporate-and-consumer-responsibilities-2018-05-18> (accessed on 11 November 2018).

<sup>218</sup> Bracher P and Reitz D 'Product recall; the best of recollection' (2010) *Risk Management* 34-35.

<sup>219</sup> Polity 'Vehicle recalls: Corporate and consumer responsibilities' 18 May 2018 available at <http://www.polity.org.za/article/vehicle-recalls-corporate-and-consumer-responsibilities-2018-05-18>, (accessed on 11 November 2018).

<sup>220</sup> Knowler 'Ford offers Kuga owners settlements ahead of consumer commission report' 12 April 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-04-12-ford-offers-settlements-to-kuga-owners-as-consumer-commission-readies-report/> (accessed on 16 November 2018).

consumers purchase and it is unlikely that suppliers will refund or replace the vehicles.<sup>221</sup> This becomes a concern for consumers as they often take out loan agreements in order to purchase their vehicles. Consumers are placed in a situation where they are in possession of a vehicle which they no longer want. Accordingly, in terms of section 56 of the CPA, as discussed in Chapter Three, consumers should be entitled to return their vehicles and receive a refund of the price which they paid or a replacement of their vehicles, in circumstances where the manufacturer or the NCC has recalled their vehicles because they are defective, that being that it is within six months of which the consumers have purchased their vehicles.

As indicated by the analysis done in terms of the common law and the CPA in chapters two and three, it can be deduced that consumers are entitled to return their vehicles if they are defective. However, the onus is on consumers to prove that their vehicles are indeed defective. Consumers cannot merely allege that they have potentially defective vehicles and that they want to be refunded. Accordingly, consumers cannot initiate a recall on their own. Consequently, a vehicle recall is the best option for those who suspect their vehicles are defective but where the defects have not yet manifested themselves. In terms of the laws pertaining to recalls, it is either the manufacturer or a relevant agency who can initiate a recall. Consumers will have to rely on the manufacturer or the NCC to issue a vehicle recall. It is suggested that consumers may be able to use social media to raise sufficient awareness to ensure that the manufacturer or NCC takes action to remedy the problem. However, consumers will have to be careful how they do this because defamatory posts could have serious legal consequences for consumers.<sup>222</sup> An example of the power of social media may be in found in the recent insurance saga concerning Momentum Life, an insurance company and Mrs Ganas whose husband had died in a

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<sup>221</sup> McQuire 'Bought a 'problem car'? Here are your options' 16 August 2018 available at [https://www.cars.co.za/motoring\\_news/bought-a-problem-car-here-are-your-options/45398/](https://www.cars.co.za/motoring_news/bought-a-problem-car-here-are-your-options/45398/) (accessed on 21 November 2018).

<sup>222</sup> Making use of social media is suggested as a means of gathering sufficient support for a problem to ensure that suppliers or authorities take action. As stated above, consumers will have to be careful how they do this because of laws relating to defamation. A full discussion of this issue is beyond the scope of this mini-dissertation.

home invasion at their home. Momentum did not want to pay out the insurance claim because Mrs Ganas's husband had not disclosed his medical condition when he took out the insurance policy; he suffered from high blood sugar.<sup>223</sup> The approach adopted by Momentum ignited an unexpected response on social media where many clients stated that they would cancel their policies if Momentum persisted with its approach.<sup>224</sup> As a result of consumer pressure, Momentum has changed their policies where they will pay out death benefits where the insured has been killed because of a violent crime, even though the deceased had not provided them with the full facts regarding their medical history.<sup>225</sup> This shows how powerful social media is and how it can get an entity to take action. In line with such an approach, consumers who become aware of reports about defective vehicles which are similar to theirs, but where they do not know if their vehicles are defective, can contact the manufacturer or dealer which they have purchased their vehicles from and view their concerns regarding the matter.<sup>226</sup> If consumers are unsuccessful and the manufacturer or dealer does not take any action, then they can refer the matter to the Motor Vehicle Ombudsman of South Africa (MIOSA).<sup>227</sup> MIOSA deals with matters regarding the automobile industry and attempts to resolve the problems between suppliers and consumers.<sup>228</sup> This could possibly be a way to motivate the NCC to deal with the matter and initiate a vehicle recall.

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<sup>223</sup> Zulu 'Widow in Momentum saga approaches ombudsman for long term insurance' 20 November 2018 available at <https://ewn.co.za/2018/11/20/widow-in-momentum-saga-approaches-ombudsman-for-long-term-insurance> (accessed on 22 November 2018).

<sup>224</sup> Mjo 'Momentum's new policy sparks mixed reactions on Twitter' available at <https://www.timeslive.co.za/news/2018-11-21-momentums-new-policy-sparks-mixed-reactions-on-twitter/>, accessed on 22 November 2018.

<sup>225</sup> Ibid.

<sup>226</sup> McQuire 'Bought a 'problem car'? Here are your options' 21 November 2018 available at [https://www.cars.co.za/motoring\\_news/bought-a-problem-car-here-are-your-options/45398/](https://www.cars.co.za/motoring_news/bought-a-problem-car-here-are-your-options/45398/) (accessed on 21 November 2018).

<sup>227</sup> Ibid.

<sup>228</sup> MIOSA 'MIOSA constitution' 2004 available at <https://www.miosa.co.za/constitution1.htm> (accessed on 21 November 2018).

The determination on the most appropriate step to be taken to minimise the risk to consumers will depend on various factors, such as the nature of the risk, the distribution and lifecycle of the product.<sup>229</sup> Suppliers should seek advice from the commission regarding the most appropriate strategy to be taken.<sup>230</sup>

According to the guidelines, suppliers must notify the commission in writing within two days of initiating a product recall.<sup>231</sup> They are also responsible for goods supplied outside of South Africa which are to be recalled.<sup>232</sup> In addition, suppliers must inform the relevant recipients of the goods in writing.<sup>233</sup> Thereafter, a copy of the notice must be sent to the NCC within ten days after it has been provided.<sup>234</sup>

Suppliers must submit a recall strategy to the NCC on initiating a recall.<sup>235</sup> The recall strategy must consist of the following elements:<sup>236</sup>

- 'An explanation of the problem, including the hazard associated with the product and the suppliers assessment of the risk posed by the product;
- The number of units supplied to consumers and others in the supply chain;
- Information about any known injuries or incidents associated with the product;
- Information about the life cycle of the product;
- Information about the proposed communication with consumers, including the method of communication, frequency with which the communication will be repeated and details of the message. This should be negotiated with the Commission;

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<sup>229</sup> GN 490 of GG 35434, 13 June 2012, 9.

<sup>230</sup> Ibid 9.

<sup>231</sup> Ibid 10.

<sup>232</sup> Ibid 11.

<sup>233</sup> Ibid 11.

<sup>234</sup> Ibid 11.

<sup>235</sup> Ibid 12.

<sup>236</sup> Ibid 12.

- Information about the way in which the supplier will manage contact from consumers about the recalled product, including any complaint handling procedures;
- Information about the manner in which the recalled product will be collected, destroyed or rectified;
- Contact details of the manufacturer and/or importer of the product;
- Contact details of other entities in the supply chain to whom the recalling supplier has supplied the product;
- Contact details of international product recipients; and
- Action taken by the supplier to identify and correct the cause of the hazard, including the root cause analysis or the time period in which such analysis will occur.’

Suppliers are required to furnish the Commission with reports on the progress of the recall in order to determine its effectiveness.<sup>237</sup> Once suppliers have taken all reasonable steps to effectively mitigate the risk posed by the unsafe product, the recall can be closed.<sup>238</sup> Thus, suppliers do not need to promote the recall any longer.<sup>239</sup> However, consumers can access information about the recall from the supplier’s website.<sup>240</sup>

#### **4.4. Conclusion**

The CPA has provided a significant remedy for consumers who are in possession of a vehicle which may be defective, that being the issue of product recalls. This is probably the most appropriate way for consumers in such circumstances to resolve their problem. This is because there are no other laws which assist consumers who suspect that they may have a defective vehicle. The vehicle must in fact be defective for the common law or laws under the CPA to apply. This proves to be the same in the USA and UK. Accordingly, consumers may also not be able to recover the purchase price of their

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<sup>237</sup> Ibid 15.

<sup>238</sup> Ibid 16.

<sup>239</sup> Ibid 16.

<sup>240</sup> Ibid 16.

vehicle and there is no guarantee that the repairs carried out for the vehicle are conclusive. Furthermore, consumers cannot issue a recall on their own and require the manufacturer or the relevant entity to do so. However, consumers can take steps to motivate for a product recall, as discussed above. Consumers can complain to suppliers regarding the matter, if that does not prove to be successful, consumers are advised possibly to air their concerns on social media which may encourage suppliers or the authorities to take action.

It can be deduced from the analysis done on recalls in the United States of America and the United Kingdom that they have specific regimes which deal with vehicle recalls. However, South Africa does not have a separate regime or regulator that specifically regulates motor vehicle recalls.<sup>241</sup> The CPA and the NRCS deals with product recalls in general. Thus, it extends to vehicle recalls and how those should be issued effectively in the country. Nevertheless, there should be a separate regime assigned for vehicle recalls as it has become a major concern over the years, as discussed in Chapter One of this dissertation. In addition, this would enable South Africa to fit in with international standards.

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<sup>241</sup> BakerMckenzie 'Global Product Recall handbook' 1 February 2018 available at [https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie\\_globalproductrecallhandbook\\_4thedition.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/bakermckenzie_globalproductrecallhandbook_4thedition.pdf?la=en) (accessed on 11 November 2018).

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Conclusion

Prior to the enactment of the CPA, there were common law remedies which were available to consumers who had purchased defective products and these claims would be against the relevant entity in the supply chain. This protection would extend to defective vehicles and falls under the law of sale and the law of delict.<sup>242</sup> However, proof that the vehicle is defective is necessary.<sup>243</sup> From the perspective of this dissertation, this is not possible as consumers are in possession of vehicles where the defects have not yet manifested themselves.

As indicated by Woker, there was a need for the introduction of the CPA for various reasons.<sup>244</sup> The CPA has made some important changes in the law to enable better protection to consumers in the commercial sector. Section 55 provides consumers with the right to safe, good quality goods; a right which they are not afforded under common law.<sup>245</sup> However the consumer will still have to prove that the vehicle is defective as indicated by the definition set out in section 53 of the Act.

Section 56 also affords certain rights to consumers who purchase goods where defects manifest themselves within six months of the consumer buying the goods. This means that there is an implied warranty given to consumers regarding the quality of the goods.<sup>246</sup>

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<sup>242</sup> C Kriek *The Scope of liability for Product defects under the South African Consumer Protection Act 68 of 2005 and Common Law - A comparative Analysis* (LLD thesis, Stellenbosch University, 2017) 36.

<sup>243</sup> Barnard J "The influence of The Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" (2012) *De Jure* 457.

<sup>244</sup> Woker TA "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer protection Act" (2010) 31(2) *Obiter* 217.

<sup>245</sup> Naude T "The Consumers right to safe, good quality goods and the implied warranty of quality under Section 55 of the Consumer Protection Act 68 of 2008" (2011) 23 *SA Mercantile Law Journal* 340.

<sup>246</sup> Schoeman 'Short notes on: The Consumer Protection Act: returns, implied warranties and deposits paid by customers' March 2012 available at <https://www.schoemanlaw.co.za/wp->



Consumers have this remedy in addition to their common law remedies and the warranties given by suppliers.<sup>247</sup> Consumers can utilise the remedies provided under this section but they still have to show that their particular vehicles are defective. In terms of section 61 of the Act, any entity in the supply chain can be held liable for the defective vehicles.<sup>248</sup> All these remedies assist consumers who have defective vehicles, however this does not apply to vehicles where consumers merely have a suspicion that their vehicles may be defective.

The most suitable option for consumers who are in possession of vehicles which may be defective is a recall of their vehicles. Section 60 of the Act has been introduced to deal with product recalls. However, a recall of the vehicles can only be issued by the relevant entities. It is a daunting challenge for consumers to get entities to take action as seen in the Ford Kuga saga where the family of a man who lost his life when his Ford Kuga burst into flames, have been waiting for over three years to have the matter investigated.<sup>249</sup> If a matter of such calibre has taken so long to resolve, it is unlikely that consumers who have concerns that their vehicles may be defective will get assistance. This is a real and problematic issue for consumers, especially with the increase in the number of reported cases of vehicles which are defective. Consumers can try to motivate for a vehicle recall by complaining to the supplier of their vehicles. If they are unsuccessful in this regard and the supplier does not take any steps to remedy the problem, the only practical option will be for consumers to make their concerns known on social media. This will hopefully put pressure on the responsible entities involved to take action. The case involving Momentum discussed in Chapter Four is an example of the power of social media.

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content/uploads/2012/03/Website-article>Returns-and-the-Consumer-Protection-Act-ha-edit-v1-260312.pdf (accessed on 5 December 2018).

<sup>247</sup> Ibid.

<sup>248</sup> Govinden K "One step forward, two steps back" (2014) *Without prejudice* 36.

<sup>249</sup> Gous 'AfriForum wades into family's battle with Ford over deadly Kuga fire' 21 November 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-11-21-afriforum-wades-into-familys-battle-with-ford-over-deadly-kuga-fire/> (accessed on 7 December 2018).

## 5.2. Recommendations

The following recommendations are proposed:

- As illustrated in Chapter Three, the remedies afforded to consumers under the CPA only apply to defective vehicles. These remedies would not benefit consumers who merely suspect that their vehicles are defective but where the defects have not yet manifested themselves. It is recommended that this is an issue which bears further consideration and the government should provide some kind of protection under the CPA for consumers who have such concerns. Driving a potentially defective vehicle could pose a serious danger to the lives of consumers. The need to take action is necessary in order to prevent future possible harm to consumers when there is evidence that vehicles may be defective.
- The government could enact some laws which allow consumers who believe that their vehicles are defective to take it to the supplier for a test to check if the vehicle is in fact defective. This would extend some rights to consumers who have such concerns. This should be done free of charge for consumers.
- An independent entity, other than MIOSA, should be created in SA, like in the USA and UK which deals solely with matters which relate to vehicles which may be defective. There should be contact details which consumers can use to contact them if they have any complaints. They could have a website where consumers can air their concerns. Consumers can also be given the email address, telephone number and postal address of the regulator so that consumers can contact them. This is in line with how the USA deals with such complaints.

In conclusion it is re-iterated that purchasing a motor vehicle is one of the most expensive purchases consumers will make in their lifetimes. Defective vehicles pose a serious hazard not only to the driver of the vehicle but also to other road users. Given the potential for damage which a defective vehicle can cause, it is necessary to have stringent and specialist rules relating to product recalls when it comes to vehicles which are suspected of being defective, rather than simply dealing with this issue under general product recall rules. It is suggested that specialist rules dealing with defective vehicles should be drafted

which give clear guidelines to consumers, dealers and manufacturers regarding the process which needs to be followed when it emerges that a particular make of vehicle may have defect especially in circumstances where those defects pose a danger to property and life.

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## Annexure A: Ethical Clearance Certificate



12 November 2018

Ms Pranisha Maharaj (214514516)  
School of Law  
Howard College Campus

Dear Ms Maharaj,

Protocol reference number: HSS/2059/018M

Project title: Examining the rights of consumers who may have purchased defective vehicles

**Full Approval – No Risk Exempt Application**

In response to your application received on 26 September 2018, 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

.....  
Professor Shenuka Singh (Chair)

/ms

Cc Supervisor: Professor T Woker  
cc Academic Leader Research: Dr Donrich Thaldar  
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

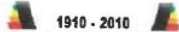
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