Table of Contents

Part A

Chapter 1: General Introduction

Chapter 1 is the roadmap to this study: it gives background on the concept of product liability, its general evolution and underlying policy principles as well as its specific development in the USA where it was pioneered, in order to contextualise the discussion in the chapters that follow. The chapter further provides information on the research statement, objectives, and delineations of the thesis; motivates the rationale for the selection of the European Union and Australia as comparative jurisdictions, and sets out the research methodology and chapter lay-out.

1. Introduction

Our daily lives are filled to the brim with products that we are exposed to and which we need to navigate our way on this planet in order to define ourselves and facilitate our existence: we live in houses; drive cars; wear clothes made from different textiles; eat processed food; use electricity, toasters, stoves, heaters, hairdryers, televisions, computers and mobile phones; drink medicine when we are ill; have operations performed with laser, and so the list goes on. Every hour of our lives we are exposed to products, actively or passively, not only during our waking hours but also when we are asleep, while the air conditioner turns in the background, the electric blanket or heater remains on to starve off the cold and the electronic clock marks time. Generally we expect these products to be safe and not to harm us or cause damage to our property. However Owen points out the fallacy of expectations that the concept of "safe" products is absolute.[1] The question therefore inevitably arises as to how we should deal with situations where these products that surround us and facilitate the way we live our lives also cause us harm? Inasmuch as we cannot fathom a world without the products that we have become so used to, we should also contemplate a context within which to deal with the "dark side" of those products - the unsafe, defective side that can cause injury and damage.

[1] Owen (1996) *UILR* 754. See Also Keeton (1963) *TLR* 855; and Prosser (1970) *GLR* 164 who further ask "[W]hat is to be done about the product that is inherently unsafe - the kind of product which, in our present state of scientific knowledge, and in our present development of the art, we do not know how to make safe, so that it is virtually impossible to produce a safe product of that type?."

Across the globe, defective products are the cause of numerous injuries to persons and damage to property every year, having spiked rapidly during the Industrial Revolution and subsequent ever-increasing mass production of a multitude of products, many of which are sophisticated and complex to an extent which is beyond the intellectual grasp of many ordinary consumers.[2] This constant innovation may even have the result that products are pushed onto the market whose possible side-effects may be unknown at the time it is supplied - thus Howells comments that the sheer complexity of these modern products can be a source of danger to consumers.[3] Geistfeld also warns that: "Product risk is pervasive, increasingly so in the modern economy. Automobiles can crash. Drugs can cause harmful side effects. Chemicals can be carcinogens. Even seemingly benign products pose the risk of serious physical harm. Food, the most basic of all products, can be contaminated. Or a bottle of soda can explode."[4]

In an attempt to address the issue of liability for harm caused by defective products, the law has seen the development of a specialised area referred to as "product liability". This area of the law is focused on unacceptable risks of death, injury and damage caused by defective goods; aimed at preventing the realisation of those risks and assuring compensation when such risks do realise.[5] Franklin *et al* point out that no area of personal injury has changed as dramatically in the past century as the law governing liability for defective products.[6]

At the heart of the evolution of product liability law is the question as to who should be the bearer of such liability?[7] Many attempts have been made to answer this

[2] Landmark (1996) *JILP* 242.
[3] Howells (1993) 4.
[4] Geistfeld (2011) *FP* 7. Van Eeden and Barnard (2017) 381 remark: "The design, manufacture and distribution of products are activities that are central to the wealth and welfare of society, but they may also be attended by, or result in death, disease or injury for a wide range of parties, such as workers in factories or along distribution channels, users of defective products, and third parties, for example occupants of defective or unsafe vehicles, or innocent bystanders." See further Strydom (2014) 39 regarding product liability measures being both preventative and remedial in nature; as well as Riordan (2003) *SCJIL* 27 and 28.
[5] Van Eeden and Barnard (2017) 384.
[6] Franklin, Rabin and Green (2006) 550.
[7] Owen (1990) *PLR* 63. In Owen's view, the question regarding who should "justly" be required to bear the economic consequences or "harm" caused by a defective product should be the ultimate issue in product liability law.

question by interrogating the rationale behind, and the goals of, product liability.[8] It has proven to be a very difficult question to answer, because of the many competing interests at stake which vary from those of a consumer who buys a product, to a person who receives the product as a gift, to a user of a product belonging to someone else, or an innocent bystander injured by a defective product, as well as the interests of manufacturers and also those of the broader community who stand to benefit from innovative products that may, for example, save lives. Although there are instances when a victim should personally bear the risk of injury caused by a product, such as when a person throws a glass bottle against a pole and he is injured by the shrapnel from the bottle, Owen points out that consumers sometimes passively and unknowingly confront other product risks, such as being exposed to toxic chemicals or defective pacemakers, where they cannot, from a moral perspective, be expected to bear the liability for harm they suffer in the process. He thus cautions that *the product liability paradigm is more complex than merely stating that because a manufacturer produces and sells products, it should by necessary implication compensate a person who has suffered harm as a result of using that product.*[9] Indeed many other factors come into play in the context of product liability, for instance the manner in which the person who was injured by a product has actually used that product[10] or the presence of defectiveness that remained latent even despite the manufacturer having resorted to all the available and accessible advances in science and technology at the time that the product was developed and put into circulation.[11]

It thus becomes evident that *product liability can by its very nature not be absolute* given the many interests and variables that impact upon such liability which necessitates balance and proportionality when designing a product liability regime.[12]

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[8] Wright (2007) *RL* 1067 remarks that more than any other area of tort (delict) law, the law of product liability has been the subject of continuing debate regarding the interrelated issues of its proper rationales and grounds of liability.

[9] Owen (1993) *NDLR* 461. Own emphasis.

[10] See for example *General Motors v Hopkins* (Tex.1977) 548 S.W.2d 344 at 349 where the court stated: "We cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts."

[11] Owen (1993) *NDLR* 465 remarks that "[W]hen a danger at the time of sale is neither known nor reasonably discoverable, the problem of moral accountability for resulting accidents becomes far more difficult."

[12] See also Prosser (1970) *GLR* 166 where he remarks: "You cannot impose strict liability upon a man who sells what appears to be a perfectly reputable product and it is extremely beneficial to the human

However, whereas the laws of product liability introduced in many jurisdictions was initially fault-based, recent decades have witnessed a migration to what has been hailed as "strict" product liability regimes that are perceived as more pro-consumer as they have discarded proof of negligence in order to found liability.[13] In theory, at least, under these so-called "strict" liability approaches the general balance of the risk of injury between producer and consumer is shifted in the consumer's favour with the derivative effect that such a regime is also said to promote safer products.[14]

At its core however "pure" strict liability is unforgiving towards the person against whom it is applied. In this pure form, "strict" liability entails that once it is established that a person has engaged in the relevant conduct, he is per se liable and there is no room to manoeuvre himself out of such liability *via* some or other defence.[15] It will however also become evident that the so-called "strict product liability regimes" discussed in this thesis are in actual fact *not* that strict - they merely did away with proof of negligence in order to found product liability, which has over the years been a substantial impediment to the success of product liability claims, but at the same time they allowed for the introduction of a number of statutory defences specifically created to balance the harshness of the product liability regimes concerned.[16]

Hodges remarks that "[I]t is all too easy for members of the general public to approach every marketed product on the basis that it is intrinsically safe in every

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race; you cannot make him strictly liable because once in a while something goes wrong with it in a way that he cannot prevent." See also Madden (1993).

[13] Howells (1993) 7 remarks that there are essentially four types of product liability standards: The contractual or warranty standard involves products which fail to meet the promised standard or to comply with a term implied by law. The negligence standard judges the conduct of the defendant in light of the risks and benefits which result from his conduct. The strict liability-standard focuses on the product and not on the conduct of producer. The last standard he mentions is the absolute liability standard although he submits this standard is not applied in practice.

[14] Boger (1983) *FILJ* 12; and Schwartz (1988) *YLR* at 369 point out that the concept of strict liability *inter alia* also regulates product quality. See also Hodges (1993) 6. Van Eeden and Barnard (2017) aptly remark at 382 that if producers are not held liable for the costs of design, manufacturing and distribution errors that harm consumers…they have little incentive to avoid such errors, and society, often some individuals or groups disproportionately, must bear the cost. He further points out, at 384, that fault-based and strict product liability regimes may impact in different ways on production costs and the management culture in respect of product safety and product defect issues.

[15] Goldberg (2016) *FLR* 744; and Alexander (2017) *SDLSRP* No 17-281.

[16] See for example Kysar (2003) *CLR* at 1708 who remarks, in the context of US product liability, that "American courts have invariably stopped short of making the manufacturer bear the personal injury costs of all products-caused accidents irrespective of fault." See further Kriek (2017) *Thesis* 16 where she points out that "[R]egardless of which test is adopted to establish product defectiveness, it is clear that foreign strict product liability regimes are not absolutely strict."

application in which it might be used. In reality however, very few products are thoroughly safe especially if used in unintended applications and some products which are genuinely useful are nevertheless dangerous even in their intended application."[17] Owen, an American academic who has conducted important foundational research in the law of product liability, remarks that in the context of the competing interests at stake, it makes sense limiting product liability to instances of "intended use" thus denying such liability for situations where the injured person put the product to "use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it."[18] Accordingly product misuse that results in injury should not result in liability for the manufacturer unless such misuse was foreseeable by the manufacturer.[19] There are also limitations in product safety that are necessarily brought about by the development of science, engineering and technology and these limitations consequently impact on what "consumers can expect of products". As the court stated in *Bruce v Martin-Marietta Corp*:[20] "A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today."

The product liability conundrum has brought to the fore various theories about what the goals of a product liability regime should be. The conventional goals are stated to be "compensation", "risk-spreading" and "deterrence".[21] Compensation entails compensating for the harm suffered by an award of damages to the victim; whereas risk-spreading entails allocating the most risk to the person or entity who or that is best able to control that risk. Deterrence as a goal envisages that imposing liability for harm caused by defective products will deter the release of products onto the consumer market which can cause harm to persons and property.[22]

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[17] Hodges (1993) 93.
[18] As stated in *Findlay v Copeland Lumber Co.* (Or. 1973) 509 P.2d 28 at 31.
[19] Owen (1996) *UILR* where he mentions the example of a nightgown that brushes momentarily against a warm stove.
[20] *Bruce v Martin-Marietta Corp* (10th Cir. 1976) 544 F.2d 442 at 447: this consideration is referred to as the "state of the art" defence. See Owen (1996) *UILR* 782.
[21] Owen (1990) *PLR* 64.
[22] *Ibid*. Owen (1990) *PLR* however submits (at 73) that these conventional goals fail to provide a sufficient moral foundation to support the construction of product liability principles hence he argues that other moral concepts such as freedom and equality, truth, trust and expectations; utility and efficiency; and power and risk control should also be considered to devise a sound product liability regime.

Constructing a product liability framework that appropriately addresses all of the issues that can arise in this complex landscape of harm caused by defective products is therefore extremely daunting. Generally the sentiment is that it is the manufacturer of the defective product that should bear the brunt of responsibility as its product causes harm to a person or property. This view is premised upon a mismatch in equality between manufacturers and consumers insofar as risk control is concerned. The argument in this regard is that:

> [M]anufacturers have much greater control over product safety than consumers in many ways: the manufacturer, not the consumer, conceives the balance of utility and safety in the product; the manufacturer alone determines how much quality control to use to prevent and screen out errors in production; the manufacturer has practical access to far greater safety information than consumers, and it alone determines how much and in what manner to share such information with the consumers who need it; and the manufacturer alone decides what promises about product safety to make to consumers to induce them to buy the product. In sum - the manufacturer's initial power over the product safety-risk control is enormous; by comparison the consumer's initial control of product risk is almost trivial. Thus, there is a gross inequality in the initial distribution of risk control between the maker and the user.[23]

Given that the consumers generally are rarely able to appropriately and fully analyse a product's safety, it is regarded to be in the public interest that the risk of injury inflicted by defective products should rest on the manufacturer of those products.[24]

2. Defectiveness as foundational concept

Central to any product liability regime is the issue of "defectiveness" which provides the foundation for this specific type of liability. Taking into account what has been said above about loading the bulk of responsibility onto manufacturers due to their position of control, "product liability" can thus generally be described as the liability

[23] Owen (1993) NDLR 471.
[24] *Jacob E. Decker & Sons v Capps* 164 SW 2d 828 (1942).

incurred by the manufacturer of a defective product that causes harm (whether property damage or personal injury) to a person.[25]

Notably there are three broad categories or types of defectiveness that may exist in products: *manufacturing defects, design defects and instruction or warning defects*.[26] Owen remarks that as product liability law has matured over the years it has given rise to an understanding "that meaningful evaluation of the acceptability of a product's dangers logically turns on considerations that vary contextually depending on whether the problem was one of manufacture, design or the absence of sufficient warning."[27]

With regard to *manufacturing defects* Franklin *et al* remark that the most common and straightforward cases involve the aberrational mass-produced item that has come off the assembly line different from (and more dangerous than) the intended product.[28] Manufacturing defects are therefore concerned with the physical process of manufacturing, assembling, packaging, inspecting and testing of the product, and are readily identifiable in general because the defective product is one that comes off the assembly line in a substandard condition in comparison with other identical units. The defective product consequently does not conform to the manufacturer's own specification.[29] Manufacturing defects can be caused not only by mechanical irregularities in the production process but also by human inadvertence.[30]

Owen remarks that, at some level of abstract awareness, most consumers know that manufacturers sometimes make mistakes during the manufacturing process. However, while they may abstractly comprehend the presence of imperfect

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[25] Loubser and Reid (2012) 1. See also Landmark (1996) *JILP* 239; and Howells and Owen (2010) 224. McQuoid-Mason (1997) *Juta* 65 prefers the following definition of product liability: "The liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any person affected by the use of a defective product." See Bianco (2002) *UNISA* 12 for other definitions.

[26] Noel (1962) *YLJ* 816; and Traynor (1965) *TLR* 363. Own emphasis.

[27] Owen (2008) *MLR* 295-296.

[28] Franklin, Rabin and Green (2006) 567. Examples mentioned by the authors are *inter alia Cronin v J.B.E Olson Corp,* 501 P.2d 1153 (Cal.1972) where a bakery truck driver was injured when, in a crash, the trays fitted in the vehicle came forward and struck him in the back; and *Barker v Lull Engineering Co. Inc* 573 P.2d 443 (Cal.1978) where the plaintiff was hurt when the high-lift loader he was operating overturned on a slope.

[29] Owen (2008) *MLR* 296 states that "[A] manufacturing defect is truly a mistake, one that results from some fault in the production process whereby a particular product deviates from the manufacturer's own 'blue-print' specifications of the intended and correct design." See also Bianco (2002) *UNISA* 14.

[30] De Jager (1977) *Thesis* 8-9; and Bianco (2002) *UNISA* 13-14.

production, their actual expectation when purchasing a new product is that its important attributes will match those of other products. He thus states that, as a foundational principle, equality of respect between manufacturers and consumers demand that manufacturers "are accountable for injuries resulting from manufacturing (production) flaws, regardless of a manufacturer's efforts or even power to prevent such defects."[31] Markesinis and Deakin agree that a strict test based on a consumer expectations model makes most sense when the defect is a manufacturing defect hence they remark that "[N]o reasonable or 'ordinary' consumer expects to find a snail in a bottle of ginger beer."[32]

Design defects on the other hand, encompass not only the intellectual creation of the concept and specification of a product, but also research, development and any other initial testing which is undertaken.[33] Design defects are generally more complex to identify than manufacturing defects as they are generally latent, at least in the sense that they are not "visible" to the ordinary consumer. They do not occur in random sample and relate to the manufacturer's decision to construct his goods in a certain way.[34] Such decision must strike a balance amongst various product qualities that bear on safety and utility, for example a failure to provide a safety device in machinery, power tools and appliances.[35] Design defects are also very challenging from a judicial evaluation perspective because they require courts to second-guess a manufacturer's analyses of consumer market preferences.[36]

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[31] Kysar (2003) *CLR* at 1709; and Owen (2008) *MLR* 296.
[32] Markesinis and Deakin (2012) 615.
[33] Strydom (2014) *UP* 76. Owen (2008) *MLR* 296 explains that a design defect challenges the specifications of a product on the grounds that the design engineers, in their conceptual rendition of the product, failed to take safety into adequate account. As such, questioning a product's design challenges the decision of the manufacturer's engineers and managers to develop and sell a product containing a particular type and level of danger.
[34] De Jager (1977) *Thesis* 10-12; Fisher and Powers (1988) 57; and Bianco (2002) *UNISA* 15.
[35] Tebbens (1979) 8.
[36] Owen (1993) *NDLR* 473 states that the manufacturer ordinarily has virtually exclusive power to prevent errors in the manufacturing process. As a result of this enormous imbalance in power, the equality demand arises that the manufacture must bear responsibility for the consequences of production defects. See also Henderson (1973) *CLR* 1531 where he argues that design defect cases that require courts to set independent product safety standards by judging existing designs as defective are beyond the limits of adjudication. However Twerski and Weinstein et al (1975/6) *CLR* 495 argue that Henderson is wrong in making such an assumption.

Determining the proper basis for liability for design defects has proven to be "the most vexing problem in the entire field of product liability law."[37] Owen points out that the moral questions concerning dangers in product design raise very different questions of equality and risk control than in the case of manufacturing defects. If the manufacturer should foresee that some aspect of the product's design will present a danger that may be hidden from consumers (but not from the manufacturer) it must at least warn consumers of such risk. Owen however also remarks that yet many products, such as for instance chain saws, contain inherent dangers in design that are "obvious for all to see" and "with products such as these, the consumer is not tricked into thinking that the product is safer than it really is, nor does he pay for a safety value that is imaginary. Instead, when persons buy and use products with obvious, inherent dangers - or dangers that have been warned about - they make personal choices to engage in the risk."[38]

Whereas a manufacturing defect implicates merely a single product unit, a design defect *challenges the integrity of the entire product line* "and so pierces the very core of the manufacturer's enterprise." Hence design defect claims are of the greatest concern to manufacturers since a judicial declaration that the design of a particular product is defective *condemns the entire product line*.[39] As alluded to by Owen, apart from the fundamentally perplexing issue of whether "strict" product liability makes sense at all for design defects, US courts and practitioners have been confounded by a bewildering array of conceptual problems from the time design defect litigation entered the scene in the 1960s. Debate has raged for many years over important

[37] Owen (1996) *UILR* 753; and Owen (2008) *MLR* 291. See also Epstein (1978) *NCLR*; and Shapo (1995) *VLR*.

[38] See also *Bartkewich v Billinger* (1968) 247 A.2d at 606 where the court remarked: "We hardly believe it is any more necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth." See also *Campo v Scofield* (N.Y. 1950) 95 N.E.2d 802 where the New York Appeal Court introduced the "patent danger doctrine" holding that a manufacturer is "under no duty to guard against injury from a patent peril". However with time this doctrine fell out of favour until the New York High Court itself repudiated the doctrine in *Micallef v Miehle Co.*(1976) 348 N.E 2d 571 where it held that the obviousness of a danger logically weakens a plaintiff's case but should not destroy it altogether. Thus Owen remarks that the patent-danger doctrine has been buried as an absolute no duty-rule for design cases in almost every U.S State. However he points out that in warnings cases, on the other hand, the obviousness of a product danger generally continues to play a decisive no-duty role and states that "If a danger is truly obvious, then its very obviousness informs potential victims of the danger, so that the in formational goals of warnings have been fulfilled. In such cases, there is no value in providing warnings of dangers that should be known already, and the costs may be substantial."

[39] Owen (2008) *MLR* 296. Own emphasis.

issues such as the "test" for liability for design defects, including how to find a proper role for consumer expectations in relation to design defects and the definition of outer boundaries of responsibility based on factors such as the obviousness of the danger, the misuse of a product by the victim or another person and to what extent developments in science and technology should play a role.[40]

Owen accordingly concludes that because the concept of "strict" liability implies that "any degree of risk is simply wrong", it is intrinsically deficient as a true standard for liability for design defects. He states that the degree of risk or safety in every product design is counterbalanced by considerations such as cost, utility and aesthetics hence the basis of responsibility for design choices should logically be based on the principle of optimality. Optimality requires the goal of manufacturers and the law to be to promote in products an ideal *balance* of product usefulness, cost and safety. Therefore Owen states that negligence, based on the notion of "reasonableness", is the ideal standard for product design defects hence "strict" liability for design defects is inappropriate.[41]

The third category, namely *instruction or warning defects,* generally involve defective written communication relating to instructions and/or warnings accompanying the product or absence of any such instructions or warnings and are often grouped together with design defects because warning defects share some of the same characteristics.[42] As pointed out by Schwartz, warnings serve two functions: they indicate risk levels and provide directions for safe use.[43] Very often the *design* of a

[40] Owen (1996) *UILR* 753.

[41] Owen (1996) *UILR* 754. Own emphasis. See also Nader (1965) *DLCJ* incorporating *dicta* 32. In this latter article Nader indicates that the type of liability for instances of defective design should be based on negligence. See further Wade (1965) *SWLJ* 5. Wade attempts to adapt a cost-benefit approach for the determination of negligent product design by means of "balancing the utility of the risk against the magnitude of the risk." Henderson and Twerski's remarks in this context are also noteworthy. In their journal article Henderson and Twerski (1997) *MJLR* 565 they state: "If one seeks to determine whether a product contains a manufacturing defect, comparison between the intended design and the allegedly defective product unit will reveal whether the product is defective. On the other hand, in cases alleging defective design one cannot identify defect by referring to the manufacture's own design standards. *Those very standards are under design as defective.* One cannot mouth the words 'strict liability' and hope to convey any message regarding how one should determine liability. In the context of product design, the term "strict liability" proves vacuous. To give any meaning to the liability standard, one must look outside the manufacture's own product design to discover an objective standard with which to determine defectiveness." Own emphasis.

[42] De Jager (1977) *Thesis* 9-10; Tebbens (1979) 8; and Howells and Owen (2010) 14.

[43] Schwartz (1988) *YLJ* 396. Franklin, Rabin and Green (2006) 568 state that instructions and warnings may reduce risk by instructing users regarding how to obtain the benefits from the product's

product, for example a pharmaceutical product, will be such that it may cause harm unless the manufacturer enables its safe use through instructions or warnings. *Therefore in some instances the very nature or "design" of the product may pose a risk of harm, hence requiring a duty to warn.*[44] The duty to warn is also necessary as a result of information asymmetry in the information possessed by a manufacturer, as opposed to the information possessed by a consumer or person that risks being injured by a product.[45] As indicated above, some products are obviously dangerous and consumers can reasonably be expected to be aware of such dangers, for example that knives are sharp and can cut and inflict injury.[46] However there are many dangers that may lurk in otherwise seemingly non-defective products that can either cause harm on their own or in combination with other products, if not accompanied by adequate instructions and/or warnings.[47] The thin line that sometimes exists between design defects and warning defects appear from the following remark by Twerski and Weinstein[48] "…if a proper warning would result in the non-marketability of the product, then the true issue before the court is the acceptability of the basic design." The aforesaid authors also draw attention to the fact that in some circumstances, such as with very young children, a warning will not have any effect on a class of foreseeable users and that even with a warning, the product may still be unreasonably dangerous and thus defective.[49]

The main issue with regard to instruction or warning defects is therefore to determine the necessity for and extent of a warning in a specific instance. This will usually

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intended use and by alerting users to the dangers of using the product in ways unintended by the manufacturer. Warnings may also alert potential buyers and users to irreducible dangers in the product, i.e. dangers that cannot reasonably be reduced by the manufacturer nor avoided by consumers no matter how careful they may be. Warnings of side effects of pharmaceuticals are perhaps the most common examples of the latter.

[44] Bianco (2002) *UNISA* 17. Own emphasis. See also *Greiner v Volkswagen Aktiengesellschaft* 540 F. 2d 85 (3d Cir 1976) where it was found that a duty existed for the manufacturer to warn of "rollover danger" in Volkswagen beetles.

[45] Bianco (2002) *UNISA* 17.

[46] For example: in *Brown Forman Corp v Brune*, 893 S.W.2d 640 (Tex.app.1994) the court held that no notice was required on a bottle of tequila to warn against the dangers of drinking a large quantity in a short period of time. Nor is there a duty to warn of the dangers of riding unrestrained in the cargo bed of a pick-up truck, as held in *Maneely v General Motors Corp.* 108 F.3d 1176 (9th Cir.1997).

[47] Fisher and Powers (1988) 57 remark in this regard that warning defects should not be underestimated since unsatisfactory product information can turn an intrinsically safe product into an unsafe product.

[48] Twerski and Weinstein *et al* (1975/76) *CLR* 501.

[49] Twerski and Weinstein *et al* (1975/76) *CLR* 506 where they refer to *McCormack v Hankscraft* 278 (Minn.1967) 322, 154 N.W.2d 488 that concerned a three year old child who was injured by scalding hot water from a vaporiser.

require a consideration of whether the *design* of the product is such that the product may be unsafe if not accompanied by adequate instructions or warnings. It is especially in this realm that developments in science and technology are again relevant. Whereas it may be easy to indicate that the manufacturer of a pharmaceutical should provide instructions to consumers as to the safe use of the pharmaceutical the issue becomes more complex when one considers that, despite all the manufacturer's research and access to developments in science and technology there may sometimes be defects in products that were "undiscoverable" at the time of their supply hence the argument that it seems inappropriate to impose liability on a manufacturer in such instance for failure to warn persons of such undiscoverable risks or hazards. *As regards the foundation for liability for warning defects, Owen thus again submits that instead of holding manufacturers strictly liable, "reasonableness" should be the yardstick*. He therefore argues that liability for defects related to failure to provide adequate instructions or warnings should also not be strict but that it should be rooted in negligence.[50]

Owen's views essentially explain the American product liability journey, as discussed in more detail hereinafter. Notably other jurisdictions that subsequently adopted product liability regimes, such as the EU and Australia, opted for strict product liability regimes without making any distinction between the types of product defect and whether certain types of defects merit different treatment than others.

3. Tracing the origins and evolution of modern product liability

3.1 The development of product liability in the USA

The early development of modern product liability can be traced back to the United Kingdom where the principle of *caveat emptor*[51] and the principle of privity of contract[52] were stated in the English case of *Winterbottom v Wright*[53] to "retard" the

[50] Owen (1996) *UILJ* 766.
[51] Howells and Owen (2010) 227 explain that the *caveat emptor* principle essentially means that the buyer should beware and that he, rather than the seller, takes the risks of defects in products purchased. The authors indicate that in the early 1800s, the Chancellor Kent of New York extended the doctrine of caveat emptor to hidden (latent) product defects.
[52] Meaning that where no contract existed between a person harmed by a defective product and the manufacturer of that product, the person injured could not sue the manufacturer for harm caused by the defective product.
[53] (Ex 1842) 152 Eng. Rep. 402-403.

development of product liability law. However the United States of America (USA) subsequently pioneered the development of modern product liability law hence no thesis on product liability is complete without at least a brief overview of the evolution of product liability in the USA to serve as a contextualising backdrop to further investigations and discussions.[54]

The USA product liability journey began in the 1916 with the decision of *MacPherson v Buick Motor Co.*[55] where Judge Cardozo dispensed with the privity requirement for negligence claims and allowed an action in tort (delict) based on negligence against the manufacturer directly - thus extending the reach of fault-based liability to manufacturers of defective products. In *Palsgraf v Long Island Railroad,*[56] Cardozo framed the outer boundary of liability from the perspective of a person's capacity to control risk, confining responsibility to "the orbit of the danger as disclosed to the eye of reasonable vigilance."[57] Later in *Escola v Coca-Cola Bottling Co.*[58] a new basis for product liability was announced: while the majority of the court decided the case on the traditional negligence footing, using the doctrine of *res ipsa loquitur*[59] to infer negligence on the part of the manufacturer and sustain the plaintiff's claim, Judge Traynor in his separate concurring judgment famously stated:[60]

> [Those] who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the

[54] Priest (1985) *JLS* notably remarks that the expansion of product manufacture liability throughout the latter half of the twentieth century stands "among the most dramatic [changes] ever witnessed in the Anglo-American legal system." See also Kysar (2003) *CLR* at 1708; and Graham (2014) *SCLFP*.
[55] (NY 1916) 111 N.E. 1050. See Owen (1992) *GLR* 713; and Kysar (2003) *CLR* at 1709. See also *Henningsen v Bloomfield Motors Inc.* (NJ 1960) 161 A.2d 69 where the New Jersey Supreme court repudiated the privity bar in a landmark implied warranty case where injuries were sustained as a result of defects in a car. Kysar at 1710 remarks that the *Henningsen* case also presents a key moment in the historical development of products liability law: "By recognising an implied warranty of merchantability irrespective of consumer-manufacturer privity, and by refusing to enforce a manufacturer's attempted contractual disclaimer of such a warranty, *Henningsen* followed through on the early movement of *MacPherson* away from freedom of contract as the exclusive jurisprudential paradigm for product-cased injuries." See further Prosser (1970) *GLR* 157.
[56] 162 N.E 99 (N.Y 1928).
[57] Owen (1992) *GLR* 713.
[58] (Cal 1944) 150 P.2d 436. The plaintiff, a waitress was injured when a soda bottle broke in her hand as she moved it from the case to the refrigerator. She testified that she handled it carefully. The defendant used pressure to bottle carbonated beverages and the majority of the court used the *res ipsa* doctrine to infer negligence on the part of the manufacturer in manufacturing the bottled drink.
[59] Translated from Latin this means "the thing speaks for itself". This doctrine infers negligence from the very nature of an accident or injury. See Harper (1928) 724.
[60] (Cal 1944) 150 P.2d 462. See further Traynor (1965) *TLR* 363. See also Wright (2007) *RL* 1067.

> public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

This paved the way for Traynor to make *Greenman v Yuba Power Products*[61] the first case where a court unequivocally imposed strict product liability for harm caused by a defective product. However as pointed out by Owen, Judge Traynor in *Greenman v Yuba* carefully limited manufacturer liability to a product's "intended" use thus not allowing for liability to arise where the consumer "misused" a product that eventually caused harm.[62]

Page Keeton remarks as follows regarding this shift to a strict product liability regime in the USA:[63]

> There are at least three separate and distinct underlying reasons in support of the general proposition that a maker should be subject to some liability for physical harm resulting from the dangerous condition of his product without regard to either fault or privity of contract. In the first place it is said that the consumer is entitled to assume that the product is what it purports to be and if harm results from the facts that his expectations were frustrated, he should be able to recover…A second reason is that liability without proof of negligence on the part of the maker is calculated to reduce the incidence of harm resulting from unfit and unsafe products…Finally it is argued that the maker-enterpriser has the capacity, to accept this kind of legal responsibility

[61] 377 P.2d 897 (Cal 1963). In this case the defendant made a combination power tool called a "Shop-Smith" which could be used for various purposes such as a lathe and a saw. While the plaintiff was operating the machine as a lathe, it caused a piece of wood to fly that hit him in the head and injured him. See also Prosser (1970) *GLR* 162.
[62] Owen (1996) *UILJ* 780.
[63] Keeton (1969) *SLR* at 560.

without hardship by distributing as a cost of doing business the losses of the few to the many who purchases his products.

These developments in product liability jurisprudence were followed by the adoption in 1965 by the American Law Institute (ALI) of section 402A of the *Restatement (Second) of Torts*[64] that restated the law on product liability as follows:[65]

> **S 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer:**
>
> (1) One who sells any product in a defective condition "unreasonably dangerous" to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the conditions in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all reasonable care in the preparation and sale of his product; and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A "seller" included all those engaged in a business capacity along the length of the supply chain and thus included manufacturers, distributors, wholesalers and retailers.[66] Markesinis and Deakin remark that, as far as the range of plaintiffs were concerned, by making the seller liable to the "user or consumer", section 402A appears to have excluded an action brought by a mere bystander but the courts of

[64] 2nd Torts Law USA, revised 1998. Restatements are produced by the American Law Institute (ALI), a private organization established in 1923, whose members are prominent legal practitioners, judges and academics. The purpose of ALI is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the administration of justice, and to encourage and adopt scholarly and scientific legal work." ALI accordingly adopts and publishes treatises that consist of statements of the blackletter law, accompanied by comments and illustrations derived largely from recent developments in case law. These texts are the result of exhaustive analysis and passionate debate. Because Restatements are sources of secondary authority, they are not binding on the courts but nevertheless have unquestioned influence in resolving ongoing debates and predicting future legal trends within the United States. See ALI (2018).

[65] Priest (1989) *CLR* 2301 remarks that the adoption of s 402A of the 2nd Torts Law USA, revised 1998, is commonly viewed as initiating "a revolution in the law of torts".

[66] Markesinis and Deakin (2012) 598.

several states subsequently extended the application of section 402A also to bystanders.[67]

Notably Priest points out that William Prosser, who was the Reporter for the Second Restatement, simply presumed that the definition of "defect" in the Restatement was uncontroversial and thus Prosser never discussed the concept at length in any of the articles that he wrote on the topic of the Restatement.[68] The concept "defective condition" in section 402A(1) was however defined in Comment *g* to the restatement in affirmative terms and thereafter in negative terms in Comment *h*.[69] In terms of Comment *g* a defective condition was described as "one *not contemplated by the ultimate consumer*, which will be *unreasonably dangerous* to him".[70] Thus it was a broad definition that did not distinguish between manufacturing, design and instruction or warning defects and which incorporated a "consumer expectations test" and the concept of reasonableness to gauge the safety of a product. Markesinis and Deakin however point out that this definition was "not equivalent to reading a requirement of negligence back into the section since the test was whether the product was unreasonably dangerous *from the point of the consumer*, not whether the manufacturer was at fault in the process of producing it."[71] Wright notes that at this time the view was that there was no need to distinguish between the types of defect since "*it was assumed that strict liability should apply regardless of the type of defect*".[72] Comment *h* to the Restatement further provided that a product was not defective in condition when it was "safe for normal handling and consumption". Comment *i* to the Restatement indicated that the "article sold must be *dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics*."[73] This view of defectiveness meant to serve as a limitation on liability where a product might cause harm, but where the consumer was fully aware of the product's harm-causing potential, such as in the case of alcohol and

[67] *Ibid*. In Elmore v. American Motors Corp (1969) 451 P 2d 84 (Cal 1969) the California Supreme Court suggested that "if anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable." Markesinis and Deakin (2012) 598 explain that the reason for this view is *inter alia* that bystanders have no opportunity of any kind to inspect the product which injures them for defects.
[68] Priest (1989) *CLR* 2309.
[69] See Comments to the 2nd Torts Law USA, revised 1998; and Priest (1989) *CLR* 2318.
[70] Own emphasis.
[71] Markesinis and Deakin (2012) 599. Own emphasis.
[72] Wright (2007) *RL* 1070. Own emphasis.
[73] Own emphasis.

cigarettes.[74] Notably Comment *j* of the Restatement indicated that: "[W]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Markesinis and Deakin indicate that the formulation of the consumer expectations test in section 402A was however designed to *avoid a situation of absolute liability that would exclude any defences*.[75] This led some courts to develop a risk-utility defence by which to measure the costs and benefits of product innovation, particularly with regard to product design, in a way that was potentially more favourable to manufacturers.[76] The risk-utility approach enabled courts to engage in "a balancing act, weighing the social utility of the product against the risk and seriousness of any injury that might occur from its use."[77] Other defences availed by section 402A were *inter alia* that a defendant would not be liable if the product left his hands in safe condition and was subsequently mishandled by another person.[78] It was further also possible to plead contributory negligence or voluntary assumption of risk.[79] Particularly it was also possible in some instances to raise the so-called "state of the art-defence". Murray explains that in a strict product liability context the defence entails two types of evidence. The first is evidence of industry-wide

[74] Priest (1989) *CLR* 2318-2319: "The Rule stated in this section applies only when the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinarily sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous….Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter contaminated with poisonous fish oil, is unreasonably dangerous." Henderson and Twerski (1997) *MJLR* 572 remark that the drafters of the Second Restatement did not contemplate strict liability based on a consumer expectations test for design defects but used the consumer expectations test to impose liability for manufacturing defects, in which context they opine it is an acceptable test for defectiveness. They further point out (at 574) that the reference to consumer expectations in Comment i allowed the consumer expectations test to serve as a defence against liability in accordance with the "patent danger rule" in terms whereof no liability for manufacturers followed in respect of common products whose dangers were known to almost all users.

[75] Markesinis and Deakin (2012) 599.

[76] *Ibid*.

[77] Markesinis and Deakin (2012) 616.

[78] Restatement (Second) of Torts, comment *g*.

[79] Owen (2000) SCLR 1.

standards with which the defendant's product conformed. The second is evidence that shows that the product could not, with the current limits of scientific knowledge at the time it was developed and supplied, have been made more safe. Accordingly this second type of evidence of the state of the art defence entails that the emphasis is not on what other manufacturers were doing at the time, but rather on the fact that the defendant had done everything possible on a technical (and scientific) level to make the product safe.[80] The state of the art–defence thus "allowed a supplier to be absolved from all liability for harm which resulted if the means of making the offending article safe - or safer - were beyond the state of the scientific or industrial art at the time the article was marketed."[81]

Kysar indicates that on a practical level section 402A did however not provide a straightforward answer to the issue of defining defectiveness for purposes of product liability with the result that a significant number of US courts attempted to fashion their design defect standard for product liability "from a notion of consumer expectations that lies within the comments to section 402A itself."[82]

After the introduction of the Restatement (Second) of Torts the reach of products liability expanded ever wider, and few were surprised when the New Jersey Court subsequently announced, in the asbestos case of *Beshada v Mannville Products Corp,*[83] that its "strict liability rule" was truly strict. In *Beshada* it was held that a product sold *without warning of a hidden danger* was defective, subjecting its manufacturer to liability for resulting harm, regardless of the unforeseeability of the risk. *Beshada* was the first product liability case rendered by a major court in which the outcome of the case explicitly depended on the principle of strict liability and where the manufacturer's total inability to foresee or guard against the danger of the defective product was both alleged and held to have made no difference. As

[80] Murray (1974) *MLR* 651-654.
[81] Dahl (1978) *TLR* 338.
[82] Kysar (2003) *CLR* at 1712. He states that the most basic problem with resting the consumer expectations test on the comments to s 402A is that the language of comment *i* appears not to have been directed at all toward the task of fashioning a test for design defectiveness but that the drafters had only manufacturing defects in mind at the time. He points out that this was because of the fact that at the time of the drafting of the Second Restatement, manufacturing defect cases dominated thinking about the nascent field of products liability. See the examples he provides at 1714.
[83] (N.J.1982) 447 A.2d 539.

remarked by Owen, "[T]he high-water mark of modern strict product liability had been reached."[84]

However merely two years later in *Feldman v Lederle Laboratories,*[85] a case involving a prescription drug, the New Jersey court all but overruled *Beshada* and marked the end of the rise of strict liability cases in the United States. Owen observes that *"[F]eldman defines the point at which the law turns away from its lock-step march towards strict liability, back to principles of fault.*" He indicates that "lest *Feldman* have been interpreted as a fluke", the California Court certified its rectitude in another prescription drug case in 1988, *Brown v Superior Court.*[86] Three years later it announced a broad rejection of strict liability in the product warning context in *Anderson v Owens-Corning Fiberglas Corp*, another asbestos case.[87]

It was clear that section 402A of the Restatement (Second) of Torts had become outdated especially in the context of its suitability to design defects. The consumer expectations test in the Restatement also attracted criticism. It was complained *inter alia* that the expectations of consumers "provide too amorphous a basis" on which to assess manufacturer liability in having regard to the differences between manufacturing defects and design defects and instruction or warning defects.[88] After all, what could an ordinary consumer really expect regarding the complex design of, for example, a pharmaceutical product? Thus, twenty three years later, in 1998, the American Law Institute (ALI) introduced the Restatement (Third) of Torts: Product Liability[89] which replaced section 402A of the Restatement (Second). Section 1 of the Restatement (Third) sets the basic liability standard as follows:

> **S1. Liability of Commercial Seller or Distributor for Harm caused by Defective Products**
>
> (a) One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.

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[84] Owen (1992) *GLR*.
[85] (N.J.1984) 479 A.2d 374.
[86] (Cal.1988) 751 P.2d 470.
[87] 810 P.2d 549 (Cal 1991). Owen (1992) *GLR* states that the significance for the USA Law of Torts of the cases of *Feldman* and *Anderson*, in combination, cannot be overstated: "Together they represent the rejection of the doctrine of strict liability in an important area of tort law by the very two courts that had led the nation in the expansion of tort liability during the 1960s and 1970s."
[88] Kysar (2003) *CLR* 1715. See Awad (1998) *PILR*; Howells and Mildred (1998) *TLR*; and Dreier (2000) *KJLPP.*
[89] Restatement (Third) of Torts: Products Liability & cmts (1998). See Kysar (2003) *CLR* 1719.

(b) A product is defective if, at the time of sale or distribution, it contains a manufacturing defect, is defective in design or is defective because of inadequate instructions or warnings.

S2. Categories of Product Defect

For purposes of determining liability under section 1:

(a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a *reasonable alternative design* by the seller or other distributor, or a predecessor in a commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.[90]

Apart from trifurcating the concept of a product defect into three types, namely manufacturing, design and warning defects, the Restatement (Third) *inter alia* rejected the consumer expectations test as the standalone test for purposes of determining defectiveness and augmented it with a risk-utility test that originates in the negligence doctrine.[91] Henderson and Twerski state in this regard:[92] "The Restatement takes the position that consumer expectations do not, standing alone, determine defectiveness. Although they are an important factor in risk-utility balancing, consumer expectations are too amorphous to operate as an independent test for design defect."

[90] Own emphasis.

[91] Henderson and Twerski (1997) *MJLR* 568.

[92] Henderson and Twerski (1997) *MJLR* 569. See also Twerski and Henderson (2009) *BLR* 1061. Earlier proponents of the risk-utility test for design defects include Keeton (1973) *SMLJ* 39; Wade (1973) *MLJ* 825; Fischer (1974) *MLR*; and Keeton (1979) *CLR* 313 who proposed that a product be determined to have been defectively designed "if a reasonable person would conclude that the magnitude of the danger…outweighs the utility of the design." See further Schwartz (1983) *NYLR* 796; Landes and Posner (1985) *JLS* 535; Henderson and Twerski (1991) *NULR* 1332; Powers (1991) *UILR* 639; Henderson and Twerski (1992) *CLR* 1512; Davis (1993) *WLR* 1217; and Owen (1997) *UMJLR* 239.

As pointed out by Owen, the significance of section 1 of the Restatement (Third) lies not in the fact of "trifurcating" defectiveness into manufacturing, design and instructional or warning defects, "but in what it *does* with the trifurcation".[93] He remarks that:

> [B]y splintering the defect notion from a unitary concept into three, section 1 provides a mechanism for stripping away the great bulk of *strict* liability from products liability law and returning it to negligence, more or less. More specifically, by pulling design and warnings cases away from those involving manufacturing defects, section 1 permits the retention of strict liability in the latter context, where almost all agree that it belongs, while abandoning the strict liability concept for negligence principles in design and warning cases which comprise the bulk of products liability law and litigation.[94]

Many commentators have applauded the distinction made in the Restatement (Third) between the three types of defect for purposes of imposing liability but have however lamented the difficulty of requiring proof of a "reasonable alternative design" (RAD) in the context of design defects.[95] Assessment of a product design in most cases requires comparing (from the viewpoint of a reasonable person) the product design that caused the injury with the alleged alternative design. Plaintiffs can establish a RAD either by developing a working prototype using expert testimony or by comparing the defendant's product to similar designs in the same field used by another manufacturer.[96] Thus the RAD requirement introduced by the Restatement (Third) indeed appears to impose an onerous burden on product liability plaintiffs.

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[93] Own emphasis.

[94] Owen (1996) *UILR* 748.

[95] Banks and O'Connor (1993) *OLR* 411; Philips (1993) *TLR* 151; Korzec (1997) *BCICLR* 227; Shapo (1997) *UMJLR* 215; Lavelle (2000) *DLR* 1059; and Kysar (2003) *CLR* 1725 where he indicates that US courts have in the early times after the introduction of the Third Restatement been less uniformly receptive of the Restatement's reasonable alternative design (RAD) requirement and its concomitant demotion of the consumer expectations test to a subsidiary role for purposes of design defect litigation.

[96] Sorenson (2003) *WLR* 257 at 270. See however comment *f* to s 2 of the Restatement (Third): Products Liability which states that a plaintiff need not establish an actual prototype of the proposed alternative design.

The Restatement (Third) also provides a number of defences *inter alia* compliance with applicable product safety statute or regulation;[97] the state of the art defence;[98] and apportionment of liability.[99]

With the Restatement (Third), product liability in the USA had thus come full circle from where it cast defectiveness as a generic feature possessed by an "unreasonably dangerous" product gauged by means of a "consumer expectations test" and discarded negligence as a requirement for product liability, to a point where it recognised that the concept of "defect" has different dimensions and that not all defects can be treated the same and be tarred with the same brush of "strict" liability and therefore that some defects, notably design and instruction or warning defects, implore a return to negligence as basis for liability.[100]

3.2 The development of product liability in the EU and South Africa

Approximately two decades after the USA embraced "strict" product liability *via* the section Restatement (Second) of Torts, the European Union followed suit by introducing the 1985 Product Liability Directive[101] which was stated to introduce a regime of strict product liability in Europe. As discussed in more detail in Chapter 6, the Product Liability Directive imposes liability on a producer if its product caused harm as a result of being defective. The plaintiff is not required to prove negligence on the part of the producer of the product but merely has to prove the defect and the

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[97] S 4(a) Restatement (Third) provides that in connection with liability for defective design or inadequate instructions or warnings "(a) a product's non-compliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by statute or regulation" and "(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether a product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product effect."

[98] See the discussion above regarding the State of the Art defence in the Restatement (Second) of Torts.

[99] S 17 Restatement (Third) provides that "(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."

[100] Banks and O'Connor (1993) *OLR* at 420; Little (1994) *TLR* at 1193-4; and Shapo (1995) *VLR* at 666. See also Kriek (2017) *Thesis* 13 where she opines that initially consumer protection was the main driving force for the imposition of strict product liability but that the American regime "has become noticeably more conservative over the last two decades, seemingly in an effort to increase industry protection against already overblown liability rules."

[101] Directive 85/374/EEC. Directives are a form of Community legislation that is binding upon each of the EU Member States who are in turn obliged to transpose the contents of the Directive into their national legislation. The extent to which the contents of a Directive must be transposed into national laws depends on whether the Directive prescribes minimum or maximum harmonisation. See https://europa.eu/european-union/eu-law/legal-acts-eu.pdf accessed in September 2018.

damage and a causal link between them.[102] Australia has also subsequently adopted a strict product liability regime largely based on the EU Product Liability Directive, as discussed in more detail in Chapter 7.

Recently, after many years of being sensitised to the need for a more pro-consumer product liability regime, South Africa has also taken the bold move with the enactment of the Consumer Protection Act 68 of 2008 (hereinafter CPA) to transition from a fault-based system of product liability to a purportedly strict product liability regime.[103] Notably, the South African product liability regime as introduced by the CPA did however not follow the American product liability framework as set out in the Restatement (Third) but largely resembles the strict product liability regime introduced by the 1985 EU Product Liability Directive.[104]

4. Research statement

The existence of a "defect" is central to the notion of product liability hence it is critical in determining the application of a specific product liability regime, to establish under what circumstances a product will be regarded as defective for purposes of founding product liability. Imposing strict liability in the context of product liability *ex delicto* should essentially mean that once the defectiveness of a product that has wrongfully caused harm is established, there should be no defence to the avail of the manufacturer of the defective goods. However, the policy considerations underlying the notion of product liability have shown that not even a strict product liability regime can be unwaveringly strict and absolute in all circumstances hence even in so-called strict product liability regimes statutory defences have been introduced for manufacturers in certain limited instances.

At first glance the apparently strict product liability regime introduced into South African law by the CPA may appear to be the panacea to the pre-CPA woes, lack of consumer protection, and minimal redress in the context of product liability claims. However, it is submitted that specific aspects of the strict product liability regime

[102] Chp 6, par 2.
[103] 68 of 2008 (hereinafter referred to as the "CPA").
[104] Du Preez (2009) *TSAR* 1; and Kriek (2017) *Thesis* 15.

introduced by the CPA require an in-depth analysis and consideration in order to aid the proper interpretation and application of section 61. Two very important aspects that specifically require intensive scrutiny are the manner in which the CPA deals with the pivotal concept of "defect" which is central to product liability, and also what routes the statute specifically creates to provide proportionate balancing for suppliers to escape strict liability for harm caused by defective products.

5. Research objectives

While this thesis will contextualise the South African product liability journey by providing a broad overview of the leap from a fault-based product liability regime under the common law *ex delicto* to a strict product liability regime under the CPA, the main aim of this thesis is not to provide an exhaustive analysis of every aspect of the common law and the new CPA regimes. The aim is specifically, from the perspective of a product liability claim founded in delict (hence in the absence of a contract between the injured party and manufacturer or other supplier of defective goods) to investigate and critically evaluate the concept of a product "defect" as introduced by section 61(1) of the CPA; and further to examine and critically evaluate the nature of each of the specific statutory "defences" that are available to a supplier as listed in section 61(4) of the Act. The purpose of the aforesaid examination is to enable the candidate to eventually conclude on the appropriateness of the meaning and application that the CPA ascribes to a product "defect" as well as the appropriateness of the new statutory defences and to make recommendations for reform where necessary.

Accordingly the research objectives of this study are the following:

a. To provide a critical overview of the common law position regarding product liability *ex delicto*, and specifically to critically focus on the interpretation and application of the concept of "defect" and the nature and extent of the defences available to a manufacturer. The purpose of this chapter will be to contextualise the broad differences between the common law regime and the product liability regime introduced by the CPA.
b. To provide a critical overview of the CPA as general consumer protection legislation and specifically with regard to the strict product liability regime

introduced by section 61 of the Act, focusing in detail on the interpretation and application of the concept of a "defect" in terms of the CPA, and the nature and extent of the statutory defences introduced by the Act.

c. To conduct a critical, comparative analysis of the strict product liability provisions in terms of the legislative frameworks prevailing in the European Union and Australia – with specific focus on the concept of defect and the defences available to the supply chain.
d. Having regard to the comparative studies undertaken, to extract the lessons South Africa can learn from these jurisdictions and to make appropriate recommendations pertaining to the concept of "defect" and the statutory defences under the South African product liability regime as introduced in section 61 of the CPA.

6. Selection of comparative jurisdictions

Martinek[105] writes that:

> after the First World War [there was] the desire for understanding and comprehension of neighbouring legal systems...to allow for a better and deeper insight into legal systems [in order to ultimately create] a universalistic idea of a uniform world law which could in the long run leave behind the national legal orders and make individual national laws superfluous.

In addition to the study of South African local principles of law, a comparative study of foreign laws is necessary to provide clarity of legal terms, save time and effort, and avoid duplication of work in native countries, as there may already be existing solutions to current legal problems.[106]

A consideration of comparative jurisprudence is therefore indispensable, especially with regard to those foreign legal systems with which one's native country is closely connected politically, economically or culturally.[107] Section 2(2) of the CPA specifically provides that during the course of its interpretation or application, a

[105] Martinek (2013) *TSAR* 44 although at 45 the author suggests that rights and freedoms of human beings cannot be treated equally, despite the search for universal principles of law.
[106] Martinek (2013) *TSAR* 43-45.
[107] Martinek (2013) *TSAR* 39.

person, court, Tribunal or the Commission may consider *appropriate*[108] foreign; and international law, conventions, declarations or protocols relating to consumer protection. Accordingly, given that South Africa has, like Australia, opted for a strict product liability regime resembling that of the EU, an evaluation of the term "defect" and the statutory "defences" available to a supplier in the product liability regime within the European Union and Australia will be undertaken, in chapters 6 and 7 respectively.

6.1 European Union

Since its establishment in 1958 in accordance with the Treaty of Rome the EU has been significantly influential in law reform across the globe.[109] Given that South Africa has opted to base its new statutory product liability model largely on the product liability regime contained in the 1985 EU Product Liability Directive 85/374/EEC, the EU is a necessary choice for comparative purposes.[110]

6.2 Australia

Australia has been chosen as a country of comparison primarily for two reasons. Firstly, Australia and South Africa have a similar foundation[111] as they were both British Colonies until Australia achieved independence in 1901 and South Africa in 1910, despite remaining members of the Commonwealth to date. During the years of British influence, Australia as a southern hemisphere country, adopted its roots in English common law.[112] South Africa, also as a southern hemisphere country, has a diverse legal system with its common law roots in Roman-Dutch law as influenced by the English legal system.[113] Secondly, and the most important reason, is that Australia has also not followed the American route as per the Restatement (Third) but has adopted a strict product liability regime modelled largely on the European

[108] Own emphasis.
[109] Treaty establishing EEC (1957) 298 *U.N.T.S.* 11; and see Cini and Borragan (2013) 222 and 227.
[110] See Loubser and Reid (2012) particularly 79; and Strydom (2014) *UP* 12. The South African strict product liability regime introduced by the CPA demonstrates an appreciable similarity to the product liability provisions of the EU Product Liability Directive.
[111] Martinek (2013) *TSAR* 39 opines that the correct comparative jurisdiction to be selected must be the one that is most connected to the native country.
[112] Australia's legal system originated through the adoption of the Anglo-Saxon system of Europe which derived from the old English common law. However, over time the Australian common law system evolved and it developed a legal system with its own right and its own features - see Postic (2003) *Droit-NTIC* 3-4. The other two legal systems in existence in Europe are the Romanic and Germanic legal systems - see Martinek (2013) *TSAR* 48-49.
[113] Martinek (2013) *TSAR* 49.

Product Liability Directive.[114] The EU has, through its Directive 85/374/EEC, therefore foundationally influenced the Australian strict product liability regime[115] - currently located in Part 3-5 of Schedule 2 of the Australian Competition and Consumer Act 2010 (ACL).

7. Delineation and limitations

a. The focus of this thesis is on product liability *ex delicto*. It will further deal with product liability through the prism of the concept of defect and the statutory defences introduced by the CPA and appraise them in comparison to the concept of defect and the defences in the EU Product Liability Directive and the Australian Consumer Law (ACL) respectively. Save for some mention of the contractual foundations of product liability where relevant, this thesis does not deal in any detail with product liability *ex contractu*.
b. Given that the focus of this thesis is on the concept of "defect" and the statutory defences introduced by the CPA from the perspective of product liability *ex delicto* hence it does not purport to provide an exhaustive discussion of each and every aspect of product liability in South Africa.
c. An enquiry as to whether section 61 can be interpreted to also apply to services, is beyond the scope of this thesis. The thesis will also not deal with second hand goods, electricity or any specific products in particular.
d. With regards to the comparative jurisdictions (the European Union and Australia), an in-depth discussion regarding their general legal framework is beyond the scope of this thesis and this study will therefore set out a broad general exposition of each product liability regime with a specific focus, for comparative purposes, on how the concept of defectiveness and the statutory defences available to suppliers are addressed by these jurisdictions.

[114] Utz (2010) *ACL* 22.
[115] *Ibid*.

8. Referencing technique

a. The full titles of the sources referred to in this study are listed in the bibliography, together with an abbreviated "mode of citation" which is used to refer to the particular source in the footnotes. However, legislation and court decisions are referred to in full.
b. The law that is discussed reflects the legal position as at 30 August 2018.

9. Outline of chapters

The thesis is divided into four parts:

- Part A – comprises of Chapter 1 which introduces the topic by providing background on foundational policy behind the law of product liability, the development of product liability in the US, the research statement and objectives, selection of comparative jurisdictions and chapter lay-out.
- Part B - comprises of Chapters to 2 to 5, which deals with the South African law on product liability. It provides a critical overview of the South African position regarding product liability *ex delicto* under the common law (Chapter 2), a broad contextualising discussion of the new strict product liability regime introduced by section 61 of the CPA (Chapter 3), and specifically interrogates the concept of "defect" and "defectiveness" (chapter 4), and the closed list of statutory defences available to a supplier (Chapter 5).
- Part C – comprises of a discussion of the strict product liability regimes of the selected comparative jurisdictions, namely the EU (Chapter 6) and Australia (Chapter 7) with a specific focus on how these regimes approach the concept of "defect" and the statutory defences available to the supply chain.
- Part D - contains the candidate's conclusions and recommendations for reform of the provisions of section 61 of the CPA.

Part B: South African jurisdiction

Chapter 2: The South African common law of product liability *ex delicto*

Chapter 2 provides an overview of the common law of product liability *ex delicto* for purposes of contextualizing the discussion on the product liability regime under the Consumer Protection Act (CPA) that follows in subsequent chapters. It is important to note that this chapter does not purport to be an exhaustive analysis of *all* aspects of the common law of product liability *ex delicto*. Its purpose is to enable the reader to grasp the main features of the delictual common law regime in order to appreciate in principle how it differs from the product liability regime introduced by the CPA, as discussed hereinafter in Chapter 3. Specifically it enables an understanding of how these two regimes differ with regard to the concept of "defect" and the defences that can be raised against a product liability claim. Notably, the common law of product liability remains relevant as the consumer's rights under the common law have been preserved by section 2(10) of the CPA. The common law of product liability thus applies parallel to the statutory product liability regime introduced by the CPA and a person harmed by a defective product after 24 April 2010 (the early effective date of the CPA) can choose whether to institute a product liability claim in terms of the CPA or the common law or, for the sake of prudence, would be well-advised to institute the common law claim as alternative to the CPA claim.

1. Introduction

The South African common law of product liability *ex delicto* has developed from the law of delict. It is thus necessary to briefly consider the basic tenets of the law of delict for purposes of contextualisation.

Neethling, Potgieter and Visser remark that the fundamental premise in law is that damage rests where it falls, which means that each person must bear the damage he suffers (*res perit domino*).[116] They explain that if someone drives his car carelessly and collides with a tree, or a person clumsily drops and breaks his watch, or hail damages his corn crop, or lightning kills his horse, then in principle he has no

[116] Neethling *et al* (2015) 3.

legal ground for complaint. The fundamental principle of *res perit domino* is however not absolute – meaning that damage does not always rest where it falls. There are certain legally recognised instances in which the "burden of damage" is shifted from one person to another, with the result that the latter person becomes obliged to bear the former's damage or to provide compensation for it. One such instance is where damage arises from a delict. A delict is "the act of a person that in a wrongful and culpable way causes harm to another."[117] The law of delict "determines the circumstances in which a person is obliged to bear the damage he has caused another, i.e. when he may incur civil liability for such damage."[118] For delictual liability to arise, all five elements of a delict, namely an act (conduct), wrongfulness, fault, causation and harm, must be present.[119]

Notably the law of delict had its early origins in Roman law. In terms of Roman law the claim *damnum iniuria datum*[120] and its remedy the *actio legis Aquiliae*[121] were created by the *lex Aquilia*, a plebiscite in 287 BC consisting of three chapters,[122] with the aim of compensating a victim for harm suffered.[123] Chapter 3 of the *lex Acquilia* provided a remedy for the wrongful injury of slaves and four-footed animals as well as "the damaging of objects by means of burning, breaking and destroying" of other things including the "direct destruction" of other things.[124] The prerequisite was physical damage and there needed to have been a direct, causal connection that existed between the conduct and the damage that resulted.[125]

Wrongfulness entailed that it had to be proved that the wrongdoer acted without a right or exceeded the boundaries of this right, or that the wrongdoer engaged in

[117] Neethling *et al* (2015) 4.
[118] Neethling *et al* (2015) 3. The authors explain that because the wrongdoer has an *obligation* to make compensation for the damage suffered, the person prejudiced has a corresponding right to claim compensation with the result that an *obligation* between the two parties is created, and accordingly the law of delict applies which belongs to that part of the private law known as the *law of obligations.*
[119] Neethling *et al* (2015) 4. If any one or more of these elements are missing, then a delict cannot be said to have been committed and no liability arises. See also Van Eeden and Barnard (2017) 31.
[120] This claim applied when an act resulted in patrimonial damage. See Neethling *et al* (2014) 220 and 262.
[121] See Neethling *et al* (2015) 3-4 for an overview of the development of the *actio legis Acquliae* in Roman law.
[122] Midgley and Van der Walt (2016) par 7 subpar 1. See also Neethling *et al* (2001) fn 35.
[123] Midgley and Van der Walt (2016) par 7 subpar 1.
[124] Midgley and Van der Walt (2016) par 7 subpars 3-4.
[125] Midgley and Van der Walt (2016) par 7 subpar 4.

unreasonable conduct such as the breach of a legal duty.[126] Fault (*culpa*) entailed that the wrongdoer had acted either *doli capax* (intentionally) or *culpae capax* (negligently).[127] Whether a wrongdoer had acted *culpae capax* was determined objectively by ascertaining whether there was a breach of the duty of care and diligence as tested against the actions of a *diligens paterfamilias,* being the average prudent person.[128] As pointed out by De Jager, the essence of liability based on fault was founded on the notion that only damage that was caused in a blameworthy manner needed to be compensated.[129]

Originally the penalty, in terms of the plebiscite, for causing harm due to a wrongful and culpable act was calculated by determining the value of the damaged thing and requiring that the defendant pay the highest market value of the damaged thing as determined from the previous year.[130] The penalty extended to include all patrimonial damage (*damnum*) and not only damage to the thing itself, as long as the plaintiff could show an interest (*id quod interest*) in the damaged thing.[131]

An action in delict was subsequently the legal ground relied upon in terms of the South African common law by a plaintiff who wished to pursue a product liability claim in a situation where there was no contractual relationship between the parties.[132] The South African law of delict was founded on Roman and Roman-Dutch law with influence from English law.[133] In Roman-Dutch law[134] product liability was a familiar concept and was recognised by the classical writers[135] such as the classical French writer Pothier, who was respected in the Roman-Dutch community, as well as by the Roman-Dutch law writers of the day.[136]

In Roman-Dutch law, the Aquilian action also underwent changes which included that physical damage was not a prerequisite for establishing liability, and the action

[126] Midgley and Van der Walt (2016) par 7 subpars 7-8.
[127] Midgley and Van der Walt (2016) par 7 subpar 10.
[128] Snyman (1980) *CILSA* 186; and Midgley and Van der Walt (2016) par 7 subpar 11.
[129] De Jager (1980) *RAU* 13.
[130] Midgley and Van der Walt (2016) par 7 subpars 2-3 and 15.
[131] Neethling *et al* (2001) 9; and Midgley and Van der Walt (2016) par 7 subpar 5.
[132] Loubser and Reid (2012) 39.
[133] *Cape Town Municipality v Paine* 1923 AD 207 at 211. See also Alheit (2006) *CILSA* 285.
[134] Van der Walt (1968) *CILSA* 64.
[135] Snyman (1980) *CILSA* 179.
[136] Snyman (1980) *CILSA* 177 and 179.

became available in other instances such as to the holder of a personal right over a thing, a borrower (or persons in similar relationships to the owner), dependants of a deceased person, or parents or employers for patrimonial loss suffered if a child or domestic servant was injured.[137] Snyman summarises the prerequisites for the application of the *actio legis Aquilia* under the Roman-Dutch law as follows:[138] there must have been the establishment of a duty of care, a breach of this duty of care, proof of negligence, and the result of injury or damage.

Boberg[139] indicates that in terms of the principles of common law product liability *ex delicto* that developed in response to harm caused by defective products the plaintiff could have instituted the Aquilian action against a manufacturer if the ordinary delictual requirements were satisfied. He accordingly describes product liability *ex delicto* as a "*wrongful act"*[140] constituted by the production of a defective article that caused physical or purely economic damage to any person. The *fault*[141] requirement was satisfied by showing that "the plaintiff's damage was reasonably foreseeable, that a reasonable man would have guarded against it, and that the defendant failed to do so" thus indicating that such liability was occasioned by the negligence of the manufacturer.

In *Cape Town Municipality v Paine*[142] and subsequently in *Herschel v Mrupe*[143] the prevailing Roman-Dutch law principles that applied in South Africa in the context of product liability were laid down. It was held that a manufacturer owed a *legal duty* to the public to prevent harmful things from being placed in circulation. Accordingly a person could hold a manufacturer liable in delict if the manufacturer had *negligently* put into circulation a defective product which caused harm provided the consumer was not in privity of contract with the manufacturer.

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[137] Midgley and Van der Walt (2016) par 7 subpar 18. See further Neethling *et al* (2012) 9 for the developments regarding Aquilian liability that occurred in Roman-Dutch law.
[138] Snyman (1980) *CILSA* 188 where he indicates that wrongfulness lies in the breach of a legal duty as opposed to the infringement of a subjective right.
[139] Boberg (1984) 194.
[140] Own emphasis.
[141] Own emphasis.
[142] 1923 AD 207 at 216-217. See also Davis (1979) *CILSA* 209.
[143] 1954 (3) All SA 414 (A) at 431-432. See also Snyman (1980) *CILSA* 189.

2. Concept of "defect" for purposes of common law product liability *ex delicto*

In the context of product liability *ex delicto* De Jager states that the "conduct" element is found in the manufacturer's voluntary control and supervision exercised over, and the organisation of the complex process of industrial production.[144] Kriek further remarks that in the case of a distributor, wholesaler or retailer, the relevant conduct may involve taking delivery of the product, transportation, storage, packaging, repackaging and on-sale of the product.[145] Simply put, it can be said that the release of a defective product onto the consumer market can, in general terms, be said to constitute an "act" or "conduct" as an element of common law product liability *ex delicto*. As the concept of a "defective" product is central to the issue of product liability, it is necessary to determine when exactly a product can be said to have a "defect" for purposes of common law product liability *ex delicto*.

Notably the concept of "defect" was extensively dealt with in the common law of sale but not in the common law of delict. In terms of the common law of sale liability for defects in goods generally applied only where the goods contained latent defects at the time of their supply.[146] This was due to the operation of the implied warranty against latent defects afforded by the common law to a buyer of goods, whether movable or immovable, which resulted in a purchaser being entitled to either claim a reduction in the purchase price of the product or to cancel the agreement of sale if a product sold was found to be defective.[147] Liability could likewise be incurred by the seller of goods who provided an express warranty that the goods were not defective,

[144] De Jager (1978) *THRHR* 41. De Jager describes the process of industrial production to include the design, manufacturing and distribution of a product.
[145] Kriek (2017) *Thesis* 59. She explains that during this process, the distributor or retailer handles the product and may have the opportunity to conduct inspections or quality controls prior to on-sale to a subsequent supplier or the ultimate supplier.
[146] It is submitted that contractually the parties could agree to sell the product "as is" meaning a plaintiff could not institute a claim for patent defects and latent defects that he was aware of; or contractually the parties would have been able to agree that liability would ensue even in the event of a patent defect although if such a defect did occur, it would have been very rare and the purchaser in any event could have utilised the ordinary remedies for breach of contract. See Loubser and Reid (2012) 28. With regard to delictual liability, the distinction between latent and patent defects may be relevant as factors during the wrongfulness aspect, as well as during the proof of negligence phase – see par 2.1 and fn 130 hereunder. See also Barnard latent defects (2012) *DJ* 455; Barnard (2013) *Thesis* at 362; Strydom (2014) *UP* 20; Lebea (2016) *UP* 14-18; and Kriek (2017) *Thesis* 279.
[147] Loubser and Reid (2012) 27.

in which event the buyer's remedy was the *actio empti* which also entitled him to claim damages.[148] In *Dibley v Furter*[149] and subsequently in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[150] it was held that a "latent defect" is a "defect in the thing sold which is of such a nature that it rendered the *merx* unfit for the purpose for which it was bought or normally used, and which defect was not known to the buyer at the time of conclusion of the contract, and could not be discovered by him upon a reasonable examination of the thing sold."[151] As pointed out by Barnard, the buyer had the onus to prove that the defect existed at the time of conclusion of the contract and that the buyer had not been aware of such defect.[152]

The nature of the defect must therefore have been such that it affected the utility of the goods in relation to its intended purpose and accordingly only substantial (material) defects qualified as latent defects for purposes of redress under the common law of sale.[153] The nature of the defect as well as its influence on the utility of the goods had to be determined objectively.[154] It should further be noted that the South African common law of sale allowed sellers to contract out of their liability for defective goods by means of a "*voetstoots*" clause in terms whereof the goods were sold to the buyer "as is", i.e. with any defects it may possess.[155] A comprehensive discussion of *voetstoots* clauses and liability for defective goods under the common law of sale falls however outside the scope of this thesis.

Although the common law concept of "defect" arose from the law of sale it is clear that such concept is not comprehensive enough for purposes of product liability.

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[148] Christie's (2016) 186; and Kriek (2017) *Thesis* 38-40.
[149] 1951 (4) SA 73 (C).
[150] 1977 (3) SA 670 (A). See also *Schwarzer v John Roderick's Motors Pty Ltd* (1940) OPD 170 at 180 where it was stated that a defect is considered latent if "the defect was such that a normally intelligent individual could not discern it after careful inspection by a normal trial run." See further *Waller v Pienaar & Another* 2004 (6) SA 303 (SCA).
[151] Nagel *et al* (2016) par 14.52 remark that "The criterion is not whether an expert would have discovered the defect, or whether it would only be discovered upon an unusually thorough examination." See Barnard (2013) *Thesis* at 358.
[152] Barnard (2013) *Thesis* at 358.
[153] Nagel *et al* (2016) par 14.53.
[154] *Ibid*. See also *A Gibb & Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W) which concerned a scaffold plank alleged to be patently defective. See further Loubser and Reid (2012) 50.
[155] Kerr (2004) 150 describes a "*voetstoots*" clause as a clause which stipulates that the seller is not to be held liable for defects in the goods sold and that such goods are sold "as is" or "with all its faults". See also Barnard (2013) *Thesis* at 371.

From a product liability perspective it is not sufficient that a product was merely defective in the sense that its utility was compromised and that it was not fit for purpose. Given that product liability arises from harm caused by a defective product the concept of "defect" for purposes of product liability therefore implies that the defect had to have an *additional dimension or feature*, namely that the particular defect made the product *unsafe* and *potentially harmful* in the sense that it could injure persons or even cause their death or otherwise cause damage to property. One can also ask whether the common law of product liability *ex delicto*, like the common law of sale, only recognised latent defects that caused harm as ground for liability? No clear answer on this issue is presented by the common law of product liability *ex delicto* and it submitted that it would probably be correct to conclude that where a product was patently defective the manufacturer would, as discussed in paragraph 4.2 below, in most instances have been able to escape liability on the basis of voluntary assumption of risk (based on the doctrine of *volenti non fit iniuria*) by the person who suffered damages occasioned by such patently defective product.

Notably the South African common law of product liability *ex delicto* also makes use of a "consumer expectations test" although strictly speaking this test is broader than merely referring to the expectations of consumers as it is pegged on the expectations of society, thus on what "persons generally" can expect with regard to products. Determining whether a product contained a defect for purposes of common law product liability *ex delicto* thus involves a layered approach which also requires an assessment of what the society, i.e. persons generally, would reasonably have been entitled to expect from such product in terms of its level of safety. Such expectation is necessarily influenced by other factors such as the time at which the product was manufactured and the intended use of the product. Also, in determining whether a product is defective for purposes of common law product liability, a cost-benefit analysis is undertaken in some instances by asking whether the benefit of the product outweighed the cost attached to making the product safer. The common law however acknowledges that some products are inherently dangerous such as a sharp knife and that this knowledge is commonly known to society hence a person injured by such a product is expected to appreciate such danger and would therefore

not have a product liability claim against the manufacturer of the knife in the event of injury.[156]

In *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk*[157] the court specifically dealt with the factors to be considered in determining whether a product was defective for purposes of product liability. In this matter the plaintiff purchased a herbicide from Bayer to control grass and weeds on his farm.[158] Bayer obtained the herbicide from Ciba-Geigy, who had imported it from the parent company in Switzerland. The parent company had undertaken extensive tests on the product to determine its use and safety in all the "leading maize-growing countries in the world, including South Africa." Ciba-Geigy also undertook its own tests with regard to the use and safety of the herbicide. Both the parent company and Ciba-Geigy were satisfied with the outcome of the tests. Over time, Doornbult's maize however displayed chlorotic leaf conditions, resulting in loss of the leaves and stunted growth, causing Doornbult to suffer damages to the value of more than R100 000 as the entire crop was destroyed.[159] Doornbult brought two claims, one *ex contractu* against Bayer and the other *ex delicto* against Ciba-Geigy.[160] With reference to the *ex delicto* claim against Ciba-Geigy, the court indicated that a manufacturer had a general duty to ensure that defective products did not reach the market;[161] or if they nevertheless reached the market, to recall them or to ensure that no harm ensued.[162] The court indicated that to decide on whether a product was defective, it was necessary to consider certain factors which varied from case to case, namely:[163]

(a) the type of product, for example, a manufacturer of food for human consumption would be subjected to stricter measures than the manufacturer of cattle feed;[164]

[156] Loubser and Reid (2012) 34.
[157] 1979 (T), an unreported case discussed by Van der Merwe and De Jager (1980) *SALJ.*
[158] The herbicide was supposedly safe for controlling weeds without damaging maize. However the herbicide damaged the plaintiff's "waxy" maize resulting in the loss of the entire crop. The "waxy" maize was an exotic variety and not an officially registered seed variety in South Africa.
[159] Van der Merwe and De Jager (1980) *SALJ* 84.
[160] *Ibid.* The contractual claim is not discussed further as it falls beyond the scope of this thesis.
[161] Van der Merwe and De Jager (1980) *SALJ* 90.
[162] Van der Merwe and De Jager (1980) *SALJ* 88.
[163] Van der Merwe and De Jager (1980) *SALJ* 88-89; and Neething and Potgieter (2014) *THRHR* 503.
[164] Van der Merwe and De Jager (1980) *SALJ* 88 fn 19.

(b) practices in a trade, for example, in *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd*[165] the industry showed that the practice was for the user of the product to inspect the goods before using them;

(c) knowledge and expertise of potential purchasers and users of the product, for example, a person buying medicine off the shelf or over the counter must have been given instructions in plain and understandable language to be understood by the user, however, if the medicine was supplied to a pharmacist, it could be presumed that the instructions were intended for an expert user;[166]

(d) abnormal use of the product: a manufacturer must have expected to know frequent and obvious uses of its products, such as when people sat on chairs versus using them to stand on;[167] or

(e) the specific stage at which the defect originated, for instance:[168]

i. during the planning and design phase, the manufacturer needed to consider the latest knowledge within its field;

ii. during a product's manufacture, the manufacturer had a duty to inspect and control the product;

iii. when the product was released onto the market, the manufacturer had a duty to issue users with directions and warning notices regarding risks; and

iv. if there was a subsequent defect in the product that reached the market, the manufacturer needed to have recalled or withdrawn it.

Alheit and also Loubser and Reid further indicate that the factors generally considered by the courts to assess if a product was defective for purposes of common law product liability *ex delicto* are varied and can be summarized as follows:[169]

- the nature of the manufacturer's business;
- the time of manufacture and supply and the specific stage in the production process during which the defect originated;
- the customs and practices in a certain trade or industry;
- the production standards issued by the producer and/or legislation;

[165] 1975 (2) SA 457 (W) at 466; and see Van der Merwe and De Jager (1980) *SALJ* 88 fn 20.
[166] Van der Merwe and De Jager (1980) *SALJ* 88 fn 21.
[167] Van der Merwe and De Jager (1980) *SALJ* 88 fn 22.
[168] Van der Merwe and De Jager (1980) *SALJ* 89.
[169] Alheit (2006) *CILSA* 298; and Loubser and Reid (2012) 44-45.

- the option of an alternative manufacturing process that would have resulted in a different, non-harmful outcome;
- the cost of safety measures (i.e. a cost-benefit analysis);
- the degree of harm and whether the consumer should have carried an element of risk as the need (or benefit of) for the product exceeded the risk (for example a vaccine developed to prevent certain illnesses);[170]
- whether stricter measures may have been required depending on the type of the product;[171]
- the aim of the product such as why the product was marketed, packaged and displayed;
- the intended versus abnormal use of the product;
- the presence of warning notices or instructions;
- the use of a trade description or mark; and
- the knowledge and experience of the users of the product.

It thus appears that the common law of product liability *ex delicto* made use of consumer expectations as well as a risk-benefit analysis to determine defectiveness in a product.

Notably the common law did not specifically distinguish between manufacturing, design and instruction or warning defects. Kriek also points out that at common law, no separate rules have crystallised in respect of different types of product defects.[172]

3. Overview of other elements of common law product liability *ex delicto*

3.1 Wrongfulness

Neethling, Potgieter and Visser state that an act which causes harm to another is in itself insufficient to give rise to delictual liability as such liability will only follow if the act is wrongful. Thus, without wrongfulness a defendant may not be held liable in delict for harm caused by such defendant.[173] They further remark that in essence

[170] Alheit (2006) *CILSA* 298 fn 326.
[171] Alheit (2006) *CILSA* 298 fn 323.
[172] Kriek (2017) *Thesis* 79.
[173] Neethling *et al* (2015) 33.

"wrongfulness lies in the infringement of a *legally protected interest* (or an interest worthy of protection) in a *legally reprehensible way.*"[174]

Loubser and Reid point out that in the context of product liability the concept of "wrongfulness" has in the common law been closely linked to the question of defectiveness "because the causing of harm is not necessarily wrongful in itself – the concept of a 'defective product' plays a *normative role* in the process of determining whether harm resulting from the manufacturing and supply of a product should be considered wrongful."[175]

The determination of wrongfulness in principle entails a dual investigation: firstly, it must be determined whether a legally recognised right has been infringed, that is, whether such an interest has in fact been encroached upon due to the defendant's act having a harmful effect.[176] Secondly, if it is clear that a legally protected interest has been infringed, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible manner. This means that violation of a legal norm must therefore be present, as a harmful consequence in itself is insufficient to constitute wrongfulness. Whether an interest is worthy of protection, as well as whether its infringement is legally unacceptable, is *ex post facto* determined by reference to the legal convictions of the community and the *boni mores*.[177] The application of these criteria also involves public policy.[178]

Van Der Merwe and De Jager concluded in 1980 already that Aedilitian liability of a manufacturer for harm caused by a defective product essentially involves applying the criterion of reasonableness.[179] They indicated that a manufacturer has a general duty to take reasonable steps to ensure that defective products do not reach the

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[174] *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (ZASCA) par 33; Midgley and Van der Walt (2005) 70 as updated (2016); and Neethling *et al* (2015) 33. Own emphasis.
[175] Loubser and Reid (2012) 40. See also Boberg (1984) 194; and *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (3) All SA 362 (SCA) at 293A-C for the opinion that wrongfulness is not a special form of the Aquilian liability requiring its own approach. Neethling and Potgieter (2014) *THRHR* 505 however disagrees and argue that in order for wrongfulness to be determined, a defect must exist foremost which deviates from the normal determination of the test of wrongfulness.
[176] Neethling *et al* (2015) 33.
[177] *Ibid. See also Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (ZASCA) par 39.
[178] *Mukheibir v Raath* 1999 (3) SA 1065 (SCA) par 25. See also Van Aswegen (1993) *THRHR* 180.
[179] Van der Merwe and De Jager (1980) *SALJ* 88.

market, or if they do, to withdraw them or to take their steps to make sure that their presence on the market does not cause harm:[180]

> The criterion of reasonableness coupled with the community's concept of what behaviour is reasonable in given circumstances is flexible enough to take into account such factors as the type of the product, the nature of the manufacturer's business enterprise, the customs and practices prevailing in a particular trade or industry, the amount of knowledge and expertise of potential purchasers and users of the product, abnormal use, and the specific stage in the production process during which a defect originated.

Loubser and Reid indicate that in general wrongfulness both supplements and overarches the other elements of delict.[181] This is because with all the other elements of delictual liability (namely conduct, causation, harm and fault) proved or assumed to be present, the element of wrongfulness involves a further value judgment on whether the affected interest of the plaintiff deserves protection from the defendant's action or lack of it, so that the burden of damage should be shifted from the plaintiff to the defendant.[182] Accordingly they remark that wrongfulness "adds a further value - or policy based dimension to the enquiry into liability and requires the exercise of judicial discretion in determining the scope of protection afforded to various rights and interests, the scope of responsibility to act, and overall policy considerations relating to the question whether the law of delict should intervene."[183]

Loubser and Reid however remark that the criteria that are used to determine wrongfulness purport to be objective, normative standards for determining wrongfulness but they caution that conclusions reached on the basis of these standards alone would be "impenetrable to analysis and unverifiable".[184] Thus these criteria are not exclusive but they serve as general standards or guidelines used by the court to assess the particular circumstances of a case where wrongfulness is

[180] *Ibid*.
[181] Loubser and Reid (2012) 40.
[182] *Ibid*. See also Fagan (2005) *SALJ* 90.
[183] *Ibid*. See further Fagan (2005) *SALJ* 90 who points out that the enquiry into wrongfulness involves the application of wide and evaluative criteria and the exercise of judicial discretion.
[184] Loubser and Reid (2012) 41.

alleged to be present.[185] In assessing wrongfulness, Loubser and Reid therefore indicate that the following considerations are relevant:[186]

- Was there an infringement of a right (including a common law, statutory or constitutional right)?
- Was there a legal duty not to cause harm or to prevent it?
- Was there a statutory duty not to cause harm or to prevent it?
- Are there policy considerations indicating that the law of delict should or should not intervene?
- What is the nature of the defendant's conduct?
- What is the nature of the defendant's state of mind?

On the issue of wrongfulness in the context of common law product liability in general, the following cases have attempted to provide greater clarity: in *Herschel v Mrupe*[187] the court indicated that harm caused by "potentially harmful things" involves the infringement of the rights of the user and a breach of duty by the manufacturer. The court stated:

> By putting into circulation potentially harmful things…the manufacturer is not merely exercising a legal right but encroaching upon the rights of others not to be exposed, when going about their lawful occasions and when accepting the implied general invitation to acquire and use such commodities, to danger without warning and without their having a reasonable opportunity to become aware of such danger before use. In other words, it is an encroachment upon the rights of others to set hidden snares for them in the exercise of their own rights. To refrain from doing so is a duty owing to the world at large.

In *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk,*[188] as referred to above, the court reasoned as follows:[189] The defendant was a distributor of herbicide. The herbicide's primary aim was to exterminate plant

[185] *Ibid*. These authors remark further: "For this assessment the courts look at the proven facts, the relationship between the parties, relevant policy considerations, relevant provisions of the Constitution and of other legislation, the overall costs, risks and utility of the defendant's conduct and possible alternatives to such conduct. Wrongfulness in the final analysis involves a value judgment, reached by (what should be) an open and structured process of reasoning, with reference to the facts found to be proven, and the principles of law, legislation and policy considerations found to be applicable."
[186] Loubser and Reid (2012) 42.
[187] 1954 (3) SA 464 (A) with reference to *Donaghue v Stevenson* (1932) AC 562, 1932 SC (HL) 31.
[188] 1979 (T) an unreported case discussed by Van der Merwe and De Jager (1980) *SALJ.*
[189] Van der Merwe and De Jager (1980) *SALJ* 90.

life to a certain extent, without harming it but protecting it. Thus a risk of extensive damage existed if the herbicide was defective. Accordingly the defendant could reasonably have been expected to carry out "intensive tests on a…variety of maize cultivars under different climate and soil conditions" to determine the extent of damage, although it could not possibly have known every possible type of climatic or soil condition that existed.[190] The defendant carried out the necessary extensive tests. By considering the industry practice, the defendant could have assumed that a purchaser would have supervised the preparation and application of the product, which was often applied by unskilled labour. The plaintiff however failed to do this. The court also remarked that warnings and notices were needed for the user of the herbicide. It was found that adequate warnings were indeed issued. Furthermore,[191] the court pointed out that section 3(2) of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act[192] required the registration of agricultural remedies, including the herbicide *in casu*, and that its registration must have been in the public interest. The registration of the herbicide was appropriately approved. Thus the court held that the defendant had acted reasonably and did not breach its duty of care, with the result that it did not act wrongfully. The plaintiff's product liability claim could therefore not succeed.

In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*[193] the court characterised the causing of damage to a consumer by a "potentially" hazardous product as wrongful,[194] stating that:

> If a manufacturer produces and markets a product without conclusive prior tests, when the utilisation thereof in the recommended manner is potentially hazardous to the consumer, such negligence on the part of the manufacturer may expose him to delictual liability to the consumer. Where the consumer does not acquire the product directly from the manufacturer, and the manufacturer is thus a third party, such liability amounts to what is sometimes termed 'product liability'. A contractual nexus between the manufacturer and the consumer is not required. …It follows as a matter of course that a

[190] Van der Merwe and De Jager (1980) *SALJ* 89.
[191] Van der Merwe and De Jager (1980) *SALJ* 90 fn 30-31.
[192] Act 36 of 1947.
[193] 2002 (2) SA 447 (SCA) par 64. See also *Betko Products CC v Grasso (Pty) Ltd* 2010 ZAWCHC 60.
[194] Loubser and Reid 43.

> manufacturer who distributes a product commercially, which, in the course of its intended use, and as the result of a defect, causes damage to the consumer thereof, acts wrongly and thus unlawfully according to the legal convictions of the community.

In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*[195] the appellant sold spices containing a banned colourant. The respondent claimed in contract and also in delict in the court *a quo*. The delictual claim was based on the plaintiff's awareness that breach of contract, due to delivery of the faulty spices, would, or reasonably could, cause loss to the respondent. The court accepted that the same facts may give rise to a claim for damages both *ex contractu* and *ex delicto*. It however also accepted that breach of a contractual duty is not per se wrongful for purposes of Acquilian liability. The court further indicated that the negligent causing of pure economic loss is not *prima facie* wrongful because wrongfulness depends on the existence of a legal duty, which in turn is a matter for judicial determination based on criteria of public or legal policy consistent with constitutional norms.[196]

3.2 Negligence

Neethling, Potgieter and Visser point out that the element of "negligence" entails that a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him.[197] In *Kruger v Coetzee,*[198] the *locus classicus* for the abstract or general test of negligence, it was held that the defendant *in casu* was negligent because:

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[195] 2011 (4) SA 276 (SCA). Although the product liability provisions in the CPA was already in operation by the time this case was decided the cause of action in this matter arose before the product liability provisions of the CPA came into effect hence only the common law of product liability was available as basis for the delictual claim. As pointed out by Barnard, the CPA would in any event not have applied in this matter as the consumer was a juristic person with an annual turnover or asset value in excess of R2 million. See Barnard (2013) *Thesis* 404. See further Neethling and Potgieter (2014) *THRHR* 502.

[196] At par 38.

[197] Neethling *et al* (2015) 137.

[198] 1966 (2) SA 428 (A) at 430. See also Neethling and Potgieter (2014) *THRHR* 509. The test for negligence as laid down in the *Kruger* case was confirmed in *Mukheiber v Raath* 1999 (3) SA 1065 (A). See also *Nicholls v Burbridge CC t/a Dulce Café* 2015 JOL 33443 (ECG) where the plaintiff slipped and fell on a slippery floor at the defendant's coffee shop of the defendant, sustaining injuries. Applying the test in *Kruger v Coetzee* the court a quo found that the defendant did not establish that the defendant was negligent and thus dismissed the claim. This judgment was confirmed on appeal.

> (a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person and property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.

Accordingly the criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable man (person), the so-called *bonus paterfamilias.*[199] Neethling, Potgieter and Visser indicate that the reasonable man (person) is merely a fictitious person, a concept that was created by the law to have a workable, objective norm for conduct in society. In *Herschel v Mrupe*[200] it was explained that:

> [T]he concept of the *bonus paterfamilias* is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrast he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expect others to do likewise.

Thus Neethling, Potgieter and Visser remark that the reasonable person serves as the legal personification of those qualities which the community expects from its members in their daily contact with one another.[201] They however point out that it is

[199] Neethling *et al* (2015) 137. They refer to the following description of negligence that was put forward by Midgley and Van der Walt (2016) 166: "Conduct is negligent if the actor does not observe that degree of care which the law of delict requires. This involves a value judgment which is made by balancing various competing interests. The standard of care which the law demands is ordinarily that which a reasonable person…in the position of the defendant would exercise in the same situation." However in the opinion of Neethling *et al* (2015) 137 ft 62 this description is probably too vague to be of much value and may lead to confusion with understanding and applying wrongfulness.

[200] 1954 (3) SA 464 (A) 490.

[201] Neethling *et al* (2015) 142. See also *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 410-410 where the court stated: "In my opinion it serves no purpose to ascribe to various anthropomorphic characteristics to the *diligens paterfamilias*, because we are not dealing with a physical person, but only with the name of an abstract, objective criterion. We are furthermore not concerned with what the care of a legion of reasonable persons would have been, such as a reasonable educated person, a reasonable illiterate person, a reasonable skilled labourer, a reasonable unskilled labourer, a reasonable adult or a reasonable child. There is only one abstract, objective criterion, and that is the Court's judgment of what is reasonable because the Court places itself in the position of the *diligens paterfamilias*."

both fair and realistic to accept that the characteristics of the fictional reasonable person in South Africa must be adapted with the changing circumstances.[202]

Negligence therefore indicates failure to apply the degree of care that a reasonable person would have exercised in the same situation and to avoid causing "foreseeable" harm.[203] The requirement of foreseeability that forms part of the test for negligence, can be understood in an abstract sense, indicating that *some harm* must be foreseeable to *someone,*[204] or in a more specific concrete sense, indicating that *the kind of harm in issue* must have been foreseeable to a person *in the position of the plaintiff.*[205] Neethling, Potgieter and Visser are of the view that the concrete approach to foreseeability is to be preferred.[206] A more general approach to the issue of negligence was however followed in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*[207] where the court declared:

> In the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

Loubser and Reid remark that the "foreseeability" of harm depends on a consideration of *all* the circumstances of a particular case, but point out that our courts have focused in particular on the following questions:[208]

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[202] Neethling *et al* (2015) 142 opine that circumstances such as improved technology and improved access to education, training and information may require the reasonable person test to be more stringent in evaluating the degree of care expected of human conduct in particular circumstances.
[203] *Ibid*.
[204] *Ibid*.
[205] Neethling *et al* (2015) 148-149.
[206] Neethling *et al* (2015) 149. They base their preference largely on Boberg (1984) 276-277 who, in their opinion, correctly observes that the question of whether the reasonable person in the position of the wrongdoer would have acted differently in order to prevent damages, may only be answered in a meaningful way by reference to the consequences that were indeed reasonably foreseeable (and not by reference to damage in general as per the abstract approach). Accordingly it is only when these consequences of an act are considered that one can judiciously decide what steps or precautions (if any) the reasonable person would have taken in order to guard against such consequences. Thus they indicate that this does not mean that the precise nature and extent of the harmful consequences or the precise manner in which the damage was caused must be reasonably foreseeable. It is sufficient if the general nature of the consequences and the manner in which it was caused were foreseeable.
[207] 2000 (1) SA 827 (SCA) at 839F.
[208] Loubser and Reid (2012) 46-48.

- How likely was it that a person in the position of the defendant (also taking into account the class of person to which he is connected or associated to) would have suffered harm?
- Was the kind of harm that occurred reasonably foreseeable (as opposed to the specific harm)?
- Was the general manner of occurrence of the harm (general kind of causal sequence, as opposed to the specific turn of events) reasonably foreseeable?
- How likely was it that harm might have occurred?
- If harm did occur, what was the likely extent of the damage?

The subsequent enquiry into the "preventability" of foreseeable harm is therefore pivotal to the establishment of negligence because "a reasonable person will take reasonable measures to prevent the occurrence of foreseeable harm".[209] Accordingly courts take the following factors into account when determining whether foreseeable harm could have been prevented:[210]

- Did the degree of the risk of the occurrence of harm and likely extent or gravity of the possible consequences, if the risk of harm did materialise, require more extensive protective measures?
- The magnitude of the risk was to be weighted up against the social utility of the risk-creating conduct.
- The cost and burden of possible precautionary measures must have been balanced against the risk.
- What would have been the likely success of preventative steps?

The importance of establishing negligence by the manufacturer in a product liability claim *ex delicto* under the common law was confirmed by Coetzee J in *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd*[211] where he stated that "South African law has chosen…to make fault [negligence] the cornerstone of legal liability for defective products." Negligence, as an element of common law product

[209] Loubser and Reid (2012) 48.
[210] Loubser and Reid (2012) 48-49.
[211] 1975 (2) SA 457 (W) at 464-465. Burchell (1993) at 245 remarks that the principle of no liability without fault is firmly established in the modern South African law of delict. Personal fault was the prime justification for shifting the loss suffered by one person onto the financial shoulders of another. See also and Neethling and Potgieter (2014) *THRHR* 509.

liability *ex delicto*, is accordingly "an important filter in the evaluative process to decide whether liability should be imposed."[212] This "filter" requirement has however proven to be the most severe impediment for persons who instituted product liability claims under the common law of product liability *ex delicto*, particularly due to the informational imbalance between the parties,[213] and, as discussed in more detail below, was the main reason for the introduction of a strict product liability regime by the CPA.

As regards the application of the requirement of proof of negligence in common law product liability, the following cases are pertinent: in 1923 the Appellate Division of the Supreme Court in *Cape Town Municipality v Paine*[214] stated that each individual has a right not to sustain injury due to another person's negligence.[215] The facts[216] in this matter were that the Cape Town Municipality owned athletic grounds which it leased to an athletic and cycling association. In terms of the lease, the Municipality had an obligation to repair the external structural defects whereas the Association would maintain the grounds and repair the interior of the buildings. During a sports meeting, Paine stepped from one seat to a lower one on the grand stand and put his foot through the rotten woodwork of the flooring, sustaining injuries, suffering and disability. He sued the Municipality for damages and was successful in the court *a quo* as it was found that the Municipality owed a legal duty to the public, particularly each occupant of the stand, to ensure the safety of the grand stand structure and that the Municipality had failed to discharge this duty and was thus negligent.

On appeal, the court explained the negligence test in the context of Aquilian liability by stating that, in determining negligence, each case was to be decided on its own set of facts without preference to any particular fact.[217] It was stated that as accountability for unintentional injury depended upon *culpa,* the test was whether a

[212] Loubser and Reid (2006) *Stell LR* 422.
[213] Loubser and Reid (2012) 49. See Neethling *et al* (2001) 325 where they also remark that negligence, as a rule, was very difficult to prove on the part of the manufacturer – either because fault was simply not present during the production process or, as remarked by Van der Walt (1972) *THRHR* 242-243, the prejudiced party could not obtain proof of fault as "the technological production process [was] complicated and a closed book as far as he [was] concerned."
[214] 1923 AD 207; and discussed by Snyman (1980) *CILSA* 186.
[215] 1923 AD 207 at 216-217.
[216] 1923 AD 207 at 207, 210 and 212.
[217] 1923 AD 207 at 211, 217 and 219.

reasonable man "would have foreseen the likelihood of harm and governed his conduct accordingly" in that he would have guarded against causing harm.[218] Once it was established that the harm would have been foreseen and guarded against by a reasonable person (*diligens paterfamilias*), then the duty of care was established and the "failure to observe that degree of care which a reasonable man would have observed" resulted in liability. Accordingly it was held that the Municipality should have foreseen the danger posed to the occupants of the grand stand, which would have resulted from its failure to adequately repair it, and it should have guarded against the foreseeable harm.[219] The court stated that this was how a reasonable man would have acted and a legal duty thus arose on the part of the Municipality *vis-a-vis* the occupants of the stand.[220]

Notably the 1932 English case of *Donaghue v Stevenson*[221] proved to be quite influential for the development of South African product liability law. In this case Lord Atkin stated[222] that "a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products, will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care."

Subsequently in 1954 the court in *Herschel v Mrupe*[223] dealt with a negligent statement about his product, made by the defendant who knew that the plaintiff would have relied and acted upon the facts contained in the said statement, resulting in damages which were subsequently claimed by the plaintiff, albeit unsuccessfully.[224] The court applied *Cape Town Municipality v Paine*[225] holding that

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[218] 1923 AD 207 at 216.
[219] 1923 AD 207 at 219.
[220] 1923 AD 207 at 220.
[221] 1932 AC 562, 1932 SC (HL). See Davis (1979) *CILSA* 208-209; and Snyman 1980 CILSA 177. See also Burchell (1993) 246.
[222] 1932 AC 562, 1932 SC (HL) at 599.
[223] 1954 (3) All SA 414 (A) at 415-416.
[224] 1954 (3) All SA 414 (A) at 426 and 427. In this matter the plaintiff's husband died in a motor vehicle accident due to a collision with another motor vehicle that belonged to the defendant. Following the collision, the plaintiff's attorney alleged that the defendant was negligent and requested the details of the insurance company. The defendant provided such details although liability was denied. A letter of demand was then delivered, negotiations proceeded and the insurance company

the defendant owed a duty of care and diligence towards the plaintiff in that a reasonable man would have foreseen the likelihood of harm and acted accordingly by guarding against the danger, and the court needed to ascertain whether or not it was discharged.[226] The court also approved of the position in English law as set out in *Donaghue v Stevenson.*[227]

Later in *A Gibb & Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd*[228] the plaintiff, a building contractor, claimed damages from the defendant, a building materials merchant, for injuries sustained by an employee of a sub-contractor (the foreman) as a result of a patently defective scaffold plank. The plank was weakened by a large knot and gave way, causing the injuries. The plaintiff had paid damages to the injured person and thereafter sought to recover such payment from the defendant on the basis that 90% of the defendant's damage was attributable to the defendant's negligence because the defendant had a duty to have inspected the plank in order to establish whether it was defective prior to using it for scaffolding purposes. The court held that a merchant's liability for damage caused by defects in products depended on whether it had a duty to take reasonable care in detecting defects, for which the court considered the position of the *diligens mercator*. The court however held that this duty did not arise where a dealer in the position of the defendant could reasonably expect that the client would inspect the product for defects and that such inspection would be likely to reveal any defects. On the facts,

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admitted that it had insured the defendant's motor vehicle. A settlement could not be reached and the plaintiff instituted court action to claim damages against the defendant due to the negligence of the driver. However, it emerged in the plea that the details of the insurance company previously provided by the defendant were incorrect. Due to this error, the matter was withdrawn and instituted against the correct insurance company – the content of which shall not be discussed herein. As the plaintiff wasted costs due to the erroneous institution of court proceedings, she successfully proceeded to claim these costs from the defendant in the Magistrate's Court. The court, at 427, stated that "one would expect a statement made by an attorney of record…could be relied upon and that it could be acted upon without having to apply any tests as to its correctness." At 428, there was an appeal to the Transvaal Provisional Division by the defendant where Malan J stated (and Bresler AJ concurred) that no special relationship existed between the parties *in casu* and the statement made by the defendant was an "innocent [and] non-defamatory [statement]" which founded no damages claim in law. The Magistrate's judgment was changed to absolution from the instance with the respondent having to pay the costs of the appeal. The plaintiff (appellant) then appealed the matter to the Appeal Court. The majority judgment dismissed the appeal as the plaintiff failed to prove *culpa* (negligence) on the part of the defendant.

[225] 1923 AD 207 at 161-162; and 1954 (3) All SA 414 (A) at 416.

[226] 1923 AD 207 at 217; and *Herschel v Mrupe* 1954 (3) All SA 414 (A) at 416.

[227] 1954 (3) All SA 414 (A) at 414, 420 and 429.

[228] 1975 (2) SA 457 (W). See further Davis (1979) *CILSA* 206; Snyman (1980) CILSA 177; and Bianco (2002) *UNISA* 162.

therefore the court held that the particular damage was not reasonably foreseeable because a reasonable timber merchant would have expected a building contractor to have at least inspected the scaffolding for possible defects before using it.

In *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk,*[229] as discussed above, the action in delict failed *inter alia* because the plaintiff was unable to prove that the manufacturer of the herbicide concerned was negligent. It was held that the manufacturer was not under a duty to test the product against every possible variety of maize in every possible soil or climatic condition, and could not be blamed by reference to circumstances which were not foreseeable to it.

In *Combrink Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd*[230] the plaintiff hired a motor vehicle from a leasing company (who was the owner of the motor vehicle that it had purchased from a garage). The agreement between the plaintiff and the leasing company required the plaintiff to repair the motor vehicle when necessary, and it excluded liability for loss sustained by the plaintiff due to the motor vehicle being defective. Subsequently the motor vehicle was indeed found to be defective and the plaintiff sued the manufacturer of the motor vehicle for damages that he had sustained due to the vehicle being defective. The court *inter alia* recognised the *actio legis Aquiliae* for patrimonial loss suffered unlawfully and negligently.[231] The court however held that the manufacturer *in casu* was not liable for the loss suffered by the plaintiff as it could not have *foreseen* that subsequent successors[232] in title would waive their common law remedies to claim

[229] 1979 (T) an unreported case discussed by VDM and DJ (1980) *SALJ* 89-90.
[230] 1972 (4) SA 185 (T). The court made certain findings on the contractual aspects of the case which fall beyond the scope of this thesis. See also the criticism by Davis (1979) *CILSA* 210.
[231] Davis (1979) *CILSA* 210.
[232] The plaintiff who had renounced his right to recover damages from the leasing company - Loubser and Reid (2012) 50.

from a predecessor due to defects.[233] Thus the court held that there was no negligence on the part of the manufacturer.[234]

Kriek explains that establishing negligence on the part of a manufacturer often presents a "weighty or insurmountable evidential burden" as it requires expert evidence in many instances to establish that the manufacturer could reasonably have foreseen the harm and "taken reasonably available, practicable and economically feasible measures to prevent it." She also points out that consumers are generally unfamiliar with the technicalities of the production processes as well as the scientific knowledge or technology applied and available at the relevant time. However, manufacturers generally have more financial and informational resources available to produce expert evidence in defence of their production processes and products. To illustrate, Kriek mentions the example of a pharmaceutical product, where the manufacturer would produce substantial amounts of evidence regarding its scientific research and development, clinical trials and quality control processes as evidence that it had taken reasonable steps in ensuring that its product, which has social utility, was as safe as reasonably possible.[235]

3.2.1 The interaction between negligence and wrongfulness

From the aforesaid it is evident that there is a close interrelation between wrongfulness and negligence as elements of common law product liability ex delicto as *both negligence and wrongfulness involve the application of a standard of reasonableness.*[236] Loubser and Reid indicate that whereas the test for negligence

[233] 1972 4 SA 185 (T) at 191; and Davis (1979) *CILSA* 210. This judgment was met with criticism from Davis – despite him stating that the manufacturer could not have foreseen the harm resulting from successors in title, he concurs with Boberg (1972) *ASSAL* 133-134 who indicates that "the defendant manufacturer ran the risk of liability to all those who might suffer physical injury as a result of its negligent manufacture; [and] why should it not be liable for the very much more limited and easily foreseeable economic loss of the unfortunate hirer of the defective vehicle."

[234] Davis (1979) *CILSA* 211; and Neethling *et al* (2001) 326 .

[235] Kriek (2017) *Thesis* 75.

[236] Boberg (1984) 269-279 offers the following explanation: "When wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged ex post facto and in the light of all relevant circumstances including those not foreseeable by the actor or beyond his control. Here the emphasis is upon the effect of the actor's conduct, and a finding of wrongfulness expresses the law's disapproval of the result that he produced. With negligence, on the other hand, the enquiry is whether the actor behaved himself unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him. Here the emphasis is upon the actor's role in bringing about a consequence that has already been branded wrongful and a finding of negligence expresses the law's disapproval of the part that he personally played in producing it." Boberg's view that wrongfulness

assesses *conduct of the manufacturer* on the basis of the foreseeability and preventability of harm, the test for wrongfulness evaluates whether the causing of harm by distribution of the product, with its particular qualities and potentially harmful effect, constitutes an *unreasonable infringement of rights* and deserves the intervention of the law of delict.[237]

3.2.2 Application of the *res ipsa loquitur* doctrine

As stated, inability of plaintiffs to prove negligence on the part of the manufacturer of a defective, harmful product has proven to be the greatest stumbling block to successfully bringing product liability claims under the South African common law of product liability *ex delicto*. The common law however, in theory, provided some reprieve for plaintiffs in product liability cases by the application of the *res ipsa loquitur* doctrine in order to alleviate the onerous burden of establishing negligence in the context of manufacturing defects.[238] As pointed out in Chapter One, this doctrine derived from Anglo-American law and can be translated as "the facts speak for themselves."[239] The basis of the doctrine is that the mere fact that harm resulted from a defective product is in some instances sufficient to justify an inference of negligence on the part of the manufacturer.[240]

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always entails an *ex post facto* assessment has however been criticised by several authors. See Fagan (2005) *SALJ* 90; and Loubser by Boezaart & De Kock LM (2008) at 133.

[237] Loubser and Reid (2012) 50. Neethling *et al* (2015) 129-130 further indicate that a controversial issue is whether wrongfulness or negligence should be determined first in the course of establishing delictual liability. The one view is that fault in the form of negligence can only be present if a person has acted wrongfully, whereas the other view is that the inquiry into negligence can be dealt with before the wrongfulness issue, either because the enquiry into negligence "is the logical starting point to any enquiry into the defendant's liability" or because it is "convenient" to focus on negligence first. Although an in-depth analysis of this issue is beyond the scope of this study, it is submitted that logic dictates that the wrongfulness-enquiry should precede the negligence–enquiry as negligence is of no significance for purposes of product liability in the absence of wrongfulness. For a detailed discussion see further Kriek (2017) *Thesis* 76-86.

[238] Notably the *res ipsa loquitur* doctrine was not applied in the context of design defects. See Van der Merwe and De Jager (1980) *SALJ* 92 fn 40.

[239] Neethling *et al* (2001) 325.

[240] Van der Merwe and De Jager (1980) *SALJ* 91; Neethling and Potgieter (1990) *De Jure* 375-376; and VDH and Lawrenson (2015) *De Rebus* 15. See further *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (2) SA 617 (A). Van der Merwe and De Jager (1980) *SALJ* 92 point out that in terms of common law product liability *ex delicto* it had to be considered by the court which party needed more protection – the consumer or the manufacturer. If the consumer was offered more protection, then the defendant (manufacturer) would have needed to produce a solid rebuttal as negligence would have been accepted more easily. However, if the manufacturer, trade or industry required the protection, negligence would have been accepted less easily. These interests and outcomes accordingly needed to be balanced.

Neethling explains that in South African law the application of the doctrine of *res ipsa loquitur* allows for the inference of negligence in a given situation and thereafter gives rise to two presumptions which the defendant is required to rebut, namely:[241] that the manufacturer used an unsuitable production process, and that its employees exercised the production process negligently. The manufacturer thereupon has to provide sufficient evidence to satisfy the court that it displaced the inference of negligence and that it acted with the necessary precaution.[242]

The judgment in *Bayer South Africa (Pty) Ltd and Another v Viljoen*[243] confirms the application of this doctrine where policy considerations demand it. In this case Bayer Germany manufactured Bayleton, a fungicide, and distributed it to Bayer South Africa who further distributed the product to WP (Co-Operative) Ltd ("WPK"), who in turn sold it to Viljoen. Viljoen's grape crops were subsequently damaged due the alleged inability of the fungicide to protect the grape crops from mildew. He subsequently sued Bayer and WPK jointly and severally, on the basis of breach of contract with the alternative cause of action being negligent misrepresentation.[244] Viljoen succeeded with his claim whereupon Bayer and WPK appealed the matter.

The Appeal court considered the requirements for negligent misrepresentation and stated that certain principles relating to negligent misrepresentation apply to a defective product and the delictual element of negligence,[245] specifically the doctrine of *res ipsa loquitur*.[246] Milne JA stated that if policy considerations provided good reasons for the application of the doctrine then it could be applied to a situation where a merchant seller could be held liable for a defective product causing damage "as the facts inferred negligence." He referred to Boberg[247] who indicated that the establishment of negligence "must be assisted" by applying the *res ipsa loquitur* doctrine in an appropriate situation. However, *in casu*, the Appeal court held that

[241] Neethling *et al* (2001) 325 fn 324.
[242] Alheit (2006) *CILSA* 300; and VDH and Lawrenson (2015) *De Rebus* 15. The defendant was actually only required to have provided a plausible satisfaction to the court that excluded an inference of negligence - VDM and DJ (1980) *SALJ* 91; and Alheit (2006) *CILSA* 301 - having regard to considerations of the defendant's persuasiveness, probability and credibility.
[243] 1990 (4) ALL SA 81 (AD). The facts appear at 82 and 85.
[244] *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (4) All SA 81 (AD) at 84.
[245] *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (4) All SA 81 (AD) at 90.
[246] *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (4) All SA 81 (AD) at 94.
[247] Boberg (1984) 195.

there was no need to rely on the doctrine as the evidence presented to the court indicated that the product that was supplied had complied with the necessary specifications and the "ability of the product to control the disease was to a large extent dependent upon it being properly applied" by the plaintiff, which the plaintiff failed to do.[248]

From the perspective of a plaintiff in a product liability claim the application of the *res ipsa loquitur* doctrine is advantageous as it entails a difficult rebuttal obligation for the defendant as well as, in effect, holding the defendant liable on a "strict" product liability basis.[249] Van der Merwe and De Jager further comment that the doctrine can be adjusted to any circumstance, industry, type of consumer, and type of defect involved."[250] However, apart from being referred to but not applied in the *Viljoen* – case mentioned above the *res ipsa loquitur* has to date not yet been applied to justify an inference of negligence in a product liability case under the common law hence its value in this context has not yet been appropriately tested. Nevertheless, it is still possible that a scenario may arise in future in the context of common law product liability *ex delicto* where a court may decide to apply the doctrine.

3.3 Causation

Liability can only follow if the defective product was the cause of the plaintiff's harm. The plaintiff in a product liability case is required to prove both factual and legal causation. Factual causation entails asking whether, ***but for the defendant's conduct***, the harm would have occurred? Once the existence of the causal link is established in this literal sense, the aspect of legal causation has to be evaluated in order to determine whether it is of sufficient significance to justify liability in the legal sense. Issues of legal causation have an important role to play in limiting liability to certain consequences of the defendant's actions.[251]

[248] *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (4) ALL SA 81 (AD) at 94.
[249] Neethling *et al* (2001) 325 fn 324.
[250] Van der Merwe and De Jager (1980) *SALJ* 92.
[251] Boberg (1984) 195 remarks that "legal causation is merely a device or mechanism by which the law implements a prior decision as to what the ambit of liability should be. Indeed, the issue is not one of causation at all, but one of limitation of liability for consequences already caused."

In *International Shipping Co (Pty) Ltd v Bentley*[252] the Appellate Division (as it then was) made the following distinction between factual and legal causation:

> [D]emonstration that the wrongful act was a *causa sine qua non* for the loss does not necessarily result in legal liability. The second enquiry then arises, namely, whether the wrongful act is linked sufficiently close or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'.

Loubser and Reid point out that historically the South African courts have adhered to two main theories of legal causation.[253] The first is the "theory of direct consequences" as applied in the 1920s English case of *In re Polemis v Furness, Withy and Co Ltd*.[254] The theory of direct consequences regards the causal test as satisfied if the harm was a direct result of the defendant's wrongful conduct, irrespective of whether such a result was foreseeable.[255] If extraneous factors such as an act of God or of a third party - *a novus actus interveniens* - had intervened, the causal chain was broken. Loubser and Reid however indicate that although there is authority for the application of this test in the case law,[256] most writers are in agreement that it does not form an independent test for causation in modern law and that it must be combined with other factors.[257] They point out that in particular it was difficult to sever this test from the foreseeability criterion, and the assessment of whether a supervening event constituted a *novus actus*, breaking the chain of causation, often collapsed back into the question whether the event was "foreseeable."[258]

The second theory is the "theory of foreseeability" which limits liability to those consequences of the defendant's actions which he could reasonably have been expected to have foreseen.[259] This differs from the "reasonable foreseeability test"

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[252] 1990 (1) SA 680 (A) at 700.
[253] Loubser and Reid (2012) 104.
[254] 1921 (3) KB 560.
[255] Loubser and Reid (2012) 104.
[256] Loubser and Reid (2012) 104. See *Alston v Marine and Trade Insurance Co Ltd* 1964 (4) SA 112 (W); and *Smit v Abrahams* 1992 (3) SA 158 (C) at 164.
[257] Boberg (1984) 442; and Midgley and Van der Walt (2016) par 134.
[258] Loubser and Reid (2012) 104.
[259] Midgley and Van der Walt (2016) pars 132 and 136.

for negligence in that the latter not only enquired as to foreseeability but also as to *preventability* of harm. The foreseeability theory in the context of causation however requires that the defendant need not reasonably have foreseen all the consequences of his actions but merely the general nature or the kind of harm which actually occurred.[260] As the flexibility criterion attached to the general nature of the harm, rather than its extent or the exact way it occurred, liability also arises in the case of any pre-existing weakness.[261] In other words, if injury was sustained because of some unusual susceptibility on the part of the victim, the test was nonetheless satisfied. Loubser and Reid point out that the importance of foreseeability as a suitable subsidiary factor in a more flexible and comprehensive test was demonstrated in *Standard Chartered Bank of Canada v Nedperm Bank Ltd*, where the Appellate Division referred to the flexible test and thereafter proceeded with the causation enquiry in terms of foreseeability.[262]

A third theory that has been used to a lesser extent in determining legal causation is the "theory of adequate cause."[263] This theory combines factual and legal enquiries and considers whether the defendant's conduct was adequately or appropriately connected with the harm which allegedly resulted.[264] The point of reference for this enquiry is the "normal" expectation of the consequences following from the conduct in question.[265] What is normal in this regard is expressly distinguished from what was foreseeable.[266] Yet Loubser and Reid remark that the suggestion by Neethling, Potgieter and Visser that a causal connection is adequate "if, according to human experience, in the normal course of events the act had the tendency of bringing about that type of consequence" suggests that the dividing line between adequate causation and foreseeability is problematic.[267]

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[260] *Masiba and Another v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C) at 342; *Smit v Abrahams* 1992 (3) SA 158 (C) at 163-164; and *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 768.
[261] Loubser and Reid (2012) 105. For example in the so–called "thin skull rule" entailing that the defendant was obliged to take the victim as he found him. See also *Masiba and Another v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C) at 342.
[262] 1994 (4) SA 747 (A) at 764-765 and 766-769 respectively; and Loubser and Reid (2012) 105.
[263] Loubser and Reid (2012) 105.
[264] *Ibid*.
[265] Boberg (1984) par 3.3.
[266] Midgley and Van der Walt (2016) par 137.
[267] Loubser and Reid (2012) 105, with reference to Neethling *et al* (2001) par 3.3.

Following the judgment in *S v Mokgethi,*[268] South African courts accept that legal causation involves the basic question whether there was a close enough relationship between the wrongdoer's conduct and the ensuing consequence in order for such consequence to be imputed to the wrongdoer, taking into account policy considerations based on reasonableness, fairness and justice.[269] In order to determine the closeness of the connection, the courts apply a combination of criteria as subsidiary tests including those of "direct consequences", "adequate causation" and "reasonable foreseeability."[270] Thus Loubser and Reid remark that a product liability case under the common law must balance these criteria in the same way as cases involving harm from other sources.[271] They point out that the flexible criterion is similar to the policy-based test to determine wrongfulness.[272] Although both of them play an important function in limiting liability, the legal causation test focuses on the limitation of loss as a consequence of the wrongful act causing harm, whereas the wrongfulness enquiry focuses on whether the plaintiff had an interest entitled to protection.[273]

According to Loubser and Reid, the onus to prove the causal link between the defect and the harm suffered however presents yet another daunting obstacle for product liability plaintiffs. In their opinion it is an even more complex task than proving the existence of a defect, for it requires the plaintiff to draw together technical data about the product and the accident event, with evidence of the conduct of the individuals concerned as well as environmental factors.[274]

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[268] 1990 (1) SA 32 (A).
[269] *S v Mokgethi* 1990 (1) SA 32 (A) at 40-41; and Loubser and Reid (2012) 107.
[270] Midgley and Van der Walt (2016) par 132. See also *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at par 34 where Brand states the following about the flexible approach adopted in the *Mokgheti* case: "what Van Heerden JA said in that case that it [was] not that the 'flexible' or 'supple test supersede[d] all other tests such as foreseeability, proximity or direct consequence, which were suggested and applied in the past, but merely that none of the tests [could] be used exclusively and dogmatically as a measure of limitation in all types of factual situations. Stated somewhat differently: the existing criteria of foreseeability, directness, *et cetera*, should not be applied dogmatically, but in a flexible manner so as to avoid a result which [was] so unfair or unjust that it [was] regarded as untenable. If the foreseeability test, for example, [led] to a result which [was] acceptable to most right-minded people, that [was] the end of the matter."
[271] Loubser and Reid (2012) 107. See also the judgment of the Constitutional Court in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (SA) as discussed by Kriek (2017) *Thesis* at 66 to 70.
[272] Loubser and Reid (2012) 107.
[273] *Ibid*.
[274] Loubser and Reid (2012) 53.

3.4 Harm

Neethling, Potgieter and Visser point out that the law of delict has a "compensation function",[275] which may take the form of compensation for damage or satisfaction. Damage includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss.[276] The remedy for patrimonial harm caused by a defective product is the Acquilian action for damages which aims to restore the plaintiff to the position he would have been in had the delict not been committed.[277]

Arguably, the worst harm that can be caused by an unsafe product is the death of a person. Under the common law of delict, the death of a breadwinner can give rise to a claim by a dependent.[278] These claims are however limited to economic loss, in the form of loss of support and certain expenses such as for funeral costs and erection of a tombstone. A dependent is entitled to be placed in the position he would have been in had the breadwinner not died and for this purpose he is required to establish that he had suffered patrimonial loss – the common law does not recognize a claim for a *solatium* for loss of companionship or grief.[279]

The common law also recognizes a claim for harm suffered as a result of having been "injured"[280] by an unsafe product. The damages awarded for such injury include pain and suffering, emotional distress, disfigurement and loss of amenities.[281] As indicated by Loubser and Reid, economic loss such as for medical expenses, the costs of increased duties of maintenance suffered by a person with a duty of support as a result of the injury of a dependent such as a child, or damages relating to future expenses and loss of future income, is also recoverable.[282]

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[275] See also chp 1 par 1.
[276] Neethling *et al* (2015) 221. See further 229 regarding the concept "patrimony."
[277] *Ibid*.
[278] Loubser and Reid (2012) 94. This was a claim founded in family law and it was historically restricted to cases where the duty of support arose from a valid marriage, and thus mainly concerned spouses and children. However, as pointed out by Loubser and Reid, this right was extended in modern law to include those whose right of support derived from a relationship akin to marriage, but not constituting a legally valid marriage such as for instance a marriage in accordance with recognised and accepted faith or a same sex marriage.
[279] Loubser and Reid (2012) 94.
[280] Loubser and Reid (2012) point out at 97 that "injury" and "illness" are overlapping concepts.
[281] Loubser and Reid (2012) 95.
[282] Loubser and Reid (2012) 96.

It is further competent under the common law to recover compensation for loss of or damage to property (immovable or movable) caused by an unsafe product, for example, where a house burnt down because a defective gas heater exploded. Generally compensation for loss of or damage to property is assessed according to the reduction in the market value of the property as a result of the damage. Any economic loss that resulted from the loss or damage of such property is also recoverable and may for instance include the cost of hiring substitute property or loss of profit (where the property was used for business purposes).[283]

Notably the common law imposes a duty on the plaintiff to mitigate or limit his losses and this duty accordingly impacts on the amount of damages that is eventually awarded.[284]

4. Defences under the common law of product liability *ex delicto*

4.1 Introduction

In Roman law, the *damnum iniuria datum* and its remedy the *actio legis Aquiliae*, as created by the *lex Aquilia* plebiscite in 287 BC, regulated the defendant's defences.[285] A defendant could defend himself against a delictual claim by alleging and proving that he acted in self-defence or due to necessity or with the injured person's consent or that the doctrine of *volenti non fit iniuria* applied.[286] Other defences available to the defendant were that he acted in terms of public authority or in the perseverance of the exercise of a private right, or unintentionally or that the plaintiff contributed to the harm in which case the wrongdoer was absolved from liability (this principle was referred to as *culpa compensatio*).[287]

These defences that were available under Roman law evolved with time and some of them became obsolete in the common law. Under the common law of product liability *ex delicto* the most obvious defences available to manufacturers of defective products that cause harm are defences based on the lack of proof of any of the

[283] Loubser and Reid (2012) 97.
[284] Loubser and Reid (2012) 99.
[285] Midgley and Van der Walt (2016) par 7, subpar 7 and fn 20-24.
[286] Neethling *et al* (2001) 98.
[287] Midgley and Van der Walt (2016) par 7, subpar 13.

elements necessary to found a delict. A defendant can thus for instance plead lack of defectiveness in a product, for example on the basis that the product complied with specific standards or he can plead that an alleged defect was attributable to abnormal use of the product.[288] Alheit remarks that if a manufacturer of a product complied with standards set in respect of that product, such as standards set by the South African Bureau of Standards and quality assurance procedures,[289] the product may have been regarded as "not defective." Notably, in *Bayer South Africa (Pty) Ltd and Another v Viljoen*[290] the court stated that if the relevant Registrar had registered the product then it meant that the product was deemed not defective because the product was tested and found to be effective and safe enough for the market. Likewise, a defendant could generally plead lack of negligence or lack of wrongfulness or that the plaintiff did not suffer harm or that the defendant's product did not cause the harm suffered by the plaintiff.

Other specific defences available to the defendant under the common law of product liability *ex delicto* included consent (voluntary assumption of risk); contributory negligence and prescription, as discussed in more detail below. It should however be noted that the common law defences can be said to be general in nature and capable of being raised to a wide variety of delictual claims hence the defences available under the common law cannot properly be regarded as "product–liability specific."

4.2 Consent

Neethling, Potgieter and Visser indicate that "[W]here a person legally capable of expressing his will gives consent to injury or harm, the causing of such harm will be lawful." Consent is a ground of justification meaning that by giving consent the person suffering harm waives his right to the extent that he permits the defendant to

[288] If a product was used by a consumer in a manner different to its intended purpose, it was accepted that the ensuing damage could not imputed to the manufacturer. Such a scenario is illustrated by *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (4) All SA 81 AD (at 91-93) where the plaintiff sprayed his grape crops too late, at too great intervals and also ignored the guidance of the defendant's representative as he did not spray each row as he was told to do so, nor did he apply sulphur before the shoots reached 10cm in length, as required.
[289] Quality assurance refers to the assurance that the product is able to do what a consumer expects it to do. "Fitness for purpose" was the focal point for quality assurance which meant there was a purpose which the product was fit for. See Alheit (2006) *CILSA* 299.
[290] 1990 (4) All SA 81 AD at 93.

violate his interests hence the defendant cannot be held liable for the damage caused.[291]

The defence of consent is based on the Roman and Roman Dutch Law maxim of *volenti non fit iniuria* which can be translated as "a willing person is not wronged" or "he who consents cannot be injured."[292] Consent generally takes two forms, namely *consent to injury* and *consent to (or acceptance of) the risk of injury*. Neethling, Potgieter and Visser explain that since both are forms of the same ground of justification, the same principles apply to each of them. In the case of *consent to injury*, the injured party consents to "specific" harm whereas in the case of *consent to risk of injury*, the injured party consents to the *risk* that the defendant's conduct may cause him harm. Whether consent is present in a given case is a factual question.[293]

Insofar as the characteristics of consent as a ground of justification are concerned, the following should be noted:[294]

(a) Consent to injury is a unilateral act. Thus it need not be made known to the defendant. This means that the existence of an agreement or contract between the injured person and the defendant is not necessary in order for the defendant to rely on consent as a defence. The consent may further be unilaterally revoked by the consenting party at any stage preceding the defendant's conduct and should the defendant in such instance nevertheless proceed he acts wrongfully.
(b) Consent is a legal act that restricts the injured person's rights. In order to qualify as a legal act the consent must be apparent or manifest and it will not be held to exist if it is not evident.
(c) Consent may be given either expressly or tacitly. Neethling, Potgieter and Visser point out that incitement, encouragement and invitation to injury normally, but not

[291] Neethling *et al* (2015) 108. The authors point out that consent must be distinguished from *a pactum de non petendo in anticipando*, which is a contractual undertaking not to institute action against the defendant, i.e. not to hold the defendant liable. In the case of a *pactum de non petendo in anticipando* there is no doubt that the defendant committed a delict but the injured person undertakes not to hold the defendant liable. Wrongfulness is thus not excluded (as in the case of consent) but it is agreed that no action will be instituted.
[292] Neethling *et al* (2015) 108 point out that this maxim describes both consent to injury as well as consent to the risk of injury.
[293] Neethling *et al* (2015) 111.
[294] Neethling *et al* (2015) 109.

necessarily, mean that consent is present. However, mere acquiescence or submission does not necessarily amount to consent.

(d) The general rule is that the injured person must have consented although there are exceptions to this general rule where another person may give consent on behalf of the injured person, such as for example the guardian of a minor child.

The law also sets specific requirements for consent to be valid, namely:[295] the consent must be given freely or voluntarily; the person giving the consent must be capable of expressing his will (volition)[296] and he must have full knowledge of the extent of the consent.[297] It is further required that the consenting person must realise or appreciate fully (i.e. comprehend and understand) what the nature and extent of the harm will be; he must in fact subjectively consent[298] to the prejudicial act *and* the consent must be permitted by the legal order, i.e. it must not be *contra bonos mores*. In this regard Neethling, Potgieter and Visser point out that consent to bodily injury or consent to the risk of such injury is normally *contra bones mores* unless the contrary is evident such as in the case of participation in lawful sport, medical treatment or where the injury is of a very minor nature.[299]

4.3 Contributory negligence

A defence of contributory negligence is directed at the conduct of the plaintiff. It entails that the defendant alleges that he was not the only negligent party but that the plaintiff was also negligent with reference to the harm he sustained.[300] In the context of a product liability claim, contributory negligence may be raised, for

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[295] Neethling *et al* (2015) 111.

[296] Neethling *et al* (2015) explain at 111 that this does not mean that he must have full legal capacity to act but he must be intellectually mature enough to appreciate the implications of his acts. He must also not be mentally ill or under the influence of drugs that interfere with the functioning of his brain.

[297] Neethling *et al* (2015) point out at 112 that it is especially important that the requisite knowledge must be present where a person consents to the risk of injury, in which case full knowledge of the nature and extent of the risk is required.

[298] As stated by Innes CJ in *Waring and Gillow v Sherborne* 1904 TS 340 at 344: "[I] t must be clearly shown that the risk (of injury) was known, that it was reali[s]ed, and that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements: but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."

[299] Neethling *et al* (2015) 113.

[300] Neethling *et al* (2015) 167. The authors remark that it is terminologically and theoretically incorrect to speak of "contributory negligence" because, strictly speaking, an act can only be negligent if it is also wrongful and a person cannot act wrongfully towards himself.

instance, where a plaintiff misused a product, tampered with it, failed to maintain it or disregarded warnings or instructions that accompanied the product.[301]

In Roman–Dutch law a plaintiff who was also at fault with regard to the harm he sustained was precluded from claiming damages from a negligent defendant, unless the defendant was more to blame for the plaintiff's injury than the plaintiff himself.[302] Later South African law took over the doctrine of contributory negligence as applied in English law[303] and in 1956 a legislative framework for apportionment of damages on the basis of contributory negligence was introduced by means of the Apportionment of Damages Act.[304]

The pertinent provisions of the Apportionment of Damages Act are section 1(1)(a) and 1(1)(b). Section 1(1)(a) reads as follows:

> Where any person suffers damages which is caused partly by his own fault and partly by the fault of another person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

Section 1(1)(b) provides:

> Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

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[301] Kriek (2017) *Thesis* 89.
[302] Neethling *et al* (2015) 167.
[303] This doctrine was developed in *Davies v Mann* (1842) 10 M&W 546 where the defendant, driving his wagon, collided with the plaintiff's donkey which the plaintiff had left haltered in the road. Both parties were negligent and in terms of the "all-or-nothing"- rule then prevailing in England the plaintiff would have been unable to claim any damages from the defendant. The court however took a new approach by holding that since the defendant had the "last opportunity" to avoid the collision, the plaintiff's negligence was ignored and the defendant incurred full liability for the plaintiff's damage. In 1945 the English legislature replaced this rule with the principle of proportional division of damages according to each party's degree of fault.
[304] Apportionment of Damages Act 34 of 1956 as amended by the Apportionment of Damages Amendment Act 58 of 1971. For a historical overview of the developments that led to the introduction of the Apportionment of Damages Act see Neethling *et al* (2015) 167-168.

Neethling, Potgieter and Visser point out that the defence of contributory negligence is only available to a defendant who has *not* intentionally caused harm to the plaintiff. They further remark that a finding of contributory negligence on the part of the plaintiff leads to a reduction of the damages awarded to the plaintiff on the basis of his negligence with respect to the damage he sustained. South African courts apply the criterion of the reasonable man, as discussed above in paragraph 3.2, to establish the degree of negligence of each of the parties. The basic approach regarding apportionment of damages on the basis of the test for negligence appear from *South British Insurance Co Ltd v Smit*[305] and *Jones v Santam Bpk*[306] from which Neethling, Potgieter and Visser draw the following conclusions: "[I]nsofar as the objective reasonable person test applies, one is dealing with the deviation from the standard of care which applies to all persons in the community. The Act clearly implies that in the case of the plaintiff as well as the defendant one is concerned with a negligent act or omission that is causally linked to the damage. This causal nexus is determined according to the usual test and not, as was previously the case, in terms of the so-called 'last opportunity rule'. Moreover, the court does not attempt to deal with degrees of causation. In other words, the court does not take into account, for example, that the defendant's conduct has actually contributed to the harm to a greater extent than the plaintiff's conduct. If the court is satisfied that the negligent acts or omissions of both parties are causally connected to the damage, the question of causation is resolved."

The portion of damage to be borne by each party is then calculated with reference to the respective degrees of negligence of each of the parties which is determined by expressing, as a percentage, the deviation of such negligence from the standard of the reasonable person. Thereafter the two percentages are compared and responsibility is allocated in respect of the damage in question.[307]

In *South British Insurance Co Ltd v Smit*[308] the approach taken by the Appellate Division (as it then was) was that once the plaintiff's degree of negligence had been established, it was unnecessary to inquire to what extent the defendant's conduct

[305] 1962 (3) SA 286 (A).
[306] 1965 (2) SA 542 (A).
[307] Neethling *et al* (2015) 170.
[308] 1962 (3) SA 826 (a) at 835.

deviated from the standard of the reasonable person. Thus, if it was found that the plaintiff was 40% negligent in causing the harm he suffered, then the defendant was automatically 60% negligent in causing the said harm. However, subsequently in *Jones v Santam Bpk*[309] the court followed a new approach: according to *Jones* the fact that the plaintiff was, for example 30% negligent does not automatically imply that the defendant was 70% negligent. In order to establish the degree to which each of the parties was negligent, the court in *Jones* stated that the "carefulness" of the conduct of each party must be measured separately against the standard of conduct of the reasonable person. So for example, it is possible that the plaintiff's conduct deviated 70% from such standard whereas that of the defendant deviated 80%. In such case the ratio between the fault of the parties is 70:80 (7:8(15)). The plaintiff's degree of fault is thus 7/15 x 100/1 = 46,7% and the degree of fault of the defendant is 8/15 x 100/1 = 53,3% and thus the plaintiff is then awarded compensation for only 53,3% of the damage he has suffered.[310]

Despite the reasonably clear guidelines in the *Jones*-case, Neethling, Potgieter and Visser however remark that it appears that in *AA Mutual Insurance Association Ltd v Nomeka*[311] the Appellate Division confirmed the earlier "automatic" approach applied in *South British Insurance Co v Smith.* In their opinion the position in our law is that currently a court can follow any of the two approaches until such time as the Supreme Court of Appeal pronounces definitively on the matter.[312]

Note should also be taken of the view of the Appellate Division in *General Accident Versekeringsmaatskappy SA Bpk v Uijs.*[313] In this matter it was held that the extent of a plaintiff's fault is merely one of a number of factors that a court may take into account in order to reduce the damages claimed by the plaintiff in a just and equitable manner. Neethling, Potgieter and Visser remark that although it may initially appear that section 1(1)(a) regards the plaintiff's fault as the only or exclusive criterion which may be taken into account for purposes of reducing the plaintiff's

[309] 1965 (2) SA 542 (A).
[310] Neethling *et al* (2015) 171.
[311] 1976 (3) SA 45 (A).
[312] Neethling *et al* (2015) 171-172. They indicate that yet another view is that the decisions in *Jones* and *Nomeka* can be reconciled - see further the discussion on 172.
[313] 1993 (4) SA 228 (A).

damages, the approach taken in *Uijs* may be justified in the light of criteria such as fairness and equity.[314]

The onus is on the defendant who pleads contributory negligence on the part of the plaintiff to prove such a defence on a balance of probabilities. In practice the defendant usually pleads that he was not negligent at all and in the alternative he pleads contributory negligence by the plaintiff. However in *AA Mutual Association Ltd v Nomeka*[315] the Appellate Division held that contributory negligence may be taken into account even if the defendant had not specifically pleaded such defence.[316]

Neethling, Potgieter and Visser further remark that an important question is also whether section 1(1)(a) applies where the plaintiff was not negligent in respect of the damage–causing event itself but where his negligence increased the damage suffered by him. In *Bowkers Park Komga Cooperative Ltd v SAR and H*[317] the court held that the section leaves no doubt that contributory negligence relates to fault with regard to damage and not fault with regard to the damage–causing event. Therefore, in principle, it is always possible that a plaintiff's contributory negligence with regard to the damages suffered by him can lead to a reduction in damages, even if he cannot be held responsible for the actual damage–causing event. This approach was accepted by the Appellate Division in *Union National South British Corporation Co Ltd v Vitoria*.[318] Neethling, Potgieter and Visser however emphasise that in such a case the contributory negligence of the plaintiff is only relevant insofar as it increases his damage.

Notably they also point out that voluntary assumption of the risk, as discussed above in paragraph 4.2, also has a different meaning in relation to contributory negligence. In such instance assumption of the risk is a ground that cancels fault and not a ground of justification that cancels wrongfulness.[319]

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[314] Neethling *et al* (2015) 172.
[315] 1976 (3) SA 45 (A). See also *Ndaba v Purchase* 1991 (3) SA 640 (N).
[316] Neethling *et al* (2015) 172.
[317] 1980 (1) SA 91 (E).
[318] 1982 (1) SA 444 (A).
[319] Neethling *et al* (2015) 177.

4.4 Prescription

The Prescription Act[320] allows a defendant to avoid liability on the basis that the plaintiff's claim has prescribed and is no longer enforceable.This Act thus provides for the prescription of debts by effluxion of time. As pointed out by Loubser and Reid the concept of a "debt" is not defined in the Prescription Act, but according to case law it must be understood in a wide and general sense to include any duty side of an obligation.[321] The word "debt" includes any liability arising from delict, contract or statute.[322] The concept of "debt" must however be distinguished from the concept "cause of action."[323] A "cause of action" is the factual basis or set of material facts that "begets" the plaintiff's right of action and its correlative, the defendant's "debt."[324]

As such the Prescription Act provides that, subject to the provisions of Chapter III and Chapter IV of the Act, a debt shall be extinguished by prescription after the lapse of the time period designated by the Act in respect of that debt.[325] Debt such as that which arose from harm caused by a defective product would, in accordance with section 11(d) read with section 12(1) of the Prescription Act, prescribe within three years after the debt became "due." It should further be noted that there may be a difference between the time when a debt arises, accrues or comes into being on the one hand, and the time when it becomes "due" or payable on the other.[326] A debt is "due" when it is "owing and immediately payable", "immediately claimable", "immediately exigible at the will of the creditor", or "enforceable."[327] In *The Master v IL Back & Co Ltd*,[328] the Court held that the words "debt is due" in section 12(1) mean that there must be money due, which the creditor can claim from the debtor.

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[320] Act 68 of 1969.
[321] See generally *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) at 369C-D; and *CGU Insurance v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 61.
[322] *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) par 370A-C.
[323] *CGU Insurance v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at par 6, and the cases cited therein.
[324] *CGU Insurance v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 6. See Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-12.
[325] S 10(1). The prescription of a principal debt shall also lead to prescription of a subsidiary debt that arose from such principal debt (s 10(2)). However if the debtor pays a debt after it has been extinguished by prescription it is nevertheless regarded as (valid) payment of that debt (s 10(3)).
[326] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-12.
[327] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-13. See generally *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H; *Kotzé v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* 1996 (1) SA 645 (C); and Loubser and Reid (2012) 138.
[328] 1983 (1) SA 986 (A).

Where harm is one of the elements of the cause of action, some harm must have occurred for the cause of action to be complete and for the prescription period to begin to run.[329] The Prescription Act further provides that a debt shall not be deemed to be due until after the creditor has knowledge of the identity of the debtor *and* the facts from which the debt arises. However a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. If the debtor "willfully prevents" the creditor from coming to know of the existence of the debt, prescription does not begin to run until the creditor becomes aware of the existence of the debt.[330]

These provisions of the Prescription Act have been interpreted by the courts in a number of cases, of which the following are important examples - in *Van Zijl v Hoogenhout*[331] an adult survivor of child abuse was held not to have acquired "meaningful" knowledge of the wrongs against her for the purposes of prescription until a "progressive course of self-discovery finally removed the blindfold she had worn since the malign influences . . . took over her psyche." In *Truter & Another v Deysel*[332] the plaintiff had undergone eye surgery and only several years later obtained advice to the effect that the procedure was performed negligently. The court held that the plaintiff did not lack knowledge of the facts from which the debt arose for the purpose of prescription, because the presence or absence of negligence is not a fact but it is a legal conclusion based on the facts.[333]

Section 13 of the Prescription Act provides for the delay of the completion of prescription in certain instances such as where the creditor is a minor, or is insane, or is a person under curatorship, or is prevented by superior force (including any law or order of court) from interrupting the running of prescription, or is outside the

[329] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839C-G. In *Oslo Land Corporation v Union Government* 1938 AD 584, the spraying of excessively strong locust poison by a government agency caused death to cattle over a three year period, and it was held that prescription began to run when the first damage occurred. In *John Newmark & Co v Durban City Council* 1959 (1) SA 169 (D), damage occurred when excavations alongside a wall caused it to collapse. The court held that prescription began to run when the first subsidence occurred. See also Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-13.
[330] S 12(2).
[331] 2005 (2) SA 93 (SCA).
[332] 2006 (4) 168 (SCA).
[333] At pars 17, 19 and 20 of the judgment *ibid*.

Republic of South Africa.[334] Such a delay of prescription occurs if the prescription period would have been completed before, or on, or within one year after, the day on which the relevant impediments had ceased to exist. In that case the period of prescription will not be completed before a year has elapsed after the day on which the relevant impediment had ceased to exist.[335]

The Prescription Act further provides for the interruption of prescription. In terms of section 14(1) prescription can be interrupted by an express or tacit acknowledgement of liability by the debtor. Such acknowledgment must be clearly intended by the debtor.[336] If the running of prescription is interrupted then prescription begins to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date on which the debt again becomes due.[337] The Act also provides for the judicial interruption of prescription by the service on the debtor of any "process" whereby the creditor claims payment of the debt.[338] Unless the debtor acknowledges his liability, the interruption of prescription in terms of section 15(1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.[339] If the running of prescription is interrupted as contemplated in section 15(1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of section 15(2), prescription commences to run afresh on the day on which the judgment of the court becomes executable.[340] It is to be noted that the aspect of prescription may be raised at any stage of the

[334] See s 13 for all the instances in which the running of prescription is delayed. Except for s 13(1)(a) and (b) as indicated above, none of the other instances mentioned in s 13(1) are relevant to the issue of product liability.
[335] S 13.See generally *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA) at 930B.
[336] *Agnew v Union & South West African Insurance Co Ltd* 1977 (1) SA 617 (A) at 623A-C; *Estate Allie v Cape Town Municipality* 1980 (1) SA 265 (C) at 268D; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Vermeulen* 1997 (1) SA 498 (O) at 583G-I; and *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 36-37.
[337] S 14(2).
[338] For purposes of s 15, "process" includes a petition, a notice of motion, a *Rule Nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings have commenced.
[339] S 15(2).
[340] S 15(3).

proceedings but it has to be raised by the defendant in his pleadings and a court is prohibited from raising prescription of its own motion.[341]

It is thus possible for a manufacturer–defendant in a common law product liability claim to raise the defence that the plaintiff's claim has prescribed because three years had lapsed since the plaintiff's cause of action arose. Unless the plaintiff is able to rebut this allegation by, for example, proving that three years had not yet lapsed since the cause of action arose or that prescription had been interrupted, successful reliance on prescription can defeat a product liability claim despite all the elements for product liability *ex delicto* otherwise being present.

5. The move from fault-based product liability to strict product liability

Over the years fault as basis for delictual liability in South Africa came under increased attack.[342] Already in 1913 in the case of *Union Government v Sykes*[343] the court remarked that the fault principle caused unequal treatment of the consumer.[344] Later in *Kroonstad Westelike Boere Kooperatiewe Vereniging Bpk v Botha and Another*[345] the court formulated the following rule for holding a merchant seller strictly liable for defects in goods sold (based on the Pothier-rule): "Liability for consequential damages caused by latent defects attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and

[341] Sub-ss 17(2) and (1).
[342] For a general discussion see Burchell (1993) 249-254.
[343] 1913 AD 156 at 185, as discussed by Van der Walt (1968) *CILSA* 67. The facts in this matter were that the plaintiff sought damages to his land from the local Railways due to a fire that was caused by sparks from a locomotive engine. The plaintiff had to prove fault and he lost the case as he was unable to do so. Solomon JA stated that his sympathies were with the plaintiff as it was only fair that private persons were compensated by the Government who administered the Railways, because to prove fault was an impossible task. He, however, concluded that this was a matter for legislation and not an issue for the courts to address.
[344] In *Ross and Another v S.A. Railways* 1938 OPD 128 Krause J agreed with Solomon JA who quoted that it was "not equitable that a private citizen should suffer irreparable loss…it [was] a just and fair principle…that no man's property should be confiscated for the benefit of the State unless adequate compensation [was] paid."
[345] 1964 (3) SA 561 (AD).See also *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447. See however *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*, 1996 (2) SA 565 (A) where the court criticised the *Kroonstad* rule as follows: "The merchant is denied the opportunity to see, feel or to smell the product that passes through his hands. He can as little examine the metal in the bearings as the beans in the tin or the chip in the computer…It seems to me cumbrous, wasteful and uncertain of result, and therefore unjust, to require a buyer to prove and a seller to resist in case after case the proposition that the latter publicly professes to have attributes of skill and expert knowledge in relation to particular goods." See further Basson (2001) *JIE* 83.

expert knowledge in relation to the kind of goods sold…Whether a seller falls within the category mentioned will be a question of fact and degree, to be decided from all the circumstances of the case. Once it is established that he does fall within that category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it."[346]

The difficulties experienced by a plaintiff with a product liability claim were exacerbated by the reality that the modern South African consumer increasingly functioned in a time of unprecedented industrialisation, automatisation and technological innovation.[347] Inequality in resources abounded as manufacturers became ever more powerful due to mass production of products.[348] In the modern market the manufacturer became remote from the user and sales were accomplished through other suppliers who had very little involvement with the production process, leaving consumers exposed to the risk of defective products and harm.[349] In this regard Mcquoid-Mason argued that because the vast majority of manufacturers do not sell directly to the public, consumers would not be able to rely on the strict liability of manufacturers for consequential damages occasioned by latent product defects as imposed at common law in *Kroonstad v Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and Another.*[350]

Despite the South African common law of product liability *ex delicto* being available to persons who suffered harm occasioned by defective products, proof of negligence was the greatest barrier to successfully bringing a product liability claim.[351] Plaintiffs were often unable to prove fault in the production process as they could not acquire proof of such fault due to their lack of knowledge of, and access to, the manufacturer's complicated design and production processes.[352] Furthermore, manufacturers needed to protect their reputation and many matters were settled

[346] See also Barnard (2013) *Thesis* 393 for a detailed discussion of the Pothier-rule. She points out that this rule as it has been applied in terms of South African positive law has two requirements which must both be present, namely :the seller must be a merchant seller and he must have professed in public to have expert knowledge and skill.
[347] Alheit (2006) *CILSA* 294.
[348] Davis (1979) *CILSA* 206.
[349] Snyman (1980) *CILSA* 183.
[350] 1964 (3) SA 561 (AD); and McQuoid-Mason (1997) *Juta* 108.
[351] Alheit (2006) *CILSA* 269.
[352] Alheit (2006) *CILSA* 295 and 300.

outside of court or were merely absolved.[353] In addition to litigation often being expensive and protracted, other challenges were that in some instances proof was not possible because the product in question had perished[354] or the manufacturer could not be identified or he could not be accessed because he was not resident in South Africa or was unable to meet the cost of harm to the injured consumer.[355]

Calls for a move to a regime of strict product liability consequently increased. With South Africa entering a new constitutional dispensation with the enactment of the Constitution of the Republic of South Africa, 1996 it was argued that notions of fairness and justice which permeate the Constitution should form the basis for the development of a new "*boni mores*." It was indicated that this would assist the development of the common law, in accordance with section 39(2) of the Constitution, in order to "protect vulnerable consumers against dangerous or defective products, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract."[356] It was *inter alia* argued that strict product liability would ensure the maximum degree of care for consumers as it would remove the onerous obligation to prove that the manufacturer was negligent and would in turn cause manufacturers to raise the bar by ensuring that their products are safe. [357]

Van Eeden and Barnard significantly remark that "[p]rior to the introduction of the CPA, Parliament had not given general consideration to product liability issues. Assisted by the particular requirements of the private law for establishing liability in respect of product liability incidents (especially negligence), many suppliers and manufacturers have effectively enjoyed virtual immunity from liability for product defect claims. The private law liability regime for defective products has, over more

[353] Van der Walt (1968) *CILSA* 83.
[354] Neethling *et al* (2001) 325; and Loubser and Reid (2012) 1-2. The latter authors do not define which costs were burdensome but this could be presumed as legal costs to bring the action before court, including costs of expert witnesses and the costs in establishing the plaintiff's case - Van der Walt (1968) *CILSA* 83 states the costs as litigation costs.
[355] Loubser and Reid (2012) 119.
[356] MacQuoid-Mason (1997) *Juta* 108. S 39(2) of the Constitution provides that, "[W]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."
[357] Neethling *et al* (2001) 326. Snyman (1980) *CILSA* 178 states that there was "very little difference between a vicious animal and a dangerously defective product" as both were extremely dangerous to the public.

than thirty years, attracted periodic criticism in academic circles. From a comparative perspective, South African law could be seen as lagging behind developments internationally, specifically with regard to the introduction of some form of strict liability."[358]

Kriek also convincingly argues that it was clear that the scope of protection afforded by the common law (both the common law of contract and the common law of delict) to persons harmed by defective goods was indeed inadequate, warranting statutory intervention. Specifically with regard to common law product liability *ex delicto* she *inter alia* notes the following problematic aspects:[359]

(a) It may be difficult for an innocent bystander injured by a defective product being used by another person to establish that the manufacturer of that product owed such bystander a duty of care.
(b) Judicial application of the *res ipsa loquitur* doctrine is limited in South Africa and is yet to be applied in a product liability case.
(c) Where the plaintiff had the opportunity of inspecting the product prior to use, the foreseeability requirement may present difficulties in establishing negligence on the part of the defendant.

The quest to introduce strict product liability into South African law eventually reached a tipping point in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd.*[360] In this matter Wagener and Cuttings were the joint appellants who underwent separate surgeries and who both received a local anaesthetic manufactured by Pharmacare, the respondent. Both appellants were left paralysed after the anaesthetic was administered and they sued the respondent in a consolidated action for damages due to harm caused by the allegedly unsafe anaesthetic.[361]

The appellants argued in support of the application of strict liability that the common law remedy, the Aquilian action as discussed above, was inadequate[362] as it failed to

[358] Van Eeden (2017) 386.
[359] Kriek (2017) *Thesis* 96.
[360] 2003 (2) All SA 167 (SCA) at 168 and 171. See also the discussion of the *Wagener*-case in Van Eeden (2017) 390.
[361] *Ibid*.
[362] 2003 (2) All SA 167 (SCA) at 173.

protect their right to bodily integrity in terms of the Constitution.[363] They argued that negligence by the manufacturer of the product was extremely difficult to prove as they had "no knowledge of, or access to, the manufacturing process either to determine its workings generally, or more particularly, to establish negligence in relation to the making of the item or substance which [had] apparently caused the injury complained of."[364] They therefore argued that strict product liability was called for and pointed out that the South African law already had areas accommodating strict liability; such as for consequential damages arising out of the sale of defective merchandise where the merchant seller professes expert knowledge relating to the goods sold, the *pauperian* action in terms of the *actio de effusis vel dejectis,* and the action based on unlawful deprivation of personal freedom.[365] The appellants further argued that the application of the *res ipsa loquitur* doctrine was insufficient to overcome the problem they faced in proving negligence, and that it was "merely a maxim to trick adherence to the fault requirement." It was therefore contended that the court should develop the common law in line with the spirit, objects and purport of the Constitution as both the concept of fault-based liability and the *res ipsa loquitur* doctrine were insufficient to protect the appellants.[366]

The court took a different view: it remarked that strict liability meant that the plaintiff would only be alleviated from the burden of proving fault. However, even if strict liability applied, it pointed out that plaintiffs in product liability cases would still carry the burden of proving that the product was defective when it left the manufacturer's control and at the time of its use, and these elements of proof would still be difficult to establish especially in relation to medical products where scientific analysis and expert evidence would be needed. The plaintiff would also need to acquire the administered product or unused sample from the same batch as the defective product.[367] Even though instances of strict liability within the law of delict existed, as mentioned above, the court indicated that this was due to "special policy considerations that [applied] to those cases."[368]

[363] Constitution of the RSA.
[364] 2003 (2) All SA 167 (SCA) at 171.
[365] *Ibid*.
[366] *Ibid*.
[367] 2003 (2) All SA 167 (SCA) at 173.
[368] 2003 (2) All SA 167 (SCA) at 175.

The court consequently indicated that if strict product liability was to be imposed for commercial reasons, it would have to be done by legislation "after due Parliamentary process and investigation so as to produce a comprehensive set of principles, rules and procedure."[369] It stated that problems would arise if a court had to impose strict liability as it would *inter alia* have to be considered whether the law would apply retrospectively and/or prospectively. The legislature could however ensure that the law of strict liability only applied prospectively[370] which would ensure fairness. Furthermore if legislation regulated the matter, the legislature could decide which products should be included, whether component parts should be included or excluded, which parties in the supply chain could be held liable towards an injured party, what a defect means, if packaging must play a role, what defences should exist with reference to foreign law, and whether damages should be limited.[371] The court remarked that it could not address these issues based on the matter *in casu*, which was a single instance of litigation that was too limited to enable the establishment of "a cohesive and effective structure by which to impose strict liability."[372] The court was thus not opposed to the notion of strict product liability but preferred that the matter be addressed by the legislature.[373]

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[369] 2003 (2) All SA 167 (SCA) at 175. Van Eeden and Barnard (2017) 385-386 remarks that the court in *Wagener* appears to have relied on economic policy arguments. He comments that the rationale of particularly consumer protection laws should be convincing and should be susceptible to rational explanation and justification. If government is to intervene in a market there should be a rational, economically sound basis for doing so meaning it should not introduce perverse and counter-productive incentives and disincentives. In addition, such intervention should contribute to the overall welfare; it should not impact disproportionally on any individual or group; it should be cost-effective and the direct and indirect cost of regulation should not outweigh its benefits.

[370] 2003 (2) All SA 167 (SCA) at 176.

[371] 2003 (2) All SA 167 (SCA) at 177.

[372] 2003 (2) All SA 167 (SCA) at 178. The court indicated (at par 35) that the following aspects would *inter alia* need to be addressed by means of legislation:

(a) What products should be included for purposes of determining the extent of strict product liability?

(b) Should a manufacturer also include the maker of a component that is part of a whole article?

(c) Should defects only include manufacturing defects or also design defects? And should it include the failure to warn (adequately or at all) of possible harmful results?

(d) Should product liability be confined to "products intended for marketing without inspection or even extend to cases where the manufacturer does, or is legally obliged to exercise strict liability quality control?

(e) What liability should the packaging of products have, for example, should liability be limited to cases where the packaging precluded intermediate examination or should liability also extend to cases "where the manufacture stipulates that a right such as a guarantee would be forfeited if intermediate examination were made?"

(f) Is a product defective if it is used innocuously on its own but where it causes damage when used in combination with another product?

(g) What defences should be available to strict product liability claims?

[373] Confirmed by Alheit (2006) *CILSA* 302 who states that legal policy should decide upon strict liability.

The move towards a strict product liability regime in South Africa gained further momentum after the *Wagener*-case when, as discussed in more detail in Chapter 3, South Africa embarked on the adoption of comprehensive consumer protection legislation including a new product liability regime that *inter alia* abandoned proof of negligence.

6. Conclusion

The South African common law of product liability *ex delicto* enables a person (and not only a consumer) harmed by a defective product to claim damages from the manufacturer of such defective product if he can prove all the elements of a delict, namely conduct, wrongfulness, negligence, harm and causation. Both movable and immovable products are covered by this regime.

The common law of product liability *ex delicto* appears to have fixated on the elements of negligence and wrongfulness with the result that no definitive jurisprudence developed on the interpretation of the concept of "defect." Case law indicates that the concept of "defect" that evolved in the common law mainly dealt with latent defects that arose in the context of the common law of sale and the implied or express warranty against latent defects. No product liability-specific concept of "defect" crystallised in the common law although it is clear that in order to found common law product liability *ex delicto* the "defect" in a product must have been such that it caused harm that gave rise to a damages claim. One can therefore conclude that defectiveness for purposes of the common law was founded on the fact that, simply put, a product was unsafe for its intended use. The common law did also not pertinently distinguish between manufacturing, design or warning defects and accordingly it may be concluded that the concept of "defect" for purposes of common law liability *ex delicto* was generic.

Despite the common law of product liability *ex delicto* being in existence for a substantial period of time not many product liability cases were successfully brought under the common law. This is attributed largely to the challenges a plaintiff faces when trying to establish negligence on the part of the manufacturer. Although the *res ipsa loquitur* doctrine was available to relieve the burden of the need to prove

negligence, it appears that very little opportunity arose for this doctrine to be invoked and to date it has not yet been applied in a product liability case under the common law thus making its relevance in the context of the evolution of the common law of product liability *ex delicto* negligible. Other elements such as causation also presented a difficult burden of proof. Yet another stumbling block was presented by the requirement that such actions be instituted against the manufacturer of the defective goods which was problematic in those instances where the manufacturer was abroad or could not be identified. Apart from the difficulty in establishing negligence a further hurdle presented itself in the sense that, even if a consumer was able to establish negligence, the manufacturer could still escape liability if he was able to successfully rely on one of the defences allowed by the common law. Although these defences were not product liability specific they were nevertheless varied and facilitated avoidance of liability where harm was caused by a defective product.

It is clear that the fault-based approach of the common law of product liability had a chilling effect on successfully pursuing product liability claims and the ill consequences this approach has yielded for persons harmed by defective products occasioned an outcry for a strict product liability regime that would extend greater consumer protection by discarding proof of negligence. After the debate on whether to introduce strict product liability into South African law reached a highwater mark in *Wagener v Pharmacare,* a new chapter in South African product liability law began which eventually culminated in the enactment of the CPA and the statutory product liability regime it introduced as part of its comprehensive consumer protection reform framework.

What this new regime entails, whether it is really as strict as it purports to be and specifically how it deals with the concept of “defect” and the new product liability defences it has introduced will accordingly be explored in Chapters 3, 4 and 5.

Chapter 3: The CPA and strict product liability

Chapter 3 deals with the South African Consumer Protection Act 68 of 2008 (CPA) and focuses specifically on the strict product liability regime introduced by the Act. It provides an overview of the road to implementing the CPA and of the purposes and scope of application of the Act, and particularly the reach of the product liability provisions in section 61. The provisions of section 61 are briefly unpacked in order to contextualise the analysis in subsequent chapters regarding the concept of "defect" and the statutory defences against product liability introduced by the CPA.

1. The road to implementing the CPA

Prior to the introduction of the Consumer Protection Act (CPA) terms such as "consumer protection" and "consumer legislation" were not generally referred to in South Africa.[374] Consumer law was "fragmented and outdated"[375] although Woker points out that South African consumers were to a certain extent protected through industry specific, provincial and national legislation.[376] Naudé and Eiselen indicate that since 2000 a number of comprehensive consumer protection laws have however been enacted, providing wider ranging measures of consumer protection.[377] The first step in this direction was the enactment of the Electronic Communications and Transactions Act[378] in 2002 that provides protection to online consumers. Another such step was the enactment of the National Credit Act[379] that came into full effective operation in June 2007 and also introduced various measures to protect consumers, although aimed specifically at consumer protection in the credit market. However over the years no comprehensive piece of legislation existed that provided extensively for general consumer protection measures - the closest South Africa came to providing some general consumer protection measures was by enacting

[374] Otto (2010) *Fundamina* 257; and Woker (2010) *Obiter* 218. See also Barnard (2013) *Thesis* 19-23; and Van Eeden and Barnard (2017) 5.
[375] Stoop (2014) *THRHR* 135.
[376] Woker (2010) *Obiter* 218-219. These pieces of legislation did not govern product liability and are not further addressed.
[377] Naudé and Eiselen (2014 *et seq*) 1.
[378] 25 of 2002.
[379] 34 of 2005.

the Consumer Affairs (Unfair Business Practices) Act (hereinafter referred to as UBPA) in 1988.[380]

The UBPA's purpose was to prohibit "unfair business practices." It defined a "business practice" as one that included:

> (a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons; (b) any scheme, practice or method of trading, including any method of marketing or distribution; (c) any advertising, type of advertising or any other manner of soliciting business; (d) any act or omission on the part of any person, whether acting independently or in concert with any other person; [or] (e) any situation arising out of the activities of any person or class or group of persons, but does not include a practice regulated by competition law. [381]

It further defined an "unfair business practice" as a business practice which had or was likely to have had the effect of:

> (a) harming the relations between businesses and consumers; (b) unreasonably prejudicing any consumer; (c) deceiving any consumer; or (d) unfairly affecting any consumer.[382]

In terms of the UBPA, the Consumer Affairs Committee (hereinafter referred to as CAFCOM)[383] a statutory body within the Department of Trade and Industry (DTI) was established to receive complaints from consumers[384] regarding a business[385] that engaged in an unfair business practice. The CAFCOM would then investigate the

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[380] 71 of 1988.
[381] S1 of the UBPA.
[382] *Ibid*.
[383] Hereinafter referred to as "CAFCOM" which was established in terms of s 2 of the UBPA. See Woker (2010) *Obiter* 221-222. The CAFCOM's predecessor was the Business Practices Committee (BPC) which favoured self-regulation. The BPC ensured such regulation through investigating and/or approving codes of conduct within industries. However, self-regulation failed as there were no industry bodies to monitor and enforce the codes, or if such bodies did exist they were not able to deal with transgressors efficiently.
[384] S 1 of the UBPA defined "consumer" as "(a) any natural person to whom any commodity is offered, supplied or made available; (b) any natural person from whom any investment is solicited or who supplies or makes available any investment; (c) any other person who the Minister with the concurrence of the committee declares to be a consumer by notice in the Gazette; [or] (d) any person who is a consumer for the purposes of this Act in terms of any other law."
[385] S 1 of the UBPA defined a "business" as "any business, undertaking or person who - (a) offers, supplies, or makes available any commodity; [or] (b) solicits or receives any investment or to whom any investment is supplied or made available."

complaint and report and make recommendations on the matter to the Minister of Trade and Industry.[386] The Minister, if he deemed the business practice as unfair, would subsequently publish a notice in the *Government Gazette* declaring the business concerned to be engaged in an "unfair business practice" and would prohibit it from continuing with such practice.[387] If the said business ignored the direction from the Minister, it constituted a criminal offence and the Consumer Affairs Court, established in terms of section 13 of the UPBA, could declare the relevant unfair business practice as unlawful and impose a fine not exceeding R200 000 or order imprisonment not exceeding five years, or both a fine and imprisonment.[388]

Woker remarks that the UBPA however proved unsuccessful in its endeavours to extend consumer protection to South African consumers *inter alia* because the CAFCOM was under-resourced and lacked efficiency.[389] The CAFCOM could not provide redress to consumers as it merely investigated and advised on complaints.[390] Woker also indicates that the police and the prosecuting authorities had to ensure compliance with the Minister's orders but were constrained by the fact that these bodies were also heavily burdened with criminal matters and did not regard consumer matters as important.[391] According to Woker complaints received by the CAFCOM mainly centered around matters where goods purchased did not contain necessary information,[392] or were defective[393] which resulted in expensive and unsuccessful litigation.[394] She further remarks that the UBPA resulted in

[386] Woker (2010) *Obiter* 219.
[387] *Ibid*.
[388] Woker (2010) *Obiter* 220.
[389] *Ibid*. Woker (2010) *Obiter* 219 fn 15: A Law Review Project titled "Opinion concerning the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 of General Interest to National and Provincial Government" dated 17 March 2000 was undertaken which declared the UBPA as unconstitutional as it failed to *list* (own emphasis) exactly what type of conduct constituted an "unfair business practice."
[390] Woker (2010) *Obiter* 221.
[391] Woker (2010) *Obiter* 219.
[392] Woker (2010) *Obiter* 225 and 230 states that information provided may have been insufficient for a consumer to have known what the effects of a product were after its supply.
[393] Woker (2010) *Obiter* 229. She further remarks that where a defect was present in a product, which resulted in harm to a consumer, the consumer could have instituted an action in delict against the manufacturer in order to hold it liable for his incurred loss. However, a successful claim required the plaintiff to prove negligence – an almost impossible determination to be made by the plaintiff in establishing his case against a manufacturer. See also Davis (1979) *CILSA* 209; VDM and DJ (1980) *SALJ* 91*;* Neethling *et al* (2001) 325; and Loubser and Reid (2012) 49.
[394] Woker (2010) *Obiter* 230.

perpetuation of unequal bargaining power between consumers and businesses,[395] consumers not opposing businesses due to a lack of finances, and businesses undertaking imports and exports with the international community thus making South Africa "a dumping ground for unsafe and substandard products" and accordingly exploiting South Africa's vulnerable consumers.[396]

Due to the shortcomings of the UBPA and its failure to provide appropriate and comprehensive protection to consumers, the Department of Trade and Industry (DTI), by means of the CPA, sought to introduce a comprehensive legislative framework for consumer protection in South Africa.[397] It was envisaged that the CPA would "ensure a fair and transparent market place…to regulate all aspects of the purchasing cycle…beginning with the advertising or marketing of products [and] the practices adopted in securing a sale";[398] and offer legal certainty and accessibility of redress for consumers.[399] The CPA would comprehensively cover various areas and aspects of consumer protection by way of a holistic legal framework and it was accordingly envisaged that the CPA would *inter alia* also address the lack of adequate protection offered by the common law to persons who suffered harm occasioned by defective products.

2. The Consumer Protection Act 68 of 2008

2.1 Introduction

In 2006, a draft Consumer Protection Bill was published and shortly thereafter amended by the DTI.[400] A final version of the Bill was subsequently published for comment on 19 May 2008.[401] On 24 April 2009, the CPA was eventually assented to by the President and the Act was subsequently promulgated on 29 April 2009.[402] Some provisions of the CPA were scheduled to come into operation on the so-called

[395] Botha and Joubert (2011) *THRHR* 305 agree and state that this imbalance negatively affected consumers, which resulted in more defective products.
[396] Woker (2010) *Obiter* 231.
[397] Consumer Protection Bill (2008).
[398] Botha and Joubert (2011) *THRHR* 305.
[399] Loubser and Reid (2006) *Stell LR* 412; and Botha and Joubert (2011) *THRHR* 305.
[400] The Bill was originally unveiled in the DTI's 2004 Green Paper on the Draft Consumer Policy Framework. The Bill was first published on 15 March 2006 in *GenN* 418 of *GG* 28629 and subsequently amended by *GG* 28749 of 19 April 2006. See also Barnard (2013) *Thesis* 23-24.
[401] In terms of *GG* 31027.
[402] *GG* 32186.

"early effective date" and the remainder of the CPA provisions would come into operation on a later date, the "general effective date."[403] On 24 April 2010, being the "early effective date", chapter 1,[404] chapter 5,[405] section 120,[406] and schedule 2 accordingly took effect.[407] Emphasizing the urgency with which the DTI viewed the introduction of a legislative framework for product liability, the strict product liability provisions in the Act took effect on the early effective date.[408] On 31 March 2011, being the "general effective date", the remaining provisions of the CPA took effect, namely chapters 2, 3, 4, 6 and 7, and schedule 1.[409]

2.2 Purpose and objectives of CPA

In terms of the long title the objectives of the CPA are to:

> promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to *consumer protection*,[410] [and] to provide for improved standards of consumer information.

The preamble to the Act further provides that:

> it is necessary to develop and employ innovative means to *protect the interests of all consumers,* ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace…a law is to be enacted in order to *promote and protect* the economic interests of consumers… [and] *protect consumers* from hazards to their well-being and safety.[411]

The purpose of the CPA is set out in section 3(1), namely to promote and advance the economic and social welfare of consumers in South Africa by

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[403] See *GN* 467 in *GG* 32186 regarding the early effective date; and *GN* 917 in *GG* 33581 regarding the general effective date.
[404] The interpretation, purpose and application provisions.
[405] Chp 1 contains provisions relating to governing institutions.
[406] Chp 5 contains provisions stating that Regulations must be decided by the Minister.
[407] Sch 2 sets out the transitional provisions.
[408] Item 3(4) schedule 2.
[409] The CPA Regulations were published in *GN* R293 in *GG* 34180 - hereinafter referred to as the "Regulations." See also Tennant (2011) 145.
[410] Own emphasis.
[411] Own emphasis.

(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods and services by consumers -
    (i) who are low-income persons or persons comprising of low-income communities;
    (ii) who live in remote, isolated or low-density population areas or communities;
    (iii) who are minors, seniors or other similarly vulnerable consumers; or
    (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
(c) promoting fair business practices;
(d) protecting consumers from -
    (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
    (ii) deceptive, misleading, unfair or fraudulent conduct;
(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
(h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

The Act provides for the protection of eight fundamental consumer rights, namely: the right of equality in the consumer market; the consumer's right to privacy; the consumer's right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just

and reasonable terms and conditions; and the right to fair value, good quality and safety.[412]

The focus of the CPA is therefore foremost on the protection of the consumer, and it protects consumers accordingly by codifying the abovementioned consumer rights whilst establishing the duties of suppliers towards consumers.[413] In order to attend to the enforcement of the aforesaid consumer rights, the CPA provides for the establishment of the National Consumer Commission as primary enforcement body.[414] The Commission *inter alia* investigates complaints regarding prohibited conduct; issues and enforces compliance notices; negotiates and concludes consent orders and refers complaints regarding prohibited conduct to the National Consumer Tribunal that was established in 2007 under the National Credit Act,[415] and that functions as an administrative Tribunal also for purposes of hearing matters arising under the CPA. The Tribunal can *inter alia* make declarations that certain conduct by suppliers amount to prohibited conduct, impose administrative penalties on suppliers and provide redress to consumers.[416] The CPA has further introduced collective redress for consumers via the provisions of section 4(1) with the result that it is possible for a group of consumers to institute a class action based on infringement of consumer rights as protected by the Act.[417]

Notably the legislature has placed a high premium on the manner in which the Act must be interpreted to ensure that its consumer protection objectives are achieved and has dealt with this aspect in a number of provisions. Section 2(1) requires the Act to be interpreted in a manner that gives effect to the purpose of the Act as stated

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412 Van Eeden and Barnard (2017) 26 remarks that Chp 2 that deals with these fundamental consumer rights essentially constitutes a charter of substantive consumer rights.

413 Tennant (2011) 144.

414 S 4(1) read with ss 85 ("establishment"), 92 ("functions") and 99 ("enforcement functions") of the CPA. For a comprehensive overview of these sections, see further the discussion of them in Naudé and Eiselen (2014 *et seq*) 85-1 to 99-3.

415 The National Consumer Tribunal was established in terms of s 26 of the National Credit Act 34 of 2005.

416 Ss 69 and 75 (read with s 112) of the CPA; and see the discussion of these sections by Van Heerden in Naudé and Eiselen (2014 *et seq*) 69-1 to 75-4.

417 S 4(1) provides that the following persons have *locus standi* to approach a court, the Tribunal or the National Consumer Commission and allege that their rights in terms of the CPA have been infringed: (a) a person acting on his/her own behalf; (b) an authorised person acting on behalf of another person who cannot act in his/her own name; (c) a person acting as a member of a group or class of affected persons; (d) a person acting in the public interest with leave from the Tribunal or court; or (e) an association acting in the interest of all its members.

in section 3(1). Section 2(4) further provides that when interpreting or applying the CPA, a person, court or the Tribunal may consider-

(a) appropriate foreign and international law;

(b) appropriate international conventions, declarations or protocols relating to consumer protection; and

(c) any decision of a consumer court, ombud or arbitrator in terms of the CPA, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court.

In terms of section 4(2)(a) the court or National Consumer Tribunal is obliged to develop the common law as necessary to *improve the realisation and enjoyment of consumer rights* generally, and in particular by persons contemplated in section 3(1)(b) of the CPA. In addition a court or Tribunal must promote the spirit and purposes of the Act and it must make appropriate orders to *give practical effect to the consumers right of access to redress*, including but not limited to any order provided for in the CPA; and "any innovative order that *better advances, protects, promotes and assures the realisation by consumers of their rights* in terms of the Act." Van Eeden and Barnard remark that it may be inferred that the word "spirit" was employed to indicate that the CPA should not be interpreted overly literally and that the interpretation of the Act should facilitate the realisation and enjoyment of consumer rights.[418]

Section 4(3) further provides that where a provision in the CPA can be interpreted to have more than one meaning, the meaning that best promotes the spirit and purposes of the CPA and will *best improve the realisation and enjoyment of consumer rights must be preferred*. Additionally, a document prepared by a supplier must be interpreted *for the benefit of the consumer*.[419]

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[418] Van Eeden and Barnard (2017) 40. All italicised words in this paragraph are the author's own emphasis.

[419] S 4(4). See Tennant and Mbele (2012) *DR* who discuss how the CPA has impacted five common law principles relating to consumer agreements that have been reduced to writing and signed by the parties (in particular, the rule of *caveat subscriptor*, the notion of freedom to contract, the passing of the risk rule, the parol evidence rule and the *voetstoots* clause). In addition to these changes being made in favour of a consumer, the common law rule of interpretation, named the *contra proferentem* (meaning a court will interpret an ambiguous clause against the party who was responsible for adducing the agreement) is given statutory authority by s 4(4)(a) of the CPA whereby a contract must be interpreted to the benefit of a consumer. Therefore the courts "accept an interpretation

Van Eeden and Barnard hold the view that the provisions of section 4(3) are susceptible to both broad and conflicting interpretation. He remarks that "when searching for a meaning that best promotes the spirit and purposes of the Act, social or economic welfare may be emphasised more or less, a tension between fairness and efficiency may be discovered, and the benefit of consumers generally must be ascertained. The provisions of section 4(3) do not displace existing rules and assumptions of interpretation and thus should be read in conjunction with, as well as subject to, existing rules of interpretation. Firstly, it is submitted that the CPA is what may be described as 'remedial law'. Such laws are interpreted in a manner that will 'extend the remedy as far as the words will admit'. However sight should not be lost of the fact that the CPA was enacted for the purpose of promoting and advancing the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible, and for the benefit of consumers generally. This clearly contemplates a balancing of rights and remedies that will be fair not only to suppliers and consumers, but that will be efficient. Secondly, it is submitted that the court (or the NCT, as the case may be) must also take into consideration, within this broader context, the rule that where the meaning of burdensome or onerous provisions is not clear, a more equitable interpretation should be favoured to lessen the burden. Thirdly, regard should be had to the assumption that the legislature does not intend to encroach on the rights of, or confiscate the property of, persons."[420]

2.3 Scope of application of CPA

2.3.1 Introduction

In terms of section 5(1), the Act applies to:

(a) every *transaction* occurring within the Republic, unless it is exempted by section 5(2) or exempted in terms of section 5(3) and (4);

(b) the *promotion* of any goods or services, or of the supplier of any goods or services, within the Republic - unless those goods or services could not reasonably be the subject of a transaction to which the CPA applies in terms of paragraph (a) above; or the promotion of those goods or services has been exempted in terms of section 5(3) and 5(4);

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unfavourable to the *proferens* because he had the opportunity to express himself more clearly." See also Mupangavanhu (2014) *PELJ / PER*.

[420] Van Eeden and Barnard (2017) at 41.

(c) goods or services that are supplied or performed in terms of a transaction to which the CPA applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services; and
(d) goods that are supplied in terms of a transaction that is exempt from the application of the CPA, but only to the extent provided for in section 5(5).[421]

In general terms it can thus be said that the CPA applies to the promotion and supply of goods and services by suppliers to consumers, in the ordinary course of the supplier's business.[422] The Act does not require that the consumer should have acted for private purposes or for business purposes only hence consumers are protected by the Act regardless of whether they act for private or business purposes.[423]

Section 5(8) further extends the application of the CPA to a matter *irrespective* of whether the supplier concerned resides or has its principal office within or outside South Africa; whether it operates on a for-profit basis or otherwise; or is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or whether it is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

2.3.2 Relevant definitions

The Act provides various definitions to aid in determining the reach of its scope of application. Accordingly one needs to consider the interaction between this conglomeration of definitions in order to determine, in a given instance, whether the Act will apply.

[421] Own emphasis.
[422] Van Eeden and Barnard (2017) 36 explains that the CPA regulates "the 'marketing' of goods and services to consumers, plus the relationships, transactions and agreements between them and producers, suppliers, distributors, importers, retailers and providers of goods and services, and various intermediaries, 'acting in the ordinary scope of business. The Act also regulates the relationship between franchisor and franchisee." See Jacobs, Stoop and Van Niekerk (2010) *PELJ* 309-316; Barnard (2013) *Thesis* 31-33 and 39-43; and Eiselen in Naudé and Eiselen (2014 *et seq*) 4-1 to 4-19 for a detailed discussion of the CPA's scope of application.
[423] See also Van Eeden and Barnard (2017) 42.

A “consumer” is defined in section 1 as:

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

The concept of “consumer” for purposes of the CPA is thus broad: A “consumer” includes both natural persons as well as juristic persons with an asset value or annual turnover of less than R2 million;[424] and even includes a franchisee[425] irrespective of its asset value or turnover.[426] Users of goods and beneficiaries or recipients of services are also included regardless of whether they entered into a transaction relating to such goods or services. No monetary threshold applies to natural person consumers, which means that such consumers enjoy the protection of the CPA in those instances where the Act applies - irrespective of their financial status. As is clear from its purpose section the CPA particularly seeks to improve the level of consumer protection extended to vulnerable consumers.[427]

In terms of section 1 of the CPA, a “supplier” is defined as a person who “markets” any goods or services.[428] Although the term “market”, when used as a verb, means both to “promote” and “supply” any goods or services, the broad interpretation that should be afforded to the concept of “supplier” becomes even more evident when one has regard to the definition of “supply chain” contained in section 1 of the CPA. As pointed out by Barnard “supply chain” is an umbrella term and with respect to any

[424] See also s 5(2)(b).
[425] A discussion of the CPA’s application to franchise agreements is beyond the scope of this thesis.
[426] See also s 5(6)(b)-(e).
[427] Barnard (2013) *Thesis* at 39.
[428] *Ibid*.

particular goods or services, it means "the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods and services to a consumer, whether as a producer, importer distributor or retailer of goods, or as a service provider."[429] Thus "supplier" for purposes of the CPA can refer to a producer, importer, distributor or retailer of goods; or a provider of services; or all of the aforementioned, depending on the context.[430]

A "producer" is defined as a person who:

(a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or

(b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a).[431]

The definition of a "producer" in terms of the Act thus corresponds with the meaning that one would ordinarily ascribe to a manufacturer of goods but it is also broader as it includes a person who has, by appending certain information on the goods, created the reasonable expectation among consumers that he is the manufacturer of such goods.

The modern South African consumer market is flooded with large volumes of imported goods hence the CPA also brings importers of such goods within the reach of the Act and imposes accountability on them in respect of defective goods. 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."[432] Given that consumers in the modern market seldom acquire goods directly from manufacturers the Act also draws distributors and retailers into the realm of product liability, thus making them liable for defective goods supplied in the

[429] S 1.
[430] Barnard (2013) *Thesis* 41-42. It can also include a promoter of a promotional competition as provided for in s 36 of the CPA.
[431] *Ibid*.
[432] *Ibid*.

ordinary course of their business. A "distributor" in relation to any particular goods, means "a person who, in the ordinary course of business, (a) is supplied with those goods by a producer, importer or other distributor; and, (b) in turn, supplies those goods to another distributor or to a retailer."[433] A "retailer", in respect of any particular goods, means "a person who, in the ordinary course of business, supplies those goods to a consumer."[434] Liability is further extended to a "service provider" who is defined as "a person who promotes, supplies or offers to supply any service."[435]

Given that a consumer is *inter alia* defined as a person to whom goods or services are "marketed" and a supplier is defined as a person who "markets" any goods or services, which "when used as a verb, means to promote or supply"[436] it is also necessary to have regard to what is meant by the words "promote" and "supply" as used in the CPA.[437] "Promote" entails a number of activities namely to:

(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;
(b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or
(c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.[438]

"Supply" also refers to a broad range of activities, and "when used as a verb, in relation to goods, includes to sell, rent, exchange and hire in the ordinary course of business for consideration." When "supply" is used as a verb in relation to services it means "to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration."[439]

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[433] *Ibid*.
[434] S 1.
[435] *Ibid*.
[436] *Ibid*.
[437] See however *MFC v Botha* (2013) ZAWCHC 107 (15 August 2013) where the court failed to note the nexus between the word market and the definition of market in s1. See further the discussion of this case by Otto, Van Heerden and Barnard (2014) *SA Merc LJ* 247.
[438] *Ibid*.
[439] *Ibid*.

As indicated a consumer is *inter alia* described as a person who enters into a "transaction" for the supply of goods and services. A "transaction" is defined in section 1 as:

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

The reach of the Act is thus extended by section 5(6) which provides that certain arrangements must be regarded (deemed) as a transaction between a consumer and a supplier irrespective of whether it meets the definition of "transaction".[440]

Notably, the CPA provides no definition for the term "ordinary course of business" and it is submitted that the question whether the supplier in a specific instance promoted or supplied goods or services in the ordinary course of his business would have to be determined with reference to the facts of each specific instance. Van Eeden and Barnard points out that the phrase "ordinary course of business" has often been interpreted over the years in the context of the phrase "disposition in the ordinary course of business" in terms of section 29 of the Insolvency Act.[441] In

[440] S 5(6) provides that for greater certainty, the following arrangements must be regarded as a transaction between a supplier and a consumer, within the meaning of the CPA:
"*(a)* The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity; *(b)* a solicitation of offers to enter into a franchise agreement; *(c)* an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee; *(d)* a franchise agreement or an agreement supplementary to a franchise agreement; and *(e)* the supply of any goods or services to a franchisee in terms of a franchise agreement."

[441] Act 24 of 1936. See further *Griffiths v Janse Van Rensburg NO and Another* [2016] 1 All SA 643 (SCA) par 11.

Eskom Holdings v Halstead-Cleak,[442] the court also pointed out that although "ordinary course of business" is not defined in the CPA, it has been considered by our courts in the context of insolvency law where it was found that it entails an objective test requiring regard to be had to all the circumstances, including the actions of both parties to the transaction.

"Goods" have been non-exhaustively defined in section 1 to include:

(a) anything marketed for human consumption;
(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
(c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
(d) a legal interest in land or other immovable property, other than an interest that falls within the definition of "service" in section 1; and
(e) gas, water and electricity.

Although not specifically mentioned, the definition of goods is wide enough to include component parts fitted into those goods.[443]

"Services" is also non-exhaustively defined in section 1, as including, but not being limited to:

(i) any work or undertaking performed by one person for the direct or indirect benefit of another;
(ii) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act;[444]
(iii) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service –
    (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act; or

[442] 2017(1) SA 333 (SCA) at par 20. See also *Van Zyl and others NNO v Turner and Another NNO* 1998 (2) SA 236 (C) at par 34.
[443] Loubser and Reid (2012) 81.
[444] Act 37 of 2002.

(ii) is regulated in terms of the Long-term Insurance Act[445] or the Short-term Insurance Act;[446]

(iv) the transportation of an individual or any goods;

(v) the provision of –

(i) any accommodation or sustenance;

(ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;

(iii) access to any electronic communication infrastructure;

(iv) access, or a right of access, to an event or to any premises, activity or facility; or

(v) access to or use of any premises or other property in terms of a rental;

(vi) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and

(vii) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e),

irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service.

"Consideration" is broadly defined to mean: anything of value given and accepted in exchange for goods or services, including

(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;

(b) labour, barter or other goods or services;

(c) loyalty credit or award, coupon or other right to assert a claim; or

(d) any other thing, undertaking, promise , agreement or assurance,

irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.[447]

[445] Act 52 of 1998 governing market conduct only as the Insurance Act 18 of 2017 (as published in *GG* 41388) took effect on 1 July 2018 specifying the prudential requirements of the insurance industry.

[446] Act 53 of 1998 governing market conduct only as the Insurance Act 18 of 2017 (as published in *GG* 41388) took effect on 1 July 2018 specifying the prudential requirements of the insurance industry.

[447] S 1.

2.3.3 Exempt transactions

Section 5(2) stipulates that the following transactions are exempt from the application of the Act:[448] a transaction in terms of which goods and services are promoted or supplied to the State;[449] transactions in terms of which the consumer is a juristic person with an asset value or annual turnover that, at the time of the transaction, equals or exceeds the threshold value of R2 million;[450] transactions falling within an industry-wide exemption granted by the Minster of Trade and Industry in terms of sections 5(3) and (4) of the Act;[451] transactions that constitute credit agreements under the National Credit Act[452] although the goods and services that are the subject of the credit agreement are not excluded from the ambit of the CPA;[453] transactions pertaining to services to be supplied under an employment contract;[454] or that give effect to a collective bargaining agreement[455] or to a collective agreement.[456]

Therefore, in order to establish whether the CPA applies in a given instance one has to have regard to whether the matter is one that arose on the early or general effective date of the Act and then has to determine, with reference to the definitions as set out above, whether the Act applies. In this regard one also has to bear in mind that some transactions have expressly been excluded from the application of the Act by section 5(2) and that section 5(8) extends the reach of the Act's scope of application. Specifically in the context of product liability it should however be noted that the Act has *sui generis* application by virtue of the provisions of section 5(1)(d) read with section 5(5), as discussed in more detail in paragraph 3.2 below.

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[448] S 5(2)(a)-(g).
[449] S 5(2)(a). Note however that a transaction whereby the State is the supplier of goods and services is not exempted by s 5(2)(a), thus ensuring consumer protection.
[450] S 5(2)(b).
[451] S 5(2)(c). See sub-ss 5(3) and (4) regarding an application to the Minister for such an industry-wide exemption.
[452] Act 34 of 2005.
[453] S 5(2)(d).
[454] S 5(2)(e).
[455] S 5(2)(f). Within the meaning of s 23 of the Constitution RSA; or the Labour Relations Act 66 of 1995.
[456] S 5(2)(e). As defined in s 213 of the Labour Relations Act 66 of 1995.

2.4 The CPA and the preservation of the consumer's common law rights

The CPA 's objective to extend the best and widest possible protection to consumers is further borne out by section 2(10) which states that "no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law." Accordingly section 2(10) serves to preserve the consumer's common law rights. As pointed out by Barnard, this preservation of common law rights extends only to consumers and not to suppliers.[457] Naudé and Eiselen refer to section 2(10) as a "general savings clause", stating that it prohibits a reading of the CPA that results in the limitation of any common law-remedy which may have been available to the consumer.[458] They further indicate that section 2(10) must be viewed against the backdrop of the presumption that the legislature does not intend to alter the common law unless clearly stated in a particular statute. Accordingly they remark that section 2(10) confirms that the CPA does not revoke or alter the common law and must be read to be capable of co-existing with the common law.[459]

This explanation by Naudé and Eiselen is supported. Having regard to section 2(10) it is submitted that it would be prudent in respect of a product liability claim that arose after 24 April 2010, and that is subsequently instituted under section 61 of the CPA, to rely in the alternative on a claim founded on common law product liability.

3. Strict product liability in terms of section 61 of the CPA

3.1 The provisions of section 61

An overview of the product liability provisions in section 61 of the CPA is important to contextualise the discussion on the concept of "defect" and the statutory product liability defences that are the focus of this thesis. The product liability provisions in section 61 are captured within Part H, Chapter Two of the Act, which encompasses section 53 to 61 and bears the title "Right to fair value, good quality and safety." It is accordingly of particular importance to note the location of the product liability

[457] Barnard (2013) *Thesis* 27.
[458] Eiselen in Naudé and Eiselen (2014 *et seq*) 2-8.
[459] Eiselen in Naudé and Eiselen (2014 *et seq*) 2-9.

provisions within Part H as it is submitted that it is instructive in interpreting the said section.

Having regard to Part H one comes to appreciate that the CPA has created a specific narrower context relating to the supply of goods, of which the product liability provisions in the Act form part. This narrower context is supported by the broader "assurances" given by the Act relating *inter alia* to aspects such as use of plain language,[460] adequate disclosure,[461] unfair contract terms,[462] unfair commercial practices,[463] and labelling and packaging,[464] a discussion of which falls outside the limited scope of this thesis. On a narrower level, as captured in Part H, the Act introduces the right to safe, good quality goods as contained in section 55, supported by an implied warranty of quality contained in section 56 and a warranty on repaired goods as set out in section 57. It should further be noted, albeit that a detailed discussion thereof is beyond the scope of this thesis, that the Act also imposes, by means of section 58, certain obligations on suppliers specifically with regard to (known) risks in respect of goods and provides, in terms of section 59, for the recovery and safe disposal of designated products and components. In order to further curb the incidence of harm caused by defective products, section 60 of the Act contains provisions relating to safety monitoring and recall.[465] It is thus submitted that all the provisions in Part H of the Act that precede section 61 are aimed at facilitating the prevention of any defects in products that would make those products unsafe alternatively the timeous recall of defective products in order to limit potential harm.[466] In addition, it has to be borne in mind that in South Africa there is also sector-specific legislation that sets standards for certain type of products that also serves to avoid defectiveness in such products.[467]

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[460] See s 22 read with s 50.See also Barnard (2013) *Thesis* 163-166 and 194-200.
[461] See ss 23, and 25-27 read with s 15.
[462] See s 48 read with reg 44.
[463] See s 51.
[464] See s 24.
[465] A discussion of s 60 falls beyond the scope of this thesis.
[466] It is conceded that although ideally product recall should occur as soon as a defect is discovered and before it causes harm the practical reality is that defective products are often recalled only after some harm has already occurred which alerted the suppliers concern of the problem. The recent listeriosis–crisis in South Africa which led to the recall of various processed meat products serve as an example. For more information see the recall statement by the CGCSA (2018).
[467] For example the Medicines and Related Substances Act 101 of 1965; the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; and the Agricultural Product Standards Act 119 of 1990.

Part H defines various concepts which are relevant in the context of general sale of goods as well as with regard to product liability, and which also informs the concept of "defect" from both a contractual and a delictual product liability perspective. As such section 53 is entitled "Definitions applicable to *this Part*"[468] and provides as follows:

> 53(1) In this Part, when used with respect to any goods, component of any goods, or services -
>
> (a) 'defect' means-
>
> (i) any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
>
> (ii) any characteristic of the goods or components that renders the goods less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;
>
> (b) 'failure' means the inability of the goods to perform in the intended manner or to the intended effect;
>
> (c) 'hazard' means a characteristic that-
>
> (i) has been identified as , or declared to be, a hazard in terms of any other law; or
>
> (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and
>
> (d) 'unsafe' means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons."

Section 61, which bears the heading "Liability for damage caused by goods", has been stated by the DTI to introduce a regime of strict product liability into South African law which "has a dramatic influence on the legal position regarding liability for harm caused by goods."[469] Section 61(1) provides that, except to the extent

[468] Own emphasis. These definitions therefore apply wherever the concepts defined in s 53 appear in Part H.

[469] Botha and Joubert (2011) *THRHR* 305. Van Eeden and Barnard (2017) 387 refer to the product liability regime introduced by the CPA as regime of "modified liability" where negligence per se is no longer a requirement.

contemplated in section 61(4),[470] the producer, importer, distributor or[471] retailer of any goods is liable for harm caused wholly or partly as a consequence of the supply of

(a) unsafe goods;

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

(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

irrespective of whether the harm resulted from any negligence by the defendant.[472]

The Act also applies to service providers who are not traditionally regarded as suppliers of goods in the first instance. In terms of section 61(2) a supplier of services, who in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a "supplier of those goods" to the consumer, for purposes of product liability as contemplated in section 61.[473] As pointed out by Jacobs, Stoop and Van Niekerk this would for example include an electrician that installs a defective geyser or a surgeon who implants a defective pacemaker.[474] Section 61(3) further provides that if, in a particular case, more than one person is liable in terms of section 61, their liability is joint and several.

A number of statutory defences are catered for in section 61(4), which provides that liability of a "particular person" in terms of section 61*does not arise* if:[475]

(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

(b) the alleged unsafe product characteristic, failure, defect or hazard -

(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

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[470] This sub-s sets out a closed list of defences available to the supply chain, as discussed hereinafter in chp 5.

[471] Jacobs, Stoop and Van Niekerk (2010) *PELJ* 384 remark that it is not clear why the word "or" was inserted between distributor and retailer as they may both be involved in the same supply chain and may both be liable to the consumer at the same time.

[472] Own emphasis.

[473] See Jacobs, Stoop and Van Niekerk (2010) *PELJ* 383; and Barnard (2013) *Thesis* at 406 who argue that s 61(1) should be amended to also include the word "supplier" in order to enable the provisions of s 61(1) to also apply to service providers as indicated in s61(2).Notably it would appear that Melville (2010) 98-100 regards a supplier to be included in the application of s 61.

[474] Jacobs, Stoop and Van Niekerk (2010) *PELJ* 383.

[475] Own emphasis.

(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;

(c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or

(d) the claim for damages is brought more than three years after the -

(i) death or injury of a person contemplated in sub-section (5)*(a)*;

(ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in sub-section (5)*(b)*; or

(iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to property contemplated in sub-section (5)*(c)*; or

(iv) the latest date on which a person suffered any economic loss contemplated in sub-section (5)*(d)*.

"Harm" for which a person may be held liable, *includes*:[476]

(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)*.

Furthermore, the court is granted the power to determine whether "harm" has been established and adequately mitigated, to determine the extent and monetary value of any damages incurred, including economic loss, or to apportion liability between suppliers who are jointly and severally liable.[477]

3.2 Discussion

3.2.1 Special application of the CPA for purposes of product liability

As alluded to above, the legislature has made special provision for the application of the CPA in instances of product liability which, it is submitted, manifests the intention of the legislature to broaden the reach of the strict product liability provisions in the

[476] S 61(5). Own emphasis.
[477] S 61(6)(a)-(c).

Act.[478] Not only, as pointed out above, did the product liability provisions in section 61 of the Act take effect on the early effective date (24 April 2010) but section 5(1)(d) provides that the Act nevertheless applies to goods that are supplied in terms of a transaction that is exempt from the application of the Act, but only to the extent provided for in section 5(5). Notably section 5(5) provides specifically that if any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of the CPA, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are *nevertheless* subject to sections 60 (product recall) and 61 (product liability).[479] This means that, insofar as the product liability provisions in section 61 are concerned, those provisions will apply where defective goods that cause harm are supplied by a supplier after 24 April 2010, even if the transaction is one that would be otherwise be exempt in terms of section 5(2)(a) to (e), for example where goods are supplied in terms of a collective bargaining agreement.[480]

A vexing question that inevitably arises is whether the product liability provisions in section 61 only apply if the person who suffered harm is a "consumer" as defined in the CPA and further whether its application is dependent on such person having entered into a "transaction"[481] with the supplier in terms whereof goods were supplied for "consideration"? Jacobs, Stoop and Van Niekerk opine that the product liability regime introduced by the CPA applies "not only to consumers but all injured persons may claim under section 61." However they do not elaborate further on this opinion.[482] Van Heerden and Barnard argue that an interpretation that confines the applicability of the product liability provisions in section 61 only to persons who meet the definition of "consumer" and who entered into a transaction with the supplier of the defective product that caused the harm, would mean that the product liability provisions in section 61, despite their extended reach in terms of section 5(5) and 5(8) and also section 61(1) which imposes liability on the whole supply chain, actually has a *narrower* reach from a claimant's perspective than under the common law of product liability *ex delicto.* This is because the common law provides a remedy

[478] Van Heerden and Barnard (2018) 2.
[479] See also s 5(1)(d).
[480] Van Heerden and Barnard (2018) 8.
[481] Including a deemed transaction in terms of s 5(6).
[482] Jacobs, Stoop and Van Niekerk (2010) *PELJ* 384.

to any person harmed by a defective product and not only to consumers who enter into transactions with suppliers in terms whereof they acquire goods for consideration. This means that innocent bystanders who have no contractual relations with the supplier of a defective product are also protected by the common law of product liability *ex delicto*. In any event they point out that product liability *ex delicto* has developed to cater for those situations where a person, due to lack of privity of contract, is unable to rely on product liability *ex contractu* and that it is thus distinguished by the fact that there is *no transaction* between the parties in an instance where the basis of product liability is delictual in nature. Therefore, if a transaction is always required for purposes of application of the product liability provisions it would negate the fact product liability can be founded either in contract or delict. It would also mean that innocent bystanders will be foreclosed from instituting product liability claims but will have to fall back on the common law with its onerous requirement of proof of negligence.[483]

Also, as indicated above, the definition of "consumer" is broad and includes persons such as users or beneficiaries of goods who are not in privity of contract with the supplier by virtue of having entered into a "transaction" with such supplier. If one has regard to the broad definition of "consumer" in section 1 it includes, as expected, a person to whom goods or services are marketed (i.e. promoted and/or supplied) in the ordinary course of the supplier's business and a person who has entered into a transaction with a supplier.[484] The reach of the CPA insofar as the consumers to whom it applies are concerned, is however extended by virtue of subparagraphs (c) and (d) of the definition of consumer which includes "*if the context so requires or permits*, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to transaction concerning the supply of those particular goods or services" and a franchisee in terms of a franchise agreement to which the Act applies. Thus for example, if a person buys a microwave oven from a retailer and that person's child was injured when he used the microwave due to it having malfunctioned and exploded, the child would be regarded as a "consumer" for purposes of the

[483] Van Heerden and Barnard (2018) 14.
[484] Note here that the proviso in s 1(b), relating to exempt agreements as contained in the definition of "consumer", does not apply as a result of the widening of the scope of application of the CPA by s 5(5) insofar as the product liability provisions in s 61 are concerned.

application of the CPA even though the child was not a party to the transaction. The precarious position of an innocent bystander for purposes of a product liability claim derives from the fact that such bystanders are not specifically mentioned in the definition of "consumer" and it thus needs to be considered whether innocent bystanders can be accommodated at all within the definition of consumer.

Being nascent legislation not many cases have yet been reported under the CPA and to date only one product liability case, *Eskom Holdings Ltd v Halstead-Cleak,*[485] has made its way to the high court and subsequently to the Supreme Court of Appeal. This case, however illustrates the limitations of the definition of "consumer" for purposes of product liability *ex delicto* in terms of section 61 of the CPA.

In brief the facts were that Halstead-Cleak had come into contact with a low-hanging power line on 11 August 2013 whilst riding a bicycle, resulting in harm. After being informed of the incident, the employees of Eskom inspected the power lines and discovered that all three conductors of the power line had been vandalised by the theft of stay rods, which resulted in the power lines hanging in a low position. Halstead-Cleak alleged in his pleadings that Eskom was a producer or "supplier" of electricity, or that it provided a "service" in terms of the CPA; while the production or generation of electricity constituted "supply" and "market" as defined in the Act. It was further alleged that Halstead-Cleak was a "person" mentioned in section 61(5) of the Act, that is, a "natural person" who had been injured, or a "consumer" and had suffered injuries which constituted harm as envisaged in section 61(1) and 61(5) of the CPA due to the alleged supply of unsafe goods[486] and/or defective goods, or a hazard in the goods.[487]

Eskom pleaded that it was a licensee in terms of the provisions of the Electricity Regulation Act[488] and responsible for the relevant power line through which it conducted electricity. However Eskom denied that, in the context of this particular accident, it was a "producer" or "supplier" or that the respondent was a "consumer"

[485] 2017 (1) SA 333 (SCA).
[486] The "goods" were the electricity generated, supplied and permitted to be present in the lines spanning the footpath.
[487] At par 6.
[488] Act 4 of 2006.

as defined in section 1. Eskom also denied that the incident arose as a result of the "supply" of unsafe goods or a product failure, defect or hazard in any goods or inadequate instructions or warnings. Eskom's argument was further that it could not have been expected to discover the state of the power line.[489] When the action was initially instituted, the High Court[490] found against Eskom and *inter alia* held that "…the wording of section 61(5) makes it clear that liability arises not only in respect of "consumers" as defined in the CPA…or consumers in the general sense, but to "any natural person…".

On appeal, the central question before the Supreme Court of Appeal was phrased as whether Eskom could be held strictly liable in terms of section 61 of the CPA for harm caused to the respondent from a low hanging power line which was "not supplying or required to supply electricity to anyone."[491] The court remarked that from the definitions, the Preamble and purpose of the CPA, it is clear that the whole tenor of the CPA is to protect *consumers* and accordingly the Act must be interpreted keeping in mind that its focus is the protection of *consumers*."[492] The court pointed out that the product liability provisions contained in section 61 of the CPA appears in Chapter 2 of the Act that deals with "Fundamental *Consumer* Rights" and particularly Part H of Chapter 2 that deals with the "Right to fair value, good quality and safety".[493] It thus held that it was clear that the harm envisaged in section 61 must be caused to a natural person mentioned in section 61(5)(a), "in his or her capacity as a consumer" as this "is the only business like interpretation possible." The court further stated that "the reason why reference is made to a 'natural person' is clearly to distinguish it from the concept of 'person' which may include a 'juristic person' or 'consumer' which may also include a "juristic person".[494]

[489] At par 7.
[490] *Halstead-Cleak v Eskom Holdings Ltd* 2016 (2) SA 141 (GP).
[491] At par 1. The parties agreed that this issue would be determined separately and that the remaining issues such as quantum would stand over for later determination, if necessary.
[492] Par 16. Own emphasis. Notably the court stated: "A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers. There are categories of persons who fall outside this definition, but they are deemed to be consumers in terms of the provisions of s 5(6) as set out above. These purchases are made by way of transactions."
[493] Par 16.
[494] Par 17.

The Supreme Court of Appeal thus rejected the High court's interpretation that the product liability provisions in section 61 are not limited only to consumers as defined in the Act and stated that such interpretation loses sight of the fact that "there should be a supplier and customer relationship for Eskom to be strictly liable for harm, as the Act's purpose is to protect consumers."[495] It indicated further that, having regard to paragraph (c) of the definition of "consumer" a person who is a "user" of goods can also qualify as a "consumer" but then there must be "a *transaction* to which a consumer is a party, or the goods are used by another person consequent to that transaction."[496] The court however held that "in this instance the respondent is not a consumer *vis-à-vis* Eskom as (a) the respondent did not enter into any transaction with Eskom as a supplier or producer in the ordinary course of Eskom's business; and (b) the respondent was not utilising the electricity, nor was he a recipient or beneficiary thereof."[497]

Van Eeden and Barnard submit that the words "if the context so requires or permits" in subsection (c) of the definition of "consumer" might possibly be interpreted to accommodate product liability claims by users, recipients or beneficiaries of defective goods who have not entered into "transactions" with the supplier of those goods.[498] However Van Heerden and Barnard point out that this does not resolve the position of innocent bystanders who do not qualify as users, recipients or beneficiaries of those defective goods.[499] They further point out that section 4(1) which provides for *locus standi* under the CPA also does not assist as it provides for *locus standi* to "approach a court, Tribunal or the Commission alleging that a *consumer's* rights in terms of the [CPA] have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring."[500]

Van Heerden and Barnard are however of the opinion that the view of the Supreme Court of Appeal in the *Eskom* case that section 61 is only to the avail of a "consumer" who entered into a "transaction" with a supplier, cannot be supported. They argue that there is no basis on which it can be reasoned that the legislature

[495] *Ibid*.
[496] At par 21. Own emphasis.
[497] At par 22.
[498] Van Eeden and Barnard (2017) 42.
[499] Van Heerden and Barnard (2018) 5.
[500] Own emphasis.

intended to change the common law more than necessary by limiting the availability of the product liability regime in section 61 to only consumers as defined in the Act and more specifically only to such consumers who enter into transactions as opposed to "persons" who may claim under the common law and who include innocent bystanders. No such intention appears from the Explanatory Memorandum[501] to the CPA either. In their opinion an interpretation that the product liability provisions in section 61 are to the avail of a "person" and not merely to a "consumer" can be inferred from section 61(1) read with section 61(5)(a) to (d) of the CPA which allows for a claim on the basis of harm that includes the death of, or injury to, "any natural *person*"; an illness of "any natural *person"*; any loss or damage to "any" movable or immovable property and any economic loss that results from harm contemplated as aforesaid.[502] In support of their contention they point out that the definitions of "defect" and "hazard" in section 53 refer to "persons" and the definition of "unsafe" which is particularly relevant for product liability, refers to the" consumer or other persons."

Van Heerden and Barnard further argue that limiting the strict product liability provisions in section 61 to consumers as defined in the CPA also offends the right of persons to be treated equally in terms of section 9 of the Constitution. This is because innocent bystanders who appear not to be included in this definition will be limited to instituting a claim under the common law and will have to go to great lengths to prove negligence on the part of the manufacturer which saddles them with a more onerous burden of proof than a plaintiff who claims under section 61 of the CPA. They argue that such limitation further infringes on the right of access to justice in terms of section 34 of the Constitution of persons who will not be able to obtain redress under the common law as they would have difficulty proving negligence by the manufacturer or who might not be able to institute action against the manufacturer but will not, like with section 61, be able to pursue their claim against any other party in the supply chain. Such persons are prejudiced as they cannot rely on the absence of fault or the broad liability imposed on the supply chain by the CPA. Van Heerden and Barnard therefore indicate that the most appropriate solution

[501] Explanatory Summary published in *GG* 31027 of 5 May 2008 amended by *GG* 31074 of 19 May 2008 – Consumer Protection Bill (2008).
[502] Van Heerden and Barnard (2018) 16.

would be that the definition of "consumer" should be augmented to provide for persons other than those already mentioned in the definition of consumer who may be harmed by defective products. They argue that such an amendment is warranted because it will equitably extend the reach of the product liability provisions in the Act to innocent bystanders who, it is trite, are often the victims of product liability accidents.[503]

Loubser and Reid also consider the implications of the *Eskom*-case for product liability under the CPA and remark that it is possible that the references in section 61(5)(a) and (b) to "any natural person" were meant to indicate that harm in the form of death or injury can only be suffered by a natural person, thereby distinguishing a consumer who is a natural person from a consumer who is a juristic person, explaining why the property damage in section 61(5) is not linked to natural persons. They further state that "[I] t follows from this argument that a section 61-claimant can be any person, natural or juristic, *who fits the description of 'consumer',*[504] either as a person to whom the defective goods were marketed or who received the defective good pursuant to a transaction with the supplier, as referred to in paras (a) and (b) of the definition of 'consumer', or as a user, recipient or beneficiary of those particular goods, as referred to in para (c) of the definition."[505]

They however indicate that section 61, read with section 53 that deals with the definition of defect and the various levels (failure, hazard, unsafe) at which a product may be defective, does not unambiguously exclude bystanders injured by goods as potential claimants, such as a person injured when touching an open and live electricity cable.[506] They further point out that section 61(1)(c) and 61(2) refer to the "consumer" as opposed to section 61(5)(a) and (b) that refers to the death or illness of "any natural person." Also, like Van Heerden and Barnard, they point out that the definition of "unsafe" in section 53 (1)(d) refers to an extreme risk of personal injury or property damage to the "consumer or other persons." They further state that section 5(1)(d) read with section 5(5) which extends the application of the CPA to exempt transactions arguably highlights the intention of the legislature to provide

[503] *Ibid*.
[504] Own emphasis.
[505] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-4
[506] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-4A.

general redress for persons harmed by defective goods "even if they did not receive the goods pursuant to a 'transaction' or as a 'consumer' within the meaning of para (b) of the definition of 'consumer'." They therefore argue that this ambiguity in section 61 warrants a purposive interpretation. Pointing out that the Supreme Court of Appeal in *Eskom* emphasised that the purpose of the CPA is to protect consumers, they remark that it is arguable that bystanders injured by goods fall within the category of "vulnerable consumers" to be protected against harm caused by defective goods and ask: "Are we to assume, for example, that there can be no claim under s 61 on behalf of an infant injured by defective goods bought by its parents, on the basis that such an infant cannot be party to a consumer transaction and in many cases would not, on a strict interpretation, qualify as the user, recipient or beneficiary of the goods?". According to Loubser and Reid it is not clear that the legislature intended this result and they therefore suggest that the courts should in cases of injury suffered by bystanders adopt a wide and purposive interpretation of the concepts "recipient" and "beneficiary" as contained in the definition of "consumer" in order to accommodate claims by or on behalf of such bystanders.[507]

Kriek is of opinion that in light of the consumer protectionist policy underlying the CPA, the ambiguity created by the wording of section 61 and the prevailing position in foreign jurisdictions,[508] section 61 should be interpreted as "being available to all persons falling within paragraph (c) of the definition of 'consumer'….in other words, including users of goods." She thus holds the view that bystanders are excluded from the application of section 61. Referring to *Eskom Holdings Ltd v Halstead-Cleak* she notes that it is however unclear when a person would qualify as "using" goods.[509] She points to the fact that no reference was made to bystanders in the draft definition of "consumer" in the Consumer Protection Bill[510] and remarks that if it was the legislature's intention to provide bystanders with the protection afforded by section 61, it is arguable that the definition of consumer would have expressly included bystanders. She nevertheless submits that in the interest of legal certainty, it would have been preferable for the legislature to have consistently referred in

[507] *Ibid*.
[508] See the discussion of the product liability regimes in the EU and Australia in chp 6 and chp 7 hereinafter.
[509] Kriek (2017) *Thesis* 312-319.
[510] B19-2008.

section 61 to either “consumers” or “persons” harmed by goods and to specifically state whether bystanders harmed by defective goods are protected by section 61.[511]

It is however submitted that the confusion relating to whether section 61 is to the avail of persons generally, thus including bystanders, who wish to institute a product liability claim *ex delicto* for harm occasioned by a defective product, is most likely an unintended consequence of shoddy legislative draftmanship. Nevertheless it is clear that it presents a potential stumbling block to persons harmed by defective products where such person does not fit the definition of consumer as per the CPA. This problem has been exacerbated by the decision of the Supreme Court of Appeal in the *Eskom*-case and should be revisited-either by the Supreme Court of Appeal itself or attended to by the legislature.

3.2.2 Proof of negligence not required

Section 61 has introduced a strict product liability regime into South African law by removing the onerous common law requirement of proof of negligence, which severely hampered the successful pursuit of product liability claims prior to the introduction of the CPA. Consequently, as general principle, a plaintiff who wishes to pursue a product liability claim *ex delicto* under the CPA, insofar as the elements of such delict are concerned, only need to prove conduct (i.e. release of a defective product by a supplier), causation and harm. Whether or not there was any negligence on the part of the supplier is irrelevant for purposes of founding product liability under section 61 although, in terms of section 61(6)(c) it may still be relevant for purposes of apportioning liability between suppliers who are found to be jointly and severally liable for the harm suffered by the plaintiff. Given that negligence is not a requirement to found a product liability claim in terms of section 61, it is submitted that the application of the *res ipsa loquitur* doctrine insofar as it may assist in inferring negligence on the part of the manufacturer is not relevant for establishing a claim under the CPA. It is further submitted that the effect of the introduction of statutory faultless liability is that it will also not be necessary for the plaintiff to prove wrongfulness as imposing strict liability implies that the conduct (i.e. releasing a

[511] Kriek (2017) *Thesis* 324.

defective product onto the consumer market) is regarded as per se wrongful.[512] Courts will further be able to have regard to the existing literature and case law as discussed in Chapter 2 in relation to the element of causation as it has been developed under the common law. However insofar as the element of conduct, i.e. the release of a defective product and the type of harm is concerned, it appears that section 61 deviates substantially from the common law and as a result the literature and case law pertaining to these two elements as they developed under the common law will no longer be sufficient where a product liability claim is brought under the CPA and will need to be developed further.

On a practical level a plaintiff who wishes to institute a product liability claim in terms of section 61 will thus *inter alia* first have to allege and prove that the CPA finds application to his dispute, i.e. that the cause of action arose after 24 April 2010 and that his claim is covered by section 5(5) read with section 61. Until such time as the decision in *Eskom v Halstead-Cleak* is overturned or section 61 is amended to expressly provide that section 61 is to the avail of "any person", the plaintiff will have to prove, for purposes of *locus standi*, that he is a "consumer" as contemplated in the *Eskom*-case. The plaintiff must further prove that the defendant was a "supplier" of the goods, i.e. a producer, importer, distributor or retailer as defined in section 1 or a supplier of services as contemplated in section 61(2). It will thereupon have to be established that the goods fall within the definition of goods covered by the CPA and that those goods were "defective" in the broad context envisaged by section 61(1)(a),(b) or (c) read with section 53 as set out above, and that such defectiveness caused (wholly or partly) the plaintiff to suffer harm as contemplated in section 61(5).

From the aforesaid it is clear that key to interpreting the concept of "defectiveness" for purposes of section 61, is the requirement that such defectiveness must have resulted in one or more of the types of "harm" contemplated in section 61(1) read with section 53 and section 61(5). Thus the harm specified in section 61(5) also alludes to the character of the "defectiveness" in the product that will give rise to a product liability claim. The fact that the defect was of such a nature that it caused the specific types of "harm" listed in section 61(5) to the consumer is thus a foundational

[512] See however Barnard (2013) *Thesis* 406 for a contrary opinion.

aspect of product liability *ex delicto* under section 61. It is further clear from the words "wholly or partly as a consequence of" in section 61 that the defective product need not have been the sole cause of the plaintiff's harm but that the fact that it may in part have contributed to such harm is sufficient for purposes of establishing product liability on the part of the supply chain.

For purposes of comprehending the reach of the harm that can be claimed for by means of section 61, regard has to be had to specific terminology contained in section 61(5): "Injury" as used in section 61(5)(a), is described by Loubser and Reid as "hurt or harm to the body" including pain and suffering, emotional distress, disfigurement and loss of amenities. They indicate that "illness" in terms of section 61(5)(b) can be interpreted to mean "an unhealthy condition of body or mind or sickness."[513] With reference to harm arising in relation to "movable or immovable property" per section 61(5)(c), Loubser and Reid remark that it does not restrict the claim to that of the owner's property despite damage most likely to be caused to his property – in their opinion a third party may claim or a claim for economic loss may exist.[514] They remark that "economic loss" as contemplated in section 61(5)(d), relating to death, requires that the dependent be placed in a situation as though the breadwinner did not pass away; and economic loss in relation to injury or illness refers to harm resulting in medical costs, other expenses like the increased duties of maintenance, loss of future income and a claim by the dependent for duty of support.[515] Barnard points out however that if regard is had to the literal meaning of section 61(5) it would appear that not all economic consequential damages will be claimable under section 61(5)(d) but only to the extent that such damage was caused by harm as set out in section 61(5)(a) to (c).[516] Notably Neethling and Potgieter are however of the opinion that pure economic loss is not actionable under the CPA.[517]

[513] Loubser and Reid (2012) 94-96.
[514] Loubser and Reid (2012) 97.
[515] Loubser and Reid (2012) 94-96.
[516] Barnard (2013) *Thesis* 410 in agreement with Otto (2011) *THRHR* 525.
[517] Neethling and Potgieter (2014) *THRHR* 502.

4. Conclusion

The CPA, as its name clearly indicates, is consumer protection legislation *par excellence*. That its objective is to extend a high level of protection to South African consumers is also borne out by its Preamble, its purpose statement and the various provisions detailing how the Act should be interpreted to ensure the degree of consumer protection it espouses. The Act indeed mentions the concept of a fair and sustainable consumer market and also contains some provisions that bring a measure of balance to the statutory obligations of suppliers. However it is submitted that anyone who reads the CPA will be left with no doubt that the interests and protection of consumers are paramount.

In line with the consumer protection agenda of the CPA, the product liability provisions contained in section 61, which are largely based on the EU Product Liability Directive discussed in Chapter 6 hereinafter, has opened-up access to redress for persons harmed by defective products after 24 April 2010. It has done so by introducing a purportedly strict product liability regime which does not require proof of negligence to found a product liability claim. It has further broadened the scope for the institution of product liability claims through the extended reach of the product liability provisions in section 61 by virtue of sections 5(5) and 5(8) and by imposing joint and several liability on the whole supply chain, including service providers. This broadened product liability regime introduced by the CPA is however currently only to the avail of consumers as defined in the Act who enter into transactions with suppliers as held by the Supreme Court of Appeal in *Eskom v Halstead-Cleak,* being the first and to date the only, product liability case brought in terms of the CPA.

The CPA has further introduced various definitions relating to product defectiveness. Notably section 61 does not differentiate between manufacturing, design and warning or instruction defects although it does mention warnings and instructions specifically in section 61(1)(c). That the product liability regime in the Act is not absolutely strict appears from the fact that although it has discarded proof of negligence (and by implication proof of wrongfulness) to found a product liability

claim it has nevertheless introduced a closed list of defences that suppliers may rely on to escape liability for harm caused by defective products.

It is specifically in the context of the concept of "defect" that the CPA will require extensive interpretation because unlike common law product liability *ex delicto* which hinges on a rather simplistic, generic view of "defect", the CPA has introduced a significant number of concepts and definitions that have to be navigated in order to establish whether a product is defective for purposes of section 61. The list of defences introduced by the Act are also new and thus there is no existing body of South African case law or comprehensive literature to which our courts can revert in interpreting the nature and scope of these defences. Although the defence of prescription is also available in respect of product liability claims brought under the common law it needs to be considered how the "prescription defence" introduced by section 61(4)(d) differs from a prescription defence raised against a claim based on common law product liability *ex delicto,* that is, how the statutory prescription defence in section 61(4)(d) differs from a defence based on the Prescription Act of 1969.

Given that South Africa has to a large extent "copied" the strict product liability regime in the 1985 EU Product Liability Directive, which regime was also largely followed by Australia when it transitioned from fault-based to strict product liability in 1992, it further requires to be considered how those jurisdictions deal with the concept of defectiveness and which defences they avail to suppliers. Chapter Four will accordingly delve deeper into the concept of "defect" for purposes of section 61 and thereafter a detailed consideration of the statutory defences will follow in Chapter 5 before embarking on a comparative appraisal of how these two aspects are dealt with in the EU and Australia respectively.

Chapter 4: The concept of "defect" and "defectiveness" in terms of the CPA

A defective product lies at the centre of product liability. Section 61(1) of the CPA introduces "strict" product liability in respect of a product that is "unsafe" or "fails" or is "hazardous" or contains a "defect" or lacks necessary instructions or warnings. The section does not only uses the word "defect" to generically refer to types of product defectiveness that can found a product liability claim but, in addition to its use of the word "defect", it refers to a cluster of concepts which apparently indicate various levels of "defectiveness" that can give rise to product liability under the CPA. Accordingly this Chapter will focus on the meaning of the narrow concept of "defect" as defined in section 53 and specifically used in both sections 55 and 61; as well as the broader concept of "defectiveness" for purposes of strict product liability in terms of section 61 which includes the various concepts of "defect" ,"hazard", "failure" and "unsafe."

1. Introduction

Loubser and Reid aptly remark that section 61(1) read with the definitions set out in 53(1) of the CPA present "a complex and interrelated range of criteria by which the goods in question may be assessed. The distinctions between the different terms used…are potentially confusing for plaintiffs and defendants alike."[518] The challenge is therefore to unravel this complex interrelation between the various concepts that need to be considered in order to establish what the narrow concept of "defect" and the broader notion of "defectiveness" entails for purposes of the product liability provisions contained in section 61.

1.1 The relevance of section 55

Section 61 itself does not contain any provisions indicating how it should be determined that a product is defective. Apart from the definitions of the various concepts of "defect", "failure", "hazard" and "unsafe" in section 53 as discussed below that have to be incorporated into section 61, there is no mention of any specific factors in section 61 that have to be taken into account to assess whether a

[518] Loubser and Reid (2012) 58.

product is defective. The situation that presents itself is that the same concept of defect is used in both section 55 and section 61, apparently requiring incorporation of the same definition wherever the word "defect" appears in both these sections, but only section 55 provides a list of factors to be taken into consideration when determining defectiveness.

How to solve this conundrum? In unraveling the meaning of "defect" (both in the narrow and broad sense) in the context of the product liability provisions of section 61, it is submitted that the initial point of departure should be the fact that the CPA, in section 55, specifically affords consumers the right to good, safe quality goods. The right to a "non-defective" product as contained in section 55 is broadly framed and encompasses rights in respect of suitability, quality, operational ability, lack of defects, usability, durability and safety as set out in section 55(2). Where a product does not meet the requirements of section 55(2) as discussed in more detail below, it can thus generally be said to be "defective" for purposes of the CPA. If defective goods have been supplied to a consumer in terms of a transaction to which the CPA applies he may allege and prove a breach of his rights afforded by section 55, and may further rely on the *ex lege* remedies set out in section 56 of the Act which contains an implied warranty of quality that can be called upon should the defect manifest itself within six months after the delivery of goods.[519] The question now arises what, if any, the

[519] S 56 provides that "(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in s 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be. (2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in s 55, and the supplier must, at the direction of the consumer, either - (a) repair or replace the failed, unsafe or defective goods; or (b) refund to the consumer the price paid by the consumer, for the goods. (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 a further failure, defect or unsafe feature is discovered, the supplier must - (a) replace the goods; or (b) refund to the consumer the price paid by the consumer for the goods. (4) The implied warranty imposed by sub-s (1), and the right to return goods set out in sub-s (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 the case may be." If however the defect only manifests itself after the lapse of the six month period provided for in s 56, then the consumer must take his recourse against the supplier in terms of the common law by virtue of the provisions of s 2(10) of the CPA that preserves the consumer's common law rights. For a detailed discussion see Barnard (2013) *Thesis* 212. See also Naudé and Eiselen (2014 *et seq*) 56-4 to 56 -7.

significance of the rights to safe, good quality goods in section 55 is in relation to the product liability provisions contained in section 61 from the perspective of product liability *ex delicto*?

Note is taken of the view of Naudé who points out that strict liability for harm arising from a product defect is not dependent upon proof that the requirements of section 55(2), as discussed in more detail below, were not met.[520] It is indeed appreciated that sections 55 and 56 apply in a contractual context and are relevant to the law of sale. However it is submitted that section 55 is instructive in that it entrenches the principle that suppliers are obliged not to release defective and in many instances, unsafe, goods onto the consumer market, but only "*safe*, good quality goods." Given that the word "defect" is used in both section 55 and section 61 and that section 53(1)(a) specifically enjoins the application of the definition of "defect" in the context of all the provisions in Part H that contain a reference to the word "defect", it justifies the inference that the legislature regarded some *relation to exist between section 55 and 61*. Notably Kriek also remarks that "there is an inevitable conceptual overlap or interrelationship between the section 55(2) standards and the various concepts of product defectiveness for purposes of section 61, as defined in section 53.[521]

One further has to bear in mind that although the product liability regime in section 61 is largely based on the 1985 EU Product Liability Directive as discussed in more detail in Chapter 6, some provisions that appear specifically in the Product Liability Directive interestingly does not appear in section 61 of the CPA as one would expect, but have been incorporated into section 55 instead. These include the provisions in section 55(4), as indicated below, that assist in determining whether a product can be said to contain a defect for purposes of sections 55(2) and (3), such as the marketing and presentation of the goods, the reasonably expected use of the goods and the time that the goods were supplied

[520] Naudé (2011) *SA Merc LJ* 339.
[521] Kriek (2017) *Thesis* 302 where she remarks that "[F]or instance, goods that are not 'free of defects' within the meaning of s 55(2)(b) may simultaneously be 'unsafe' or contain a 'defect' or 'hazard' for purposes of s 61, and *vice versa*. Therefore, the s 55(2) requirements and the non-exhaustive list of factors in s 55(4) for assessing whether these requirements are met, may provide South African courts with some guidance in determining whether goods have a 'defect', 'failure', 'hazard' and 'unsafe' characteristic for purposes of section 61."

- which is similar to Article 6(1) of the EU Product Liability Directive.[522] It also includes the provision in section 55(5)(b), as dealt with below that a product failure or defect may not infer in the goods "solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier."-which is similar to the provision in Article 6(2) of the EU Product Liability Directive.[523]

It is submitted that the fact that section 55 specifically mentions the right to "safe" goods in its heading also points to some relation between section 55 and section 61 which provides for liability with regard to "unsafe" goods. The types of defectiveness listed in section 55 are further comprehensive in nature and defectiveness due to lack of safety is also mentioned in section 55 by virtue of the application of the definition of "defect" in section 53. Further, it can be argued that the ways in which a product can be defective for purposes of section 55(2) can also cause a product to fail or be hazardous or unsafe as envisaged in section 61. For instance, if a pacemaker is implanted into a patient and that pacemaker is not usable and durable for a reasonable period of time it can also be argued that the pacemaker is therefore unsafe.

Therefore it is submitted that, the legislature most likely, by grouping all the provisions relating to the consumer's right to fair value, good quality and safety together in Part H and mandating use of the same definition of defect for both sections, intended that a court would be able to have regard to the provisions in section 55 that can assist in interpreting whether a product is defective also for purposes of section 61. Other than shoddy drafting there is no logical explanation why the legislature would have required consideration of specific factors to determine defectiveness for purposes of section 55 but not also having a similar provision in section 61.

[522] See chp 6 par 1.
[523] *Ibid*.

1.2 The multi-layered concept of defectiveness in section 61

As indicated in Chapter 3,[524] section 61(1) of the CPA imposes strict liability on the whole supply chain if harm arises in consequence of supplying any "unsafe" goods; a product "failure", "*defect*"[525] or "hazard" in any goods; or inadequate "instructions or warnings" provided to the consumer pertaining to any hazard arising from or associated with the use of the goods. It should accordingly be noted that section 61 refers specifically to a "defect" as defined in section 53(1)(a) but that it also sets out other additional respects in which a product that causes harm may be defective. From the aforesaid it thus appears that the concept of "defectiveness" for purposes of product liability in terms of section 61 is broader than the mere concept of "defect" as defined in the CPA.

The CPA, in section 53, assigns very specific definitions to each of the concepts of defectiveness mentioned in section 61(1), namely "defect", "failure", "hazard" and "unsafe" that must be applied when interpreting the provisions that appear in Part H of the Act. Loubser and Reid refer to the aforementioned definitions as "definitions indicating types of product deficiency."[526] It is submitted that each of these concepts point to different levels of defectiveness. Hence, it will not suffice only to have regard to and contemplate the meaning of the concept of "defect" as defined in section 53(1)(a) of the CPA in order to come to an informed conclusion regarding what would constitute a defect for purposes of founding product liability as contemplated in section 61. In order to grasp the exact nature and meaning of the concept of "defect" and the nature and meaning of the broader notion of "defectiveness" for purposes of section 61, it has to be determined how section 61 interacts with the definitions in section 53 and exactly what significance section 55 has for the interpretation of the concepts mentioned in section 61.

[524] See chp 3 par 3.1.
[525] Author's emphasis.
[526] Naudé and Eiselen (2014 *et seq*) 53-1.

2. Unpacking the concepts of "defect" and "defectiveness"

2.1 Exploring the significance of section 55 of the CPA

Section 55 of the CPA gives a consumer the right to receive *safe*, good quality goods and sets out various aspects relating to such right. In order to contextualize the discussion that follows, the contents of section 55 will be set out first whereafter those aspects of section 55 that are pertinent to this thesis will be further analysed and discussed.

In terms of section 55(2) every consumer has the *right*[527] to receive goods that:[528]

> (a) are *reasonably suitable* for the purposes for which they are generally intended;[529]
>
> (b) are of *good quality,*[530] in *good working order*[531] and *free of any defects*;
>
> (c) will be *useable and durable*[532] *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[533] or any other public regulation.[534]

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[527] Note however that in terms of s 55(1), the provisions of s 55 do not apply to goods bought at an auction as contemplated in s 45 of the CPA.

[528] S 55(2)(a)-(d) - provided in accordance with the Act.

[529] Otto (2013) *TSAR* 1 remarks that the wording of s 55(2)(a) is similar to the test in *Holmdene Brickworks* which describes a 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." De Stadler in Naudé and Eiselen (2014 *et seq*) at 55-7 remarks that the context of the transaction is of particular importance when determining the purpose of the goods: in the absence of a specific communicated purpose the general or ordinary or common use of the goods should be considered from the perspective of a reasonable person.

[530] See *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C) where quality was described as "the degree of excellence possessed by a thing." The South African Concise Oxford Dictionary defines quality as "the standard of something as measured against other things of a similar kind" or "a particular class, kind or grade of something, as determined by its character, especially its excellence." De Stadler in Naudé and Eiselen (2014 *et seq)* at 5-9 aptly points out that quality is a wider concept than fitness for use and may include issues relating to the aesthetics of the product." She further remarks that the requirement of "good quality" can *inter alia* mean that a product must be "satisfactory", "enjoyable" or "pleasing."

[531] De Stadler in Naudé and Eiselen (2014 *et seq*) 5-10 equates this requirement to the requirement that goods must be fit for their purpose.

[532] De Stadler in Naudé and Eiselen (2014 *et seq*) at 5-11 points out that durability "is an essential component of quality which is absent where goods break or show an inordinate amount of wear and tear before a reasonable time has lapsed." She states that it may also be an indication that goods are of an inferior quality. However she regards the insertion of both "useable" and durable in s 55(2)(c) as superfluous as she argues that the durability of gods will necessarily influence their usefulness over time.

[533] Referred to in the CPA as Act 29 of 1993 although the correct citation is Act 8 of 2008. The suggested regulatory body in terms of the Standards Act is the "South African Bureau of Standards"

In addition to the right set out in section 55(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 ordinarily offers to supply such goods; or the consumer acts in a manner consistent with being knowledgeable about the use of those goods, such consumer has a "right to expect" that the goods are reasonably suitable for the specific purpose that the consumer has indicated and not merely for the purpose for which those goods are generally intended.[535]

In determining whether any particular goods satisfy the aforementioned requirements pertaining to a consumer's rights to receive *safe,* good quality goods, section 55(4) makes it clear that "all of the circumstances *of the supply*"[536] of those goods must be considered. Such circumstances include, but are 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 the goods;
(b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
(c) the time when the goods were produced and supplied.[537]

From the aforementioned, it is clear that the circumstances set out in section 55(4) do not present a closed list and a court would consequently be able to have regard to any relevant circumstances other than those aspects mentioned when it has to determine whether goods meet the standards set out in section 55(2), such as for example the price of the goods. It is further submitted that in determining

("SABS"). S 2(a) of the Standards Act states that the SABS must develop, promote and maintain standards in South Africa. S 1 of the SA defines a "standard" as "a document that provides for common and repeated use, rules, guidelines or characteristics for products, services, or processes and production methods, including terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method." S 2(b) of the Standards Act requires SABS to promote quality for products and services.

[534] "Public Regulation" is defined in s 1 of the CPA as "any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority." See chp 5, par 2.2.1.

[535] S 55(3). Naudé (2011) *SA Merc LJ* 341 points out that a similar rule is recognised under the common law of sale.

[536] Own emphasis.

[537] S 55(4).

defectiveness in terms of the consumer expectations test a court should at the very least take into account the presentation, intended reasonable use and time of production and supply as set out in section 55(4).

Section 55(5) attempts to add more clarity regarding the manner in which the criteria in section 55(4) should be applied by providing that "for greater certainty in applying section 55(4) –

(a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and

(b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that *better goods have subsequently become available* from the same or any other producer or supplier."[538]

For the sake of completeness it should be noted that section 55(2)(a) (which provides that goods must be reasonably suitable for purposes generally intended) and section 55(2)(b) (which provides that goods must be of good quality, in good working order and free from defects) do however not apply to a transaction if the consumer has been expressly informed that particular goods were offered in a specific condition; and he expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.[539] Thus, from a contractual perspective, a general "*voetstoots* clause" where goods are sold "as is" will no longer protect a supplier of defective goods in an instance where the CPA applies to the transaction.[540]

The significance of section 55 for purposes of determining defectiveness that can found a product liability claim as per section 61 of the CPA is thus that firstly, *it indicates when goods can generally be said to be "defective" for purposes of the Act*, namely in those instances where the goods do not meet the requirements of section 55(2), read together with section 55(3) to (6). As such goods will be "defective" if they:

[538] S 55(5).
[539] S 55(6).
[540] Barnard (2013) *Thesis* 394-397 also points out that this means that such a clause can also not be relied upon after expiry of the six month period indicated in s56.

- are *not* reasonably suitable for the purposes for which they are generally intended;
- are *not* of good quality;
- are *not* in good working order;
- are *not* free of any defects (here specifically one should bear in mind the definition of "defect" in section 53(1) as discussed below);
- are *not* useable and durable for a reasonable period of time; and
- do *not* comply with any applicable standards under the Standards Act or any other public regulation.

So, *if* goods are defective in any of the aforementioned ways and such defectiveness is present at a level which makes the product unsafe, hazardous, or causes it to fail or lack adequate instructions or warnings relating to its safe use *then* it can give rise to product liability.

Thus*, section 55 indicates what a "consumer" is "entitled to expect" with regard to the quality and characteristics of goods that are promoted or supplied to that consumer.* It also contains *the yardstick* with which to measure the "reasonableness" of such expectation by requiring the determination whether a product is defective to be gauged with reference to section 55(4) and (5).

2.2 Section 55 and the definition of "defect" in section 53

As pointed out, the aspects listed in section 55(2)(a) to (d) above, are aspects in which goods may be defective. However, the fact that the legislature has, in addition to all these respects in which goods may be defective, also chosen to still provide separately for a definition of "defect" can only be interpreted rationally to mean that goods containing a "defect" as defined in section 53(1)(a)(i) or (ii) are merely *two* of the ways in which or the levels at which, goods can be defective. Accordingly wherever the word "defect" specifically appears in sections 55 or 61, the definition of "defect" as per section 53(1) has to be employed in interpreting meaning of the word "defect" for purposes of section 55.

Section 53(1)(a)(i) and (ii) defines “defect” to mean:

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

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

Given that the word “defect” in section 55(2)(b) should be interpreted to include the definition in section 53(1)(a)(i) and (ii), it is submitted that a clearer picture of the exact scope of section 55 would be obtained if the word “defect” in section 55 is substituted with the relevant definition provided in section 53. Thus the amplified text of section 55(2) where the word “defect” is used actually reads as follows:

55(2)...[e]ach consumer has the right to receive goods that -

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

(b) are of good quality, in good working order and free of any *“material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances”;*

(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…(Act 29 of 1993), or any other public regulation.

From the aforementioned amplified and arguably very congested and duplicative version of section 55(2) it is clear that, by incorporating the definition of “defect” as contained in section 53 into section 55(2)(b) the legislature specifically incorporated the notion of safety into section 55, as also alluded to in the heading of the section which refers to “safe”, good quality goods.

2.3 The definition of "defect" as per section 53(1)(a)

Notably the concept of "defect" in section 53(1) refers to either to a "material imperfection" which occurred during the manufacture of the goods or components, *or* to a "characteristic" of the goods or components. Such material imperfection or such characteristic each has specific effects which cause them to constitute a "defect" in goods. The material imperfection which occurred during the manufacture of the goods or components must result in those goods or components being "less acceptable than persons generally would be reasonably entitled to expect in the circumstances." Likewise where the defect relates to a characteristic of the goods or components, such characteristic must have the specific effect of those goods becoming "less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."

It is submitted that, although stated in the alternative, it is possible that goods may in a given instance be defective in both respects set out in section 53(1)(a) and that it would have been more appropriate to use the words "and/or" instead of merely "or" between sections 53(1)(a) (i) and (ii).

Before analysing each of the parts of the definition of "defect" in detail, it should be noted that the definition of "defect" as set out in section 53(1)(a)(i) and (ii) applies to goods as well as components and also to the performance of services (which latter aspect is beyond the scope of this thesis).[541] As indicated, the definition of "goods" in section 1 of the Act is broad enough to include components in goods. This approach is sensible given that in certain instances the goods may not be defective *in toto* but merely contain a defective component which may or may not taint the complete goods with defectiveness depending on how material the component is to the proper working of the goods. Hence, for purposes of this discussion, wherever the word "goods" is used, it also includes components in those goods.[542]

[541] A "defective service" is dealt with in s 54 of the CPA. Furthermore, the definition of "defect" in ss 53(1)(a)(i) and (ii) both apply to goods and components, whereas only s 53(1)(a)(i) refers to the performance of services - not s 53(1)(a)(ii).

[542] Loubser and Reid (2012) 85 remark that it is important to note that component parts such as nuts, bolts, industrial fasteners and raw materials in themselves also qualify as "goods" within the various parts of the definition. They indicate that the producers and suppliers of a defective component are in principle liable if a defect in the component has caused the "complex product" to fail and it causes harm. They opine that this sharing of responsibility provides important protection for the consumer's interests. In this regard they remark that sometimes the purpose of product liability would be better

2.3.1 Section 53(1)(a)(i)

2.3.1.1 Material imperfection

The CPA contains no definition of "material imperfection."[543] As pointed out by Loubser and Reid, the word "material" ordinarily means "serious, substantial or important."[544] "Imperfection" means "faulty or incomplete"[545] with synonyms including "broken, damaged, deficient, flawed, impaired, undeveloped, unfinished, blemished, weak and frail."[546] Loubser and Reid indicate that a "material imperfection" as mentioned in the definition of defect in section 53(1)(a)(i) is therefore a serious, substantial or important fault.[547] It is therefore clear that the imperfection in the goods should not be trivial.

Loubser and Reid further point out that the definition of "defect" in section 53(1)(a) indicates that the material imperfection relates to the manufacture of the goods, which in their opinion could also include a design defect.[548] They however point out that the definition contains no further specification of the nature of the imperfection, which therefore does not necessarily mean a fault impairing the *safety* of the goods or components. They further remark that a "material imperfection" can also mean a fault impairing *quality*, involving matters like functionality or even aesthetic appeal.[549]

2.3.1.2 Less acceptable

Loubser and Reid remark that the word "acceptable" is broad and that it should further be noted that such "acceptability" is not narrowed down by limiting it to specific aspects such as usefulness, practicability or safety,[550] as in the case of the word "characteristic" mentioned in section 53(1)(a)(ii). Section 53(1)(a)(i) thus does

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served by channelling liability to the producer of the finished product. However, they argue that to limit liability to the producer of the finished product could be detrimental to the injured consumer in cases where the producer of the finished product is insufficiently funded or insured; and in any event the component producer could be a more substantial enterprise than the producer of the finished product. Also, the distinction between the component and the finished product could be difficult, especially in the case of natural products. See also Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-2.

[543] Neither does it contain a definition of the words "material" and "imperfection" respectively.

[544] *Oatorian Properties (Pty) Ltd v Maroun* 1973 (4) All SA 1 (A) at 7.

[545] Soanes *et al* (2006) 455.

[546] Hanks (ed) (1988) 250-251.

[547] Loubser and Reid (2012) 63; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-2.

[548] *Ibid*.

[549] *Ibid.*

[550] *Ibid*. The authors at the same point indicate that the only qualification is that the [material] imperfection must render the goods less acceptable than persons would be reasonably entitled to expect in the circumstances.

not limit the “respects” in which the goods must be “less acceptable” but merely uses the concept of “acceptableness” as a general yardstick to indicate the aspect to which the imperfection must relate.

The word “acceptable” ordinarily means “satisfactory”, “pleasing” or “tolerable” and according to Loubser and Reid it thus indicates a *subjective* reaction to the goods, which may be acceptable to some but not to others, depending *inter alia,* on the purpose for which the goods and components were acquired and the fastidiousness of the person concerned.[551] They remark that the term “acceptable” therefore indicates a wide range or spectrum of reactions to the goods and an important additional standard to be applied is whether they are *“less* acceptable than *persons generally* would be reasonably entitled to expect in the circumstances.”[552]

“Less” ordinarily means “not as much”[553] hence it is submitted that for a defect to meet the definition in section 53(1)(a)(i) it is not required that the material imperfection be such as to render to goods *totally* unacceptable. All that is required is that the imperfection be material, thus not minor or trivial, and that such imperfection causes the goods to be less acceptable and not necessarily totally unacceptable.

It is further submitted that the words “material imperfection” read with the words “less acceptable” in section 53(1)(a)(i) indeed appear to cater for defects that relate to quality and not for those types of defects that would necessarily make the product unsafe. Furthermore, when one has regard to section 55(2)(b) it is submitted that the right granted to the consumer regarding the “condition” of goods that he receives, which resonates most with the use of the word “acceptable”, is the right to receive goods that are of “good quality” as stated in section 55(2)(b). It is thus submitted that the type of defect contemplated in section 53(1)(a)(i) may be a manufacturing defect or design defect that impairs the quality of the said goods or components but which does not make those goods less useful, practicable or safe.

[551] Loubser and Reid (2012) 63; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-2.
[552] *Ibid.*
[553] Soanes *et al* (2006) 521.

It is further clear from section 53(1)(a) that the mere presence of a material imperfection in goods is not sufficient to constitute a "defect" in the quality of those goods but that such material imperfection must also meet the other criteria in section 53(1)(a), namely that its effect is that it "renders the goods …. less acceptable than persons generally would be reasonably entitled to expect" - which introduces a measure of objectivity as it will not only depend on the subjective taste of one individual consumer whether the goods were indeed "less acceptable." Only if these additional requirements based on consumer expectations (or rather persons' expectations") are met, can goods be said to be defective for purposes of section 53(1)(a)(i).

2.3.1.3 Consumer expectations

As indicated, section 55 is significant for purposes of determining what would constitute a "defect" also for purposes of section 61 because section 55 indicates what rights consumers have with respect to goods, in other words what they are "entitled to expect" regarding those goods. Given that both section 53(1)(a)(i) and (ii) incorporate a "consumer expectations test", the discussion of this test with reference to both parts of the definition of "defect" will be undertaken below in paragraph 2.3.3, in order to avoid unnecessary duplication.

2.3.2 Section 53(1)(a)(ii)

Section 53(1)(a)(ii) provides the alternative definition of a "defect", namely "any characteristic of the goods or components that renders those goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."

2.3.2.1 Characteristic

A "characteristic" generally means *any*[554] quality typical of a product.[555] A characteristic is thus a "feature" of a product. Loubser and Reid remark that the "characteristic" mentioned in section 53(1)(a)(ii) is not specified and can thus relate to the manufacture, design, quality, functionality or aesthetic (artistic) appeal of the

[554] Author's emphasis.
[555] Soanes *et al* (2006) 142.

goods.[556] Van Heerden holds the view that design defects ought to have been expressly included in section 53(1)(a)(ii) for purposes of legal certainty.[557] Kriek is also of the opinion that the words "any characteristic" is broad enough, on its plain meaning, to refer to design characteristics and therefore, to design defects although she remarks that it would have been preferable for the word "design" to have been included in section 53(1)(a)(ii).[558]

2.3.2.2 Less useful

"Useful" means "capable of being put to use", "serviceable for an end or purpose" or "a valuable or productive kind." Therefore "less useful" may be interpreted to mean that due to a specific characteristic of a product, that product cannot be fully or totally utilised, does not fulfil an aim, or has a diminished value or level of productivity.[559] Whether goods contain a characteristic that makes them less useful is determined with reference to what persons generally are reasonably entitled to expect in the particular circumstances of the supply of the goods (i.e. the consumer expectations test).

2.3.2.3 Less practicable

"Practicable" means "capable of being put into practice", "capable of being used" or "capable of being done or accomplished."[560] Accordingly "less practicable" can be interpreted to mean that due to a characteristic of a product, the product cannot be relied upon, lacks in success, or has a reduced performance. Whether goods are rendered "less practicable", by virtue of a characteristic of those goods, has to be gauged in terms of what persons generally would be reasonably entitled to expect in the particular circumstances of the supply of the relevant goods (i.e. the consumer expectations test)).

[556] Loubser and Reid (2012) 67; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-8.
[557] Strydom (2014) *UP* 37; and Van Heerden (2014) *UP* 4.
[558] Kriek (2017) *Thesis* 354-355.
[559] Loubser and Reid (2012) 67.
[560] *Ibid*.

2.3.2.4 Less safe

Notably the CPA does not define the concept "safe" although it does define "unsafe" later in section 53(1)(d). "Safe" generally means "free from harm or risk."[561] Accordingly "less safe" can be interpreted to mean that a product contains a characteristic that impedes the safety of that product and that contributes to that product's ability to cause harm, thus a characteristic that makes the product "unsafe." Again the test whether a specific characteristic of a product renders it "less safe" as contemplated by section 53(1)(a)(ii) has to be gauged in terms of what persons generally would be reasonably entitled to expect in the particular circumstances of the supply of the relevant goods (i.e. the consumer expectations test).

2.3.3 The consumer expectations test in section 53

Having regard to the definition of "defect" in sections 53(1)(a)(i) and (ii), it should be noted that it is toned down by the requirement that the level of "acceptability" contemplated by section 53(1)(a)(i) or the level of "usefulness", "practicability" or "safety" contemplated in section 53(1)(a)(ii) should be tested against what "a person generally would be *reasonably entitled* to expect in the circumstances."[562] Loubser and Reid indicate that this benchmark or standard set by section 53(1)(a) incorporates the notoriously complex "consumer expectations test" already alluded to in Chapter One[563] of this thesis, that is also applied with considerable controversy in a number of other prominent jurisdictions, notably the EU and Australia, as discussed hereinafter in Chapter 6 and 7.[564] It has to be pointed out though that the test or yardstick employed by section 53 appears to be broader than the expectations of a "consumer" as it refers to "persons generally." It is accordingly submitted that it would actually be more correct to speak of a "persons expectations

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[561] *Ibid*.

[562] Own emphasis.

[563] See chp 1 par 3.1 regarding the consumer expectations test in s 402 A of the Restatement (Second) of Torts. See also the discussion of the consumer expectations test in chp 6 and 7 respectively.

[564] Loubser and Reid (2012) 64. They, in Naudé and Eiselen (2014 *et seq*) 53-3, indicate that the application of the consumer expectations test in American and European jurisdictions has proved to be contentious. Note further that Botha and Joubert 2011 *THRHR* 315 incorrectly state that the CPA, in determining the existence of a defect, excludes the "consumer expectations test" or "legitimate expectations test."

test."[565] However as Loubser and Reid refer to it as a "consumer expectations test" and the concept "consumer expectations test" is widely used in product liability literature in jurisdictions such as the US, EU and Australia, this thesis will use the words "consumer expectations test" to refer to the test in section 53.

The rationale behind using the consumer expectations test in the definition of "defect" in sub-sections 53(1)(a)(i) and (ii) is not expressly stated anywhere in the memorandum on the objectives of the CPA or in the Act itself. According to Loubser and Reid the consumer expectations test in section 53(1) is an *objective* enquiry that entails the consideration of objective factors, such as:[566]

- standards intended by the producer or supplier of the goods (i.e the manufacturers own specifications and productions standards);
- standards or duties prescribed by legislation for the product;[567]
- the possible prevention of the harmful effect of the goods by using an alternative manufacturing process;[568]
- the risk, benefit, utility and costs relating to the production of the goods;
- the manner in which and purposes for which the goods have been marketed;
- the use of any marks in relation to the goods;
- any instructions for or warnings with respect to doing or refraining from doing with or in relation to the goods;
- what might reasonably be expected to be done with or in relation to the goods; and
- the time when the goods were manufactured or supplied.

These factors would thus be considered as part of "all the circumstances of supply" as contemplated by section 55(4).

Loubser and Reid remark that the assessment of "defectiveness" in terms of the aforementioned factors essentially comes down to a cost-benefit-risk-utility analysis on the basis of reasonableness, to establish whether, *with the perspective of*

[565] See Van Heerden and Barnard (2018) 9.
[566] Loubser and Reid (2012) 66.
[567] These would for example include standards prescribed by the Standards Act 8 of 2008 as also required by s 55(2)(d).
[568] Note that the focus here is on the manufacturing process and not the design process.

hindsight, the goods were acceptable or useful, practicable or safe.[569] They indicate further that this analysis is similar to that required of the court in assessing wrongfulness as per the common law and that the respective weight to be attached to the various factors in assessing "defectiveness" will be in the discretion of the court.[570]

Loubser and Reid however argue that although the consumer expectations test in section 53(1) "purports to be an objective normative standard for determining defectiveness", in the final analysis it involves a *subjective value judgment which applies the common law test of reasonableness in relation to negligence,*[571] imploring what a consumer is "entitled to expect" as opposed to the consumer's "actual expectations" (which in any event is difficult to determine) while considering the defendant's (supplier's) actual situation in meeting those expectations.[572] They also point out that the application of the consumer expectations test presents a number of other difficulties, such as that it raises the question whether for instance consumers should expect a higher level of reasonable care, skill and knowledge than that ordinarily applied.[573] It also raises the question as to what must a reasonable buyer contemplate in light of the fact that he does not expect to be affected by a risk.[574] The authors remark that people misjudge risks or have misconceived ideas that nothing will or can go wrong and that a legal norm "cannot coherently or fairly be based on such a volatile standard."[575] They indicate that the consumer expectations test requires that the courts should determine what consumers are "entitled" to expect, but remark that this formulation is still unsatisfactory because "as a normative concept, it cannot be rationalised: one may simply assert that in one's opinion the design did not meet consumer expectations."[576] They also refer to other arguments against using this test such as that it is an impossible task for an ordinary consumer to define what he expects of the technical design characteristics of a

[569] Loubser and Reid n Naudé and Eiselen (2014 *et seq*) 53-6.Own emphasis.
[570] *Ibid*.
[571] Loubser and Reid (2012) 64-66.
[572] Loubser and Reid (2006) *Stell LR* 426; and Loubser and Reid (2012) 65. See Chp 2, par 3.2.1 for the distinction between wrongfulness and negligence.
[573] Loubser and Reid (2006) *Stell LR* 424; and Loubser and Reid (2012) 64.
[574] Loubser and Reid (2006) *Stell LR* 425.
[575] Loubser and Reid (2012) 64.
[576] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-4.

product;[577] and that it raises questions such as how the level of safety is determined when it comes to specific design criteria.[578]

Notably in *Eskom v Halstead-Cleak* as discussed in Chapter 3,[579] which at the time of writing this thesis is the only case that deals with product liability under section 61 of the CPA, the court did not undertake any analysis of the definition of defect in section 53 nor did it pronounce on the consumer expectations test for product defectiveness.

It is however submitted that the application of the consumer expectations test in section 53(1)(a) might not necessarily be quite as problematic as argued by Loubser and Reid. It is clear from the consumer expectations test in sections 53(1)(a)(i) and (ii) that the consumer's expectation must be based on what "persons *generally* would be *reasonably* entitled to expect." Here it should be pointed out that the word "reasonable" should not be equated to the reasonableness test used in the common law to determine whether the conduct of the manufacturer meets the fault threshold. One should thus not come to the conclusion that the mere use of the word "reasonable" in section 53(1) inflates the consumer expectations test with "negligence language." Rather, it is submitted, one should appreciate that it is the reasonableness of the consumer's expectation that is being evaluated.

Thus it is submitted that the test is indeed an objective one that refers to the expectations of a group of consumers and not only the subjective expectations of a single consumer. In the context of a "defect" in goods as contemplated in the CPA, it is submitted that what consumers (or persons) would generally, reasonably and hence objectively be entitled to expect with respect to goods or components of goods, is clarified by sections 55(2) and (3). These sections indicate that the consumer can expect to receive goods that, as a minimum, meets the requirements of sections 55(2)(a) to (d) and where section 55(3) applies, meets the additional requirement as set out in that section.[580] Accordingly the entitlement to an expectation by a consumer regarding the acceptability or the level of usefulness,

[577] Botha and Joubert (2011) *THRHR* 316.
[578] Loubser and Reid (2006) *Stell LR* 425.
[579] See chp 3, par 3.2
[580] See also par 2.1 above.

practicability or safety of goods for purposes of the definition of “defect”, is informed by the right to safe good quality goods as set out in section 55(2) and (3).

As clearly stated in section 53(1)(a) the consumer expectations test employed in the definition of “defect” operates within the parameters of the requirement that the *expectation* must be “reasonable” and also that the “circumstances” of the supply of the goods or components are relevant in determining what a consumer in a given situation is entitled to expect. In this latter regard it is submitted that section 55(4) which refers explicitly to all circumstances, including those specifically mentioned, and 55(5)(b) which indicates that a product is not defective merely because a better product subsequently became available, “tones down” the level of the consumer’s expectations with regard to the question whether specific goods or components meet the requirements of sections 55(2) and (3). Thus, the consumer’s expectation can be measured with reference to a broad range of factors which would also cover a risk-utility consideration as pointed out above by Loubser and Reid. It is submitted that in view of the clear interrelation between section 55 and section 61 as pointed out in paragraph 1.1 above this argument would also apply where the consumer expectations test is applied for purposes of establishing a “defect” as mentioned in section 61.

Therefore, in order to determine whether goods can be considered to contain a “defect” in the sense that they contain a “material imperfection” that impedes upon their acceptability (per section 53(1)(a)(i)) or a “characteristic” that impedes their level of usefulness, practicability or safety (per section 53(1)(a)(ii)) in any of the respects mentioned in sections 55(2) and (3), regard should be had to *all* the circumstances of their supply, including -

- 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 or warnings with respect to the use of goods;
- the range of things that might reasonably be anticipated to be done with or in relation to the goods; and

- the time when the goods were supplied.[581]

In addition, regard should also be had to the provisions of section 55(5), particularly that a product failure 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. The reference to better goods that subsequently become available would mean that, if goods were "state of the art"[582] at the time that they were produced and supplied they cannot "retrospectively" be regarded as defective merely because technology has evolved and more advanced and safer goods were produced in later years. For example, cars were manufactured in the early 1900s without safety belts which later in the century became a standard feature of motor vehicles - this does not mean however that the earlier vehicle can be said to be defective because it must be borne in mind that at the time it was produced and supplied safety belts were not a standard feature of motor vehicles.

Thus it is submitted that although the consumer expectations test in section 53 may be controversial, its application is facilitated by the aspects that the Act introduces to "guide" the application of this test, namely that the expectation must be reasonable in the particular circumstances of the supply of the goods concerned and that such "reasonableness" can be determined with reference to the aspects mentioned in section 55(4) and (5). That the consumer expectations test should not merely be discarded or replaced also seems to be the opinion of Van Eeden and Barnard who remark that the consumer expectations test in section 53 has the benefit of utilising language not used for establishing negligence but actually uses language which is more consistent with international instruments such as the EU Product Liability Directive, discussed in Chapter 6 hereinafter.[583]

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[581] As indicated, the considerations listed in s 55(4) do not constitute a closed list hence other factors as enumerated by Loubser and Reid above may also be considered in determining whether goods contain a "defect" as contemplated in s 53(1)(a). Although the focus of this thesis is on product liability *ex delicto*, it should further be noted that what a consumer may expect regarding the acceptability of specific goods or components, or the level of usefulness, practicability or safety of such goods or components, may also be amplified by the terms of the contract that exists between the parties, where applicable. Loubser and Reid (2012) at 25 point out that a contract for the supply of products typically contains warranties as to the quality and attributes of a product, to which the contracting parties are bound.

[582] In the sense of being compliant with applicable standards and meeting consumer expectations as to their level of safety and quality at the time that they were produced and supplied.

[583] Van Eeden and Barnard (2017) 392.

2.4 Concluding remarks on the concept of defect

In summary, for purposes of determining what a consumer is reasonably entitled to expect regarding the acceptability, or the level of usefulness, practicability or safety of specific goods or components for purposes of section 53(1)(a), it is submitted that, from the perspective of deciding whether a product contains a "defect" for purposes of product liability *ex delicto* regard should be had to the following:

- the rights afforded to a consumer in terms section 55(2)(a)-(d), read with sections 55(3) to (6), where applicable, in particular the right to receive goods that are reasonably suitable for their purpose; are of good quality, in good working order, and free of defects (in other words, free of a material imperfection or characteristic which meets the qualifications in sections 53(1)(a)(i) and (ii) respectively); are useable and durable for a reasonable period of time; and comply with the Standards Act or a public regulation, where applicable;
- 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 those goods;
- the range of things that might reasonably be anticipated to be done with or in relation to the goods;
- the time that the goods were supplied;
- the legislative imperative as per section 55(5)(b) that a product failure or defect may not be inferred in respect of those goods solely on the ground that better goods have subsequently become available from the same or any other producer or supplier; and
- any other relevant circumstance that may influence a consumer's reasonable expectation in the circumstances.

The fact however remains that the definition of "defect", and its incorporation of a consumer expectations test as well as its interaction with the rest of the provisions in section 55(2), is indeed complex. As indicated, it can be argued that goods are defective for purposes of section 55 if they do not meet the requirements of section 55(2), which include broad aspects of defectiveness such as not being suitable for their intended purpose but which also refer to goods containing a "defect." However the broad aspects of defectiveness listed in section 55(2)(a),(c) and (d) and the first

two items mentioned in section 55(2)(b) do not specifically refer to any consumer expectations as a yardstick to measure their defectiveness whereas the definition of "defect" in section 53(1)(a), which is incorporated into the latter part of section 55(2)(b), is determined with reference to a consumer expectations test.

Apart from its integration into section 55(2)(b) which is confusing as it duplicates aspects already listed in section 55, Loubser and Reid remark that from a logical point of view it is difficult to understand why the definition of "defect" in section 53(1)(a) has been drafted in this way. They state that the definition involves a number of alternatives and that "there is little reason why a claimant would not simply rely on what in the circumstances appears to be the lowest of the vague and general standards contained in the definition, to convince a court that the goods or components are insufficiently 'acceptable', 'useful', practicable' or 'safe', whatever judicial meaning can be ascribed to these words."[584]

From a product liability perspective - and bearing in mind that goods must have caused "harm" as contemplated in section 61(5) in order to found a product liability claim - it may be asked whether the definition of "defect" in section 53(1)(a)(i) and (ii) is appropriate? It is argued that the nature of defect contemplated in section 53(1)(a)(i), namely a "material imperfection" which renders the goods less acceptable than persons generally would reasonably be entitled to expect is unlikely to cause the death, injury, illness or type of damage or loss contemplated in section 61(5) that would give rise to a product liability claim. Accordingly it is submitted that the word "defect" as used in section 61(1)((b) should be interpreted narrowly with reference to section 53(1)(a)(ii) which gauges defectiveness also with regard to the safety of goods.

2.5 Other definitions relating to the broader concept of "defectiveness" for purposes of section 61

It appears that section 61 attaches a broader as well as a narrower meaning to the concept of "defect." In the narrow sense it refers to a "defect" specifically in section

[584] Van Heerden and Barnard (2018) 7.

61(1)(b) where it refers to “a product failure, *defect*[585] or hazard.” As such the word “defect” as used in section 61(1)(b) has only the restricted meaning given to it by section 53, which, as argued above, is the meaning afforded by section 53(1)(a)(ii).

However, apart from indicating that product liability can arise from a “defect” in goods, section 61(1) also states that liability can arise from goods being “unsafe”, “a product failure”, “hazard” or inadequate instructions or warnings pertaining to any “hazard” associated with the use of those goods. It is therefore necessary to consider what defectiveness in the broader sense as contemplated by section 61 entails with reference to these other concepts mentioned in the section. The discussion below will follow the sequence in which the various concepts appear in section 61.

2.5.1 Section 61(1)(a): Unsafe

As indicated above the CPA does not define the concept “safe” although the word is used in the definition of “defect” in section 53(1)(a)(ii) and appears in the heading of section 55. Section 61(1)(a) of the CPA however provides for liability for harm caused by the supply of “unsafe” goods. “Unsafe” is defined in section 53(1)(d) to mean 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.” One can thus argue that goods would be “safe” if they do not meet the definition of unsafe - hence a negative application of the aforesaid definition.

At first glance the definition of “unsafe” appears to be all encompassing: not only does it refer to a “characteristic” as mentioned in the definition of defect in section 53(1)(a)(ii), but it also includes the concepts of “failure”, “defect“ and “hazard” which concepts must obviously be interpreted in accordance with the meanings assigned to them by sections 53(1)(b), 53(1)(a)(i) and (ii) as well as section 53(1)(c) respectively.

The complete definition of the term “unsafe” as envisaged by section 53 can only be properly comprehended by reading the definitions of “failure”, “hazard” and “defect” into the definition of “unsafe” in the appropriate places where references to these

[585] Own emphasis.

concepts are made. Accordingly the "augmented" and heavily-layered definition of "unsafe" provided for by section 53(1)(d) would read as follows:

> "unsafe" means that, due to a characteristic, "inability of the goods to perform in the intended manner or to the intended effect",[586] "any material imperfection in the manufacture of the goods or components…that renders the goods…less acceptable than persons generally would be reasonably entitled to expect in the circumstances"[587] or "any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances",[588] or "a characteristic that – (i) has been identified as, or declared to be, a hazard in terms of any other law; or (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised",[589] particular goods present an extreme risk of personal injury or property damage to the consumer or other persons.[590]

Loubser and Reid comment that the determination of "unsafe" accordingly provides a "perplexing array of alternative and overlapping standards",[591] which is evident from the above augmented definition. They further indicate that the incorporation of the definitions of "characteristic", "failure", "defect" or "hazard" into the definition of "unsafe" entails the potential of multiple enquiries, namely:[592]

- If it is alleged that a product is unsafe due to a "characteristic", the enquiry will entail whether there is any quality of the product that causes an extreme risk to the consumer.
- If it is alleged that a product is unsafe due to its "failure", the question posed will be whether there is an inability of the goods to perform in the intended manner or intended effect which creates the extreme risk of personal injury or property damage.

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[586] Definition of "failure" per s 53(1)(b), as detailed in par 2.5.2 hereunder.
[587] First part of the definition of "defect" as contained in s 53(1)(a)(i), as detailed in par 2.3.1 above.
[588] Second part of the definition of "defect" as contained in s 53(1)(a)(ii), as detailed in par 2.3.2 above.
[589] Definition of "hazard" in s 53(1)(c), as detailed in par 2.5.3 hereunder.
[590] Thus the definition of "unsafe" further requires that the characteristic, failure, defect or hazard in the specific goods must present an "extreme risk." "Extreme" ordinarily means "existing in a very high degree" or "exceeding the ordinary, usual or expected" – see Loubser and Reid (2012) 58.
[591] Loubser and Reid (2012) 59.
[592] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-10 and 53-11.

- If it is alleged that a product is unsafe due to a “defect”, the definition of defect provided in section 53(1)(a) must be incorporated and applied . Accordingly the further enquiries that become necessary are whether the goods or components contain a characteristic that renders them less useful, practicable or safe than persons generally would be reasonably entitled to expect. Additionally, the defect must cause an extreme risk of loss.
- If it is alleged that a product is unsafe due to a “hazard”, the enquiry is whether the goods contain a characteristic that has been identified as, or declared to be, a hazard in terms of any other law; or whether the goods contain a characteristic that presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised. This hazard must also cause the presence of an extreme risk. The discord between the fact that a hazard entails that goods must present a significant risk of injury or damage and the fact that its incorporation into the definition of unsafe requires the hazard to present an extreme risk of injury or damage is clearly confusing.

2.5.2 Section 61(1)(b): Failure

The concept of a “product failure” as a specific form of defectiveness is specifically mentioned for the first time in section 61(1)(b).[593] In relation to the consumer’s right to safe good quality goods, it appears that this aspect of defectiveness impedes the consumer’s right to expect that the goods are suitable for their intended purposes (as per section 55(2)(a)) or that they are in “good working order” (as per section 55(2)(b)) or that they will be usable for a reasonable period (as per section 55(c). Section 61 deals with such failure of goods in the context where it causes harm as contemplated in section 61(5). Section 53(1)(d) defines “failure” as “the inability of the goods to perform in the intended manner or to the intended effect.” At first glance this definition appears deceivingly simple. However upon closer scrutiny it also poses various challenges. Loubser and Reid indicate that the main area of concern is what the “intended manner” or “intended effect” is, as the CPA does not mention whose intentions are relevant.[594] The suggestion is that it is the intention of the producer due to an objective measurable it creates with reference to product

[593] However, with regards to s 55(2)(a), it can be argued that if goods are not reasonably suitable for their intended purpose, they can be regarded as having “failed” due to meeting the s 53(1)(b) definition.
[594] Loubser and Reid (2012) 60.

specifications.[595] Accordingly they are of the view that the concept "failure" in the CPA refers to a manufacturing defect.[596] That is, during the manufacturing process something went wrong that caused the product to fail due its inability to operate in accordance with the intention manifested by the producer. Loubser and Reid mentions the classic example of a bottled drink that has some form of contamination or explodes when opened.[597] They indicate that in order to establish whether goods have failed the court will examine whether a particular unit of the goods manufactured by the manufacturer failed to conform to the manufacturer's own specifications. The offending goods will be compared to other goods produced for the same purpose and according to the same specifications or standard - accordingly the production line itself provides the standard that the goods should comply with.[598] They therefore state that if goods do not perform in the intended manner or to the intended effect, it is usually obvious that a mistake occurred somewhere within the manufacturing process, either during assembly or when checking the quality of components or raw materials.[599]

Loubser and Reid further point out that the definition of "failure" makes no mention of components but they remark that the definition of "goods" in section 1 insofar as it includes "any tangible object" is wide enough to include components in tangible form.[600] It is submitted that the lack of a reference to components in the definition of "failure" was probably a mere oversight alternatively the legislature regarded it to be included in the concept of "goods" as logic dictates that components can also fail in the sense contemplated in section 53(1)(b).

It is also to be noted that no reference is made to any consumer expectations test in this regard. This appears to tie in with the submission by Loubser and Reid that the definition of "failure" hinges on the manufacturer's intentions. Further, the definition does not state that the failure must result in harm although it is submitted that, used in the context of product liability, as discussed above, the presence of failure in a

[595] *Ibid*. They state that if the intention of the consumer was adopted and followed "it would introduce a variable and subjective element which would make this test almost impossible to apply."
[596] Loubser and Reid (2012) 60; and Naudé and Eiselen (2014 *et seq*) 53-7.
[597] Loubser and Reid (2012) 61.
[598] Loubser and Reid (2012) 61; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-8.
[599] Loubser and Reid (2012) 61; and Loubser and Reid Naudé and Eiselen (2014 *et seq*) 53-9.
[600] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-7.

product will not be sufficient to found a product liability claim unless the said failure resulted in harm, for example where a pacemaker failed to perform in the intended manner or effect and the patient died as a result thereof.

2.5.3 Section 61(1)(b): Hazard

Although section 55 affords consumers the right to "safe" goods it is to be noted that the word "hazard" is not specifically mentioned in section 55 but appears for the first time in section 61(1)(b) and again in section 61(1)(c). According to the definition of "hazard" provided in section 53(1)(c), it refers to a "characteristic" in goods or components[601] that has either been "identified as, or declared to be, a hazard in terms of any other law" or that "presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised."[602] Various aspects relating to this definition thus have to be analysed in order to ascertain how the concept of "hazard" as mentioned in section 61(1)(b) and (c) has to be interpreted.

It is clear that where an Act identifies or declares a certain characteristic on goods to present a hazard the product containing that characteristic will be per se regarded as hazardous. In such instance no inquiry into whether the product is hazardous need thus be undertaken. However where no applicable legislation exists which would label a specific product characteristic as a hazard the definition of hazard calls for further interpretation.

The starting point in interpreting this definition is the word "characteristic." Loubser and Reid submit that a "characteristic" may relate to the manufacture, design, quality or functionality of goods.[603] This "characteristic" must then be assessed to determine whether legislation exists that identifies or declares it to be a hazard or hazardous. If not, its status as a hazard will have to be determined by assessing whether it

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[601] S 53(1)(c) only refers to a "characteristic" and not to a "characteristic in goods" but a further reading of the section, specifically s 53(1)(c)(ii), makes it clear that the characteristic referred to pertains to goods and thus their components. Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 53-9 indicate that both the alternate definitions of "hazard" mentioned in s 53(1)(c) refer to a hazardous characteristic without specifically linking the characteristic to goods or components. However they point out that the introductory part of s 53 states that all the definitions in the section apply "when used with regard to any goods, components of any goods, or services" and therefore the implication is that the characteristic can relate to goods or components in goods.

[602] S 53(1)(c)(ii).

[603] Loubser and Reid (2012) 71. As also described in par 2.3.2.1 above.

presents a “significant risk” of personal injury to any person or damage to property, when the goods are utilised.

In determining whether goods pose a hazard or are hazardous Loubser and Reid point out that the reference to “any other law” includes national, provincial or subordinate legislation, as well as proclamations or notices in terms of such legislation.[604] However the meaning of “identified as, or declared to be” is not clear and they opine that it seems likely that the intended meaning is not only that a certain characteristic of goods has been specifically “identified or declared to be a hazard in terms of section 53(1)(c) of the [CPA]” but also that a certain characteristic has been “identified or declared to be dangerous to persons or property in “wording substantively corresponding to the definition of ‘hazard’ in section 53(1)(c).”[605]

As regards the alternate definition of hazard in section 53(1)(c)(ii), namely whether the goods pose a “significant risk” of personal injury to any person or damage to any property when utilised; Loubser and Reid[606] point out that the characteristic in question is not specified and could relate to the manufacture or the design, quality or functionality of goods. They further remark that “significant” risk as used in section 53(1)(c)(ii) means a risk that is “important”, “large”, “considerable”, “material” or “substantial.”[607] It will thus require a value judgment by a court to determine when a risk of personal injury or damage to property becomes a “significant risk.” However they indicate that this risk should not be arrived at in the abstract but through a reasoned analysis of the factors mentioned in paragraph 2.3.3 above.

Further it should be noted that the risk need not necessarily relate to personal injury as the definition provides that it can also relate to property damage.

2.5.4 Section 61(1)(c): inadequate instructions or warnings

Although no reference is made to a consumer expectations test in terms of this sub-section, the basis for product liability in terms of section 61(1)(c) is that the

[604] As per s 2 of the Interpretation Act 33 of 1957, it defines “law” as “any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law.”
[605] Loubser and Reid (2012) 70.
[606] Loubser and Reid (2012) 71.
[607] Soanes *et al* (2006) 845; and Loubser and Reid (2012) 71.

instructions or warnings provided must have resulted in harm to a person because such warnings or instructions were "inadequate." Additionally such instructions or warnings must pertain to a "hazard" arising from or associated with the "use" of the goods. It is submitted that the express mention of inadequate instructions or warnings thus makes it clear that the legislature intended the product liability provisions in section 61 to not only cover manufacturing and design defects but also warning or instruction defects. As has been pointed out in Chapter One,[608] there is in any event a close correlation between warning defects and design defects in the sense that if a manufacturer is unaware that his product contains a design defect he will also not know that he needs to provide warnings or instructions to enable its safe use, if such safe use is at all possible.

The CPA does not define any of the words contained in section 61(1)(c) save for "hazard" which has been discussed above and which, in the absence of applicable legislation identifying or declaring a characteristic to be a hazard, involves the enquiry relating to a characteristic in goods identified or declared by legislation to be a hazard or that otherwise poses a "significant risk" of personal injury or damage to property when utilised. Accordingly, in the absence of a definition by the CPA, the words "inadequate instructions or warnings" must be afforded their ordinary grammatical meaning. "Adequate" means "satisfactory" with synonyms including "average", "tolerable" or "competent."[609] In contrast "inadequate" means "not enough or not good enough."[610] "Instructions" ordinarily mean "a direction or order", or "teaching or education."[611] "Warnings" ordinarily mean "a statement or event that indicates a possible danger or problem", "advice against wrong or foolish actions" or "advance notice of something."[612] The phrase "arising from" ordinarily means to "occur as a result of"[613] whereas "associated with" means to "be involved with."[614] Such warnings or instructions are further required by section 61(1)(c) to pertain specifically to "any *hazard* arising from or associated with the *use* of the goods";

[608] See chp 1, par 2.
[609] Livingstone (2010) 9.
[610] Soanes *et al* (2006) 458.
[611] Soanes *et al* (2006) 473; and Loubser and Reid (2012) 76.
[612] Soanes *et al* (2006) 1041; and Loubser and Reid (2012) 76.
[613] Soanes *et al* (2006) 41.
[614] Soanes *et al* (2006) 47.

which, would then mean that the consumer has not adequately been warned of a hazard as defined in section 53.

It is submitted that section 61(1)(c) can be construed to refer to warnings or instructions that are either written or oral, such as instructions given in a demonstration dvd that accompanies the goods. In this regard it is important to take note that the CPA sets out certain requirements relating to instructions or warnings in section 58.[615] Section 58(2) requires specifically that a person who packages any hazardous or unsafe goods for supply to consumers "must display on or within that packaging a notice that meets the requirements of section 22, and any other applicable standards, providing the consumer with adequate instructions for the safe handling and use of those goods."[616] Thus not only does the Act oblige such persons to display instructions for safe handling of hazardous or unsafe goods but it also requires such notices to be in plain and understandable language as required in section 22 of the CPA.[617] Therefore even if a hazardous or unsafe product is provided with an instruction or warning regarding its use such instruction or warning

[615] Although s 58 is entitled "Warning concerning fact and nature of risks" it also refers to "instructions" in s 58(2).

[616] S 58(3) however provides that s 58(2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation. Note should also be taken of s 58(4) which provides that a person who installs any hazardous or unsafe goods contemplated in s 58(2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, such person must give the consumer a copy of any document required in terms of s 58(2) or any similar document applied to those goods in terms of any public regulation.

[617] S 22 sets out the right to information in plain and understandable language and provides as follows: "(1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation - (a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or b) in plain language, if no form has been prescribed for that notice , document or visual representation. (2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document, notice or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to - (a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations , examples , headings or other aids to hearing and understanding. (3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b). (4) Guidelines published in terms of subsection (3) may be published for public comment." For a detailed discussion of the right to plain and understandable language in terms of s 22 see further Stoop and Churr (2013) *PELJ* 1-42; Barnard (2014) *JTCCL;* and Stoop (2018) *CPA*.

may still fall short of compliance with sections 22 and/or 58 of the CPA and may thus be regarded as inadequate as envisaged in section 61(1)(c). Obviously an instruction and warning that is in plain language but otherwise fails to set out sufficient instructions or that is vague will not be regarded as adequate instruction or warning. Complete failure to give any instructions or warnings regarding hazardous or unsafe products will also meet the requirements of "inadequate instructions or warnings" in section 61(1)(c). Finally, it also needs to be pointed out that section 58 requires a notice with instructions regarding safe handling and use in respect of both hazardous or unsafe goods whilst section 61(1)(c) merely refers to instructions or warnings pertaining to hazardous goods. Clearly not only hazardous goods but also unsafe goods should be accompanied by adequate instructions or warnings failing which can cause harm to persons hence it is submitted that instructions and warnings as mentioned in section 61(1)(c) will give rise to a product liability claim if they pertain to unsafe goods and that in such event, given the lack of a reference to "unsafe" in section 61(1)(c), reliance will have to be placed on section 61(1)(a) which creates liability due to the supply of unsafe goods.

One may ask whether the words in section 61(1)(c) "pertaining to any hazard arising from or associated with the use of any goods" apply only to warnings or also to instructions. In other words, must the instructions or warnings contemplated in section 61(1)(c) both relate to a hazard arising from or associated with the use of goods? Such interpretation remains ambiguous although if regard is had to Loubser and Reid, this distinction remains irrelevant as they opine that the level of adequacy should be closely linked to the level of risk represented by the goods. In particular they state that

> the standard…is not to be assessed according to consumer expectations,…in terms of 'foreseeable risks of harm' or 'the provision of reasonable instructions or warnings. Instead the subsection refers simply to what is 'adequate', in relation to 'any hazard arising from or associated with the use of the goods'…[ultimately] the greater the risk, the greater the need for conspicuous and unequivocal instructions and/or warnings.[618]

[618] See also Loubser and Reid (2012) 76.

2.5.5 Must the defect be latent or patent?

Another consideration that arises in the context of the concept of a "defect" for purposes of product liability under the CPA is with regards to whether the defect should be latent or whether it also applies to patent defects. Section 61 is silent in this regard. However, as argued, a court, in interpreting whether goods are defective for purposes of founding a product liability claim, will inevitably have to have regard to section 55 in order to inform such determination.[619] As indicated, section 55(5)(a) provides that it is irrelevant for purposes of section 55 (the consumer's right to safe, good quality goods) whether a defect in goods was latent or patent or whether it could have been detected by a consumer before taking delivery of the goods. What exactly motivated the legislature to include this provision in section 55 is unclear. Even viewed through the contractual prism of the law of sale it does not make sense to afford protection to a consumer who is aware that a product is patently defective when he buys it.[620] Although it can be argued that the sheer awkwardness of having such a legislative provision is balanced by section 55(6), it is submitted that the provisions of section 55(5)(a) are questionable and unwarranted. It is submitted that a product that is latently defective and causes harm by meeting the criteria of defectiveness as set out in section 61(1)(a) and (b) will undoubtedly give rise to product liability. It is arguable whether a lack of adequate instructions or warnings as envisaged in section 61(1)(c) constitute a latent or a patent defect and it is submitted that classification of such defects as latent or patent will depend on whether it is apparent that the instructions or warnings are inadequate or not: if it is reasonably clear that they are inadequate it is submitted that the said instruction or warning defect can be said to be patent. If however, it is not reasonably clear that the instructions or warnings are inadequate one may argue that they constitute a latent defect in the goods. The reason why it becomes necessary to establish whether the concept of "defect" for purposes of product liability refers to patent or latent defects or whether it is irrelevant whether the defect is patent or latent is because a person who is harmed by a patent defect may possibly be prohibited from instituting a claim based on the nature of the defect.

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[619] See chp 4, par 2.1.

[620] See also De Stadler in Naudé and Eiselen (2014 *et seq)* 55-9.

3. Conclusion

The CPA requires the use of plain and understandable language as contemplated in section 22 but it can hardly be said that the Act itself is an example of plain and understandable legislative drafting or that it employs plain and understandable terminology. The layered and often confusing approach that the Act takes when dealing with the concept of “defect” and the broader concept of “defectiveness” is a prime example of how the Act itself does not measure up to the level of clarity one would have expected from a piece of consumer legislation that seeks to protect especially vulnerable consumers.

Notably the CPA does not expressly distinguish between manufacturing defects, design defects and instruction or warning defects. The CPA also does not only use one generic concept such as “unsafe” to create the basis for a “defect” that would give rise to a product liability claim in terms of section 61. On the contrary, it introduces an intricate maze of concepts which are in many instances circular in their application and that contain concepts which are in some instances actually incompatible such as the definition of “unsafe” which refers to an “extreme risk” of personal injury but then incorporates reference to a “hazard” which is defined in section 53 to *inter alia* refer to a “significant risk” of personal injury or property damage. Each of these definitions have to be scrutinized to determine whether they cover manufacturing defects, design defects or instruction or warning defects. Also, the definition of “unsafe” incorporates the definition of defect” which means both section 53(a)(i) and (ii) whereas it has been argued that it is actually only the part of the definition contained in section 53(a)(ii) that applies in the context of product liability.

Given the cluttered and in some respects contradictory or incompatible definition of “unsafe” in section 53 it becomes difficult to conceptualize what the legislature intended to achieve with this very compact definition. The gist is that from a reading of the definitions of “defect” “failure”, “hazard” together with the definition of “unsafe” it appears that the legislature wanted to “cover all bases.” It seems as if the definition of “unsafe” operates much like a Russian nesting doll from which one can extract

smaller dolls:[621] from a product liability perspective goods can accordingly be unsafe because they contain a "defect" as per section 53(1)(a)(ii) or because of a product "failure" as per section 53(1)(b) or because they are hazardous as contemplated in section 53(1)(c) with the added requirement that such "defect", "failure" or "hazard" should present an "extreme risk" of personal injury or property damage to the consumer or to other persons. As pointed out however this assimilation of the definitions of "defect", "failure" and "hazard" into the definition of "unsafe" leads to various inconsistencies. One also wonders why the legislature deemed it necessary to refer to these concepts in addition to referring to a "characteristic"?

It may accordingly be asked whether it is really necessary to have such a layered approach to the concept of defectiveness for purposes of product liability under the CPA especially if one considers the definition of "unsafe" and the fact that section 61(1) in any event imposes product liability not only if products are "unsafe" but also in the event of a "product failure", "defect" or "hazard" in any goods or lack of adequate "instructions or warnings." It appears as if the legislature attempted to cover every instance of defectiveness and in the process of doing so it created a maze consisting of confusing duplications and contradictions. From the perspective of product liability *ex delicto* it would probably suffice to have a definition of "unsafe" that covers all the respects in which a product may be defective to such an extent that it would cause the type of harm contemplated in section 61(5). Section 61 read with section 53 and section 55 currently make for some very exhausting reading and interpretational mind gymnastics which, it is submitted, can be cleared up by less cluttered drafting. No legislation, especially not consumer legislation should be so hard to interpret.

[621] Van Heerden presentation (2013) *UFS.*

Chapter 5: Statutory defences against product liability

Chapter 5 critically investigates the defences against product liability that section 61(4) of the CPA avails to the supply chain. This chapter explores the nature and scope of these statutory defences and, given that no body of South African case law on these defences yet exists at the time of writing this thesis, it seeks to establish how each of these defences should be interpreted and applied. This Chapter will accordingly inform the conclusions and recommendations at the end of the thesis regarding the appropriateness and adequacy of the statutory defences introduced by the CPA and whether any reform in this regard is deemed necessary.

1. Introduction

As indicated in Chapter 3 above, the strict product liability provisions of the CPA have an extended reach that covers the whole supply chain including service providers where liability for harm caused by defective products is concerned. The product liability provisions in this regard thus present double-layered protection to consumers harmed by defective products: not only does it introduce strict product liability to overcome the impediments previously presented by the requirement of proof of negligence to found product liability under the common law,[622] but it also widens the scope of persons that the consumer who suffered harm may seek redress from. Loubser and Reid comment that the CPA clearly reduces the practical difficulties for a consumer intending to pursue a product liability claim as it imposes joint and several liability on the whole supply chain, with no requirement that claims should be addressed in the first instance to the producer, if identifiable. They point out that as long as a distributor or retailer can be traced, the consumer is relieved of the problem of identifying the actual producer.[623] Thus South African consumers who wish to institute product liability claims under the CPA can do so with considerable ease as two impediments that exist in the common law *ex delicto* have now been removed by the CPA, namely the proof of negligence and the need to identify and locate the actual manufacturer.

[622] See chp 2, par 3.2 above.
[623] Loubser and Reid (2012) 120.

However, the apparently strict product liability regime as introduced by the CPA, although far-reaching, is not absolute, as is evident from the statutory defences that the legislature has specifically provided for in section 61(4). These statutory defences are new and product liability specific and at the time of writing this thesis, as pointed out, none of these defences have been dealt with by our courts. The only reported product liability case under section 61 of the CPA, namely that of *Eskom v Halstead-Cleak*, as discussed in Chapter Three[624] dealt with the scope of application of section 61 and did not engage with the defences in section 61(4). Apart from the informative writings of Loubser and Reid there is also a dearth of authority on the section 61(4)-defences thus making it largely virgin territory for purposes of this thesis.[625]

It is therefore necessary to critically unpack each statutory defence in order to assess its scope and nature.

2. Defences available in terms of the Consumer Protection Act

2.1 Introduction

The very wide reach of the product liability provisions introduced by section 61 undoubtedly creates a better redress dispensation for persons harmed by defective goods. However as argued in Chapter One, the concept of an absolutely strict product liability regime is fallacious: even if it is stemmed mainly at protection of consumers a product liability regime cannot merely turn a blind eye to the interests of suppliers in being able to provide goods for the consumer market and the resultant benefit such goods may yield for consumers.[626] Accordingly it is also necessary to balance, at least to some extent, the competing interests of consumers harmed by defective products and the economic interests of suppliers. A product liability regime that is too rigid and takes only the interests of consumers harmed by defective products into account is likely to cause suppliers to exit the market as they may fear that the risk of large product liability claims being instituted against them is just too big; thus leaving consumers with a market in which there are less product choices

[624] See chp 3, par 3.2.
[625] Although Van Eeden and Barnard (2017) 394 mentios these defences, they does not provide any comprehensive discussion thereof.
[626] See chp 1, par 1 read with chp 2, par 5.

and less price competition. Many suppliers may also be reluctant to release new products on the market due to the perceived threat of such a strict product liability regime and accordingly innovation may be stifled, which may also be to the detriment of consumers. If product liability is approached too rigidly consumers will likely not, for example, have the life-saving benefits of drugs for treatment of cancer or Aids or Ebola or Malaria. Therefore a more balanced approach to "soften" the hard edges of this new CPA product liability regime, from the perspective of the supply chain, appears to have been introduced by the statutory defences listed in section 61(4).

Section 61(4) contains a "closed" list of defences available to the supplier that a "particular person" (supplier) may rely upon in order to escape product liability. Loubser and Reid[627] indicate that the words "a particular person" that appear at the beginning of section 61(4) refer to *any supplier* identified by section 61: producers, importers, distributors, retailers, or suppliers of services who utilise goods in the performance of a service. However it should be noted that whereas some of the defences listed in section 61(4) apply to all suppliers within the supply chain, certain defences are only to the avail of specific persons in the supply chain, such as for example distributors and retailers in the circumstances set out in section 61(4)(c). Further, the onus of proof is on the defendant in the case of each of these defences to prove his statutory defence on a balance of probabilities.

2.2 Analysis of statutory defences introduced by the CPA

2.2.1 Section 61(4)(a): compliance with public regulation

In terms of section 61(4)(a), liability of a "particular person" does not arise if "the unsafe product, characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation."

Two aspects must be noted here: first the defectiveness (that eventually caused the harm) must have resulted from compliance by the supplier with a *public* regulation. In terms of section 1 of the CPA a "public regulation" is broadly defined to mean "any national, provincial or subordinate legislation, or any licence, tariff, directive or similar

[627] Loubser and Reid (2012) 137.

authorisation issued by a regulatory authority or pursuant to any statutory authority." This implies that compliance with codes of practice or voluntary standards will not qualify for purposes of the defence under section 61(4)(a).[628] For example, if goods are adapted in compliance with the Medicines and Related Substances Act,[629] an Act passed through a legislative process to promote the safety of products, the supplier can escape liability for harm caused by that product on the basis of section 61(4)(a). Likewise if goods comply with a mandatory standard imposed by the Standards Act,[630] as required in section 55(2)(d) of the CPA, then the supplier cannot be held liable if compliance with such standards caused the goods to be defective.

Secondly, it is to be noted that the defect must have resulted *wholly* (not just partially) from compliance with such public regulation. If the defectiveness of the product can only partly be attributed to compliance with public regulation the defendant will not be able to rely on the defence in section 61(4)(a). It may however be asked whether it is appropriate to require that compliance with a public regulation must have been the sole cause of the defectiveness in the goods as it appears to be contrary to the tenor of section 61(1) that employs the words "caused wholly or partly" to impose joint and several liability on the supply chain as well as contrary to section 61(6)(c) which provides for apportionment of liability by the court. For example, why should a supplier not be able to raise this defence if the defect in the goods were 70% attributable to compliance with public regulation?

Loubser and Reid point out that the public regulation relied upon that renders a product as unsafe, having failed, being defective, or hazardous must have been enacted *prior* to the time the goods were supplied by the defendant. They however submit that this defence will rarely be relied upon given that the purpose of most regulations is to make products safe and not to give rise to defectiveness in products.[631]

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[628] Loubser and Reid (2012) 131; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-10. As pointed out by Loubser and Reid, non-compliance with a code of practice or voluntary standard may however not be considered to determine whether goods contain a defect as contemplated in s 53 of the CPA.
[629] Act 101 of 1965.
[630] Act 8 of 2008.
[631] Loubser and Reid (2012) 131.

To conclude, this defence is available to any supplier in the whole supply chain and the supplier who relies on this defence will have the onus to prove that the harm is wholly, and not merely partially, attributable to compliance with a mandatory public regulation, enacted prior to the supply of the goods. Once the plaintiff has thus proved his case on a prima facie basis, the defendant can raise this defence and escape liability if he is able to prove all the elements of the defence. However it is submitted that, having regard to the broad definition of "public regulation" it is difficult to fathom how compliance with a "tariff" can be an excuse for releasing a defective product onto the consumer market. Whilst one can argue that it is possible that a license that pertains to the attributes of specific goods or a directive that mandates compliance with certain specifications for such goods can possibly have the effect that complete compliance with such licence or directive can have the effect of rendering the goods defective, it is difficult to see how this argument can be applied in the context of a tariff.

2.2.2 Section 61(4)(b)(i): defect did not exist at time of supply

It is to be noted that section 61(4)(b) provides for two alternative defences, contained in sections 61(4)(b)(i) and (ii) respectively. In terms of section 61(4)(b)(i), liability of a "particular person" will not arise if "the alleged unsafe product characteristic, failure, defect or hazard…did not exist in the goods at the time it was supplied by *that* person [the defendant] to another person alleged to be liable." The essence of this defence is that the defendant alleges that the goods were not defective at all at the time that it/he supplied them to another person in the supply chain (hence the words "another person alleged to be liable").[632] It may however be argued that this means that the defence is not available to a retailer because the retailer does not supply the goods to "another person who is alleged to be liable" - unless one construes the words "another person alleged to be liable "to refer to any other person, even outside the supply chain, such as for example a consumer or another third party. However, given that "service providers" are also drawn into the supply chain liable for defective goods by virtue of section 61(2), one could possibly argue that where a retailer supplies goods to a service provider as defined in the CPA, the retailer will also be able to rely on this defence.

[632] Loubser and Reid (2012) 131. As indicated in chp 3, par 2.3.3 the word "supply" includes selling, renting, exchanging and hiring for consideration.

The time that is relevant for determining whether this defence might be available is the time that the goods were supplied by the specific supplier (that wishes to rely on this defence) to a subsequent supplier, for example if the importer of goods wants to rely on this defence it will have to prove that when it supplied the goods to the distributor the goods did not have the alleged "unsafe product characteristic, failure, defect or hazard."

Accordingly, "the time of supply" is of vital importance. Although the CPA defines the term "supply", Loubser and Reid point out that a crucial aspect left open by the CPA is the point at which "supply" is regarded as having taken place for purposes of this defence and they submit that it can be interpreted as "when the defendant relinquishes possession of the relevant goods in favour of another party in the supply chain."[633] Thus Loubser and Reid remark that the purpose of this provision appears to be to allow the defendant to escape liability if the defectiveness in the goods arose after the goods had left the defendant's control.[634] Therefore, if a product has become defective due to mishandling or inappropriate modification, the producer and those who have supplied the product in its original, safe condition should not be held liable.[635]

It is submitted that one might possibly argue that the interpretation of the "point at which goods are supplied" can be aided by having regard to section 19 of the CPA which deals with delivery of goods and passing of the risk. As such section 19(4) sets out the instances when a consumer can be regarded as having accepted delivery of the goods. However, given that section 19 deals with the point at which the goods is supplied to the consumer and not the point at which goods a supplied to another supplier, as required by section 61(4)(b)(i) courts may be reluctant to have regard to section 19 in determining the time of supply. Nevertheless the section may be instructive in, for example, dealing with a situation where goods were supplied by the defendant to a subsequent supplier who does not expressly acknowledge receipt

[633] Loubser and Reid (2012) 132.
[634] *Ibid*. They point out that delivery may of course be constructive so that the supply may be deemed to have taken place, for example, when the goods were delivered to a third party for purpose of warehousing on account of the person ultimately alleged to be liable.
[635] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-10. The authors indicate that this should be the position unless it can be argued that the product's vulnerability to mishandling is in itself a defect.

of the goods by signing a delivery notice. It is further submitted that the time that the goods left the defendant's control cannot necessarily be regarded as the *point* of supply given that it is still possible that goods may become defective within the time period that it leaves the defendant's control and the time that it is received by the subsequent supplier. In such an instance one will for instance have to consult the contract between these two suppliers to determine who bears the risk if the goods become defective in such instance. If it is the defendant, it is submitted that he will not be able to rely on the defence in section 61(4)(b)(i).

The onus is thus on the defendant to prove on a balance of probabilities that the goods lacked defectiveness at the time of their supply to a subsequent supplier. It is submitted that reliance on this defence does not require the defendant to also prove that the defect was caused by the subsequent supplier, or even that the consumer harmed by the goods, was probably responsible for the defect in the goods. As long as the defendant is able to prove that the goods where not defective at the time that he supplied those goods, he will be able to escape liability by virtue of section 61(4)(b)(i). In practice this means that the suppler will have to have quality control processes in place that would enable him to prove to a court that the goods were for example transported in conditions that would not cause them to become defective or that they were inspected and found to be non-defective at the time of their supply to a subsequent supplier.

In the alternative to the defence in section 61(4)(b)(i) the defendant may rely on the defence set out in section 61(4)(b)(ii) as discussed below.

2.2.3 Section 61(4)(b)(ii): compliance with instructions by prior supplier

Section 61(4)(b)(ii) provides that liability of a "particular person" does not arise if "the alleged unsafe product characteristic, failure, defect or hazard…was wholly attributable to compliance by *that* person [the defendant] with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply."

It is submitted that any person in the supply chain can rely on this defence except the actual manufacturer as he cannot attribute the defect in the goods to a "prior"

supplier. Section 61(4)(b)(i) and (ii) are joined by an "or" which apparently indicates that the defendant can rely on the defence mentioned in section 61(4)(b)(ii) in the alternative to the defence in section 61(4)(b)(i). However the words in section 61(4)(b)(ii) "in which case subparagraph (i) does not apply" make it clear that a defendant may not raise these defences in the alternative but that they are actually mutually exclusive.

Loubser and Reid explain that section 61(4)(b)(ii) deals with the situation where a supplier (A) has passed on goods to another in the supply chain (B), and in so doing A has provided B with instructions relating to the goods, for example regarding their use or safekeeping. They indicate that where harm occurs as a result of compliance with these instructions, the sub-section provides a defence for B, and also stipulates that A cannot use the defence in section 61(4)(b)(i) (regarding non-existence of the defect at the time of supply) to exonerate itself. Thus they remark that the defence in section 61(4)(b)(ii) is of considerable importance when a manufacturing process involves the supply of components accompanied by technical specifications for their use in a complex product.[636] Loubser and Reid further indicate that the producers and suppliers of a defective component are in principle liable if the defective component has caused the complex product into which it was fitted, to fail. However, they state that section 61(4)(b)(ii) provides the producer of the complex product with a defence if the failure of the goods is attributable to compliance with the instructions [relating to the component] provided by the supplier.[637]

To illustrate the interaction between the two alternative defences mentioned in section 61(4)(b), Loubser and Reid provide the example of a car that crashes due to a manufacturing defect in its brakes in a situation where the brakes were made by one manufacturer and the car assembled by another. In principle the manufacturer of the car and the manufacturer of the brakes (as component manufacturer) may be held jointly and severally liable, along with the others in the supply chain as provided for by section 61. However, section 61(4)(b)(i) allows the producer (that is, the component manufacturer) of the brakes to escape liability if it can show that the

[636] Loubser and Reid (2012) 132; and Loubser and Reid in Naudé and Eiselen (2014 *et seq)* 61-10/11. Components are included in the definition of goods in s 1 and s 53 of the CPA which also covers defective components in goods, as explained above in chps 3 and 4.
[637] Loubser and Reid (2012) 132.

brakes were sound at the point when they were delivered to the producer of the car. Accordingly, if the brakes were without defect at the time of their supply to the producer of the car but became defective as a result of inappropriate fitting or modification, the producer of the brakes is not liable for harm subsequently caused. On the other hand, section 61(4)(b)(ii) allows the producer of the car to escape liability if the unsafe condition of the car was wholly attributable to compliance with instructions provided by the supplier of the brakes, for example instructions regarding the fitting of the brakes. Thus in such a situation the liability will fall on the supplier of the brakes. Loubser and Reid further point out that section 61(4)(b)(ii) however does not deal with the situation where the instructions go the other way, for example if the defect can be traced back to the technical specifications for the brake parts that the producer of the car provided to the manufacturer of the brakes. Thus in such a case the producer of the car should be liable for harm caused by the unsafe condition of the car.[638]

It is further important to note that the defence in section 61(4)(b)(ii) requires that the defect in the goods must have been "wholly" attributable to compliance with the instructions provided by a prior supplier. Thus one may ask whether, if the defect is only partly attributable to such compliance with the instructions given by a prior supplier, the subsequent supplier who through his compliance with those instructions caused the defect to arise, will be able to rely on this defence at all? Having regard to the clear wording of section 61(4)(b)(ii) it indeed appears that the legislature intended a supplier to only escape liability if compliance with the instructions by a previous supplier was the sole cause of the defect in the goods. It may however be asked whether it is fair to deprive a supplier of this defence where a defect in goods were caused partially by compliance with instructions by a prior supplier? It seems to be contrary to the tenor of section 61(1) which refers to harm caused "wholly or partly" and the provision that is made for joint and several liability of suppliers as well as the power of the court in section 61(6)(c) to apportion liability between suppliers.

To conclude, the defence in section 61(4)(b)(ii) is available to a supplier who received goods from a prior supplier. As such the supplier who raises the defence

[638] Loubser and Reid (2012) 132.

will have the onus to prove that he received instructions from a prior supplier, what those instructions were and that compliance with those instructions "wholly" caused the goods to become defective and thus harmful.

2.2.4 Section 61(4)(c): not reasonable to discover defect

The defence provided for in section 61(4)(c) has limited application as the Act makes it available only to a distributor[639] and a retailer.[640] This defence consists thereof that, in the particular instance, "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing[641] the goods to consumers."

The section 61(4)(c)-defence has been shrouded in controversy since it was first introduced. Loubser and Reid are of the opinion that it appears to be "re-introducing negligence through the back door" and also regard it as introducing some form of a "development risk defence" akin to the notorious development risk defence contained in Article 7(e) of the EU Product Liability Directive, as discussed in more detail in Chapter 6.[642] In order to fully appreciate why this defence has been so controversial it is necessary to also refer to its initial introduction in the first draft of the CPA Bill. The first draft of the Consumer Protection Bill[643] that was released in 2006 provided in clause 73(3)(c)(ii) (the then product liability provision) that liability of a person would *not* arise if:

> (c) it is unreasonable to expect the distributor or supplier to have discovered the product failure, defect or hazard, having regard to
>
> (i) that person's role in introducing the good to the consumer market; *and*
>
> (ii) the state of scientific and technical knowledge at the time the good was under the control of that person.

The Select Committee later replaced the word "supplier" with "retailer" that narrowed down the application of the defence to distributors and retailers only. In the later

[639] S 1 of the CPA defines a distributor as a "person who, in the ordinary course of business - (a) is supplied with those goods by a producer, importer or other distributor; and (b) in turn, supplies those goods to another distributor or retailer."
[640] S 1 of the CPA defines a retailer as "a person who, in the ordinary course of business, supplies those goods to a consumer."
[641] S 1 of the CPA defines "market" as "to promote or supply any goods or services."
[642] Loubser and Reid (2012) 133. See also chp 6, par 5.1.5.
[643] Consumer Protection Bill (2008).

version of the Consumer Protection Bill[644] as subsequently introduced in the National Council of Provinces the statutory defences were subsequently set out in clause 61(5) and the abovementioned defence were contained in clause 61(5)(c) which provided that liability would not arise if:

> (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to-
>
> (i) that person's role in marketing the goods to consumers; *and*
>
> (ii) the state of scientific and technical knowledge at the time the goods were under the control of that person.

When the Act was finally signed into law section 61(4)(c) however contained no reference to the state of scientific and technical knowledge at the time the goods were supplied and merely limited the availability of the defence to distributors and retailers on the basis that it would be unreasonable to have expected them to have discovered the defect in the goods given their role in the marketing of those goods.
The reason for first incorporating a type of development risk defence in the CPA Bill and subsequently discarding the reference to the state of scientific and technical knowledge has unfortunately not been well documented. Although the Draft Green Paper on Consumer Policy mentions the need for introduction of a more protective consumer protection regime it unfortunately does not deal with the detail of such contemplated regime.[645] The Memorandum on the Objects of the Consumer Protection Bill also refers to product liability in general terms but contains no reference to or detail on the rationale behind the defence in section 61(4)(c).[646]

In the context of the section 61(4)(c)-defence two main questions thus arise, namely:

(a) Given that the reference to scientific and technical knowledge has been discarded, can one say that the defence that was subsequently enacted is a development risk-defence?

(b) Is it appropriate that the defence in section 61(4)(c) should be available to distributors and retailers but not to manufacturers and importers ?

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[644] B19-2008 published in the Consumer Protection Bill (2008).
[645] Green Paper on the Consumer Policy Framework 2004.
[646] Consumer Protection Bill (2008).

As alluded to in more detail in chapter 6 the “development risk defence” is a defence that was introduced in the EU Product Liability Directive to balance the purportedly strict product liability regime introduced by the Directive. The essence of the EU defence is that producers (manufacturers) of goods are absolved from liability for harm caused by a defective product if they can prove that, having regard to the state of available scientific and technical knowledge, the defect in the product was undiscoverable at the time that the product was put into circulation.[647] Loubser and Reid argue that the “development risk” defence is intrinsically incorporated into the section 61(4)(c)-defence as it may not be reasonable to expect retailers and distributors to have discovered “development risks” inherent in the goods that they have supplied. They explain that “development risks” refer to “defects resulting from risks which have only become apparent as new products have been used and which were not foreseeable or discoverable at the time of supply.”[648] Loubser and Reid further provide the example of a development risk as arising where a new pharmaceutical product turned out to have side-effects undetected by tests or trials that were conducted prior to the marketing of the said product. They state that if an appropriately rigorous test is to be applied, the relevant level of knowledge “expected” of the distributor or retailer should be judged by an objective test, referring to the constructive as well as the actual knowledge of such distributor or retailer.[649] The standard is a normative one, namely what the reasonable distributor or retailer “ought” to have known, although they indicate that the defence must of course take into account the accessibility of information about safety defects. As such they indicate that the distributor or retailer cannot reasonably have been expected to discover defects identified in unpublished research or documents not available to the general public, or retained within the laboratory or research department of a particular company. Moreover, they indicate knowledge which only became discoverable after the goods had left the control of the distributor or retailer should not be attributed to them. At the same time, concessions should not be made for particular informational or organisational constraints affecting the individual distributor or retailer. Thus they argue that the distributor or retailer should not be

[647] See chp 6, par 5.1.5.
[648] Loubser and Reid (2012) 133.
[649] *Ibid*.

able to rely on mere negligence where scientific and technological knowledge is concerned.[650]

Loubser and Reid further comment that the defence in section 61(4)(c) is broadly drafted and that skeptics may argue that it has the potential to re-admit fault-based liability through the back door. They remark that the use of a "reasonableness test" that evaluates the conduct of distributors and retailers, and removes liability for risks which could not reasonably have been anticipated, brings the "strict" liability of the legislation back closer to the standards of the Aquilian liability, in which the duty to take into account "known and foreseeable risks" is built into the formulation of the general duty towards the consumer. In view of the policy considerations underlying the introduction of strict product liability for defective products, they remark that it seems appropriate to set a high, although not unattainable, standard of reasonableness if this defence is to be admitted. They however point out that even applying such standards, there are various categories of defect that one could not reasonably expect even a highly responsible distributor or retailer to discover.[651]

Loubser and Reid consequently raise the issue of latent defects and state that the very general wording of section 61(4)(c) can be extended to provide a defence in other circumstances which are curiously at odds with the strict liability framework supposedly created by this part of the CPA. For example they ask to what extent can one reasonably expect a distributor or retailer to detect a latent manufacturing or design defect in a product that it supplied? They remark that certainly patent defects are readily discoverable and there should be no avoiding it if the distributor or retailer, or its agents or employees, have failed to detect them. However, the position is less clear with regard to latent defects. For example, should a distributor or retailer be able to escape liability to an injured consumer if a bottle of carbonated drink fragments due to a hairline crack in the glass bottle? They refer to the wording of the European Directive on Product Liability that confines the defence to those circumstances where the current state of knowledge "was not such as to enable the

[650] Loubser and Reid (2012) 134.
[651] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-11.

existence of the defect to be discovered"[652] and point out that there is no defence in European cases where the possible existence of latent defects was known in principle, even if a defendant had practical means of detecting the presence of a defect in any particular sample of the goods. [653]

According to Loubser and Reid it remains to be seen how narrowly the South African courts will interpret section 61(4)(c), but they point out that the standard of what might reasonably be expected of a distributor or retailer seems significantly less exacting. Thus they opine that it might plausibly be argued that although distributors and retailers are in principle "able" to discover the potential existence of a latent defect, they could not "reasonably have been expected" to discover its presence in practice, having their role in marketing the goods to consumers. Yet they state that to permit all "reasonable" distributors and retailers to evade liability for latent defects opens a significant gap in the strict liability framework and, if producers and importers cannot be traced, they are of the opinion that it leaves consumers no better off than under fault-based liability.[654] Gowar adds to this sentiment by commenting that this defence appears to place a consumer "in a worse position that [he] would have been under the common law system when it comes to sellers as experts" as a consumer would not be able to hold a (merchant) seller (retailer) who professed skill and expert knowledge in the product, liable without fault.[655]

Having regard to the initial wording of the defence in the two draft CPA Bills mentioned above, it is clear that the legislature had at some stage considered introducing a limited type of development risk defence into South African law but then discarded the idea in favour of the defence currently contained in section 61(4)(c). However the defence that is now contained in section 61(4)(c) poses somewhat of an interpretational conundrum. On the one hand it is arguable whether the defence in section 61(4)(c), as it is now worded, bears any relation to the "development risk" defence that is afforded to suppliers by the EU Product Liability Directive given that it contains no reference at all to scientific and technical

[652] Loubser and Reid (2012) 136; and see also the discussion of this aspect in chp 6 on EU product liability.
[653] Loubser and Reid (2012) 135. See also chp 4, par 2.5.5 regarding a latent and patent defect of the CPA.
[654] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-12
[655] Gowar (2011) *Obiter* 534.

knowledge which lies at the basis of the development risk defence in the EU. Surely a court that has to deal with this defence will, on a plain reading of the defence, without being alluded to the initial wording in the draft Bills, not think that it is dealing with a "development risk defence." As will be discussed in more detail in Chapter 6 hereinafter the development risk defence is a defence afforded specifically to producers of goods in order not to stifle innovation and boldly applying such a defence in the context of distributors and retailers without affording it also to manufacturers seem inappropriate as the distributors or retailers did not "produce" or develop the goods. It may thus be argued that, despite the intention of the legislature to afford a development risk defence that is only available to distributors and retailers, the defence in section 61(4)(c), due to the absence of any reference to the state of scientific and technical knowledge at the time that the product was supplied, does not fit the mould of a so-called development risk defence.

Another possibility is to still regard the defence in section 61(4)(c) as being aimed at protecting the distributor and retailer against development defects that occurred when the product was designed and manufactured and to which they would not have been privy considering their role in marketing the goods to consumers which is remote from the development of the product. Although Botha and Joubert argue that the section 61(4)(c)-defence should not be afforded to distributors and retailers[656], it is submitted that affording them some type of defence against development risks that manifested in goods being defective, is not inappropriate if one considers their role in the marketing of such goods and the fact that they did not "develop" those goods. Generally distributors and retailers will not conduct research and perform testing on goods prior to their supply as such research and testing would normally be the domain of the manufacturer responsible for creating the goods. However, given that the CPA imposes liability for defects in goods on the whole supply chain jointly and severally, one can comprehend the legislature's concern that it would be unfair to hold distributors and retailers responsible for defects that arose in the goods at the time of their development (i.e. design) by the manufacturer. Surely they cannot be expected to conduct the extensive research that is the responsibility of a manufacturer who develops a new product such as a pharmaceutical? It can

[656] Botha and Joubert (2011) 314.

however also be asked whether it makes sense to hold an importer responsible for defects that arose as a consequence of the design of goods not conforming with the most recent accessible scientific and technical knowledge at the time the goods were produced and supplied? Also, it has been noted that there is a distinct interrelation between design and warning or instructions defects in the sense that if the design of goods are such that certain uses of those goods may render them unsafe it is the duty of the manufacturer to provide warnings or instructions that enable their safe use. Accordingly, if a manufacturer is not aware of for example, certain hazardous side-effects that a pharmaceutical product may have it logically follows that the manufacturer will also not provide warnings or instructions regarding those side effects. Subsequent suppliers will then also not know that these products should be accompanied by warnings or instructions as to their safe use. In the context of a regime that does provide a development risk-defence the question would then arise whether the manufacturer's ignorance can be excused at all and the answer will depend on whether the manufacturer is able to prove that, having regard to the state of objectively accessible scientific and technical knowledge at the time that the goods were supplied, he could not have been aware that the goods contained a defect. It is further submitted that defects that arose as a result of development risks will by their nature be latent and that the application of a development risk-defence, should a country opt to have such defence in their product liability regime, is not justified in the context of manufacturing defects which arise from goods not complying with the specifications of the manufacturer.

In any event, regarding section 61(4)(c) as providing a development risk defence to distributors and retailers would be somewhat of an anomaly in a regime that does not otherwise acknowledge a development risk defence. It would then mean that South Africa does indeed have a development risk defence even though it makes no reference to the state of scientific and technical knowledge and also that it uniquely affords this defence *not* to manufacturers (for whom the defence was actually created) but gives it to suppliers further down the supply chain who have nothing to do with the development of the goods concerned.

It is submitted that labelling the defence in section 61(4)(c) as a development risk defence would be misguided. Doing so would require distributors and retailers to

present scientific and technical evidence to which they will not have access. Even though one might argue that the history of section 61(4)(c) shows that the legislature intended to provide distributors and retailers with a development risk defence it is submitted that using the concept of development risks on the level of distribution and retail is simply inappropriate. The defence retained in section 61(4)(c) cannot be equated to a "development risk-defence proper" as the section 61(4)(c)-defence is given to persons who are not involved in that part of the production of goods where development risks can arise. Rather, it is submitted, the broad defence in section 61(4)(c) should be viewed as a *sui generis* defence afforded by the CPA to distributors and retailers for any defects, including those that occurred in the development of the product, which they could not reasonably have discovered given their role in the marketing of the product. Therefore the section 61(4)(c)-defence should merely be referred to as a mere "non-discoverability" defence. Accordingly the defence in section 61(4)(c) should not be subjected to the limitations inherent in the development risk defence, namely that it requires proof of the most advanced state of technical and scientific knowledge or that it is not suited to manufacturing defects but only to design and warning or instruction defects.

On a practical level thus, if a distributor or retailer is able to provide evidence regarding his role in the marketing of goods, which evidence shows that the distributor or retailer complied with all reasonably expected quality and safety control measures at the level of distribution and retail and that he could for example not have been expected to open pre-packaged goods and subject them to all sorts of tests to ensure that they were not defective, he should be able to rely on the defence in section 61(4)(c), even if the defect was a manufacturing defect.

The vexing question that nevertheless remains is whether the South African legislature was justified in, first affording in clause 73(3)(c)(ii) of the 2006 CPA Bill a development risk to retailers and suppliers (which would have included manufacturers given the wide definition of supplier) and thereafter limiting the development risk defence in the former clause 61(5)(c)(ii) to distributors and retailers and thereafter completely discarding the development risk defence prior to enactment of the CPA? Put differently, is the lack of a development risk in the CPA for manufacturers a sound position to take from a purportedly strict product liability

perspective? It can also be asked why the defence in section 61(4)(d) is given to distributors and retailers but not to service providers who also form part of the supply chain for purposes of product liability, as specifically included by section 61(2)?

2.2.5 Section 61(4)(d): prescription

The final statutory defence listed in terms of section 61(4)(d) of the CPA is that of prescription. Section 61(4)(d) sets out four instances in which prescription can be raised by any supplier as a defence to a product liability claim under the CPA, namely where the claim for damages is brought more than three years after the death or injury of a natural person; or the earliest time at which a person had knowledge of the material facts about an illness of a natural person; or the earliest time at which a person with an interest in any movable or immovable property had knowledge of the material facts about the loss or damage to that property; or the latest date on which a person suffered any economic loss resulting from harm in the aforementioned three instances.

As pointed out in Chapter 2 South Africa has a Prescription Act[657] that deals with prescription in general. The CPA in section 61(4)(d) has however now introduced a *lex specialis* relating to prescription in the context of product liability. The question that one should ask is what the intention of the legislature was with introducing a specific prescription defence in section 61(4)(d) when there was already a long-existing and comprehensive Act, that could be applied in the context of common law product liability *ex delicto* and that arguably could be equally applicable in the context of the product liability regime introduced by section 61 of the CPA. South Africa is a Republic thus the problem of fragmented application of prescription laws across its provinces does not arise as would be the case of a jurisdiction such as the EU with its various Member States who might each have their own prescription dispensation entrenched in domestic legislation. It is submitted that the most likely conclusion is that the legislature merely included the prescription defence in section 61 because the EU Product Liability Directive on which the South African regime is largely modelled, also contains a specific prescription defence in Article 10.[658] It is however also likely that the legislature specifically wanted to introduce a *sui generis*

[657] Act 69 of 1968. See chp 2, par 4.5.
[658] See chp 6, par 5.2.1.

prescription dispensation for CPA product liability claims. The further question is therefore whether, and how, this defence of prescription in terms of section 61(4)(d) differs from the defence of prescription of debt generally provided for by the Prescription Act .

The essence of the defence provided by section 61(4)(d) is that liability under section 61 will become unenforceable upon the expiry of the three year time period as indicated in each of the instances set out in section 61(4)(d)(i)-(iv), and thus that a debtor (which can be any of the suppliers in the supply chain) can escape liability by invoking the defence of prescription.[659] Notably the time period of three years is similar to the three year period contemplated in the Prescription Act in respect of prescription of "debts."[660] What is also important to bear in mind is that whereas the Prescription Act comprehensively deals with various aspects of prescription including the delay and interruption thereof, section 61(4)(d) is more limited in nature as it only deals with the time period for prescription and the date from which such time period must be calculated. It is however submitted that nothing in section 61 justifies an inference that the legislature's intention was that aspects such as delay and interruption of prescription would not apply in the context of the prescription defence in section 61(4)(d). Rather it appears that the legislature only specifically wanted to regulate the commencement period of prescription and accordingly that one will have to read section 61(4)(d) together with the Prescription Act insofar as aspects such as delay and running of prescription is concerned.

Loubser and Reid also remark that section 61(4) appears to provide for a prescription period in respect of "liability" arising under section 61 but point out that it "does not employ the established terminology of prescription" as set out in the Prescription Act. Instead it refers to a "liability" which "does not arise" if the "claim" is not "brought" within three years.[661] They indicate that the broad question arising from section 61(4)(d) is to what extent its provisions are intended to *co-exist* with the

[659] Loubser and Reid (2012) 144 – this is the same stance as the Prescription Act. Additionally, at the same point, the authors state that the defence of prescription must be raised and established by the debtor himself.
[660] See chp 2, par 4.5.
[661] Loubser and Reid (2012) 138.

operation of prescription under the Prescription Act and they point out that the following particular questions consequently arise:[662]

- Does the 'liability' arising under section 61 constitute a 'debt' for the purposes of the Prescription Act?
- Does the time period prescribed by section 61(4)*(d)* begin to run in the same way as a prescription period under the Prescription Act?
- Does knowledge of the existence of facts pertaining to a claim affect the running of the time period prescribed by section 61(4)*(d)* in the same way as it affects the running of a prescription period under the Prescription Act?
- Is the running of the time limit *delayed* in the same way as a prescription period under the Prescription Act?
- Is the running of the time limit *interrupted* in the same way as a prescription period under the Prescription Act?
- What is the effect of expiry of the time limit set by section 61(4)*(d)*, and can a court of its own accord apply the time limit set by section 61(4)*(d)*, or must it be invoked by the defendant?
- Can the right to invoke the time limit set by section 61(4)*(d)* be waived?
- How must the time limit set by section 61(4)*(d)* be calculated?

2.2.5.1 Co-existence of Prescription Act with section 61(4)(d)

Loubser and Reid point out that the potential co-existence between the provisions of the Prescription Act and special prescription provisions in other Acts, is primarily provided for by section 16 of the Prescription Act which states that the provisions of the Act shall apply to "any debt arising after the commencement of this Act" save in so far as they are "inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt." There is a similar provision contained in section 11(d) of the Prescription Act which states that the general three year prescription period applies to all debts not otherwise provided for in section 11 "save where an Act of Parliament provides otherwise." Thus the Prescription Act acknowledges that there may be instances where an Act may contain specific provisions relating to prescription of a debt in that Act, which provisions may differ from those in the Prescription Act and in

[662] Loubser and Reid (2012) 138; and Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-12.

which event the provisions of such other Act, as a *lex specialis*, will have precedence over that of the Prescription Act.

2.2.5.2 Does liability under section 61 constitute a "debt"?

Loubser and Reid indicate that if the "liability" arising under section 61 constitutes a "debt" for the purposes of the Prescription Act, the question of possible inconsistency between the Prescription Act and section 61(4)(d) must be examined.[663] Accordingly one will first have to establish whether the liability contemplated in section 61(4)(d) meets the requirements of a "debt" as contemplated in the Prescription Act. As mentioned above, "debt" refers to any duty aspect of an obligation and can *inter alia* arise from a delict. Loubser and Reid state that the liability for harm in terms of section 61, for which a court can determine the extent of the damages to be paid,[664] involves an obligation to pay damages and therefore they opine that it constitutes a "debt" for the purpose of the Prescription Act.[665] It is submitted that this contention is correct.

2.2.5.3 Time period

As explained above, different prescription periods apply to different kinds of debt as provided for in section 11 of the Prescription Act. The general prescription period for a debt, if no other period is specifically prescribed, is three years.[666] Loubser and Reid point out that under the Prescription Act the prescription period that would be applicable to the "debt" in terms of section 61 is therefore three years, which is similar to the period prescribed by section 61(4)(d). They therefore conclude that in respect of the applicable time period, there is no inconsistency between section 61(4)(d) and the Prescription Act. Accordingly one can agree with their submission that when considering the nature and effect of the time period prescribed by section 61(4)(d) in respect of "liability" under section 61, courts can take into account case law pertaining to a "debt" under the Prescription Act.

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[663] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-12.
[664] S 61(6)(b) of the CPA.
[665] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-13.
[666] S 11(d) of the Prescription Act.

2.2.5.4 Results of application of section 61(4)(d)(i) and (iv)

Section 61(4)(d)(i) provides that liability in terms of section 61 does not arise if the claim for damages is brought more than three years after the "death or injury" of a natural person harmed by a defective product. Loubser and Reid ask whether this provision constitutes a "condition" relating to the running of prescription which is inconsistent with the Prescription Act? Notably the Prescription Act provides that prescription begins to run as soon as the debt is "due."[667] Loubser and Reid point out that upon the occurrence of the death of a breadwinner, harm occurs to dependents, and, provided the other elements of the cause of action are in place, a debt to pay damages becomes "due" when death occurs.[668] Likewise, upon the occurrence of injury, harm occurs to the person injured, and, provided the other elements of the cause of action are in place, a debt to pay damages becomes "due" at the time that the injury is sustained. They remark that it may not always be a simple matter to determine when "injury" occurs, particularly in the case of latent diseases,[669] but point out that such consideration is a problematic issue in the application of the time periods under both section 61(4)(d)(i) as well as the Prescription Act. Where the liability or "debt" relates to death or injury, section 61(4)(d)(i) and the Prescription Act will therefore produce the same results. Thus, when interpreting section 61(4)(d)(i) courts should take into account case law dealing with the beginning of prescription under the Prescription Act where the "debt" relates to death or injury.[670]

Section 61(4)(d)(iv) provides further that liability in terms of section 61 does not arise if the claim for damages is brought more than three years after the "latest date on which a person suffered any economic loss contemplated in subsection (5)*(d)*." According to Loubser and Reid this is a puzzling provision and it is difficult to gauge what it intends to achieve. They point out that problems with prescription often arise where there are a series of occurrences of harm over a period of time. If the event or act causing the harm is regarded as a single cause of action, the "once-and-for-all rule" applies, entailing that all the occurrences of harm are treated as constituting a single debt, comprising not only all the harm that has already occurred but also prospective future harm. The prescription period in respect of this single debt begins

[667] S 12(1) of the Prescription Act.
[668] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839C-G.
[669] See generally Loubser and Reid (2012) 140.
[670] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-14.

to run as soon as some harm has occurred. This is the position whatever the nature of the harm in question. They point out that the position is different, however, if the event or act causing the harm is regarded as a continuing wrong causing continuing harm, in which case multiple causes of action and multiple debts arise, each subject to its own prescription period.[671]

Loubser and Reid therefore are of the view that the provision in section 61(4)(d)(iv) appears to be aimed at creating an exception to the "once-and-for-all rule" where "economic loss" is involved as the three year period provided for by section 61(4)(d)(iv) begins to run not when the first loss occurs, but when the last loss occurs. They state that this seems to run contrary to the basic policy objective of prescription, which is to create legal certainty and finality in the relationship between creditor and debtor with the emphasis on the protection of the debtor against a state claim.[672] In their opinion this objective is fundamentally undermined if the creditor can allow its economic loss to run up, subject to the rules on mitigation, knowing that it has another three years after the last loss occurred to bring a claim. Loubser and Reid therefore conclude that this rule is *inconsistent* with the provisions of the Prescription Act; and they state that it is unclear what the underlying policy objective is and why it is made applicable to economic loss only.[673]

2.2.5.5 The knowledge requirement under section 61(4)(d)(ii) and (iii)

Loubser and Reid pose the question whether knowledge of the existence of the material facts affects the running of the time period in terms of section 61(4)(d)(ii) and (iii) in the same way as it affects the running of a prescription period under the Prescription Act or whether these sub-paragraphs are inconsistent with the Prescription Act? Section 61(4)(d)(i) and (ii) refer respectively to "the earliest time at which a person had *knowledge* of the material facts about an illness" and "the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property." It has been pointed out in Chapter 4, paragraph 4.5 above that in accordance with section 12 of the Prescription Act, a debt is not deemed due until after the creditor has knowledge of

[671] See generally *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A); and Loubser and Reid (2012) 92-96.
[672] See generally Loubser and Reid (2012) 141.
[673] *Ibid*.

the identity of the debtor and the facts from which the debt arises. However, insofar as the CPA is concerned, Loubser and Reid indicate that sections 61(4)(d)(ii) and (iii) deal *selectively* with aspects of knowledge relating to "illness" and "loss or damage to…property", whereas the Prescription Act deals *generally* with knowledge relating to a "debt." Sections 61(4)(d)(ii) and (iii) refer to knowledge of "material facts" relating to illness and loss of or damage to property, whereas the Prescription Act refers to knowledge of "the existence of the debt" and knowledge of the "identity of the debtor" and of "the facts from which the debt arises." Section 61(4)(d)(ii) and (iii), unlike the Prescription Act, does not deal with the situation where the debtor "willfully prevents" the creditor from obtaining knowledge of the existence of the debt, and also not with the situation where the creditor could have acquired knowledge by exercising reasonable care. However, Loubser and Reid remark that it seems that there is no inconsistency in principle between section 61(4)(d)(ii) and (iii) and the Prescription Act in the limited areas where there is an overlap, and, therefore, when interpreting section 61(4)(d)(ii) and (iii), they submit that the courts can apply the provisions on the knowledge requirement contained in section 12 of the Prescription Act and the relevant case law.[674]

2.2.5.6 Delay

Another question posed by Loubser and Reid is whether the running of the time period under section 61(4)(d) is delayed in the same way as a prescription period under the Prescription Act? The Prescription Act provides that where certain circumstances or "impediments" exist, such as minority of the creditor[675] or marriage between the creditor and debtor,[676] the completion of prescription is delayed. According to Loubser and Reid it is highly unlikely that the legislature intended to abolish the principles concerning delay of the completion of a prescription period in respect of claims under section 61 of the CPA. If that were the intention, they indicate that it would have the result, for example, that the three year time period provided for in section 61(4)(d) would also run against a minor who has been injured by a defective product. Loubser and Reid conclude, therefore, that the legislature simply failed to deal with this aspect, and that there is no inconsistency between

[674] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-14.
[675] S 13(1)(a).
[676] S 13(1)(c).

section 61(4)(d) and the Prescription Act regarding delay of prescription. Thus the courts can apply section 13 of the Prescription Act and the relevant case law to claims in terms of section 61 of the CPA.[677]

2.2.5.7 Interruption

Loubser and Reid further ask what the claimant must do to prevent expiry of the time period in terms of section 61(4)(d) and whether the running of this time period is interrupted in the same way as a prescription period under the Prescription Act? They indicate that in terms of section 61(4)(d) no liability under section 61 "arises" if the claim is "brought" more than three years after the occurrence of certain events or the acquisition of certain knowledge. As pointed out in Chapter 4, paragraph 4.5 above, the running of prescription in terms of the Prescription Act, is interrupted by service on the debtor of "any process whereby the creditor claims payment of the debt"[678] or by an express or tacit acknowledgement of liability.[679]

Loubser and Reid consequently argue that if section 61(4)(d) means that a claim can be "brought" extra-judicially, by any or some form of demand for payment, there is an inconsistency between section 61(4)(d) and the Prescription Act, which means that the provisions of sections 14 and 15 of the Prescription Act, indicated above, relating to interruption of prescription will not apply. However, they state that it is likely that the legislature intended not to deviate from the clear and established position under the Prescription Act, so that, to prevent expiry of the time period in terms of section 61(4)(d), a claim must be "brought" by service on the debtor of "any process whereby the creditor claims payment of the debt." They therefore suggest that the courts should apply sections 14 and 15 of the Prescription Act and the relevant case law pertaining to the aforesaid sections also to claims under section 61 of the CPA, with the result that expiry of the time period in terms of section 61(4)(d) would be prevented by either service of judicial process on, or acknowledgement of liability by, the supplier responsible for the relevant harm.

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[677] Loubser and Reid in Naudé and Eiselen (2014 *et seq*) 61-15.
[678] S 15(1).
[679] S 14(1).

2.2.5.8 Effect of expiry of the time period

Yet another question posed by Loubser and Reid relates to the effect of "expiry" of the time period provided for by section 61(4)(d) which states that liability under section 61 "does not arise" if the claim is brought more than three years after the occurrence of certain events or the acquisition of certain knowledge. In terms of the Prescription Act the "expiry" or "lapse" of the applicable prescription period has the effect that "a debt shall be extinguished."[680] However, after prescription has taken effect payment can still discharge the debt.[681] Loubser and Reid point out that the position under the Prescription Act is thus that the debtor acquires a complete defence to refuse performance after expiry of the prescription period, so that the debt, although not totally extinguished, becomes unenforceable.[682]

They point out that instead of using the terminology of the Prescription Act, section 61(4)(d) provides that liability under section 61 "does not arise" if the "claim" is not "brought" within three years. They further point out that the word "arise" ordinarily means "to originate from" or "to come into being." Loubser and Reid therefore ask whether section 61(4)(d) means that a claim under section 61 must be taken never to have "come into being" if it is not duly brought within three years? They state that this would not make sense, because such a claim exists and can be enforced prior to the expiry of the three-year period. Hence they remark that it is likely that the legislature intended that the liability under section 61 will become unenforceable upon expiry of the three year time period. Accordingly they conclude that section 61(4)(d), although misleading at first glance, confers a complete defence on the debtor to refuse payment, which is consistent with the position in terms of the Prescription Act.

Loubser and Reid further comment that it is not clear whether in terms of section 61(4)(d) a court can of its own accord regard the liability under section 61 as unenforceable, or whether the expiry of the time period must be invoked by the debtor, as is the position under the Prescription Act.[683] They remark that either position is consistent with the wording of section 61(4)(d), but that the courts might

[680] S 10(1) of the Prescription Act.
[681] S 10(3) of the Prescription Act.
[682] See generally Loubser and Reid (2012) 143-144.
[683] S 17(1).

opt for the interpretation that affords the widest protection to the consumer, which is that a court cannot of its own accord take note of the expiry of the time period provided for under section 61(4)(d).[684] This interpretation means that expiry of the time period in terms of section 61(4)(d) must be invoked by the debtor, in a document filed of record in the proceedings, which is the prescribed procedure to invoke prescription.[685] According to Loubser and Reid this would also imply that payment by the debtor after expiry of the time period in terms of section 61(4)(d) can still discharge the debt.[686]

2.2.5.9 Miscellaneous aspects relating to section 61(4)(d)

Loubser and Reid also ask whether the right to invoke the time period set by section 61(4)(d) may be waived? They indicate that section 61(4)(d) is silent on the question of waiver, which involves questions of public policy. They further argue that courts will be reluctant to give effect to a term contained in a standard form contract whereby a debtor in advance renounces the right to rely on the time period prescribed by section 61(4)(d).[687] Such an anticipatory waiver would in any event have to conform to the requirements of section 49 of the CPA.[688] However they opine that if the parties specifically negotiate such a waiver after the liability under section 61 has arisen, on the basis of particular circumstances or commercial considerations, the waiver could be valid.[689]

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[684] See s 2(1) of the CPA, which requires the courts to interpret the Act in line with its purposes as set out in s 3.
[685] S 17(2).
[686] As is the position under s 10(3) of the Prescription Act.
[687] *Ryland v Edros* 1997 (2) SA 690 (C) at 713H-I. See also *Friederich Kling GmbH v Continental Jewellery Manufacturers, Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C)*;* and *ABSA Bpk h/a Bankfin v Louw* 1997 (3) SA 1085 (C) at 1090A-D.
[688] S 49 is entitled "Notice required for specific terms and conditions." It provides that a consumer must not be required to waive rights, assume an obligation, or waive the supplier's liability on terms that are unfair, unreasonable or unjust. However, a consumer can assume a risk or liability, limit or indemnify the supplier's liability or acknowledge a fact on fair, reasonable or just terms but only when notice is given to the consumer. Per sub-s (2), should there be an element of risk, and the risk is unusual, the consumer could not reasonably be expected to be aware of the risk (or an ordinarily alert consumer could not expect to be aware of the risk), or the risk could result in serious injury or death, the supplier has a duty of drawing this risk, nature and possible effect to the attention of the consumer and the consumer must assent by signing or initialling the provision/notice, or must acknowledge the provision/notice. In terms of sub-ss (3)-(4), the notice given (per sub-ss 49(1) or (2)) must be in plain and understandable language as per s 22, and drawn to the attention of the consumer, which means it must be in a manner that will attract the attention of an ordinarily alert consumer prior to entering into the transaction or prior to paying a consideration for the transaction (whichever is the earliest) – see Tennant (2011).
[689] See generally Loubser and Reid (2012) chp 10.

Loubser and Reid further ask how the three year period provided for by section 61(4)(d) must be calculated? They point out that the generally accepted method of calculating time for the purposes of prescription is the civilian method, which entails that the first day of the period is included and the last day is excluded; the last day being regarded as completed at its inception.[690]

Insofar as the onus of proof is concerned, Loubser and Reid indicate that the following rules on the incidence of the onus of proof where prescription is raised, are likely to be applied: the onus is on the supplier who invokes prescription to allege and prove the facts that indicate that prescription has taken effect.[691] This includes proof of when the debt became due, to determine the date of the beginning of the prescription period;[692] and proof of knowledge or deemed knowledge on the part of the creditor of the facts from which the debt arises, if the claimant alleges lack of such knowledge.[693] The onus is on the claimant to allege and prove that prescription was interrupted by acknowledgement of liability by the debtor,[694] or by service of a legal process on the debtor,[695] or that the completion of prescription was delayed under the circumstances set out in section 13 of the Prescription Act.[696]

2.2.5.10 Concluding remarks on the prescription defence in section 61(4)(d)

Loubser and Reid remark that section 61(4)(d) creates a number of interpretation problems which could have been avoided if the section had simply stated that the liability under section 61 constitutes a “debt” for the purposes of the Prescription Act. It would then have been clear that, unless stated otherwise, the effect of the passage of time on liability under section 61 is governed by the established principles of the Prescription Act. They therefore suggest that section 61(4)(d) be interpreted to reflect this position.

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[690] See Loubser and Reid (20120) 144-145.
[691] *Gericke v Sack* 1978 (1) SA 821 (A) at 827 and 828C.
[692] *Ibid* at 827H-828A; and *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 256G-H.
[693] *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216A-B.
[694] S 14; and see *Pentz v Government of the RSA* 1983 (3) SA 584 (A); and *Benson v Walters* 1984 (1) SA 73 (A).
[695] *Du Bruyn v Joubert* 1982 (4) SA 691 (W) at 695-696A.
[696] *Regering van die RSA v SA Eagle Versekeringsmpy Bpk* 1985 (2) SA 42 (O) at 47F-G.

3. The impact of section 2(10): retention of consumer's common law rights

It may further be questioned whether the statutory defences introduced by section 61(4) mean that where a product liability claim is instituted in terms of the CPA it means that the supplier no longer has the common law defences to his avail. As indicated, section 2(10) preserves the consumer's common law rights but not the supplier's common law rights (such as the right to raise a defence) where rights under the CPA are infringed. However, as pointed out above in this chapter, the common law defences to product liability have the common feature that they all pertain to the various elements of product liability, namely defectiveness, wrongfulness, negligence, causation and harm. It is submitted that the list of statutory defences does not prevent the supplier against whom a product liability claim under the CPA is instituted from still raising the defence that one or more of the elements to sustain a claim for product liability *ex delicto* have not been met. Clearly, given that the CPA has introduced a strict product liability regime where section 61(1) explicitly states that proof of negligence is no longer a requirement, it has the effect that absence of negligence *per se* is the only defence not available to the supply chain. Therefore, despite section 2(10) preventing a supplier from utilising his common law defences, section 61 of the CPA still requires proof of the remaining delictual elements and it is submitted that a supplier should be able to avail himself to the defences such as that that the product was not defective, absence of a causal link, or that the plaintiff did not suffer any damage as no harm was occasioned by the defective product.

4. Conclusion

The CPA has balanced the introduction of the purported strict product liability regime that it has introduced by also providing some new statutory defences for the supply chain. On closer inspection it appears that these defences are not all as "new" as they appear at first glance. The statutory defence in section 61(4)(a), for example, is basically a defence that the product was not defective, which is of course also a familiar defence under the common law. Insofar as the defence relating to compliance with public regulation is concerned, one can comprehend the need for

such a defence, given the fact that various other pieces of legislation exist with which compliance is required and that such compliance may impact on whether particular goods can be said to be defective. With regard to the “prescription defence” as stated in section 61(4)(d), it arguably provides similar protection as the prescription defence available in relation to a “debt” as catered for by the Prescription Act. Insofar as prescription is concerned, it appears that the prescription defence provided for in section 61(4)(d) will be regarded as a *lex specialis* and accordingly section 61(4)(d) will henceforth govern prescription of product liability claims. On a practical level however it appears that section 61(4)(d) will largely have the same effect as prescription in terms of the Prescription Act and one may accordingly question the need for this defence.

However it appears that the legislature’s intention with the statutory defences in section 61(4) was not only to provide defences to the supply chain against a product liability claim by a consumer, but also to provide defences within the supply chain. Further, these defences are available to suppliers in addition to the general defences under the common law that pertain to the elements of a product liability claim such as lack of defectiveness, causation or harm. These statutory defences present a closed list which does not include a development risk defence for manufacturers although it does provide some defence for distributors and retailers, apparently modelled on the development risk defence but eventually not truly resembling the development risk defence in the EU Product Liability Directive as discussed in more detail hereinafter. Whether the decision not to afford a development risk defence to manufacturers was wise and whether there are any other statutory defences that ought to be added to the defences listed in section 61(4) can however only be appropriately answered once regard has been had to developments in this regard in the EU and Australia as discussed in Chapters 6 and 7 respectively.

Part C: Comparative jurisdictions

Chapter 6: Product liability in the European Union

Chapter 6 provides an overview of the product liability regime in the EU. In line with the focus of this thesis it more specifically discusses and critically evaluates the concept of "defect" and the statutory defences available to the supply chain in terms of the Directive on Product Liability, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the Product Liability Directive).

1. Introduction

On 25 March 1957 the European Economic Community (EC) was formed in accordance with the Treaty of Rome[697] with a general purpose to ensure harmony and establish unity between European Member States.[698] It created an independent and authoritative body of law which Member States of the continent of Europe could abide by, and it has been able to exert a level of legal control over such Member States through the creation of a legal system for them to function within.[699] The 1992 Maastricht Treaty subsequently constituted the European Union.[700]

Prior to the introduction of the EU Product Liability Directive, consumer protection was a "Cinderella policy of the European Communities."[701] The EU *inter alia* lacked safeguards on the quality and safety of products in order to avoid defective goods reaching the market.[702] There was also a clear need for consolidated consumer protection in the EU as the consumer protection measures that did exist at the time differed considerably from one Member State to another resulting in suppliers being subject to differing degrees of liability depending on which Member State they traded in. This fragmentation of consumer protection laws resulted in the distortion of

[697] Treaty establishing EEC (1957) 298 *U.N.T.S.* 11.
[698] Joerges (2004) *DJCIL* 159.
[699] Joerges (2004) *DJCIL* 155.
[700] Maastricht Treaty on European Union (1992).
[701] Murray (1992) *ICCLR* 426.
[702] Murray (1992) *ICCLR* 427.

competition and restriction on the movement of goods within the common EU market.[703]

It was however not until the occurrence of the "Thalidomide disaster" that the move towards greater consumer protection in the EU gained serious momentum. Thalidomide was a pharmaceutical drug patented by Grunenthal in Germany in 1954, initially as an antidote to nerve gas poisoning. It was however launched in October 1957 as a sedative, pain killer and an anti-emetic suitable for treating morning sickness in pregnancy. The following year it was licensed in the UK and in much of the rest of the world, with the exception of the USA who insisted on seeing more pre-clinical studies on the effects of the drug.[704] In the pre-clinical testing of the drug in Germany no tests had been performed on pregnant animals to check the effect of the drug on the foetus. Such testing was not usually undertaken as the belief was held *at the time* that drugs would not cross the placenta and harm the foetus. However, between 1957 and 1961, when the drug was withdrawn, more than 10 000 children in 46 countries were born with congenital deformities, most in the skeletal system, of which *phocomelia*, the absence of limbs, was the most common. The immediate consequences of the thalidomide tragedy were that testing all drugs for teratogenicity (possible ill effects on the foetus in pregnant animals) became universal. A further consequence was that the drug licensing procedures became much more rigorous, much lengthier and marginally much more expensive. Lachmann remarks that an unintended consequence of these changes was that drugs have become "ruinously expensive" indicating that it "can now take more than 10 years and cost more than a billion dollars to bring a new drug to market."[705]

[703] Ueffiing (2013) *MRP* 375

[704] Lachmann (2012) *JM* 1197; and Vargesson (2015) 140 point out that Frances Kelsey, an FDA physician responsible for approving drug licences, was concerned about the safety of thalidomide in relation both to peripheral neuropathy in patients taking the drug but also about what its effects were during pregnancy. Kelsey was subsequently awarded the President's Award for Distinguished Civilian Service by President Kennedy for averting a thalidomide disaster in the US.

[705] Lachmann (2012) *JM* 1197 remarks that although the Thalidomide disaster was a great tragedy that affected large numbers of persons it "falls far short of the lethal consequences of the withdrawal of DDT as a pesticide in 1972 which, it is estimated, has caused several million deaths from malaria." He points out that while thalidomide was withdrawn in 1961, it has subsequently returned to the market for quite different indications. It has been proved to be beneficial in treating *erythema nodosum leprosum*, a form of cutaneous leprosy and also in treating blood cancer and multiple myeloma. See also Moro and Invernizzi (2017) 1.

The Thalidomide disaster literally shocked the EU into action. The European Commission[706] was pressured by the EU community to introduce legislative reform that would protect consumers across Member States against harm arising from unsafe products.[707] Ueffing remarks that during the 1970s Europe thus saw the rise of the "consumerism political agenda" followed by attempts by the Commission to "give Europe a human face." Accordingly the promotion of equal consumer protection across the EU became an important goal through which the Commission "sought to demonstrate that the common market was not only there to facilitate trade and serve businesses but also to aid consumers."[708] Several European organisations embarked on developing proposals that would coordinate European product liability laws. In 1972 the Hague Convention addressed the conflict of laws in product liability among the EU Member States.[709] Subsequently in 1974 the Committee on Legal Corporations (the "CCJ") of the Council of Europe proposed a Convention on Product Liability (The Strasbourg Convention) imposing strict liability on manufacturers in personal injury and death cases.[710] Notably the preamble of the 1977 Strasbourg Convention explicitly stated the necessity of protecting consumers.[711]

As pointed out by Ueffing, prior to July 1985, the product liability regimes of the various EU Member States ranged *inter alia* from traditional fault-based liability in the United Kingdom to fault-based liability with a reversed burden of proof in Germany and strict and unlimited liability with an irrebuttable presumption of fault in France. The European Commission argued that these different liability rules and safety standards would unevenly increase production costs of products in the various Member States and would also impose different marketing conditions, and therefore inevitably restrict the free movement of goods and distort the internal market.[712] The Commission thus sought to approximate the existing laws on the basis of Article 100

[706] The European Commission is an institution within the EU that proposes legislation, implements decisions, upholds EU treaties and manages the daily business of the EU. See EU website.
[707] Stapleton (2000) *WLJ* 367-368; and Loubser and Reid (2012) 9.
[708] Ueffing (2013) *MRP* 373.
[709] Ueffing (2013) *MRP* 375.
[710] See EC (CCJ), TS No 91, Strasbourg 27.I.1977. See also Ueffing (2013) *MRP* 375
[711] HC (1972); and Albanese and Del Luca (1987) *PSILR* 193.
[712] Ueffing (2013) *MRP* 375.

EEC (now Article 115 Treaty on the Functioning of the European Union).[713] Ueffing points out that the process of "Europeanisation" of product liability has therefore been "a planned transition rather than the result of bottom-up pressure, spurred by internal markets as well as political and social concerns."[714]

Notably, Howells and Mildred remark that "*The American experience certainly influenced European legal thinking*. It was the thalidomide scandal, however, which gave the reform movement impetus and public support."[715] Ueffing further comments that undoubtedly the thalidomide disaster had been an important historical trigger, captivating European attention on cases concerning unforeseeable generic product defects. However he states that it was the German reaction towards the thalidomide disaster that most likely gave the EU product liability initiatives the last push because, while most Member States reverted to private sectoral initiatives, Germany passed a statute imposing strict liability for injuries caused by defective pharmaceutical drugs.[716]

A preliminary draft EU Directive was subsequently presented in August 1974, modified in 1975, and officially proposed on 9 September 1976, followed by another amendment in 1979.[717] The European Commission submitted the proposal to the European Parliament and the Economic and Social Committee (ECOSOC) where it was met with harsh criticism as being too consumer-friendly on account of imposing strict liability whenever a product failed to provide the safety a person was entitled to expect.[718] The EU Parliament and ECOSOC held the view that any future Directive had to provide for exculpatory provisions in favour of producers because they contended that the industry should not be liable for defects in products that could not have been manufactured to a safer standard at the time that they were put into

[713] *Ibid*. This Article provides that the Council, acting unanimously and after consulting the European Parliament and the Economic and Social Committee, may request Directives for the approximation of laws, regulations and the administrative provisions of the Member State where divergence between them significantly affect the establishment or functioning of the internal market.
[714] Ueffing (2013) *MRP* 375.
[715] Howells and Mildred (1998) *TLR* 992.
[716] Bernstein (1992) *JPL* 208; and Ueffing (2013) *MRP* 375. See also the German Medicinal Act (1961) as amended.
[717] Ueffing (2013) *MRP* 376.
[718] *Ibid*.

circulation.[719] Both Parliament as well as the Council urged for the inclusion of a "development risk defence"[720] that would limit the liability of producers to defects which were foreseeable, based on the scientific knowledge available at the time that the product was introduced to the market and that would provide substantial protection especially to new and innovative firms.[721] Notably, Howells and Mildred remark in this regard that "fear remained that introducing too strict a regime might lead to an *American-style product liability crisis*."[722] The EU Parliament further urged that the producer should be able to allege contributory negligence.[723] More generally, ECOSOC was concerned about the Directive's treatment of financial ceilings, opposing any form of limitation that might leave victims of major disasters unprotected. The Commission however remained sceptical towards amendments that favoured producers.[724]

Throughout the 1980's, finalisation of the proposed Product Liability Directive seemed doubtful given that earlier debate had not reached a resolution as many national governments demanded amendments to the proposed Directive in order to preserve their sovereignty. The result was that the Commission eventually struck a compromise in this regard by an array of options that were left to Member States, *inter alia*, relating to aspects such as choosing whether or not to adopt the development risk defence and limitations on the total liability of producers.[725]

After nearly ten years of deliberation the EU Product Liability Directive, which has been hailed as "one of the most valuable occurrences in the history of product liability law in the European community",[726] was eventually introduced on 25 July

[719] *Ibid*.
[720] See par 5.1.5 below.
[721] See the European Council, Council Resolution embodying the Opinion on the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products - OJ No C 114, 7.5 (1979) as updated by COM/2018/246. ECOSOC's position was torn as some members felt that not including a development risk defence would seriously inhibit innovation and place especially small and medium sized companies and industries in a less competitive position as a result of increased transaction costs created by the need to insure themselves against unforeseeable risks.
[722] Howells and Mildred (1998) *TLR* 993.
[723] Ueffing (2013) *MRP* 376.
[724] *Ibid*.
[725] Ueffing (2013) *MRP* 381.
[726] Delaney and VDZ (2001) *NIST* 1.

1985.[727] The introduction of a general strict product liability regime in the EU was justified in the preamble of the Directive which provides that

> liability without fault on the part of the producer is the sole means of adequately solving the problem peculiar to our age of increasing technicality of a fair apportionment of risks inherent in modern technological production.[728]

Important to bear in mind from an interpretation perspective, is that the result of the tug between the Commission and the EU Parliament and Council, was that the Directive has two objectives, namely to ensure a high level of consumer protection and, on a more economic level, to secure the free movement of goods within the EU consumer market.[729] These dual objectives are *inter alia* recorded in the Green Paper on Product Liability subsequently issued in 1999 which states that the liability laid down by the Product Liability Directive "is a coherent framework which takes account of the various interests involved:

- on the one hand, those of individuals in coping with the risks to their health and physical and material wellbeing from a modern society marked by a high degree of technical complexity;
- on the other, those of producers in avoiding distortions of competition resulting from divergent rules on liability, and in reducing the impact of those differences on innovation, competitiveness and job creation."[730]

However, Whittaker makes the following significant remark: "It is true that the preamble to the Directive cited consumer protection frequently as a justification for its enactment and for some of its provisions, but it coupled this with the economic concerns of the internal market (that is, the establishment of a level playing field for competition and the removal of disincentives to cross-border trade). These economic concerns were primary in the sense that they were the ones that justified the EC Council's competence to enact the Directive, a competence that later had a direct

[727] Stapleton (2000) *WLJ* 367. Ueffing (2013) *MRP* remarks at 373 that "in recent years the EU Product Liability Directive has become something of a global smash hit, providing not only a template for EU Member States, but also an international blueprint used by countries worldwide including South Africa, Australia, Brazil and countries in the ASIA Pacific Region when reforming their product liability regimes."
[728] See the preamble to the Directive, Recital 18.
[729] Hunter and Bergkamp (2000) *PLSR* 403.
[730] Green Paper by EC (1999).

influence on the European court's decisions in 2002 that the Directive establishes within its ambit a 'complete harmonisation' rather than merely a minimum standard. The upshot of this decision was that *the consumer market came second* to the perceived requirements of the internal market, as it required Member States to cut down their legislative implementation of the Directive so as not to protect consumers beyond the terms required by it."[731]

Save for a few exceptions, the Directive in most respects imposes maximum harmonisation[732] and imposes an instruction[733] that all Member States have to incorporate the strict liability provisions of the Directive into their national legislation.[734] Accordingly, Member States must act in accordance with the Directive, and application of their national laws "may not impair the effectiveness of the Directive."[735]

It should further be noted that the EU Product Liability Directive although a separate Directive, does not operate in isolation but forms part of a comprehensive and sophisticated framework aimed at protecting consumers against harm caused by defective products.[736] This framework consists of the Product Liability Directive and two prominent EU Directives designed to protect the health and safety of consumers,

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[731] Whittaker (2010) 8-9. Own emphasis. The cases he refers to are *Commission v France* Case C-52/00 of 25 April 2002; *Commission v Greece* Case C-154/00 of 25 April 2002; and *Gonzales Sanchez v Medicina Asturiana SA* Case C-183/00 of 25 April 2002.

[732] See Verheyen (2018) *ERPL* 121 indicates that the EU Product Liability Directive is a "maximally harmonising directive."However maximum harmonisation does not prevent additional protection measures if they are outside the field harmonised by the Directive. Therefore, it remains possible within the EU member states to apply national "common law" principles in addition to the strict liability regime imposed by the Directive, the only requirement being that these rules do not create strict liability and only allow for the victim to hold the producer liable in case of negligence.

[733] Article 19 and 20. The Directive is binding by virtue of the Treaty of Rome (Treaty establishing EEC (1957) *U.N.T.S* 11). See Stapleton (2000) *WLJ* 370 and 373.

[734] Freeman, Dobson and Roberts (2018) 4. However, Hodges (2000) *EL* 33 states that despite the Member States being required to implement the Directive into their national laws by March 1988, most countries were late, with France as late as 1998.

[735] *Henning Veedfald v Arhus Amtskommune* (2001) C-203/99 par 27.

[736] See European Commission Staff Working Document (May 2018) where it is pointed out at 8 (fn12) that "[D]istinction is to be made between product 'liability' and product 'safety'. Directive 85/374/EEC seeks to compensate ex post for damages suffered by consumers due to a defective product. However, there are other pieces of European Union legislation that prevent damages ex ante, by ensuring that products placed on the EU market are safe (for instance, The General Product Safety Directive or other sector specific legislation such as the directives related to machinery, electrical equipment, radio equipment, medical devices, cosmetics, pharmaceutical products or toys.) To the extent that safety legislation ensures the safety of products on the market, it will reduce the need for consumers to seek for compensation under product liability rules." See also 44-47.

namely the European General Product Safety Directive,[737] and the EU Consumer Sales and Guarantees Directive.[738] The European Commission thus refers to the EU Product Liability Directive as a "safety net within a broader legislative framework to protect consumers."[739] Although a discussion of the General Product Safety Directive (which also contains recall provisions for unsafe products) and the Consumer Sales and Guarantees Directive is beyond the scope of this thesis, the point to be made is that these other two Directives in conjunction with the Product Liability Directive, contribute to filtering out defective products from reaching the EU consumer market hence they reduce the opportunity for defective products to cause harm. The EU has also numerous pieces of legislation relating *inter alia* to the safety of machinery, electrical equipment, radios, medical devices, pharmaceutical products and toys.[740] It has further set up the RAPEX (Rapid Alert System for Non-food Dangerous Consumer Products) which allow EU market surveillance authorities and the European Commission to efficiently share information regarding dangerous products and to alert consumers to these dangers and restrict such products from entering the common market or preventing their use.[741] Thus the EU has erected a comprehensive and sophisticated legislative and administrative framework that acts as a barrier to minimise the chances of defective products reaching the market and inflicting harm.

[737] GPSD 2001/95/EC. See also Sterret (2015) *MSILR* 886.
[738] Product Warranty Directive 1999/44/EC.
[739] European Commission Staff Working Document (May 2018), accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (2018) at 35-36.
[740] For example Directive 2014/35/EU of the European Parliament and the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits; Directive 2014/53/EU of the Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment; Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices; Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law and Directive 2001/83/EC of the European Parliament and of the Council on the Community Code relating to medicinal products for human use.
[741] For more information on Ene (2011) *Rapex System* see the EC's weekly report website. The EC publishes a weekly overview of all the alerts reported by natural authorities, which include information on the dangerous products found, the risks identified and the measures taken in the notifying country in order to prevent or restrict the marketing and use of those products.

2. The 1985 EU Product Liability Directive

As a point of departure, before providing an overview of the contents of the Product Liability Directive, it is apt to note the following observation by Stapleton: "Yet the US products liability experience – or more correctly how that experience was perceived in Europe - did have a real influence on Europe's moves towards its own rule in the Directive. During the early to mid-seventies when European governments were beginning to lock themselves into the rhetoric of this 'necessary' law reform, the popular perception of the U.S rule encouraged the view that a reform focused on products was workable, acceptable and broadly beneficial."[742]

Article 1 of the EU Product Liability Directive provides that "the producer" shall be liable for damage caused by a "defect" in his product. A "producer" is defined as a manufacturer of a component part or finished product, or person who makes raw materials, and a person who presents itself as such by attaching its name, trade mark or other identifiable feature on the product.[743] Art 3(2) of the Directive further provides that, without prejudice to the liability of the producer, "any person who imports into the community a product for sale, hire, lease or any form of distribution in the course of its business shall be deemed to be a producer within the meaning of the Directive and shall be responsible in accordance with the Product Liability Directive as a producer.

Notably, Article 1 of the Directive is qualified by the condition that the producer or importer of the product must be identifiable prior to being held strictly liable.[744] Where the producer of a product cannot be identified, each supplier of the product must be treated as the producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.[745] This also applies to an imported product where the product does not

[742] Stapleton (1999) *TLJ* 45.
[743] Recital 4 read with Art 3(1).
[744] See Hodges (2002) *ELR* 759 who states that "the liability should be channelled to him [the producer], rather than being transferred to a supplier" and a supplier's liability should come into play only when "no-one who qualifies as a producer can be identified."
[745] Art 3(3) of the Directive. Green Paper by EC (1999) 4 points out that the victim is obliged to formally notify the supplier concerned so that he can within a reasonable time provide details of the producer or previous supplier. Note should however be taken of the decision in *Commission v France*

indicate the identity of the importer - even if the name of the producer is indicated.[746] Therefore an identifiable producer or importer will, firstly, be held liable failing which other suppliers in the supply chain are held jointly and severally liable.[747] In the case that more than one person in the supply chain is held jointly and severally liable for the same damage, the consumer may choose to claim full compensation from any of them "without prejudice to the provisions of national law concerning the rights of contribution or recourse."[748]

Notably the EU Product Liability Directive does not define the term "consumer" or specifically states that only a consumer can institute a product liability claim under the Directive. Instead it provides that a "person" injured by a defective product may claim compensation under the Directive. Although the preamble to the Directive refers in numerous recitals to "the protection of the consumer" the reference to "the injured person" in the Articles of the Directive has the result that "the remedy afforded by the EU Directive appears to be available to any person harmed by a defective product, whether that person is the purchaser of the product, a bystander or a defendant who suffers loss as a result of harm caused by a defective product to another person."[749]

The Directive does not apply to services but only to products.[750] For purposes of the Directive, "product" was initially defined to mean "all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable", thus including component parts of a finished product.[751] "Primary agricultural products" were defined as "the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial

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Case C 52-00 where it was held that a supplier will be free from liability under the Product Liability Directive where such supplier identifies the producer or upstream supplier and that Member States cannot restrict this "defence" through any provisions of domestic law.

[746] *Ibid*.

[747] Hodges (2002) *ELR* 758. As pointed out by Albanese and Del Duca (1987) *PSILR* 193 it was realised that if only the "real producer" is found liable, consumer protection may sometimes be meaningless.

[748] Recitals 4 and 5; and Art 5.

[749] Kriek (2017) *Thesis* 153.

[750] European Commission Staff Working Paper (May 2018) 51. However the Commission points out that the distinction between products and services are becoming increasingly blurred due to new technological developments.

[751] Art 2.

processing." "Product" also includes electricity.[752] However after the "Mad Cow"–disaster in the 1990s the definition of "product" was amended by discarding the exception relating to primary agricultural products.[753] Liability for nuclear injury or damage is excluded if covered by special rules of Member States.[754]

It is further required that the alleged defective product must have been "ordinarily intended"[755] and "used"[756] by the injured party for *private use or consumption*[757], as confirmed by the European Court of Justice (ECJ) in *Moteurs Leroy Somer v Dalkia France and Ace Europe,*[758] where it was stated that

> an item of property intended for professional use and employed for that purpose, is not covered by the term 'damage' for the purposes of Directive 85/374 and, consequently, cannot give rise to liability of the producer under Article 1 of that directive.[759]

It should further be noted that in *Henning Veedfald v Arhus Amtskommune,*[760] the ECJ held that a product used in the provision of a service was considered a "product" and fell within the boundaries of the Directive.[761]

In line with the stated intention of the Directive to introduce a strict product liability regime on EU-level, Article 4 of the Directive provides that for purposes of founding a product liability claim, the injured person shall be required to prove "the damage, the

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[752] *Ibid*.
[753] Green Paper by EC (1999) par 1.1[2]. Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC. Art 1 of the 1999 Directive amends the Product Liability Directive by replacing the original Art 2 with the following Article: "For purposes of this Directive, 'product' means all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity."
[754] The preamble, Recital 14.
[755] Art 9(b)(i).
[756] Art 9(b)(ii).
[757] However it should be noted that the rule relating to the goods being ordinarily intended for private use or consumption is only relevant to determine the extent of the damages to be compensated but does not limit the scope of application of the EU Product Liability Directive only to defective goods used for private purposes.
[758] (2009) ECR I-04733 at pars 2 and 9-11. This case was heard in France in 2006 prior to the ECJ being approached for a preliminary ruling. In this matter damage was caused to a hospital generator due to the alternator overheating. The alternator was manufactured and put into circulation by Leroy Somer. Dalkia France installed the product whereas Ace Europe was the insurer. Upon Dalkia France and Ace Eurpose compensating the hospital, they reclaimed the money from Leroy Somer.
[759] (2009) ECR 1-04733 at pars 17 and 28.
[760] (2001) C-203/99 at pars 17-18.
[761] (2001) C-203/99 at par 12.

defect and the causal relationship between defect and damage."[762] The Directive thus does not require proof of negligence nor of wrongfulness. Castillo points out that the European Product Liability Directive proclaims strict liability directly and indirectly - it does so directly in the preface and indirectly in Article 4 which does not require the plaintiff to prove fault.[763]

A product is "defective" for purposes of the Directive when it does not provide "the safety which a person is entitled to expect, taking all circumstances into account", including:[764]

(a) the presentation of the product;
(b) the use to which it could reasonably be expected that the product would be put;
(c) the time when the product was put into circulation.

Article 6(2) further specifically provides that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Six statutory product liability specific-defences are available to a producer under the Product Liability Directive. These defences are set out in Article 7, which states that a producer shall not be liable if he proves:

(a) that he did not put the product into circulation;
(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or

[762] In *NW v Sanofi Pasteur MSD SNC* Case C-621/15 the ECJ examined the requirement in Art 4 of the Directive that requires a claimant to prove a causal link between his damages and the defect in a product. This matter concerned a hepatitis vaccine which the plaintiff alleged had caused his subsequent contraction of multiple sclerosis. The French courts had previously allowed proof of causation by way of evidentiary presumptions in similar types of matters where the plaintiff had no family history of the disease and the onset of the disease occurred soon after the vaccine was administered to the plaintiff. These presumptions thus enabled plaintiffs to establish causation even though there was a notable lack of scientific or medical evidence that hepatitis could actually cause multiple sclerosis. The ECJ held that national courts have a wide discretion to determine what evidence a plaintiff has to present to prove causation, subject only to ensuring that the evidential requirements do not have the effect of reversing the onus of proof under Art 4. Accordingly the ECJ held that the use of presumptions to establish causation was permissible under Art 4. See further Verheyen (2018) *ERPL* 123-126 for a discussion of this case.
[763] Castillo (2012) *RCD* 277.
[764] Art 6(1).

(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Article 7(e) requires specific mention as it contains the notorious development risk defence as discussed in more detail in paragraph 5.1.5 below.

Article 8(1) further provides that without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party. The liability of the producer may however be reduced or disallowed when, having regard to all the circumstances, such damage is caused both by a defect in the product *and by the fault of the injured person or any person for whom the injured person is responsible*. Thus it is possible for a producer to raise some form of *contributory negligence* against a plaintiff under a product liability case.[765]

The Directive allows compensation to be claimed for damage caused by death or personal injuries and for damage to, or destruction of any item of property, with a lower threshold of 500 ECU[766], provided that the item of property is of a type ordinarily intended for private use or consumption and that it was used by the injured person mainly for his own private use or consumption.[767] Furthermore, Member States may also award compensation for pain and suffering and other non-material

[765] Art 8(2). Own emphasis.
[766] ECU refers to “European Currency Unit”.
[767] Art 9(a) and (b).

damages where appropriate, as made effective in terms of their national law.[768] Thus the member states respective laws regarding economic loss damages are not affected by the Directive.[769]

The Product Liability Directive further requires Member States to provide in their domestic product liability legislation for a limitation (prescription) period of 3 years to apply to proceedings for recovery of damages under the Directive. Such limitation period begins to run on the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.[770] It is however specifically stated that the laws of Member States regulating the suspension or interruption of such limitation shall not be affected by the Directive. In addition to this three year limitation period the Directive also makes provision in Article 11 for a so-called "period of repose" (also referred to as a "long stop provision") which provides for expiry of the rights of the plaintiff to institute a product liability claim against the producer and which takes effect 10 years from the date on which the producer put the product into circulation.[771]

Article 12 of the Directive further provides that liability of the producer arising from the Directive *vis-à-vis* the injured person may not be limited or excluded by a provision limiting the producer's liability or exempting him from liability. In terms of Article 13 the Directive does not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing in Member States.

Sterret however points out that it is often practically difficult to prove that a causal link exists between the defect and the damage because of a product's technical complexity or the cost of expert testimony. As a result Member States have different approaches to the burden of proof. She mentions that for example, in Belgium, courts will allow the judge to infer a causal relationship between damage and

[768] Recital 9.
[769] Kriek (2017) *Thesis* 156.
[770] Art 10(1).
[771] See also Green Paper by EC (1999) par 3.2.4 where it is stated that "[T]his limitation of liability is mainly justified by the fact that strict liability puts a higher burden on producers than liability under the traditional systems of contractual or extra-contractual liability. Therefore the liability period is limited in order not to discourage technical innovation and to allow insurance cover."

defect.[772] In Denmark however, judges establish a burden of proof on a case-by-case basis and will ask the manufacturer to provide evidence to rebut the presumption of a defect.[773]

The Directive further advises a court to not place a financial ceiling on the amount of compensation recovered due to the legal traditions of most Member States.[774] However, it states that should a Member State's legal traditions permit otherwise, if consumer protection is guaranteed and there is correct functioning of the common market, a total liability for the damage may be stipulated.[775] In this regard Article 16(1) of the Directive states that a Member State may provide that a producer's total liability for death or personal injury arising from identical products with the same defect must be limited to an amount of no less than 70 million ECU.

3. Review of the Directive

Notably the European Commission is required to issue a report every five years on the working of the Product Liability Directive.[776] Mildred points out that the first report of the Commission that was released in 1995 was extremely short and based on very few cases, due to the late implementation of the Directive in many Member states.[777] Consequently in 1999 a Green Paper was issued as part of a consultation process to inform the Commission's report that was due at the end of 2000.[778] The Green Paper sought information on the application of the development risk defence in practice, whether industry had incurred additional expense in jurisdictions where the defence was unavailable, whether the defence should be retained and, if not, whether damages payable as a result of development risks should be borne by society as a whole or by the manufacturing sector concerned.[779] The responses to

[772] Sterret (2015) *MSILR* 901.
[773] *Ibid*.
[774] Recital 17.
[775] *Ibid*.
[776] Art 21 requires that the Commission must every five years present a report on the application of the Directive and if necessary submit appropriate proposals to the Council. See also Art 18(2) which states that "[E]very five years the Council, acting on a proposal from the Commission, shall examine, and if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community."
[777] Mildred in Fairgrieve and Goldberg (2005) 189.
[778] Green Paper by EC (1999).
[779] *Ibid.*

the Green Paper did not disclose any major problems with the application of the Directive. The Commission's view was that there was insufficient evidence for firm conclusions or of the need to amend the Directive. The Commission was however not complacent but also established an expert group to gather information on the legal application of the Directive and to commission research. The research had a dual purpose, namely to (a) assess the economic impact of strengthening the Directive by removing the development risk defence in Article 7(e) and the financial limit in Article 16 and (b) to analyse and compare the practical effects of the different national product liability systems in place in Member States.[780] In 2003 a report entitled *Product Liability in the European Union* which dealt with the different national product liability systems was provided to the Commission.[781] Subsequently in 2004 the Report on the development risk defence compiled by Fondazione Rosselli, was also completed and submitted to the Commission.[782] In May 2018 a further review report was issued containing a formal evaluation supported by an external study which included public consultation, as discussed in more detail in paragraph 5.1. below.[783]

4. The concept of "defect" for purposes of the Product Liability Directive

As indicated, Article 1 of the Product Liability Directive provides that a producer may be held liable for harm caused by a "defective product", making it clear that establishing a "defect" in a product is key to a successful claim under the Directive. Recital 6 in the preamble of the Directive states that "the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances." Notably, the Directive uses the broad notion of a "defect" and does not distinguish between different defect types (i.e. manufacturing, design and instruction or warning

[780] Mildred in Fairgrieve and Goldberg (2005) 189-190.
[781] PL in the EU (2001).
[782] Rosselli (2004) *Final Report*. See further the discussion in par 5.1.5 below fn 863.
[783] European Commission Staff Working Document (May 2018), accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (2018) at 35-36.

defects) – it applies the same rules to all of them.[784] Stapleton remarks that the Directive is in certain respects quite like the US restatement (Second) of Torts as it "gives no separate treatment to product types or defect types" and the (cryptic) definition of defectiveness in Article 6 is "at best, circular."[785]

The Directive does not contain a variety of definitions of defectiveness but merely states that products are defective if they are "unsafe" as measured against a "consumer expectations test" (or to be more precise, a "persons expectations test"). No definition is provided by the Directive of the concept "unsafe" and it does not specifically refer to categories of "unsafeness" such as whether a product is hazardous or whether it is unsafe at another level. The consumer expectations test provides simply that a product is defective "*when it does not provide the safety which a person is entitled to expect*."[786] However it should be noted that the concept of a safe product is dealt with in the EU General Product Safety Directive[787] which states that:

> Safe product shall mean any product which, under normal or reasonably foreseeable conditions of use, including duration, and where applicable, putting into service, installation or maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:
>
> (ii) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
>
> (iii) the effect on other products where it is reasonably foreseeable that it will be used with other products;
>
> (iv) the presentation of the product, the labelling and warnings and instructions for its use and disposal and any other indication or information regarding the product;

[784] Castillo (2012) *RCD* 279. See also Kriek (2017) *Thesis* 160 where she remarks that the fact that the EU Directive draws no distinction between the three main types of defects does not mean that member states may not refer to this distinction but that Article 6 "imposes on member states one universal test for defectiveness in all types of defect cases."
[785] Stapleton (2002) *USCLR* 1225.
[786] Hodges (1993) par 2-1012; and Delaney and VDZ (2001) *NIST* 3. Own emphasis.
[787] Art 2(b) of the GPSD 2001/95/EC. See also Howells (1993) *LV* 293.

(v) the categories of consumers at risk when using the product, in particular children and the elderly.

This definition in the General Product Safety Directive would thus arguably inform or aid the interpretation of whether a product is unsafe for purposes of the Product Liability Directive.

Regarding the choice of a consumer expectations test as yardstick for defectiveness, Howells and Mildred remark that "[I]t was, perhaps, surprising that the EC adopted this consumer expectation standard. The development of European thought in this area came from tort law rather than contract law, so there was no historical explanation for the choice of a consumer expectation test, which traditionally sounds in contract law."[788] Reimann however indicates that the consumer expectations test in the EU Product Liability Directive was imported from the United States; i.e. Europe took its cue in this regard from section 402A of the Restatement (Second) of Torts.[789] Howells and Mildred further point out that the Product Liability Directive's defectiveness standard does not require products to be perfectly safe and remark "[W]e believe it has *sufficient flexibility* to enable judges to distinguish between *risks* that consumers should be prepared to accept, because of the products *benefits*, and that which are unacceptable."[790] Notably the Directive does not allow for undiluted consumer expectations but sets parameters on what consumer are "entitled" to expect. It thus "tones down" consumer expectations by requiring that defectiveness in accordance with the consumer expectations test, be established with reference to "all circumstances"[791] *including* the aspects specifically mentioned in Article 6 - which makes it clear that these aspects that are required to be taken into consideration are not exhaustive and that it is thus possible to take into account other unenumerated factors as well.[792] Hodges also confirms that this is not a definitive list and that consumer expectations may be influenced by other factors such as availability of alternative products, choice of features between competing products and relative prices. He further points out that the courts are not restricted in the weight they must attach to each factor mentioned specifically in Article 6. However, like Howells and

[788] Howells and Mildred (1998) *TLR* 995.
[789] Reimann (2003) *ERPL* 769.
[790] Howells and Mildred (1998) *TLR* 997. Own emphasis.
[791] Art 6(1) of the Directive.
[792] Hodges (1993) 53.

Mildred, he also remarks that it should nevertheless be borne in mind that safety is a relative concept and that absolute safety is unattainable.[793]

The aspects listed in Article 6 which inform whether a product will be regarded as lacking the level of safety that consumers can expect, include a broad reference to the "presentation" of the product; the "use" to which it can reasonably be expected that the product would be put; and also the "time at which the product was put into circulation." These factors thus mirror some of those aspects that are used to determine product safety in terms of section 2 of the General Product Safety Directive, as indicated above, which in turn confirms the interrelation between the two Directives. Hodges indicates that the "presentation" of the product would include aspects such as marketing, product description, information and warnings. Accordingly the expectations regarding the safety of a product may be qualified by instructions, contra-indications and precautions issued to the consumer. It is submitted that this would also include warnings. He further points out that in some instances the degree of prominence accorded to such information may be relevant.[794]

The requirement in Article 6 that consideration should be given to "the use that the product can reasonably be expected to be put" ensures that a plaintiff who misused a product will not be able to claim on the basis of the product becoming defective and causing harm as a result of such misuse.[795] Having regard to the factors mentioned in Article 6(1)(a) and (b) it would further appear that, properly construed, these provisions accommodates an interpretation that goods would *not* be regarded as defective for purposes of the Product Liability Directive if accompanied by warnings or instructions (i.e as part of their "presentation") relating to their reasonably intended use (as per Article 6(1)(b)). Hence the lack of express mention

[793] *Ibid*. He consequently asks: "Is a consumer entitled to expect that a cheap product will have been as exhaustively tested and will incorporate as many safety features as a more expensive product?." He further points out that a more extended list of factors is stated in defining a "safe product" and hence a "dangerous product" in the Product Safety Directive and submits that courts should consider those aspects also.
[794] Hodges (1993) 54.
[795] See also Kriek (2017) *Thesis* 159. As Kriek points out, it arguably excludes liability for damage caused by unforeseeable product use or misuse.

of the words “warning or instructions” is of no consequence as these aspects are accommodated within the broad notion of product defectiveness in Article 6.

Regarding the requirement that the “time at which the product was put into circulation” has to be considered in order to determine whether the product was defective, Hodges remarks that a product should not be regarded as defective if it becomes dangerous only after extensive use or upon expiry of its reasonable or stated lifespan. Thus he argues that use by a consumer of a product after its clearly marked expiry date should excuse the producer from liability. He further remarks that public sensitivity to hazards changes over time and “what might be considered an acceptable level of safety or an appropriate warning at one time might later in the light of subsequent knowledge be unacceptable.”[796] Clearly the requirement that regard must be had to the time at which the product was put into circulation also ties in with the development risk defence in Article 7(e), as discussed below, that is afforded to the manufacturer on the basis of defects that were “undiscoverable” due to the state of scientific and technological knowledge *at the time when he put the product into circulation*. The same can be said of the provision in Article 6(2) that a product should not be regarded as defective solely because a better product was *subsequently put into circulation*.[797] Thus the explicit reference to the “time of circulation” of a product in Article 6 reinforces the important role that such specific point in time plays in the context of determining whether a product can be regarded as having contained a defect for purposes of liability under the Directive and paves the way for the development risk defence.

Interestingly Shapo observes that the reference in Article 6(1)(c) to the “time that the product was put into circulation” can be likened to the state of the art-defence under Section 402A of the US Restatement (Second) of Torts.[798] Shapo however states that “[Y]et the elastic character of the language in Article 6(1)(c)…appears to give more room for maneuver to entrepreneurs than the definition of ‘state of the art’ as the aggregate of product-related knowledge existing at any point in time.”[799]

[796] Hodges (1993) 54-55.
[797] Own emphasis.
[798] See chp 1 par 3.1. Additionally Shapo (1993) *CILJ* 301 remarks that there “is a decided undertone of fault” in Article 6(c), “one with moral harmonics.”
[799] Shapo (1993) *CILJ* 302.

It is further submitted that sight should not be lost of the significance of the factors that are mentioned in Article 6 to be considered in determining whether a product is defective: arguably the requirement that, when applying the consumer expectations test, one needs to take account of "all" the circumstances would also allow for *risk-utility balancing.*

The use of the consumer expectations test has been the subject of considerable academic debate since the early days of the Directive but, until relatively recently, this test had not been supplemented by guidance from the Commission nor had it been considered in detail by the ECJ, thus opening up its interpretation to much speculation. Taschner, one of the drafters of the Directive, remarked that the consumer expectations test in the Directive means that the question is not one "of the individual party with his subjective expectations" nor even of "the expectations of a specific group of consumers" but "what the community considers to be right."[800] Likewise Hodges, who is one of the foremost experts on EU product liability law, remarked in 1993 that the consumer expectations test is an "objective test" which refers to the level of safety which the "public at large" is entitled to expect. Accordingly he opined that "[C]ertainly, defectiveness is not to be judged by the expectation of the particular person who suffered the damage."[801]

Howells and Mildred also had their reservations about the consumer expectations test and commented that "[V]iewed through European eyes, there are two additional ways in which the adoption of a consumer expectation standard could be potentially damaging to the consumer cause. By eschewing an objective risk-utility analysis in favor of a standard based on consumer expectations, one is arguably replacing science with emotion and culture as the foundation for determining liability. Relying upon emotion and culture to determine liability has potentially serious implications since consumers' expectations are informed by the society in which they live. Images generated by commercial organisations, which in turn mediate the information we receive, dominate this society. These commercial organizations reduce safety

[800] Taschner (1992) *PLI* 89.
[801] Hodges (1993) 52.

expectations by making the public value those qualities that are more easily marketed than safety."[802]

In their opinion the consumer expectations test also leads to a tautological exercise. They point out that to determine whether a product is defective, it must be asked what expectations a consumer is entitled to have. With respect to manufacturing defects, where one has a model of the perfect product against which the defective product can be judged, Howells and Mildred indicate that it is possible to argue that a consumer does not expect any deviation from such model which could threaten consumer safety as assessed solely by reference to the condition of the product. However they remark that for design and warning defects, the issue is not as simple.[803]

Stapleton, in particular, has been very critical of the Product Liability Directive and of its consumer expectations test. In fact she was equally critical of the US product liability regime - she sharply describes the Directive as "one of the high-water marks of Euro-fudge and textual vagueness."[804] Regarding the consumer expectations test, she remarks as follows: *Actual expectations would be a strange legal standard to adopt*. People routinely miscalculate risks: in some contexts people have an irrational expectation that nothing will or can go wrong. In other contexts, the high level of risk-taking pursued by a party may lead others to have exceptionally low expectations in relation to that conduct. There is no reason why irrational optimism should be allowed to rachet up legal entitlement in the way a consumer's expectation, as a controlling test, would allow, nor is there any reason why unscrupulous risk-takers should be allowed to set their own standards of conduct in a similar fashion. *A legal norm cannot coherently or fairly be based on such a volatile standard.…To the extent that it asserts a false legitimacy from apparently objective phenomena, it is empirically unverifiable. As a normative concept. It is impenetrable to analysis: one may simply assert that in one's opinion the design did not meet consumer expectations.*[805]

[802] Howells and Mildred (1998) *TLR* 995.
[803] Howells and Mildred (1998) *TLR* 995-996.
[804] Stapleton (2000) *WLJ* 376.
[805] Stapleton (2000) *WLJ* 376-378.Own emphasis.

According to her yet another reason why the consumer expectations test is unattractive is that it "tends to mask the hindsight/foresight issue on which the handling of an undiscoverable product flaw would turn."[806]

The broad untrifurcated definition of "defect" and the use of the consumer expectations test under the EU Product Liability Directive has also over the years met with strong criticism from American authors. These US authors have had the benefit of having a long established product liability regime that has been critically revised over the course of many years and that, motivated by the inherent differences between manufacturing, design and warning defects, have moved from a fault-based to a strict to a partially strict liability regime (i.e. a hybrid regime).[807] In this context Henderson and Twerski remark that it appears that the EU, with respect to the broad core definition of product defect, are committing themselves to essentially the same position that the United States committed itself to in 1965 with Section 402A of the Restatement (Second) of Torts.[808] They regard the consumer expectations test for defect in the Directive to be rooted in Comment *i* to section 402A, pointing out that this test has been "thoroughly discredited" in the US. In their opinion the "self-proclaimed progression from negligence to strict liability in Europe...is *quintessentially 1960s American rhetoric*" whilst the movement in the United States over the past three decades since adoption of section 402A has been quite in the opposite direction.[809]

Notably however, Stapleton does not regard the EU Directive as actually and precisely adopting the US consumer expectations test under section 402A of the Restatement (Second) of Torts because, as she points out, the consumer expectations in the Directive is qualified by the word "entitled."[810] She remarks that "[S]ome commentators have seized on the word 'expect' and erroneously asserted that these provisions adopt the consumer expectations test for defect. Clearly that conclusion does not necessarily follow from the text because it ignores the weight to be put on the word 'entitled'. Because this error is both widespread and dangerous, it

[806] *Ibid*.
[807] As relayed in Chp 1, par 3.1.
[808] 2nd Torts Law USA, revised 1998.
[809] Henderson and Twerski (1999) *TILJ* 13. Own emphasis. See also Henderson and Twerski (1999) *TILJ* 1.
[810] Stapleton (2000) *WLJ* 377.

is worth emphasising some of the reasons why it is unlikely that European and Australian courts will interpret these provisions as mandating the consumer expectations test. Of course, the principal reason is that they are very likely to grasp the incoherence, instability, and unfairness of a consumer expectations test. Australian and British courts, having greater access to the U.S. experience and debates through our common language, will undoubtedly perceive the relevant pitfalls of that test and adopt an explicitly normative standard based on the sort of broad variety of risk-utility factors that underlie, flesh out and give content to the reasonableness standard. Of course…broad community standards, or 'expectations' may well form *part* of that approach."[811]

Approximately twenty eight years after the Product Liability Directive was passed into law the ECJ eventually had the opportunity to specifically consider the consumer expectations test and its relevance for determining defectiveness in terms of the Directive. In *Boston Scientific Medizintechnik GmbH v Aok Sachsen-Anhalt and Others,*[812] the German Supreme Court referred a matter relating to implanted medical devices, namely a pacemaker and cardioverter defibrillator that were manufactured by Boston Scientific, to the ECJ. In relation to the pacemaker Boston Scientific established, by means of its quality control system, that a component used hermetically to seal the pacemaker could degrade over time causing premature and sudden loss of battery power. The risk of failure was between 0.3% and 0.9%. Boston Scientific informed physicians of the problem and recommended that the pacemakers be replaced in affected patients, and offered to provide new devices free of charge and also to pay for the replacement operations.[813]

With regard to the cardioverter defibrillator, Boston Scientific established, through its quality control system, that in certain circumstances a magnetic switch in the defibrillator could remain stuck in the closed position, inhibiting the treatment of ventricular and artrial arythmia. It subsequently advised that the magnetic switch should be deactivated. In four cases out of 46 000 the devices were found to be

[811] *Ibid*.
[812] Joined Cases C503/13 and C-504/13.
[813] Boston case par 22.

defective and in those cases patients became aware of the problem by audible beeping warning tones and those devices were subsequently replaced.[814]

The health insurers of the affected patients took the matter to court, seeking reimbursement costs of originally implanting the pacemakers and the costs of replacing the defibrillators. In both cases the affected devices were destroyed after removal meaning that there was no evidence that the devices actually malfunctioned. The ECJ was required specifically to address the question whether a product was "defective" under Article 6 of the Product Liability Directive "if it forms *part of a group of products* that have a *significantly increased risk of failure*, but where a *defect has not been identified in each specific product within that group*."[815]

The ECJ subsequently held that the sixth recital in the preamble to the Directive, as alluded to above, meant that consumer expectations should be assessed "in the abstract" with regard to the expectations of the "public at large." It indicated that while the notion of "legitimate expectation" is particularly difficult to define, the expected degree of safety must be determined by taking into account various factors, including the intended purpose of the product, the nature of the product and the requirements of the group of users for whom the product is intended. In other words, while the consumer expectations test is expressed as taking into account the expectations of the public at large (as per Recital 6), the ECJ held that *in practice the test entails considering the specific requirements and expectations of the group of users for whom the product is intended.*[816]

The ECJ further held that, where products belonging to the same production series have been shown to have a "significantly higher than normal risk of failure" or in which a "significant number of failures have already occurred" *all products in that production series* can be classified as defective for proof of Article 6 *without proof that a specific product was defective*. The ECJ noted that in this particular case the affected patients were entitled to expect a "particularly high level of safety" given that the products concerned were implanted devices which could lead to cardiac failure

[814] Boston case par 23.
[815] Boston case par 26. Own emphasis.
[816] Boston case par 43. Own emphasis.

or death in the event that those devices failed. The ECJ was further of the view that this interpretation of Article 6 is consistent with the objectives of the Product Liability Directive, particularly the second and seventh recitals which indicate that the Directive is aimed at ensuring a fair apportionment of risks between the injured person and the manufacturer.[817]

The *Boston*-judgment has however not been met with widespread enthusiasm. Dodds-Smith and Brown remark that although the ECJ appeared to take cognisance of the specific risks arising from implantable medical devices in reaching its decision, its conclusion is broadly framed. They point out that the Court referred to the position where a group or series of products such as pacemakers and defibrillators have a potential defect, and treats it as relevant that the products had an "abnormal potential for damage." However the Court does not expressly limit the decision to the facts of those types of cases. Dodds-Smith and Brown further point out that the question of whether the *design* of the products could in practice be safer or the relevance of warnings was not discussed in the *Boston*-case either. They therefore remark that it remains to be seen how the national courts of the Member States will interpret the *Boston*-decision. They however state that it "is clear that the Court is saying that, in certain circumstances, it may be possible to prove the legal concept of defect for the purposes of establishing liability under the Directive *without showing an actual material defect in the individual product*. As the court has not formulated any very clear principles, it is not apparent in which circumstances, apart from in a case of implanted medical devices, defect may be established in this way."[818]

It would thus appear that the consumer expectations test in the EU Product Liability Directive is still shrouded in a significant measure of uncertainty although a few features of the test have been clarified.[819] There seems to be wide consensus that the consumer expectations test is an objective test. The ECJ in the *Boston*-case has also clarified that in each specific case concerning a defective product it is the expectations of a specific portion of the "public at large" whose expectations are

[817] Boston case par 44. Own emphasis.
[818] Dodds-Smith and Brown *ICLG* (2016) 2. See also Kriek (2017) *Thesis* 163 who indicates that, for instance, it is questioned whether product information and warnings supplied to intermediaries or information supplied directly to consumers would be relevant in the assessment.
[819] This sentiment is echoed by Freeman and Burton (2015) *IPLR* 102.

actually relevant, namely only those persons who are users of the particular product. The ECJ further made it clear that the level of safety that can be expected from a product is inherently tied to the nature of the product - thus one can expect a higher level of safety from a product like an implanted medical device than for example, one would expect from a stapler or a broom.

It is submitted that the interpretation of the consumer expectations test as being premised upon the expectations of users of a specific product that contained a defect, is sound, as it can hardly be said that persons who do not use such specific product actually have any expectations in respect of that product (except probably a broad general expectation that products should be safe and not cause injury or damage). The ECJ‘s condemnation in the *Boston*-case of a whole range of products based on a potential risk that the product has, without proof that the product was in fact defective and creating a legal rule in this regard is however questionable and may arguably lead to suppliers approaching the court again in future on this issue. Given that the court did not specifically deal with this type of defect by classifying it as a design defect and by not confining its judgment in this respect to design defects which generally tend to infuse a whole product range with defectiveness, it has the result that this sweeping condemnation could also affect a line of products where some of them contain manufacturing defects. It can even be argued that it offends the requirement in Article 4 of the Directive which obliges proof of the defect and that it reminds one of a type of *res ipsa*-approach that offends the notion of strict liability. Nevertheless, even though the ECJ did not specifically cast the product defect in the *Boston*-case as a design defect it is submitted that national courts will most likely interpret the ECJ’s ruling in this specific regard as being confined to design defects. At least the ECJ provided some clarity on the range of circumstances to be taken into account for purposes of determining whether a product is defective, namely that it also requires consideration of the nature of the product and the group of intended users.

5. The statutory defences provided by the Directive

Hodges points out that generally a producer or importer can escape *prima facie* liability in terms of the Directive if:

(a) the product concerned does not meet the definition of "product" under Article 2 of the Directive;
(b) the plaintiff failed to prove that he has suffered damage; or that the product was defective or that the damage was caused by the defect in a product;
(c) if the defendant is not a "producer" as contemplated by Article 3 of the Directive;
(d) if the product was put into circulation prior to the date in which the Directive or the legislation of the relevant Member State came into force;
(e) the damage suffered by the plaintiff was purely economic;
(f) the damage to the plaintiff's property was only to the property itself; or not to private property or less than the monetary lower limit specified by the Directive; or
(g) the claim is barred by limitation (prescription) rules.[820]

In addition, the Product Liability Directive pertinently provides in Article 7 for six defences that are product liability specific. The Directive also introduces two "limitation defences" in relation to product liability. As such Article 10 provides for a prescription period (limitation period) of three years from the day on which the plaintiff became aware or should reasonably have become aware of the damage, the defect and the identity of the supplier. In addition Article 11 of the Directive provides for a 10 year "period of repose." As pointed out in recital 7 in the preamble of the Directive, the purpose of the defences provided by the Directive is to ensure "the fair apportionment of risks between the plaintiff and defendant."

It is therefore necessary to interrogate the defences specifically created by the Directive with the aim to "balance" the purportedly strict product liability regime it introduced. The discussion below will thus first consider the product liability specific defences in Article 7 and will thereafter deal with some observations regarding to the limitation period as well as the period of repose introduced by the Directive.

[820] Hodges (1993) 70.

5.1 Article 7: Statutory product liability specific defences

Article 7 of the Directive is the main provision that specifically lists a closed number of statutory product liability specific defences available to the producer, which, if proven can exonerate the producer of an unsafe defective product from liability.[821] The onus to prove the elements of each of these statutory defences rests on the producer.[822] Unfortunately not much guidance, if any at all, is provided by the Directive and/or the Commission on the nature and scope of these defences, although, as will appear from the discussion below, the so-called development risk defence generated extensive academic debate before also getting attention from the ECJ.

5.1.1 Article 7(a): product not put into circulation

The producer has a defence in terms of Article 7(a) if he proves that he "did not put the product into circulation." Ueffing remarks that this defence entails that the producer has to prove that he had not given his consent to put the product into circulation, but that it reached the market through force *majeure* or the act of a third party.[823] According to Hodges this defence is intended primarily to exclude a person who is not responsible for a product being on the market.[824] Thus he indicates that the defence would apply to a person whose products caused injury during its production process or whose goods were stolen before being marketed.[825]

The word "circulation" is not defined in the Directive but the Explanatory Memorandum indicates that it refers to a product "which had been started off on the chain of distribution."[826] Hodges however opines that there is an ambiguity in the wording of the defence. He argues that if "circulation" is interpreted to mean "open, public market" then putting the product merely into the hands of a final manufacturer or wholesaler or retailer would not be "circulation." He indicates that if this were so, the defence would unintentionally excuse the producers of raw materials or

[821] Ueffing (2013) *MRP* 384.
[822] Hodges (1993) 71 states that once the plaintiff has proved the damage and the defect and the causal link between them, the burden of proving a defence is reversed and rests on the producer.
[823] *Ibid*.
[824] Hodges (1993) 71.
[825] *Ibid*. In his opinion it should not be necessary to apply it to counterfeit goods since they would not be the defendant's products and thus liability should not arise.
[826] Explanatory Memorandum (1976) EC Supp. L/115.

components or intermediate products from liability. However, he emphasises that it was a policy decision underlying the Directive that such persons should be subject to liability as they are all included in the definition of "producer." Hodges further points out that nevertheless the term has been defined by a number of Member States in their national product liability legislation.[827]

Geddes further states that it is clear that it is not essential that the goods should have been put into circulation as the result of any contract or even that payment should be involved. So for example, promotional gifts and free samples would be included.[828]

The ECJ eventually brought some clarity regarding this defence and the words "put into circulation" in its 2001 judgment in *Henning Veedfald v Arhus Amtskommune,* as alluded to above in paragraph 3.[829] In this matter the plaintiff required a kidney transplant. The donor's kidney was successfully removed and it was prepared for transplantation through a process referred to as "flushing", which involved cleansing the organ through the use of a specific cleansing fluid. Damage however resulted to the kidney during the said process. It was alleged that the cleansing fluid was defective and that it caused harm to the kidney during the flushing process as a result whereof the kidney could not be used for transplantation. The plaintiff subsequently claimed damages from *Arhus Amtskommune*, the owner and manager of the hospital that manufactured the kidney flushing fluid. It was however disputed that the product was "put into circulation" as it was claimed that the flushing fluid *never left the control* of the medical sphere of the dispensary where it was made, and was subsequently used by the hospital. The ECJ indicated that Article 7(a) of the Directive does not define the words "put into circulation" that appear in Article 7(a) but held that this wording must be interpreted strictly.[830] It further indicated that this defence allows for an exemption of liability only if "a person *other than the producer* has caused the product to leave the process of manufacture."[831] Put differently, the question to be asked is whether the person for whom the product was

[827] See Hodges (1993) 72 for a list of the relevant Member States that have defined the concept "circulation."
[828] Geddes (1992) 113.
[829] (2001) C-203/99.
[830] (2001) C-203/99 par 15. Own emphasis.
[831] (2001) C-203/99 par 16.Own emphasis.

intended brought himself within the sphere of "control" of the product?[832] If so, the Court indicated that it made no difference *in casu* whether the product was made in the hospital or obtained from a third party.[833] Accordingly, if a producer has "control" to cause a product to leave the manufacturing process, the defence raised in Article 7(a) may not be relied upon.

5.1.2 Article 7(b): defect not existing at time of supply

A producer will be able to escape liability for harm caused by a defective product if he is able to prove that "having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards." Thus the essence of this defence is not that the product was not defective but that the defendant cannot be held liable because at the time that the product was under his control it was, on a balance of probabilities, not defective. A product will however be defective if it is incapable of safe use throughout its or any of its components reasonably anticipated lifetime. However defects which arose after the product was put into circulation by the producer or that came into being at an even later stage can generally not be attributed to the producer of that product.[834]

This is a defence which is likely to be invoked rather often in comparison to the other defences listed in Article 7 given the likelihood that defects in products can arise during the course of its distribution along the supply chain. Hodges also gives the examples of lack of maintenance, misuse or interference by a third party that may cause defectiveness in a product after it was put into circulation. He states that the defence in Article 7(b) could be said to be "an application of a mixture of fault liability principles and of causation principles: either the damage was not caused by fault of the producer or the product is defective but there is a break in the chain of causation." He however points out that a product which contains a latent defect at the time of circulation but which manifests only after circulation, will not be excused by this defence.[835]

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[832] (2001) C-203/99 par 17. Own emphasis.
[833] *Ibid*.
[834] Geddes (1992) 113.
[835] Hodges (1993) 73.

Hodges further submits that to rely successfully on this defence, it may be important for a producer to have kept records to show that the defect probably arose through being kept after its stated shelf life or through poor storage after the product left the producer concerned (whose storage was adequate) or that product information applied to the product when it left the producer was subsequently removed or that inapplicable labelling was subsequently added. He remarks that these type of problems may well be relevant in parallel importing situations, especially where there are differences in local labelling. Other situations that may be covered include mishandling or faulty installation or servicing.[836]

He further remarks that product tampering *before* the product was put into circulation renders the product defective but if such tampering only occurs *afterwards* it will not absolve the producer from liability unless it is argued that the package is defective in that it facilitates tampering. He also points out that problems inevitably arise with normal wear and tear on a product over time and therefore producers ought to have quality control evidence of the state of the product at the time it is released into circulation.[837]

5.1.3 Article 7(c): product not supplied for gain or in the course of business

In terms of Article 7(c) of the Directive, a producer can escape liability for harm caused by a defective product if he can prove that the product was "neither manufactured by him for sale or any form of distribution for economic purpose, nor manufactured or distributed by him in the course of his business." The application of this defence appears to be twofold, thus requiring that *both* aspects should be present for the successful reliance on this defence: in other words, the producer must establish that it never benefited economically from the distribution (such as receiving a consideration) and also that the production or distribution of the product did not occur in the course of its business, for example the product was provided "once-off."

Hodges indicates that this defence bears on the intention of the producer and would exempt products which are gifts or sold outside a commercial situation. He indicates

[836] *Ibid*.
[837] *Ibid*.

that, for example, a home-made item of food would not be exempt if distributed by a person as part of his business but that it would be exempt if distributed in order to assist a charity, such as a fund-raising event, by a person whose business is *not* to raise money for charity. He also indicates that this defence would not exempt the sale, in the course of business, of second hand products.[838]

In this context regard may again be had to the judgment of the ECJ in *Henning Veedfald v Arhus Amtskommune,*[839] discussed above, where the defendant-producer unsuccessfully raised the defence in terms of Article 7(c) of the Directive.[840] The defendant argued that the funds that were available to maintain the hospital and perform operations derived from the public, specifically from taxpayers' contributions, and as such the plaintiff did not have to pay or contribute any form of consideration towards the transplant, thus concluding there was no manufacture of an economic purpose or an act in the ordinary course of business.[841] The court disagreed with the defendant and stated that the activities rendered by hospitals or medical establishments were not charitable; and in comparison to a private medical entity, the question could be asked why a private hospital should be liable in a similar situation if a public hospital was not held liable?[842]

5.1.4 Article 7(d): compliance with public regulations

In terms of Article 7(d), a producer can escape liability for harm caused by a defective product if he can prove that the defect in the product is "*due to* compliance with mandatory regulations issued by the public authorities."[843] The Directive does not define the terms "mandatory regulations" and "public authorities."

Geddes stresses that mere compliance with a regulation will not necessarily discharge a producer from liability under this provision as he would have to show that the defect was the "inevitable" result of compliance. This means that the producer must prove that it was impossible for the product to have been produced in

[838] Hodges (1993) 74. As indicated in the delimitation in chp 1, par 7, second hand goods fall outside the scope of this thesis.
[839] (2001) C-203/99.
[840] (2001) C-203/99 par 22.
[841] (2001) C-203/99 pars 19-21.
[842] (2001) C-203/99 par 21.
[843] Own emphasis.

accordance with regulations without causing the product to be defective.[844] So for example, where a regulation specifies a certain minimum requirement of performance but leaves it to the producer to decide which level of performance he will adopt in excess of that minimum, it would be no defence to rely on compliance with the regulation if he eventually adopted a lower level than was safe and that this caused the product to be defective.[845]

Notably this defence does not require that the defect must have occurred solely due to compliance with mandatory regulations and it is submitted that a defendant should thus be able to rely on it even if such compliance with a mandatory regulation was not the sole cause of the defect in the relevant product. Kriek however argues that where a product is found to be defective due to compliance with a mandatory regulation in one respect and due to some other unrelated factor, such as faulty design or a defective component, the producer would not be able to rely on article 7(d) as defence where the plaintiff can show that the defect unrelated to regulatory compliance was also causative of the harm.[846]

It is submitted that this defence does bear some measure of similarity to the state of the art-defence in the US Restatement (Second) of Torts if one views the state of the art from the perspective that if, for example, mandatory regulations for manufacturing of motor vehicles did not require safety belts because *at the time t*hat was the industry standard, *then* compliance with such mandatory regulations would absolve the producer from liability *if* the plaintiff was injured in a motor vehicle accident whilst driving a car without safety belts.

5.1.5 Article 7(e): development risk defence

Article 7(e) provides a defence to the producer if he can prove that "the state of scientific and technical knowledge *at the time when he put the product into circulation* was not such as to enable the existence of the defect to be discovered."[847] This defence is popularly referred to as the "development risk-defence." Of all the defences listed in Article 7 of the Directive, the development risk

[844] Geddes (1992) 114. See also Hodges (1993) 75.
[845] *Ibid*.
[846] Kriek (2017) *Thesis* 165.
[847] Own emphasis.

defence is the most controversial and the 1976-version of the Products Liability Directive initially ruled explicitly against incorporating this defence.[848] The development risk defence was nevertheless subsequently added into the Directive as a "balancing defence" as it was feared that strict liability would have impacted industry too harshly.[849] Arbour thus remarks that the premise underlying the development risk defence is "surprisingly simple: Overly broad liability chills innovation, threatens to make certain products entirely unavailable and increases insurance premiums" hence, in order to avoid these negative effects, the defence aims to strike an "acceptable compromise."[850]

As indicated, Member States have been given the option to exclude this defence.[851] This would mean that in those Member States that opt to exclude the development risk defence a producer is held strictly liable "*even if* he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered."[852] To date however all the EU member States except Finland and Luxembourg have adopted the development risk defence.[853] Linger initially criticized the option given to Member States to exclude the development risk defence in their domestic product liability legislation as she argued that the optional inclusion of the development risk defence undermines the Product Liability Directive by impeding harmonisation of product liability laws in the EU.[854] This criticism is now largely moot given that basically all the Member States, with the exclusion of the two Member States mentioned above, have adopted the defence in some form or another.

In simple terms, the development risk defence entails that in a particular instance, one cannot expect the producer of a defective product to have discovered the defect, *at the time that the product was put into circulation*, due to the absence of accessible

[848] Stolker (1990) *JML* 783 describes the history of the development risk defence as "turbulent" indicating that the "tug-of–war between its supporters and opponents almost resulted in a complete split. For a long time it seemed as if the development risk defence would block the establishment of the entire directive on product liability." See also Mildred in Fairgrieve and Goldberg (2005) 167. See further Arbour (2014) 913 who refers to the "infamous" development risk defence.
[849] Recital 7 in the preamble of the Directive.
[850] Arbour (2014) 927.
[851] Art 15(1)(b).
[852] Art 15(1). Own emphasis.
[853] Lovells (2018) 14.
[854] Linger (1990) *FILJ* 478.

scientific and technical knowledge *at that stage* which would otherwise have allowed discovery of the defect. As a point of departure, a number of aspects should be noted about the defence: first, it is a defence that is availed to the producer of goods that are covered by the scope of the Product Liability Directive. Second, it relates to the absence of scientific and technical knowledge which would have made the defect discoverable. Third, the crucial point in time with regard to which the availability of scientific and technical knowledge for purposes of the defence should be established, is the time of "circulation" of the product.

The development risk defence in the EU Product liability Directive is highly controversial and raises many questions of interpretation. As a point of departure it can be asked whether the defence should be availed to the whole supply chain or whether it should actually be strictly construed to only be available to the *actual* manufacturer of the goods who, it is submitted, is the party who designed the product and intended to benefit from it and on whom the obligation to conduct the vast research that is implied by the defence, would arguably reasonably rest. If not, does this mean that every time a further supplier in the supply chain receives the product for purposes of further circulation he incurs the responsibility to ensure that, in line with available scientific and technological knowledge, the product does not contain an undiscoverable defect? If so, it would mean the duty to guard against so-called development risks is a continuous duty imposed on the whole supply chain and it can be asked whether imposing such a duty on suppliers other than the actual manufacturer would be fair let alone practical? It may also be asked whether this defence can be raised in respect of any type of defect or whether its very nature limits its application to certain types of defects only? Similarly the question as to the exact state of scientific and technical knowledge required by the defence and how this element will be proved, poses interpretational challenges.

The reference to the time that the product is "put into circulation" appears to mean that it will not be sufficient for the producer to indicate that he could not have discovered the defect at the time the product was manufactured - this defence obliges him to keep abreast of scientific and technical knowledge up until the time of circulation of the product. Notably, Hodges points out that the development risk defence relates to *both* scientific and technical knowledge. He remarks that these

two types of knowledge are distinguishable and that *both types* must be satisfied for the development risk to be available. He further explains that scientific knowledge derives from the *systematic observation and testing* of phenomena and the formulation of hypotheses, principles and rules to explain and predict phenomena. Technical knowledge, on the other hand, concerns the *application* of such principles and rules. Thus, not only must the defect *not* be scientifically knowable or discoverable, it must also *not* be technically discoverable.[855] Accordingly neither science nor technology must have been at such a state of development at the time that the product is put into circulation that the defect could have been detected.

The lack of guidance provided by the Directive in respect of the exact scope and application of the development risk defence has also impeded interpretation of the defence. Mildred remarks that "[W]hilst there is little official record of the discussions during the legislative process, in anecdotal evidence from Professor Hans Claudius Taschner, the civil servant leading the legislative passage of the draft Directive, the requirement for unanimity and the potential deadlock [regarding the development risk defence] led to the *passage of a form of words which left unresolved which of the competing interpretations was to be preferred*."[856] The wording of the development risk defence has accordingly given rise to divergent opinions which oscillated between views that the defence requires "absolute undiscoverability" (the so-called narrow interpretation) as opposed to views that the defence merely requires "undiscoverability by reasonable means" (the so-called wider interpretation").[857]

Various academics have over the years commented on the meaning of the words "state of scientific and technical knowledge." Griffiths, who wrote about the defence in 1987, held the view that there are two approaches to dealing with the development risk-defence. The first is the "knowledge-based" defence which is the more rigorous approach and is somewhat restricted in application as it allows only a limited deviation from true strict liability. He explained that this approach is based largely on the assumption that a producer, in keeping with his responsibility to be up to date with developments in his field, will be aware of all the available information and

[855] Hodges (1993) 78
[856] Mildred in Fairgrieve and Goldberg (2005) 169.
[857] Mildred in Fairgrieve and Goldberg (2005) 170.

technology relating to his product at any given time. This means that only two issues are then relevant to the defence: first, whether the knowledge relating to the safer production of a product was available, and second, whether the producer applied that knowledge. He further remarked that obviously it is vital to decide at what point knowledge is deemed to be "available" (accessible) and submits that a realistic approach might be to consider it available once it has been *published in a form that would come to the knowledge of the reasonable producer*.[858] The second approach mentioned by Griffiths, is the "feasibility-based" defence that is more flexible and takes into consideration the practicalities of trading. This approach permits the producer to escape liability upon proof that his product was fitted with every feasible safety device available at the time of circulation. Griffiths, who favoured this approach, indicated that "feasibility" comprises not merely safety but also factors such as cost, utility, consumer expectations and the availability of safe alternatives. The feasibility-based approach would thus not require a producer to use a safety device that was prohibitively expensive nor would it expect him to adversely affect the product's utility.[859]

Hodges opines that on the face of it, the development risk defence is absolute - merely asking whether the state of scientific and technical knowledge at the time when the product was put into circulation enabled the existence of the defect to be discovered. He remarks that it would seem that the relevant knowledge for purposes of the defence is that of the technical and scientific community at large and not just that of the given producer and that the discoverability of the defect is to be measured by reference to the highest scientific and technical levels of intelligence and deduction. Consequently he states that "the objectivity of this wording may set a standard which is almost *impossibly high* for producers to attain."[860]

[858] Griffiths (1987) *JBL* 4 who remarks that a possible refinement of the knowledge-based defence is the inclusion of a conception period for the product, which period relates to the unavoidable time delay between the initial discovery of a safer design and the time when its implementation is possible, remarking that "[I]t is unrealistic to imagine that a new idea would be implemented overnight." The author, however, cautions regarding the importance of restricting any permissible conception period to a reasonable length. Own emphasis.
[859] Griffiths (1987) *JBL* 4.
[860] Hodges (1993) 79.

Stapleton, as with the consumer expectations test, is also critical of the development risk defence, arguing that "once the criterion for discoverability involves leaps of curiosity or creativity, a succession of value questions are introduced, the inevitable consequence of which is that liability should exist only in respect of defects discoverable by reasonable means, for there is no logical halfway house between absolute undiscoverability (rendering the defence nugatory) and undiscoverability by reasonable means (aping the negligence standard)."[861]

The American authors Henderson and Twerski are again amongst those who are very vocal about their reservations regarding the development risk defence, remarking that "[O]ne discovers 'risks', but one 'evaluates' whether value-based rules render a product design defective." They therefore are of the view that to make sense in connection with design and warning-based defects, the operative language in Article 7(e) should have read "the state of knowledge was not such as to allow the producer *to evaluate whether or not the product was defective*." According to them another way to express the idea using "discovery" rhetoric would be that the state of knowledge was not such as to allow the producer to discover "the risks or means of avoiding those risks that are relevant to the evaluation of defectiveness." Thus they state that for the drafters of Article 7(e) to talk of "discovering the defect" in connection with design and warnings, unavoidably suggests to American observers that *the drafters were focusing on Section 402A of the Restatement (Second) of Torts rather than developments in the United States since 1965* that could be used to correct the deficiencies of the development risk defence in dealing with design defects and failures to warn.[862]

Again it should be pointed out that the comments by Henderson and Twerski that the EU Product Liability Directive is premised on the outdated rhetoric of the US Restatement (Second) of Torts, does not appear to have the merit they ascribe to it. In this regard Stapleton makes the following significant remarks: "Although fact situations able to support a claim that a product flaw was undiscoverable are relatively few, they are doctrinally critical because the way a legal rule treats them

[861] Stapleton in Fairgrieve and Goldberg (2005) 339.
[862] Henderson and Twerski (1999) *TILJ* 13-14. Own emphasis. See however Rollo (2004) *BLR* 1073 for a contrary opinion.

will show whether that rule is one of strict liability. For instance, if a person may be liable under the rule even though he has exercised all reasonable care, he is being subjected to a strict liability. *By definition a person cannot conduct himself unreasonably in relation to a risk that is unforeseeable. Conduct in relation to undiscoverable risks is necessarily reasonable*. Therefore, if a rule renders one liable for an undiscoverable risk, it is a strict liability rule. By the accidents of history, then, *this critical issue was addressed explicitly in the Products Liability Directive - though in a surprising and arguably inelegant way.* The surprise was that, despite the public concern with the Thalidomide–type cases, by the time it was finalised, the text of the Product Liability Directive allowed each Member State to decide whether it would include the development risk defence or not. The inelegance of the defence lay in splitting the concept between two provisions - one dealing with defectiveness (i.e. Article 6) and the other dealing with defences (i.e. Article 7). Ironically, the resultant complexity of format allowed Europeans to be just as *mesmerised by the language of the "strict" liability* purportedly imposed on manufacturers by the Products Liability Directive as Americans were by the supposed effect of section 402A but with far less justification for confusion. *It is true that the strict liability rule set out in the defect provision may hint at strict liability, but the Products Liability Directive then goes on explicitly to spell out that the defence shields manufacturers from strict liability*…In contrast, section 402A was ominously silent on the point, requiring a long and painful period of judicial analysis *before the equivalent of the development risk defence was properly enunciated in U.S. law and the basis of design and warning recovery recognized as fault-based*."[863]

Thus it would seem that, by introducing the developments risk defence in Article 7(e) the EU, with their horrific exposure during the Thalidomide disaster, to the tragedies that can be caused by design defects, was actually aware and *ahead* of the developments in the US which led to the trifurcation of the concept of "defect" and their return to fault-based liability for design and warning defects in the 1998 Restatement (Third) Product Liability. This is evident from the wording of Article 7(e) which, despite the initial strict product liability introduced by the Directive to ease the

[863] Stapleton (2000) *WLJ* 369. See also Shapo (1993) 303 who remarks that "[I]f the "existence' of the defect could be 'discovered' then the case *begins to have a smell of negligence*." Own emphasis.

burden of proof on the consumer in the first stage of a product liability claim, actually uses *fault* as basis to escape liability for harm caused by a defective product.

It would however seem that in fashioning the development risk defence the EU did not completely ignore the evolution of product liability in the US but also took some cues from the US experience. In this regard Shapo holds the view that the development risk defence in the EU Product Liability Directive appears to share some alignment with the concept of an "unavoidably unsafe product" as dealt with in comment *k* to the Restatement (Second) of Torts. As pointed out in Chapter One comment *k* deals with certain products that are "*in the present state of human knowledge*, quite incapable of being made safe for their intended and ordinary use."[864] After laying the foundation for a proper risk-benefit analysis comment *k* goes on to state that "such a product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous."[865] The effect of comment *k*, although arguably even more clumsily worded than the development risks defence, would thus prima facie appear to be that it absolves a manufacturer of goods from liability if it was not possible "in the present state of human knowledge" (which could thus include scientific and technical knowledge) to have made the product more safe. However that doctrine of unreasonably safe products cannot be equated to being exactly similar to the development risk defence, becomes clear when one has regard to the rest of the comment which indicates that if a so-called unreasonably dangerous product is accompanied by warnings and directions, it will not be regarded as defective or unreasonably dangerous. Accordingly comment *k* entrenches the principle that some products would be unreasonably unsafe and thus defective *unless* they are accompanied by warnings and directions that would enable their safe use. What the development risk defence and comment *k* of the Restatement (Second) of Torts thus do have in common is that they both refer to a "knowledge"-component. However from the wording of comment *k* it is clear that the defect it refers to is a *known* (thus discovered) defect which can be cured by releasing the particular goods onto the consumer market with adequate warnings and directions as to its safe use. Accordingly it is submitted that apart from some commonality in the language used, the US concept of an

[864] See chp 1, par 3.1. Shapo (1993) 298.
[865] Arbour (2014) 919.

unreasonably dangerous product in comment *k* and the EU development risk cannot be equated with each other although the reference to "knowledge" in both provisions hints at the fact that the EU took note of comment *k*. The EU however went on to fashion their own rule indicating when they would regard a product as not being unreasonably dangerous, which is not located in the development risk defence but is determined with reference to the factors in Article 6 which requires consideration of factors such as the presentation of the product (which can include warnings or instructions) as well as to its reasonably intended use.

The meaning of the words "state of scientific and technical knowledge" was eventually clarified to some extent in May 1997 when the matter of *Commission v United Kingdom*[866] served before the ECJ. This case concerned an application for a declaration that, by failing to take all the measures necessary to implement the EU Product Liability Directive, particularly Article 7(e) thereof, the UK had failed to fulfil its obligations under the Directive and under the EC Treaty. The Commission was of the view that the UK did not properly transpose Article 7(e) of the Directive into its Consumer Protection Act 1987.[867] The Court made the following observations

[866] Case C300-95.

[867] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-300/95 pars 10-17. S 4(1) of the UK Consumer Protection Act 1987 which purports to implement Art 7(e) of the Directive reads as follows: "In any civil proceedings by virtue of this Part against any person…in respect of a defect in a product it shall be a defence for him to show…..(e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control." The UK argued that although the wording of s 4(1) was different from that of Art 7(e), Member States were entitled to choose appropriate wording when implementing a directive, provided that the intended result of the directive was achieved. The Commission argued that the UK legislature had broadened the defence under Art 7(e) of the Directive to a considerable degree and converted the strict liability imposed by Art 1 of the Directive into mere liability for negligence. The Commission submitted that the test in Art 7(e) is objective in that it refers to a state of knowledge and not the capacity of the producer of the product in question, or to that of another producer of a product of the same description, to discover the defect. However, the Commission's view was that by using the words "a producer of products of the same description as the product in question [who] might be expected to have discovered the defect", s 4(1)(e) of the UK Consumer Protection Act 1987 presupposed a subjective assessment based on the behaviour of a reasonable producer. It was therefore easier for a producer, under s 4(1)(e), to demonstrate that *neither he nor a producer of similar products* could have identified the defect at the material time, "provided the standard precautions in the particular industry were taken and there was no negligence" than to show, under Art 7(e) "that the state of scientific and technical knowledge was such that *no-one* would have been able to discover the defect" (Own emphasis).The UK Government did not challenge the Commission's interpretation of Art 7(e) as setting out an "objective" and not a "subjective" test but argued that s 4(1)(e) also introduced an objective test and does not provide for liability founded on negligence. The court eventually rejected the Commission's viewpoint as it was of opinion that the Commission selectively stressed particular terms in s 4(1)(e) without having demonstrated that the general legal context of s 4(1)(e) failed effectively to secure full

regarding the wording of Article 7(e): first, article 7(e) is not directed at the practices and safety standards in use in the industrial sector in which the producer is operating, but "unreservedly, at the state of scientific and technical knowledge, including the *most advanced level of such knowledge*, at the time when the product in question was put into circulation." Second, Article 7(e) does not contemplate the state of knowledge of which the producer in question "actually or subjectively was or could have been apprised" but the "objective state" of scientific and technical knowledge of which the producer is presumed to have been informed.[868]

The Court further pointed out that it is *implicit in the wording of Article 7(e)* that the relevant scientific and technical knowledge must have been *accessible* at the time when the relevant product was put into circulation.[869] Accordingly, in order to have a defence under Article 7(e), the producer of a defective product must prove that the *objective* state of scientific and technical knowledge, including the *most advanced* level of such knowledge, at the time when the relevant product was put into circulation was "not such as to enable the existence of the defect to be discovered." In addition it must be shown that "such knowledge was *not accessible* at the time when the relevant product was put into circulation."[870] The court further confirmed that the burden of proof for purposes of the development risk defence is on the producer.[871]

From the *Commission v United Kingdom*-case it is thus clear that it will generally not be easy for a producer to prove the development risk defence. He has a heavy evidential burden to shoulder which requires proof of the objective state of the most advanced scientific and technical knowledge at the time that the product was put into circulation and also proof that such knowledge was not accessible. In addition he must prove that the defect in the product could not have been discovered due to the absence of such objective most advanced scientific and technical knowledge.

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application of the Directive. See also Howells in Fairgrieve and Goldberg (2005) 149; and Mildred in Fairgrieve and Goldberg (2005) 173.

[868] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-300/95 pars 27-28. Own emphasis.

[869] Own emphasis.

[870] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-300/95 par 29. Own emphasis.

[871] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-300/95 par 34.

Conversely, if the objective state of the most advanced scientific and technical knowledge that was accessible would have allowed discovery of the defect at the time of circulation, a producer who was *unaware* of such state of knowledge, for whatsoever reason, will *not* be able to rely on the development risk defence.

The *Commission v United Kingdom*-case has however not provided answers to all the questions regarding the development risks defence in the EU Product Liability Directive. Mildred remarks that the ECJ did not resolve the classic difficulty of defining the "*state* of scientific and technical knowledge."[872] He remarks that "the notion that the most advanced idea, however abstruse, counter-intuitive or unsupported by evidence, may set the standard is puzzling. It is unclear how such an approach fits with the concept of a "state" of knowledge, a phrase which seems to imply some consensus or settled basis." He further states that the court did not elucidate the meaning of the word "accessible" but remarks that it is implicit in the judgment that the following would not be considered accessible: an unpolished document and unpublished research not available to the general public retained within the laboratory or research department of another enterprise. He argues that by inference, *publication is generally a prerequisite for accessibility*.[873] Mildred and Howells however remark in a later contribution that the existence of powerful computerised databases will allow the producer to satisfy itself of the nature of the published knowledge in the various fields of knowledge before putting a product into the production stage and *again* before putting it into circulation.[874]

Mildred also indicates that a further concern with the ECJ's judgment relates to the uncertainty concerning the definition of "knowledge." He states that traditionally scientific advances are put forward as hypotheses rather than assertions. He therefore asks "What is the standard of proof (or level of comfort) required before an idea can fairly be described as knowledge capable of being part of 'the state of the knowledge?' Is the idea itself a sufficient element of knowledge or must the controversy be resolved in its favour?." He also points out that a related dilemma is the question whether an idea must be complete before it is capable of comprising

[872] Own emphasis.
[873] Mildred in Fairgrieve and Goldberg (2005) 184. Own emphasis.
[874] Howells (1998) *MLR* 572.

knowledge for purposes of Article 7(e). In this regard he asks "When does a researcher's idea become knowledge? To what extent can a claimant argue that the conjunction of different strands of thought leads up to discoverability?."

Mildred states that whilst there is as yet no formal determination of the question whether the wide or narrow interpretation of the defence is correct, the introduction of the criterion of reasonableness into the accessibility of knowledge by the Advocate General who argued the case on behalf of the Commission "has gone a long way to suggest that the defence should be given the wider interpretation." He therefore opines that the *dictum* of the ECJ that the accessibility criterion was implicit in the wording of Article 7(e) strengthens the view that the wider interpretation is correct.

It also remains a concern for Mildred that, given the no-fault liability nature of the Directive, a court who hears a product liability matter is likely to exclude consideration of the producer's conduct (i.e. whether he was negligent or not) at the instance of either party. He thus points out the anomaly that the conduct of the producer is to be disregarded for purposes of ascertaining whether a product had a defect but that the producer's conduct may, however, be taken into account for purposes of Article 7(e).[875] In fact many scholars are of the opinion that the development risk defence has blurred the line between strict liability and negligence in EU product liability.[876] Newdick, for example, remarks that contrary to the notion that strict product liability is based on the condition of the product and not on the conduct or fault of its maker or supplier, the introduction of the development risk defence however indeed appears to peg liability on the conduct of the producer of a defective product.[877]

It is submitted that, on this specific point, the following statement by Advocate General Tessauro, who appeared on behalf of the Commission in the *Commission v United Kingdom,* is pertinent: "*the Council opted for a system of strict liability which was no longer absolute but limited*, in deference to a principle of the fair

[875] Mildred in Fairgrieve and Goldberg (2005) 188.
[876] Borra (2013) *JR* 6. Borra however points out that others believe that since the development risk defence can only be used in cases of known defects in products, as interpreted in *A v National Blood Authority* (2001) 3 All ER 289 the EU is "still on course towards strict liability."
[877] Newdick (1988) *CLJ* 455.

apportionment of risk between the injured person and the producer, the latter having to be only quantifiable risks, but not development risks which are, by their nature, unquantifiable."[878]

This statement by Tessauro makes it clear that the EU Directive, despite generally being propounded as having introduced a strict product liability regime, and despite the academic speculation that it re-introduces fault via the development risk defence, has indeed created a regime that is in fact *a mix of strict liability and fault-based liability*. The development risk defence thus captures the essence of the balancing that occurred in the EU between consumer interest and the interests of industry (and the EU Parliament and Council) in order to sustain competition across EU Member States.

Borra further points out that, despite the ECJ's decision in the *United Kingdom*-case, the interpretation of the development risk defence has led to conflicting decisions across Member States in the EU on the same subject. For example in the UK case of *A v National Blood Authority*[879] blood suppliers who supplied blood infected with hepatitis C were not able to rely on the development risk defence, while in the Netherlands a blood supplier who supplied blood infected with HIV was able to rely on the defence in *Scholten v Foundation Sanquin of Blood Supply*.[880]

Due to the controversies surrounding the interpretation and application of the development risk defence the Italian Research Institution *Fondanzione Rosselli* was commissioned in 2004 to examine the economic impact of the development risk defence. In recommending that the defence remain in the Directive, the report by *Fondanzione Rosselli* concluded that "…the Development Risk Clause is a significant factor in achieving the Directive's balance between the need to preserve incentives to innovation and consumer's interests. There is in fact evidence that the Development Risk Clause protects incentives to innovation by reducing the

[878] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-300/95.
[879] (2001) 3 All *ER* 289.
[880] 3 February 1999, unreported, County Court of Amsterdam; and Borra (2013) *JR* 5.

innovation related risks, not diverting resources from (research and development) to insurance policies and pushing firms to acquire state of the art knowledge."[881]

Regarding the question whether the development risk defence applies across the board to any type of defect it should be noted that neither the Commission nor the ECJ has pronounced on this issue. Having regard to the nature of the defence it is submitted that it seems to be directed at design defects and, by necessary implication also to warning defects given the close interrelation between these two types of defect as pointed out in Chapter One.[882] Notably it was held by the German Bundesgerichtshof[883] that the development risk defence does not apply to manufacturing defects and it is submitted that this approach will probably gain popularity across the EU in future. However one should be cognisant of the following remarks by Stapleton who is critical of excluding the application of the development risk defence to manufacturing defects and regards it as a deep anomaly: "On its face however, the development risk defence applies to *all claims* not merely those in relation to design and warnings: the literal readings of the statutory provisions would appear to allow the manufacturer of a product with a manufacturing error to escape liability where the state of scientific or technical knowledge at the time it was supplied was not such as to enable that the defect be discovered."[884]

As regards the question whether it is only the *actual* producer that can rely on the development risk defence it is submitted that logically it makes sense to only avail the defence to such producer as one would expect him, as designer and manufacturer of a product, to conduct all the time-consuming and costly research during the development of that product that would eventually render the product safe for use. However it should also be borne in mind that the Product Liability Directive by virtue of Article 3 affords an extended interpretation to the concept "producer" which includes the importer of the product and, if the producer cannot be identified by virtue of the inquiry provided for in Article 3(3), would include other suppliers such as distributors and retailers. Arguably the words "put into circulation" cannot be interpreted restrictively and would depend on the context of a particular supply and

[881] Rosselli (2004) *Final Report*.
[882] See chp 1, par 2.
[883] The so-called Mineralwasser-case BGH judgment of 9 May 1995.
[884] Stapleton (2013) *WLJ* 383.

on *who* puts the product into circulation. Thus it appears that putting a product into circulation is not a once off event but that every time a further supplier releases the product down the supply chain he is actually putting it into circulation. Therefore, although the development risk defence appears to have been introduced with the actual producer of a product in mind, the effect would be that where such producer cannot be identified a subsequent supplier should theoretically be able to rely on the development risk defence. On a practical level it is however submitted that such later supplier will likely be facing insurmountable obstacles in proving the defence as he would not have the necessary information required to prove the defence, as it would generally only be the actual producer who would be privy to such information. Accordingly, even if it can be said that this defence is available to the whole supply chain the practical reality will be that generally only the actual manufacturer will be able to adduce evidence necessary to prove the development risk defence.

It therefore appears that the development risk defence is not only significantly difficult to prove but that the high standard set for proof of the defence actually has the derivative effect of nudging firms to go to great lengths to ensure that their products are not unsafe. Notably Mildred comments that "[T]he controversy surrounding the introduction of the defence has *not been followed by its frequent invocation.* Further there seem to have been *very rare successful pleadings of the defence.* This may be less to do with clear definition of the meaning of the defence by the courts of the Union than the low volume of product liability litigation and the heavy pressure towards settlement of disputes engendered by the very high cost of litigation. Indeed, as we have seen, unresolved questions of interpretation of the components of the defence predominate over settled jurisprudence." He however states that "the balancing exercise provided by the existence of the defence is likely to remain key to the acceptance of the Directive by industry as a politically acceptable compromise on questions of the appropriate standard for liability without fault and thus the opportunity for reform of the Directive by *removal of the defence is highly unlikely* to be taken."[885]

[885] Mildred in Fairgrieve and Goldberg (2005) 188.

Notably some commentators also liken the development risk defence to the "state of the art"-defence in comment *d* to the 1998 US Restatement (Third) Product Liability and use these concepts interchangeably as purporting to refer to the exact same defence.[886] Arbour however states that *although similar in effect*, the state of the art defence is linked to the subjective foreseeability of risk by the producer while the development risk defence revolves around objectively evaluated knowledge. She remarks that "[a]s such the EU style defence relates more to the type of risk than to the producer's behaviour." She indicates however that comment *d* of the Restatement (Third) provides instead that the term "state of the art" has been defined "variously to mean that the product conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects the technology at the cutting edge of scientific knowledge."

Clark appears to particularly appreciate the nuanced difference between the EU development risk defence and the US state of the art defence.[887] He points out that "development risks" *does not mean* the risk that the later development of safer products show the product in question to have been defective at the time that it was put into circulation. He also comments that "state of the art" does not simply mean the current state of industry practice and that to argue that the producer carried out the same tests as his fellow producers is not a defence.[888]

According to Clark both terms may have often been used to mean the same thing: that given the existing state of scientific and technical knowledge the defect was not reasonably discoverable. He however submits that the distinction between the two defences is that the term "state of the art" could be used to connote a product which was *not defective* when judged against the prevailing safety standards at the time when it was put into circulation. In contrast, the term "development risk" is used in situations in which he product is indeed defective when put into circulation, but the manufacturer has the defence that the state of existing scientific and technical knowledge at such time made the defect not reasonably discoverable. Thus he opines that the state of the art-defence relates to the question of defectiveness, while

[886] See chp 1, par 3.1.
[887] Clark (1989) 34.
[888] *Ibid*.

development risk issues arise later, as a defence to defectiveness that is indeed present in a product at the time it is put into circulation.[889]

It is therefore submitted that the state of the art defence cannot be equated with the development risk defence but rather that it can be likened to the provisions in Article 6(1) which indicate that defectiveness should be determined with reference to the time that the product was put into circulation and to the provision in Article 6(2) which indicates that a product will not be defective merely because a better (i.e. safer) product has subsequently been put into circulation.
As for the development risk defence, it is somewhat of an enigma, a sui generis defence created by the EU to deal with product design defects that are latent on a level that makes them objectively undiscoverable measured against accessible scientific and technical knowledge at the time that the product was put into circulation - as was the case with the thalidomide drug in the 1950s.

5.1.6 Article 7(f): existence of a design defect

The defence stipulated in Article 7(f) provides that if a producer of a component part establishes that "the defect in a product is attributable to the *design of the product in which the component has been fitted* or to *the instructions given by the manufacturer of the product*, the producer of such component part may escape liability for harm subsequently caused by that product."[890] Accordingly suppliers of components made to the specification of the producer of the final product will not be liable if the defect in the component was the inevitable result of compliance with the specification, or if the defect was caused by the design of the final product over which the component supplier has no control. The producer of the final product would therefore be solely liable if the product became defective and caused injury.[891] Notably Article 7(f) does not provide a reverse defence to the producer of the final product and its availability is confined to a producer of a component part.

According to Hodges the reference to "instructions" may be interpreted in two ways. First, it may refer to a defect in the component which is caused by instructions given

[889] Clark (1989) 151.
[890] Own emphasis.
[891] Geddes (1992) 116.

by the producer of the final product. Secondly, it may refer to instructions for the use of the product given by the producer of the final product to the user of that product.[892] Notably, the Directive does not specify if the "defect" must be wholly or partly attributable to the design defect or warning defect. Thus it is submitted that a finding in a specific instance that both the producer of the final product as well as the producer of the component part are liable, is possible, in which event their liability will be joint and several in accordance with Article 5 of the Directive.

5.2 Limitation of defences

5.2.1 Prescription

Article 10 of the Directive states that "Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware or reasonably should have become aware of the damage, the defect and the identity of the producer." It is further provided that the laws of Member States regulating suspension or interruption of the limitation period shall not be affected by the Directive.[893]

Thus the effect of Article 10 is to standardise the prescription period for product liability claims throughout the EU. It makes sense to have such a provision as it would clearly lead to significant differences in the level of protection afforded to consumers with regard to product liability if Member States were allowed to impose different prescription periods. From the perspective of the supply chain it would also distort competition if suppliers were not all subject to the same uniform prescription period regardless of which Member State they traded in.[894]

In practice it may often happen that the plaintiff becomes aware of the damage, the defect and the identity of the supplier at different times and it appears from Article 10 that prescription will only begin to run from the day that the plaintiff has knowledge of all three these aspects. So, for example, it may happen that the plaintiff becomes aware of the damage and the defect the moment that he suffers it but is only able

[892] Hodges (1993) 84.
[893] Art 10(2).
[894] Recital 10 states the policy consideration for the introduction of a uniform prescription period as being in the "interests both of the injured person and the producer." See also Hodges (1993) 87.

after a year to determine the identity of the producer. Then prescription will begin to run from the latter date with the effect that in this particular instance prescription will only be completed four years after the damage was caused by the defective product.

Hodges remarks that a relevant consideration to be taken into account to determine when it was reasonable for a plaintiff to have knowledge of the identity of a particular producer in a chain of suppliers would be the extent to which the plaintiff made use of the mechanism of enquiring (in accordance with Article 3(3) of the Directive) from a given supplier about the identity of the producer or person who supplied that particular supplier with the product concerned.[895] Logically the extent to which the suppliers who were approached cooperated with the plaintiff's request will also influence the date on which he became aware of the identity of the producer. Where they are uncooperative it appears that the plaintiff will be able to institute product liability proceedings against such uncooperative supplier if he is unable to otherwise determine the identity of the producer - arguably the plaintiff can in such instance not be forced to continue searching for the identity of the actual producer of the defective product. It is accordingly submitted that the statutory mechanism of enquiry introduced by Article 4(3) is a very beneficial measure as it not only aids the plaintiff in determining the identity of the producer but it also protects downstream suppliers from being held liable for defects in products that they did not cause.

Notably the Directive only regulates the prescription period and leaves aspects such as suspension and interruption of prescription to the Member States. It may thus happen that suppliers are subject to some arbitrage insofar as prescription is concerned having regard to the fact that national provisions in the Member States regarding suspension and interruption of prescription may differ, especially insofar as the grounds for such suspension and interruption are concerned.[896]

5.2.2 Period of repose

Article 11 stipulates that "Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be

[895] Hodges (1993) 86.
[896] See also Hodges (1993) 87 who remarks that the detailed rules regarding the operation of the limitation period under the Directive continues to be based in existing national laws.

extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer."

The policy underlying this repose period is stated in Recital 11 in the preamble of the Directive to be the following: "Products age in the course of time, higher safety standards are developed and the state of science and technology progresses;…therefore it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product;…therefore liability should expire after a reasonable length of time, without prejudice to claims pending at law."

In this context Ueffing points out that a product is subject to use and thereby becomes obsolete over time, making it hard to establish whether it was actually defective at the time it was put into circulation. Therefore, in order to protect the producer, the victim's right to claim expires within ten years starting from the date on which the said product was put into circulation.[897] This means that the duration of the time period during which a claim can be instituted against the producer for harm caused by a defective product expires after ten years from the date that the product was put into circulation. Accordingly, if a person injured by a defective product for example, only becomes aware, after eleven years since the product was put into circulation, of the fact that such product caused the damage he suffered then he will be barred from instituting action against the producer concerned.[898]

Hodges regards the period of repose introduced by Article 11 as an important restriction on the operation of limitation rules in national laws. He points out that cases may arise in which the damage is latent and does not manifest for many years, particularly in relation to pharmaceutical products. He further points out that Article 11 makes it clear that the period of repose begins to run from the date on which the producer put into circulation the "actual" product which caused the damage and states: "This is to avoid the argument that the 10 years run from the date on which the product with that specification was first put onto the market. For example, if damage is caused to a number of plaintiffs over a number of years by cars which

[897] Ueffing (2013) *MRP* 384.
[898] On the purpose of and rationale behind repose periods generally see Martin (1982) *FLR* 745.

all have the same braking fault, a separate 10-year period runs from the date upon which each car was put into circulation by the particular defendant." Hodges thus indicate that it follows that time runs against each producer from the date on which he puts his product into circulation. The effect will be that different cut-off dates will apply in respect of the same final product for component manufacturers, the main producer and possibly for suppliers, which will benefit them in that order. He is thus of opinion that the period of repose in Article 11 may clearly be of considerable benefit to producers whose products remain on the market in the same form for an extended period or which have an extended lifespan.[899]

6. Final remarks

Stapleton, whilst conceding that the EU looked towards the American products liability experience at the time of deliberating upon the EU initiative, however remarks that "Yet, in four significant respects the Europeans departed from this meek acceptance of the section 402A precedent thereby displaying at least some capacity to decipher the lessons from the emerging US experience. First, the dangers of indiscriminately targeting all parties down the chain of supply were well anticipated and effectively avoided by the creation of a two-tier system of liability, whereby the mere supplier could escape liability if it could identify a party higher up the chain. Second, free from any pressure to legitimize the new law within a sales warranty heritage, the Europeans were able to ignore transactional limits arising from the notion of sale and to frame their law to cover all forms of commercial supply. Third, the Thalidomide children were classic examples of bystanders injured by another's use of the defective product. The European central focus on such victims ensured that there was never any doubt that bystanders would be able to sue under the liability set out in the Products Liability Directive. Finally, the European focus on the Thalidomide case also put center-stage the issue of who should bear the losses associated with undiscoverable product flaws."[900]

Note should also be taken of the statement by Arbour that recent product liability scholarship has distilled a two-prong development risk defence out of the knowledge

[899] Hodges (1993) 87-88.
[900] Stapleton (2000) *WLJ* 363.

element and the discovery variables, which gives rise to a *sui generis, EU style product liability regime, distinct from the American approach*."[901]

As argued above it is especially the development risk defence which reveals that the EU Product liability regime is not a pure strict liability regime. Reimann remarks that it is true that the European Directive proclaims strict liability but nonetheless implicitly relies on notions of due care in at least two ways. Firstly, it considers a product defective if it is "not as safe as a person is entitled to expect, taking all circumstances into account"; and secondly, the crucial moment to judge the product's defectiveness is "the time when it was put into circulation." In particular, the defendant can escape liability by showing that the defect was unavoidable given the technical or scientific knowledge at the time. In other words, if the defendant did everything possible back then, he will not be liable today, even if the product since turned out to be unreasonably dangerous. Again he is of opinion that liability really turns on blameworthiness as a truly strict regime would judge purely the product, and it would do so purely at the time of the judgment (or most, at the time of the accident). Reimann however leaves open the question whether these fault-related considerations turn the EC Directive's approach partially into a camouflaged negligence regime or whether liability is still strict in principle. Be that as it may, for Reimann, there is no denying that under the EU Directive, courts cannot decide design and warning cases without applying some kind of reasonableness standard. At the minimum strict liability is somewhat ameliorated.[902]

Finally, the European Commission has recently reviewed the Product Liability Directive again under the obligation imposed by Article 21 of the Directive.[903] This evaluation was carried out in response to widespread concerns that the Directive may no longer be fit for purpose and that it may no longer be an adequate tool for dealing with the complexities of modern products. In particular, it addressed the question of whether the Directive in its current format, is sufficiently flexible to deal with issues arising from modern technologies such as digitisation, the internet, artificial intelligence and cybersecurity. The Commission however concluded that

[901] Arbour (2014) 928 with reference to Hunter and Bergkamp (1996) *PLSR* 399.
[902] Reimann (2003) *ERPL* 751.
[903] European Commission Staff Working Document (May 2018).

despite advancements in technologies and the increased complexities of modern products, the Directive continues to serve its purpose- for the time being. It found that the Directive largely strikes a good balance between consumer protection and product innovation in the EU. It also recorded a fact which is particularly pertinent and that reflect on the reality that the EU has a different culture relating to litigation than the US which is a far more litigious population: between 2000 and 2016 most European product liability cases settled out of court. In particular settlement was negotiated in 46% of the cases, 15% was settled through alternative dispute resolution and only 32% was resolved through litigation.[904]

7. Conclusion

The EU Product Liability Directive has been in place for more than thirty years, purportedly introducing a strict product liability regime to address the lack of consumer protection occasioned by fault-based liability and the different liability regimes in the Member States. It however is not solely focused on consumer protection as it also has an economic objective, namely to protect the interests of industry. Thus the entire language of the Directive manifests a trade-off or balancing of these two objectives. On a primary level the Directive makes it easier for consumers to prove a product liability case against a producer by discarding fault as a consideration in determining whether a producer is prima facie liable for harm caused by a defective product. In this context one may thus conclude that the liability introduced by the Directive is strict. However if liability was truly strict the enquiry would have ended once the defect, damage and the causal relationship between the defect and damage, as contemplated in Article 4, were established. In pursuit of its objective to balance the interests of consumers and suppliers the Directive however specifically allows a further enquiry by affording the supply chain a closed list of statutory defences, some of which actively focus on the *conduct* of the producer, i.e whether he was at *fault*. Although the Directive takes care not to mention the concept of reasonableness it nevertheless appears to underlie the allowance that the Directive makes for defences. In fact the Directive, given its dual objectives, is infused with the notion of reasonableness. The drive to protect suppliers (and thus

[904] European Commission Staff Working Document (May 2018) 22.

not hold them strictly liable) is also clear from the defences providing for a standardised limitation period as well as a uniform period of repose. To conclude that the Directive has introduced strict product liability would therefore be fallacious. Rather, it is submitted, it has introduced a sui generis regime of mitigated strict liability and thus it is in fact a hybrid regime espousing strict liability but de facto allowing such liability to be tempered by the defences that it avails to the supply chain. That the Directive does not introduce unconditionally strict product liability is also evident from the provision it makes in Article 8(2) allowing for a reduction in damages when, having regard to all the circumstances, the damage is caused both by a defect in the product and the *fault* of the injured person or any person for whom the injured person is responsible.

As to the argument that European product liability lags behind the apparently more progressive hybrid product liability regime in the United States, it is submitted that such criticism is unfounded. Although the EU Product Liability Directive does not trifurcate the concept of defect into manufacturing, design and warning defects the broad definition of defectiveness is arguably flexible enough to accommodate a finding that a product has a manufacturing, design or warning defect or a combination of the aforementioned. As pointed out the consumer expectations test to gauge product defectiveness for purposes of the Directive is constrained by the word “entitled” and by requiring consideration of *all circumstances* specifically including those aspects mentioned in Article 6(1)(a) to (c). The factors mentioned in Article 6 however constitute a non-exhaustive list meaning that risk-utility may also be taken into account in determining consumer expectations. In this respect the EU is thus not taking an approach which is that different from the US - as pointed out, although the Restatement Third Product Liability has discarded consumer expectations as the ultimate yardstick by which to measure defectiveness, many US states still apply the consumer expectations test in product liability cases.

The lack of trifurcation of the concept of defect has the effect that the Directive does not lay down hard rules for liability depending on the nature of the defect, as is the case in the US. It does however introduce defences which, it is submitted, may achieve much of the effect that the US has sought to achieve by explicitly trifurcating the concept of defect and imposing strict liability for manufacturing defects and fault-

based liability for design and warning defects. In this regard the development risk defence, which is fault-based, is especially pertinent as it would allow a producer to escape liability for design and warning defects. It is submitted that on a conceptual level the development risk defence and the requirement in the US Restatement Third of a Reasonable Alternative Design (RAD) in the context of design defects may bear some similarity.

It should further be borne in mind that the Directive, which is a critical cog in the larger legislative machinery that comprehensively hedges against product defectiveness in the EU, has limited application in that reliance on the Directive is limited to consumers who use movable products for private purposes. Since it came into effect, the Directive has undergone only a few relatively minor amendments, such as the inclusion of agricultural products into the definition of “product.” It has since its inception not been subjected to any major overhaul despite the various views and research projects that were undertaken.

Chapter 7: Product liability in Australia

This chapter provides an overview of the strict product liability regime *ex delicto* in Australia, as initially enacted by the insertion in 1992 of Part VA into the Trade Practices Act 51 of 1974, and subsequently re-enacted in largely similar terms in Schedule 2 of the Competition and Consumer Act of 2010 (referred to as the Australian Consumer Law or ACL). This overview serves to contextualize the discussion, in line with the focus of this thesis, of how Australian product liability law deals with the concept of "defect" and the availability of statutory defences specific to product liability.

1. The development of the Australian strict product liability regime

1.1 Shift from fault-based liability into strict liability

Prior to 9 July 1992, a plaintiff with a delictual product liability claim in Australia could have instituted legal action against a manufacturer, importer or supplier if he could prove negligence on the part of such defendant.[905] A person who suffered personal injury or whose property was physically damaged as the result of a defective product occasioned by the negligence of the defendant could have claimed damages, including compensation for pecuniary loss with the exception of claiming economic loss.[906] The plaintiff had the onerous burden of proving that the manufacturer's conduct was negligent, and had resulted in loss or damage to the plaintiff.[907] The defendant could have raised certain defences to the plaintiff's product liability claim, inter alia that he was not negligent or that the defendant voluntarily accepted the risk of injury by the defective product.[908]

[905] Utz (2015) *ICLG* 51.
[906] *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR at 544. At 544-545, the justification for excluding pure economic loss was that no duty of care existed between the wrongdoer and the plaintiff, or the damage was too remote from the parties and legal action. At 555, the court stated that foreseeable loss is not enough to recover damages in this regard. However, it indicated that should "exceptional cases" allow for damages to be claimed for economic loss, the court must allow it. The court must assess each matter individually and determine if the defendant had "knowledge or means of knowledge" that the plaintiff would likely suffer economic loss due to his negligence.
[907] Hughes (2014) *ELRS* 18.
[908] Utz (2015) *ICLG* 53.

In 1992 however, a new "strict" product liability regime, that did away with proof of negligence on the part of the manufacturer in order to found liability, was introduced into Australian law. This new regime operated parallel to the fault-based product liability regime and a plaintiff would thus usually cast the claim based on negligence as alternative to the strict product liability claim.[909] The process that preceded the introduction of this new "strict" product liability regime can be traced back to 1987 when the Australian National Consumer Affairs Advisory Council released a report that detailed concerns about Australia's then existing fault-based product liability regime.[910] Subsequent to the aforesaid report, the Federal Government referred the matter to the Australian Law Commission ("ALRC") which issued a report in 1989 wherein it recommended the introduction of a new product liability regime.[911] The matter was thereafter referred to the Industry Commission in order for the said Commission to report on the economic effects of the ALRC's proposals. The Industry Commission's recommendation was that the ALRC's proposals regarding product liability should not be implemented as it was perceived that the proposals would have a "deleterious effect' upon manufacturing industries, and the Commission's view was further that there was insufficient need for radical reform in the area of product liability and that the ALRC's proposals could be addressed by relatively minor amendments to the existing laws.[912]

However the drive to reform the Australian Product Liability regime continued and subsequent to consultation between the Federal Government and business and consumer groups, the Trade Practices Amendment Bill 1992[913] was eventually introduced. The Explanatory Memorandum to the Trade Practices Amendment Bill stated that:

> [T]he purpose of this Bill is to introduce a strict product liability regime *based on the 1985 European Product Liability Directive* by way of amendment to the Trade Practices Act 1974. It provides a regime of strict liability, whereby a

[909] Tsui (2016) *Thesis* 7.
[910] National Consumer Affairs Advisory Council "Consumer Products Safety" (1987).
[911] ALRC Report of 1989. For an overview of the reform negotiations and discussions preceding the 1992 reform of Australia's product liability regime see Harland (1992) *JCP* 194; Boas (1994) *BLR* 112; and Corones (2009) *QUTLJJ* 137.
[912] IC Report of 1990 at 59-65. The Commission indicated that the adverse efficiency effects would largely arise from the inadequacies of the proposed defences and the absence of a standard of "defect." See Boas (1994) *BLR* 112.
[913] TPAB of 1991. See also Boas (1994) *BLR* 112; and Guihot (2014) *CCLJ 232.*

> person who is injured or suffers property damage as a result of a defective product has the right of compensation against a manufacturer without the need to prove negligence on the part of the manufacturer.[914]

The Trade Practices Amendment Bill accordingly inserted Part VA which deals specifically with the strict product liability of manufacturers and importers of defective goods[915] into the Trade Practices Act 51 of 1974.[916] Notably it was stated that Part VA was not concerned with goods of unsatisfactory or merchantable value such as, for example, a car that continually breaks down, but specifically dealt with "unsafe goods" such as a car that veers into oncoming traffic when the brakes are applied.[917] The new strict product liability regime was captured in sections 75AA-75AS of Part VA.[918]

The rationale for the move from a fault-based to a strict product liability regime where proof of negligence was not required, was *inter alia* that, although in some instances the difficulties faced by a plaintiff in proving negligence were softened by the application of the *res ipsa loquitur* doctrine;[919] a plaintiff in a product liability action

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[914] Explanatory Memorandum to the TPAB (1991). Own emphasis. See Boas (1994) *BLR* 113 where he questions whether the European Directive 85/374/EEC is an appropriate yardstick against which to measure product liability reforms. Boas further criticises (at 114) these reforms for placing too much emphasis on the economic impact of the reforms on business and industry instead of giving priority focus to human health and safety.

[915] Referred to as the "TPAB", as amended by the Trade Practices Amendment Act 106 of 1992 (referred to as the "TPAA"). The TPA commenced on 1 October 1974 in terms of *Gazette* 1974 No. 75B. Part VA was named "Liability of manufacturers and importers for defective goods" and became effective on 9 July 1992.

[916] Explanatory memorandum to the TPAB (1991). See also Boas (1994) *BLR* 112. With reference to Harland (1992) *JCP* 191 at 196-197, he indicates that the initial proposals announced by the Federal Minister for Justice and Consumer Affairs in 1991 differed in some respects form the EU Product Liability Directive: the plaintiff would have had to prove the damage, that the product cased the damage and, in contrast to the position under the EU Directive, that the damage did not arise solely from the goods being used unreasonably. Another point on which the proposed Australian regime differed from the EU Directive was that the plaintiff would not have to prove that the product was defective, the onus being on the producer or manufacturer (if he wished to dispute this aspect) to prove by way of defence that the product was not defective. According to the Minister, the proposals represented "a compromise position which should be acceptable to both industry groups and consumers" and by referring to the Explanatory Memorandum, it was stated that "Australian consumers who were injured by defective goods were to be placed 'in a position which is no less advantageous than that enjoyed generally by their European counterparts in the same situation'."

[917] Corones and Clarke (1996) at 510.

[918] S 75AP of the TPA provided that these strict product liability provisions in Part VA of the TPA could not be amended or avoided,[918] hence a consumer could not be required to waive his right to institute a legal action against a supplier for strict product liability arising from harm caused by a defective product. See also Kellam (1992) *PLJ* 18.

[919] Harland (1995) *SLR* 365. See chp 2, par 3.2.2 for a detailed discussion of the *res ipsa loquitur* doctrine.

generally had difficulty in tracing a solvent, recognisable wrongdoer;[920] the negligence standard proved highly demanding;[921] and it resulted in a cumbersome, unfair and expensive procedure.[922] Furthermore, it was opined that manufacturers who were liable under the strict liability regime could absorb the cost of injuries among all users of the product, such as through insurance.[923] Another factor regarded as beneficial in the context of the introduction of strict product liability was that a manufacturer could commence a business practice on condition that it would make good any loss that would arise from a defective product[924] - an attractive option afforded to a consumer. Finally, the success of the European model motivated Australia to follow suit as the general level of strict product liability claims within the European community proved to be very low which was perceived to be due to the effectiveness of the Directive.[925] Stapleton however remarks that the modelling of the Australian strict product liability regime on the EU Product Liability Directive lacked originality and that "the Part VA reforms appears to have been adopted *merely as an off-the-shelf-solution*."[926]

A couple of years later further reforms to Australia's strict product liability regime occurred when the Productivity Commission was requested in 2006 to undertake a research study to examine the impacts of options for reforming Australia's general consumer product safety system that was encapsulated in the product safety provisions contained in the TPA and the various fair trading acts of the States and Territories. In its Report, the Productivity Commission stated that the "intrinsic case for introducing a single national generic consumer law" in Australia was compelling.[927] The Commission indicated that the starting point for such reform

[920] Product Liability in Australia par 7.1.
[921] Stapleton (2000) *WLJ* 369.
[922] Product Liability in Australia par 3.1.
[923] Product Liability in Australia par 7.1. Although this theory, at the same par, has been criticised for amounting to a "compulsory accident insurance policy."
[924] Product Liability in Australia par 7.1.
[925] Hodges (2000) *EL* 33. Corones and Clarke (1996) at 512 indicate that not only was Part VA based on the EU Directive but both the Explanatory Memorandum to the TPAB (1991) and the Minister in his second reading speech requested courts, in applying Part VA, to "fully acquaint themselves with the emerging jurisprudence in Europe, especially on procedural and evidential matters." See also Howells (1996) *CCLJ* 1; and Nottage and Kellam (2007) *CCLJ*.
[926] Stapleton (2000) *WLJ* 369. Own emphasis. She further remarks: "By 1992, it had begun to become clear that a products liability regime based on the Products Liability Directive, supported by a development risk defense, provided little more exposure to liability than could be generated under a demanding negligence standard. It was a 'reform' Australian business could accept."
[927] PCI Report of 2008 at 61.

should be the then existing TPA provisions, with modifications to be made where necessary.[928] The objective was to have one consolidated piece of legislation which would comprehensively contain all the Australian consumer laws, including the provisions relating to product liability.

Subsequently the Trade Practices Amendment (Australian Consumer Law) Act (No2) 2010 (Cth) was passed on 24 June 2010 with the result that on 1 January 2011, the TPA was repealed and replaced with the Australian Consumer Law, Schedule 2 of the Competition and Consumer Act of 2010, (the ACL).[929] Tsui points out that "the ACL was not intended as a new law, drafted from scratch, but rather, an improved version of the TPA, enacted as a generic, national consumer law regime."[930] Accordingly the strict liability provisions contained in Part VA of the TPA, were almost *verbatim* re-enacted in Chapter 3, Part 3-5, sections 138 to 150 of the ACL.[931]

Tsui further explains that the product liability regime in the ACL embodies a delicate balancing exercise between the conflicting interests of the various stakeholders involved in a product liability lawsuit. While the reforms associated with the manufacturer's liability provisions manifest a strong emphasis on compensating the injured consumer, the product liability reforms also demonstrate sympathy and sensitivity towards the business and industry sector, as well as towards the welfare of the public. Tsui consequently extracts the following set of principles that underlie the said product liability regime:[932]

(a) Access to justice and compensation - a primary objective of the ACL product liability regime is to ensure that an individual would have access to justice, and subject to other considerations, would receive compensation for personal injuries caused by a particular product and through no fault of their own.

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[928] PCI Report of 2008 at 62. The Australian Consumer Law was not intended to be a new law drafted from scratch but rather, an improved version of the TPA, enacted as a generic, national consumer law regime. See further Tsui (2016) *Thesis* 25.

[929] The ACL applies nationally and across each State and Territory.

[930] Tsui (2016) *Thesis* 24. At 34-43, there is a detailed discussion on the development of the safety defect provisions in Part 3 to 5 of the ACL. See Utz (2015) *ICLG* 51.

[931] Chp 3 is titled "Specific protections" and part 3-5 is headed "Liability of manufacturers for goods with safety defects." Like its predecessor, the ACL provides in s 150 (similar to the former sections 74K and 75AP of the TPA) that the application of the strict liability provisions in the ACL may not be excluded or modified through agreement, and that any contractual term that attempts to limit a consumer's rights to below the standard of rights available in terms of the ACL are regarded as void. See also Utz (2010) *ACL* 22; and Hughes (2014) *ELRS* 20.

[932] Tsui (2016) *Thesis* 43-44.

(b) Risk, control and liability - the ACL ensures that the injured individual would be compensated by the manufacturer because it has responsibility and control over the quality and nature of the product. However, the manufacturer would only be held liable to the extent that it exercised such control (thus a defence would be allowed for a defect that occurred in the product after it left the manufacturer's control).

(c) Information and autonomy - the consumer protection afforded by the ACL includes recognising autonomy and freedom of choice. This means that consumers have the right to be informed and that such information disclosure should occur on the basis of protecting the consumer from harm, not on the basis of protecting the manufacturer from liability. However consumers may bear responsibility for the outcomes of their informed decision/s.

(d) Economic rationales - the principle captured in this regard is that intrusion into free markets is only to occur to the extent necessary to provide consumer protection. Additionally, a number of economic rationales are also relevant to determine whether liability should be imposed, including deterrence, innovation and loss-spreading.

(e) Risk/utility and social welfare considerations - the ACL also regards social welfare and the greater good of the public when assessing the outcomes of product liability law. This principle includes ensuring that a product is not to be found defective if its benefits outweigh its risks.

(f) The role of third parties - it is further important for product liability law to acknowledge the role of third parties in the production, regulation and supply of certain products. Therefore fault on the part of a consumer, regulatory body or other third party would act to limit the manufacturer's liability.

(h) Promotion of harmonisation - the ACL envisions legal and economic harmonisation with New Zealand and European jurisdictions.

Thus it is clear that, like the EU Product Liability Directive on which it is modelled, and despite the fact that the Australian product liability regime is located within a comprehensive consumer law framework, its objectives are balanced between protecting consumers and keeping industry economically sustainable.

Given that the product liability provisions in the ACL are almost a *verbatim* re-enactment of the provisions previously contained in Part VA of the TPA, it means that all the opinions and cases dealing with the relevant provisions of Part VA of the repealed Trade Practices Act 51 of 1974 still have application and relevance to the product liability provisions now contained in the ACL.[933] Therefore the discussion below will, in addition to literature and case law pertaining specifically to the ACL, also contain various references to authors commenting on and cases relating to the 1992–TPA regime in order to explain the features of the current ACL regime.

Note should further be taken that product safety in Australia is also regulated by various other pieces of legislation in addition to the provisions of the ACL.[934] Accordingly Australia can also be said to have a comprehensive and sophisticated legislative framework that is aimed at avoiding the release of defective products onto the consumer market.

2. Product liability in terms of the ACL

2.1 Introduction

The ACL applies to all territories and States in Australia. A product liability claim in terms of the ACL is broadly referred to as a "defective goods action."[935] The product liability regime in the ACL is spread out over a variety of sections that deal with specific aspects of liability for defective products. Section 9 sets out the operative definition of a "safety defect" which forms the basis for the determination whether a product is defective in such a manner that it would give rise to product liability for harm caused by such defective product. Various other provisions then subsequently

[933] See Commonwealth Treasury Office *The ACL (2010)* indicates that the differences in the drafting and order of provisions between Part3-5 and the repealed Part VA of the TPA reflect changes and drafting conventions since 1992 and are not intended to effect the operation and previous judicial interpretation of these provisions.

[934] For example the Electricity Act 1945; the Medicines, Poisons and Therapeutic Goods Act 2008; and the Food Safety Act 1991 and Food Safety Standards Code.

[935] In terms of s 2 of the ACL, a "defective goods action" is defined as "[A]n action under s[s] 138,139,140 or 141 and includes such an action because of s 138(3) or 145. Ss 138(3) and 145 are two further provisions that deal with the applicability of state or territory laws and will not be dealt with in this thesis due to its irrelevance to the thesis topic. In Coorey (2015) at 587 remarks: "In effect a 'defective goods action' is simply a cause of action instituted under the liability provisions in Ch3 Pt 305 of the ACL." A defective goods action can, in terms of s 145 of the ACL (similar to former s 75AH of the TPA), commence in accordance with the law of the state or territory, on behalf of a person who died.

deal specifically with different types of harm caused by defective products that may give rise to product liability.

As such section 138 deals with liability for loss or damage suffered by an injured individual; section 139 deals with liability for loss or damage suffered by a person "other than an injured individual"; section 140 deals with liability for loss or damage suffered "by a person if other goods are destroyed or damaged"; and section 141 deals with liability for loss or damage suffered "by a person if land, buildings or fixtures are destroyed or damaged." A closed list of statutory defences to a product liability claim is further set out in section 142 of the ACL.

In addition to the definition of "safety defect" as discussed in more detail in paragraph 2.2 below, a number of definitions are provided in the ACL which are relevant to the interpretation of the product liability provisions in Part 3-5. At the outset it has to be noted that although the ACL, as comprehensive consumer law framework, provides a detailed definition of "consumer"[936] such definition is not relevant for strict product liability *ex delicto* in terms of Part 3-5. This is because the strict product liability provisions indicate that an "injured individual" or a "person other than an injured individual" may institute a product liability claim. This means that product liability plaintiffs are not limited to persons that strictly fit the definition of "consumer" and thus that innocent bystanders can also be plaintiffs under the product liability provisions of the ACL.[937] Alternatively, the regulatory body responsible for enforcement of the ACL, the Australian Competition and Consumer Commission, may commence a strict liability action, by application, on behalf of one or more named injured persons with their written consent.[938]

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[936] "Consumer" in relation to goods, is defined in s 3 of the ACL in the following terms:
"3(1) A person is taken to have acquired particular goods as a consumer if and only if:(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed: (i) $40,000; or (ii) if a greater amount is prescribed for the purposes of this paragraph-that greater amount; or (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads. (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods: (a) for the purpose of re-supply; or (b) for the purpose of using them up or transforming them, in trade or commerce: (i) in the course of a process of production or manufacture; or (ii) in the course of repairing or treating other goods or fixtures on land."
[937] Product Liability in Australia par 8.4; and ss 138-141 of the ACL (similar to s 75AD of the TPA).
[938] S 75AQ of the TPA and s 149 of the ACL. There are three regulatory bodies in Australia that oversee product liability matters concerning consumers – The Australian Competition and Consumer Commission, The Therapeutic Goods Administration, and The Australian Securities and Investments

The product liability regime under the ACL applies to movable "goods" as defined in section 2 of the ACL (an expanded version of the former section 4 of the TPA).[939] This section provides an inclusive definition of goods which has been described as "an extension of the ordinary meaning of goods."[940] As such "goods" include:

(a) ships, aircraft and other vehicles; and

(b) animals, including fish; and

(c) minerals, trees and crops, whether on, under or attached to land or not; and

(d) gas and electricity; and

(e) computer software; and

(f) second-hand goods; and

(g) any component part of, or accessory to, goods.

Notably, goods explicitly include component parts.

The TPA originally imposed strict liability on producers due to the fact that they largely manufactured all goods in Australia.[941] It was considered that this placed them in a better position to cheaply access information pertaining to risks of product characteristics, especially in relation to design features, than consumers were.[942] This liability was however subsequently extended to importers and the rest of the supply chain.

Section 7 of the ACL (similar to former section 74A of the TPA)[943] defines "manufacturer" as follows:

(1) A manufacturer includes the following:

(a) a person who grows, extracts, produces, processes or assembles goods;

Commission. There are also a number of State Regulators that govern various industries. See Utz (2017) *ICLG* 11.

[939] S 4 of the TPA defined "goods."

[940] *SX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 97 ALR 513 at 520. The ordinary definition of goods, as per the LexisNexis ALD (2010) at 263, defines goods as "moveable personal property, especially merchandise used in trade or commerce and requiring carriage from one place to another. The word 'good' is general and of indefinite import." Coorey (2015) at 101 thus remarks that the ordinary definition of goods is wide and includes most items on shelves in retail and department stores. He further points out that s 8 of the ACL provides that, for purposes of the ACL, goods are taken to be supplied to a consumer even if they are affixed to land or premises at the time of supply. In terms of the Explanatory Memorandum at 2.42 this means that where items are supplied in relation to another transaction (such as building a house) and are fixed to the land, those items are considered to be "goods" for the purposes of the ACL.

[941] Kellam and Arste (2000) *WMLR* 151.

[942] Product Liability in Australia par 8.2.

[943] Former S 74A of the TPA.

(b) a person who holds himself or herself out to the public as the manufacturer of goods;

(c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person;

(d) a person (the first person) who causes or permits another person, in connection with:

(i) the supply or possible supply of goods by that other person; or

(ii) the promotion by that other person by any means of the supply or use of goods; to hold out the first person to the public as the manufacturer of the goods;

(e) a person who imports goods into Australia if:

(i) the person is not the manufacturer of the goods; and

(ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.

(2) For the purposes of subsection (1)(c):

(a) a name, brand or mark is taken to be applied to goods if:

(i) it is woven in, impressed on, worked into or annexed or affixed to the goods; or

(j) it is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b) if the name of a person, a name by which a person carries on business or a brand or mark of a person is applied to goods, it is presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.

(3) If goods are imported into Australia on behalf of a person, the person is taken, for the purposes of paragraph (1)(e), to have imported the goods into Australia.

As appears from the discussion of sections 138 to 141 below, a manufacturer will incur liability for a defective product under the ACL if such manufacturer supplied defective goods "in trade or commerce." It was held in *Concrete Constructions (NSW) Pty Ltd v Nelson*[944] that the phrase "in trade or commerce" was inserted into a number of provisions of the ACL to limit the scope of those provisions to conduct that bear a "trading or commercial character." The term "trade and commerce" thus

[944] (1990) 92 ALR 193 at 197.

excludes non-commercial or private transactions.[945] Coorey accordingly points out that the "conduct in question must be conduct '*in* trade or commerce' and not '*in respect of* trade or commerce' or not '*merely connected with*' or '*incidental to* trade or commerce'."

"Supply" is inclusively defined in section 2 of the ACL (similar to the former section 4 of the TPA) which provides an extension of the ordinary meaning of supply.[946] In terms of section 2, "supply" when "used as a verb, includes -

(a) in relation to goods- supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase: and

(b) in relation to services- provide, grant or confer;

and when used as a noun, has a corresponding meaning, and *supplied* and *supplier* have corresponding meanings."

In *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd*[947] the court commented as follows in relation to the meaning of "supply" in the former section 4 of the TPA (which thus also applies in the context of the similarly worded section 2 of the ACL):

> The supply of goods will usually be made pursuant to a contract for sale, lease, hire-purchase or some other form of agreement: but it is the act of supply to which the statutory [definition] is directed and this includes the process of furnishing, providing or delivering goods. Supply is a word of wide

[945] Kellam (1992) *PLJ* 19.

[946] S 11 of the ACL provides a further reference to the meaning of acquisition, supply and re-supply and states as follows - "In this Schedule: (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods pursuant to a supply of the goods; and (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services; and (c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both; and (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and (e) a reference to the re-supply of goods acquired from a person includes a reference to: (i) a supply of the goods to another person in an altered form or condition; and (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated; and (f) a reference to the re-supply of services (the *original services*) acquired from a person (the *original supplier*) includes a reference to: (i) a supply of the original services to another person in an altered form or condition; and (ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier." Coorey (2015) at 109 thus points out that the characterisation of the supply of goods or the supply of service may not always be an easy task. In *Cool and Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 35 ALR 445 it was held that a court will identify from the facts of the case the "precise legal obligation" undertaken by the supplier.

[947] (1985) 64 ALR 536 at 554.

> import. The subject matter of the Act and its evident purposes do not call for any reading down of its ordinary meaning. Neither s4c nor the definition of 'supply' in s4 call for any restrictive interpretation. The prohibited supply is essentially the supply of goods or services pursuant to business transactions: see *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 46 AJLR 241.

Section 147 of the ACL further addresses circumstances where a plaintiff intends to bring a defective goods action against the manufacturer but does not know who the manufacturer of the relevant goods is. Accordingly section 147(1) states that when a plaintiff elects to institute legal action for strict product liability against a manufacturer for harm arising from an alleged defective product, but he is unaware of who the manufacturer is or how to locate the manufacturer, he can send a written notice to each supplier within the supply chain (or to at least one supplier) who is known to him, requesting the identification and details of the manufacturer or the details of that supplier's previous supplier.[948] Should a supplier receive such a written notice by the plaintiff, such supplier has 30 days[949] to respond to the notice failing which a supplier who did not comply with the request will be *deemed* to be the manufacturer of the goods for the purpose of the defective goods liability action.[950] This demand places a burden on suppliers to ensure that they maintain records of links within the supply chain in order to avoid liability as deemed manufacturers in terms of section 147 of the ACL.[951] If two or more manufacturers (or corporations in terms of the TPA)[952] are held liable for the same loss, they are jointly and severally liable.[953] Therefore, a

[948] Coorey (2015) at 588 however points out that a person can only request information which goes towards identifying the manufacturer of the goods in question, or which identifies the supplier to whom the request has been given.
[949] S 147(2) refers only to "days" which is undefined. Throughout the ACL with regard to its other provisions, which are unrelated to product liability, expressly reference is made to either a "business day" (which has been defined in s 2 of the ACL as a day excluding a Saturday, Sunday and Public Holiday in the area where the agreement was entered into) or a "day."
[950] S 147(1) and (2). The deeming provision in s 147(2) does however not apply for purposes of s 142(c). Coorey (2015) at 588 explains that this means that a supplier will not be deemed to be the manufacturer of alleged defective goods where it is proposed that the state of scientific or technical knowledge defence (that is, the development risk defence as discussed in paragraph 4.4 below) is relied on.
[951] Kellam (1992) *PLJ* 19.
[952] Former S 75AM of the TPA.
[953] S 144 of the ACL.

wide class of defendants in the manufacturing chain may be held individually or collectively liable for damage arising from a defective product.[954]

As indicated, the ACL, by incorporating the strict product liability regime initially set out in Part VA of the TPA, does not require a plaintiff to prove negligence on the part of the manufacturer.[955] In *Cheong by her Tutor The Protective Commissioner of New South Wales v Wong*[956] the court held that supplying a re-treaded tyre was inadequate to fulfil road use expectation and that although the defendant was not negligent in supplying the re-treaded tyre, the tyre itself was a "defective good" within the meaning of the statutory prescription. Although not specifically stated a plaintiff would nevertheless have to prove the defect in the goods, the damage caused by the goods and a causal connection between the defect and the damage.

Loveday and Mckie remark that prior to the Australian tort reform process, causation was established by applying a "common sense" approach.[957] Under sections 138 to 141 of the ACL, the plaintiff has to also establish a causal link between the defect and the injury suffered, and "merely proving a possible cause is not enough."[958] The court in *Carey–Hazell v Getz Bros and Co (Aust) Pty Ltd* dealing with former section 75AD of the TPA (now section 138 of the ACL), stated:[959]

> The words in s 75AD denote clearly the requirement of causation. The approach taken in *Wardey* and in *March v Stramare* does not permit consideration of the strength of the link required. In the context of s 75AD the defect must be shown to have caused an applicant's injuries by applying a mere common sense approach. In any event, were reference to the words and statutory context possible, there is nothing in the subsection which would support the applicant's contention of there being some lesser link necessary.

Where a manufacturer or supplier is held liable for the damage caused by a defective product, monetary compensation is available for patrimonial and non-

[954] Kellam (1992) *PLJ* 18.
[955] *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40. Although proof of a lack of negligence as a defence exists at common law, which is available to a manufacture if a plaintiff consumer pursues a fault-based liability claim against it – see Utz (2015) *ICLG* 51 and 53; and Utz (2017) *ICLG* 16.
[956] (2001) NSWSC 881 at pars 63 to 73.
[957] Utz (2017) *ICLG* 16.
[958] *Ibid.*
[959] (2004) FCA 853 at par 195.

patrimonial loss.[960] Damages are calculated on the basis of the actual loss incurred by the safety defect such as personal injury or death,[961] or loss which is likely to be incurred such as medical treatment or loss of earnings.[962] Non-economic loss (such as pain and suffering, loss of amenities of life, loss of expectation of life and permanent disfigurement) may be claimed too. Losses arising from goods themselves or the cost of repair or replacement of the goods,[963] including loss related to land, buildings or fixtures obtained for private use may further be requested.[964] In fact, sections 237 and 238 of the ACL offer an extension of remedies at the discretion of the court – Utz remarks that "a court has power to make such orders it thinks appropriate", which may extend to an injunction although to the exclusion of punitive or aggravated damages.[965]

The liability of a manufacturer may further be reduced by the amount of any contributory negligence, as provided by section 137A of the ACL.[966]

2.2 "Safety defect" as a basis for product liability

As indicated above, in order to determine the basis for product liability in terms of sections 138 to 141 of the ACL, regard must be had to section 9 of the ACL that defines a "safety defect" in relation to goods. Section 9 is largely similar to the former section 75AC of the TPA except that section 75AC referred broadly to a "defect" whereas section 9 now narrows this down to a "safety defect." In terms of section 9(1), goods have a safety defect "if their safety is not such as persons generally are entitled to expect."[967] Similar to the former section 75AC(2) of the TPA, section 9(2) provides that in determining the extent of the safety of goods, regard *must*[968] be given to "all relevant circumstances" including:

> (a) the manner in which, and the purposes for which, they have been marketed; and

[960] Utz (2015) *ICLG* 57.
[961] Utz (2010) *ACL* 23.
[962] Hughes (2014) *ELRS* 27.
[963] Hughes (2014) *ELRS* 27.
[964] Utz (2010) *ACL* 23 read with s 141 of the ACL.
[965] Utz (2015) *ICLG* 57. The author, in the same par, mentions that the ACL has inserted threshold limitations on the monetary compensation claimed – an aspect that falls beyond the scope of this thesis.
[966] See also Coorey (2015) 611.
[967] S 9(1) ACL. See also Hammond (1998) *TLJ*.
[968] Own emphasis.

(b) their packaging; and

(c) the use of any mark in relation to them; and

(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and

(e) what might reasonably be expected to be done with or in relation to them; and

(f) the time that they were supplied by their manufacturer.

It is further provided that an inference that goods have a safety defect is not to be made only because of the fact that, *after* those goods were supplied by their manufacturer, "safer" goods of the same kind were supplied.[969] In addition, it is stated that "an inference that goods have a safety defect is *not* to be made *only* because there was compliance with a commonwealth mandatory standard for them; and such standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer."[970]

The above list of factors to be taken into consideration to determine whether goods had a safety defect do not constitute a closed list as safety expectations may also depend on the product's nature and community knowledge of the product.[971]

2.3 Liability for loss or damage

2.3.1 Liability for loss or damage suffered by an injured individual

In respect of liability for loss or damage suffered by an injured individual, section 138 of the ACL (similar to the former section 75 AD of the TPA) provides as follows:

(1) A manufacturer of goods is liable to compensate an individual if:

(a) the manufacturer supplies the goods in trade or commerce; and

(b) the goods have a safety defect; and

(c) the individual suffers injuries because of the safety defect.

(2) The individual may recover by action against the manufacturer, the amount of the loss or damage suffered by the individual.

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[969] S 9(3) ACL (similar to the former s 75AC(3) of the TPA). Own emphasis.

[970] See Explanatory Memorandum to the TPAB (1991) where it was indicated that this provision was included in Part VA to recognise the time lag between scientific and technological advances and the development of new standards. Thus this provision is aligned with the development risk defence as contained in s 142(c) as discussed in more detail in par 4.4 below.

[971] Explanatory Memorandum to the TPAB (1991) at par 21.

(3) If the individual dies because of the injuries, a law of a State or Territory about liability in respect of the death of individuals applies as if:
   (a) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
   (b) the safety defect were the manufacturer's wrongful act, neglect or default.

Section 138 applies to goods in general and not only to "consumer goods."[972] It should also be noted that section 138 refers to "individuals" and not "persons", hence its scope is confined to natural persons who suffer injury.[973] It is furthermore not required that the manufacturer must supply the goods directly to the individual. Coorey points out that supply to any person in the contractual chain will suffice, for example, liability against the manufacturer will still follow in circumstances where the manufacturer supplies the goods to a wholesaler or retailer who then re-supplies the goods to the individual.[974]

2.3.2 Liability for loss or damage suffered by a person other than an injured individual

Section 139 of the ACL (similar to the former section 75 AE of the TPA) provides that:

(1) A manufacturer of goods is liable to compensate a person if:
   (a) the manufacturer supplies the goods in trade and commerce; and
   (b) the goods have a safety defect: and
   (c) an individual (other than the person)[975] suffers injuries because of the safety defect; and
   (d) the person suffers loss or damage because of:
      (i) the injuries; or
      (ii) if the individual dies because of the injuries-the individual's death; and
   (e) the loss or damage does not come about because of a business or professional relationship between the person and the individual.

[972] Explanatory Memorandum to the TPAB (1991) at par 12.15.
[973] Coorey (2015) at 593.
[974] Coorey (2015) 594.
[975] That is, other than the person mentioned in s 139(1).

(2) The person may recover, by action against the manufacturer, the amount of loss or damage suffered by the person.

Section 139 applies to goods in general and not only to "consumer goods."[976] Coorey explains that the wording of section 139 means that losses caused by the injury of a business partner or injury of a director of a company are excluded. [977] Section 139(2) does not affect the ability of the person who suffered loss or injury to bring a recovery action that the defective goods had not been directly supplied to or acquired by that individual.[978]

In *Stegenda v J Corp Pty Ltd*[979] it was held that former section 75AE of the TPA was intended to benefit the dependants of a natural person, who is either injured or dies of injuries caused by defective goods. In *Cheong by her tutor the Protective Commissioner of New South Wales v Wong*[980] it was held that the structure of the former section 75AE of the TPA did not enable it to be used as a vehicle for seeking indemnity between tortfeasors (wrongdoers). It was held to be available to those who have suffered loss from injuries, as distinct from a loss being suffered by being required to meet a judgment entered by reason of that person being a cause of the injuries.[981]

2.3.3 Liability for loss or damage suffered by a person if other goods are destroyed or damaged

Section 140 of the ACL (similar to former section 75 AF of the TPA) provides that:

(1) A manufacturer of goods is liable to compensate a person if:

(a) the manufacturer supplies the goods in trade or commerce; and

(b) the goods have a safety defect; and

(c) other goods of a kind ordinarily acquired for personal, domestic or household use or consumption are destroyed or damaged because of the safety defect; and

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[976] Explanatory memorandum to the TPAB (1991) at par 12.15.
[977] *Stegenda v J Corp Pty Ltd* (1999) ATPR 41-695.
[978] Coorey (2015) 595.
[979] (1999) ATPR 41-695.
[980] (2001) 34 MVR 359 at pars 86-87.
[981] *Ibid*.

(d) the person used or consumed, or intended to use or consume, the destroyed or damaged goods for personal domestic or household use or consumption; and

(e) the person suffers loss or damage as a result of the destruction or damage.

(2) The person may recover, by action against the manufacturer, the amount of the loss or damage suffered by the person.

Section 140 also applies to goods in general and is not limited to "consumer goods."[982] Notably a claim in terms of section 140 can only be instituted if the plaintiff used the goods that caused the damage for personal domestic or household use or consumption. Thus section 140 does not apply to goods used for business purposes. The person who suffers loss or damage can recover the amount of such loss or damage by bringing an action against the manufacturer of the defective goods. It does not affect the ability of the person to bring a recovery action just because the defective goods had not been directly supplied to or acquired by that person.[983]

2.3.4 Liability for loss or damage suffered by a person if land, buildings or fixtures are destroyed or damaged

Section 141 of the ACL (similar to former section 75AG of the TPA) states as follows:

(1) A manufacturer of goods is liable to compensate a person if:

(a) the manufacturer supplies the goods in trade or commerce; and

(b) the goods have a safety defect; and

(c) land, buildings or fixtures are destroyed or damaged because of the safety defect;[984] and

(d) the land, buildings or fixtures are ordinarily acquired for private use; and

(e) the person used, or intended to use, the land, buildings or fixtures for private use; and

(f) the person suffers loss or damage as a result of the destruction or damage.

(2) The person may recover, by action against the manufacturer, the amount of the loss or damage suffered by the person.

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[982] Explanatory memorandum of the TPAB (1991) at 12.15.

[983] Coorey (2015) 596.

[984] Harland (1992) *JCP* 201 indicates that this provision is intended to overcome "anomalies which would otherwise have occurred where a defective appliance caused a fire in a home owner's [residence] which damaged not only furniture and other appliances but also the building itself."

Section 141 of the ACL applies to "goods" in general and is not limited to "consumer goods."[985] Again it should be noted that section 141 is only to the avail of a person who acquired and used, or intended to use the land, buildings or fixtures that were damaged or destroyed, for private purposes. Furthermore, section 141(2) does not affect the liability of the person who suffered loss or damage to bring a recovery action that the goods containing the safety defect had not been directly supplied to or acquired by that person.[986]

2.4 Statutory defences

The strict product liability regime contained in the ACL is not absolute, as is evident from section 142 (similar to former section 75AK of the TPA), which provides for the following statutory defences:

> In a defective goods action, it is a defence if it is established that:
>
> (a) the safety defect in the goods that is alleged to have caused the loss or damage did not exist:[987]
>
> (i) in the case of electricity – at the time at which the electricity was generated, being a time before it was transmitted or distributed; or
>
> (ii) in any other case – at the time when the goods were supplied by their actual manufacturer; or
>
> (b) the goods had that safety defect only because there was compliance with a mandatory standard for them;[988] or
>
> (c) the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered;[989] or
>
> (d) if the goods that had that safety defect were comprised in other goods – that safety defect is attributable only to:[990]
>
> (i) the design of the other goods; or
>
> (ii) the markings on or accompanying the other goods; or
>
> (iii) the instructions or warnings given by manufacturer of the other goods.

[985] Explanatory Memorandum of the TPAB (1991) at 12.15.
[986] Coorey (2015) 597.
[987] Former S 75AK(1)(a) of the TPA listed the same defence although its distinction between "electricity" and "any other case" was provided thereunder in s 75AK(2) of the TPA.
[988] Former S 75AK(1)(b) of the TPA listed the same defence.
[989] Former S 75AK(1)(c) of the TPA listed the same defence.
[990] Former S75AK(1)(d) of the TPA listed the same defence although it defined "other goods" as "finished goods."

As discussed in more detail below these defences largely mirror the defences provided in Article 7(b), (d), (e) and (f) of the EU Product Liability Directive. Notably Australia has elected not to incorporate the defence in article 7(a) of the Directive namely that the manufacturer "did not put the product into circulation."[991] Nor did it adopt the defence in Article 7(c) that the manufacturer neither manufactured the product for sale or any form of distribution for economic purpose nor manufactured and distributed it in the course of his business.[992] This is obviously due to the fact that a manufacturer will in any event only incur liability under the product liability provisions if he acts "in trade or commerce" as pointed out in paragraph 2.1 above.

2.5 Limitation periods

Like Articles 11 and 12 of the EU Product Liability Directive, section 143 of the ACL (similar to former sections 74J and 75AO of the TPA) sets out certain time limitation periods for a plaintiff wanting to commence a defective goods action against a manufacturer of defective goods and provides as follows:

> (1) Subject to subsection (2), a person may commence a defective goods action at any time within 3 years after the time the person becomes aware, or ought reasonably to become aware, of all of the following:
> (a) the alleged loss or damage;
> (b) the safety defect of the goods;
> (c) the identity of the person who manufactured the goods.
> (2) A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

3. The concept of "defect" in Australian product liability law

Boas commented as long ago as 1994 that "[O]ne of the biggest problems faced by consumers in establishing a case under Part VA [of the TPA] will be obtaining evidence to establish that the product which is alleged to have caused the loss was defective."[993] In view thereof that the product liability provisions in the TPA to which

[991] See chp 6, par 5.1.1-5.1.6 save for 5.1.3.
[992] See chp 6, par 5.1.3.
[993] Boas (1994) *BLR* 116. He points out that the Federal Bureau of Consumer Organizations, the ALRC, the Public Interest Advocacy Centre and ACA all argued before the Senate Standing Committee on Legal and Constitutional Affairs that "the plaintiff would need information relating to the safety standards, design criteria, laboratory and field testing, daily quality checks from the production

Boas refers were re-enacted basically verbatim in the ACL, this comment is thus also valid with regard to the current Australian product liability regime.

Given that the Australian strict product liability regime has been expressly declared to be modelled on the EU Product Liability Directive, the test to determine the existence of a "safety defect" in section 9(1) of the ACL, as indicated in paragraph 2.2 above, is basically similar to the test for a "defect" in Article 6.1 of the EU Directive.[994] Like its EU counterpart, the Australian strict product liability regime does also not distinguish between manufacturing, design and warning defects but uses the generic term "defect." Likewise the Australian definition of "safety defect" also contains a "consumer expectations test" as section 9(2) provides that "goods have a *safety defect* if their safety is not such as persons generally are entitled to expect." The consumer expectations test in section 9(1) also requires a consideration of all the relevant circumstances and refers to a non-exhaustive number of factors that should be taken into account. Notably these factors specifically mentioned in section 9(1) differ from the EU Directive insofar as the EU refers generally to the "presentation" of the product whereas the ACL has chosen to be more specific and rather than to use the word "presentation", it requires consideration of the manner in which and the purposes for which, the goods were marketed; their packaging; marks on the goods and instructions or warnings provided with the goods. These relevant circumstances that ought to be taken into account to determine whether a product has a safety defect are not a closed list. Given that they are joined by the word "and" at the end of each listed circumstance, it appears the intention is that these circumstances, to the extent that they are present in a given scenario, must all be considered when determining whether goods have a safety defect. Although the test in section 9(1) is actually framed as a "persons expectations test" it is nevertheless popularly referred to in product liability literature as a "consumer expectations test."[995]

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line and reports of other enquiries" to mount a case against a manufacturer under Part VA of the Trade Practices Act.

[994] Kellam and Arste (2000) *WMLR* 144 and 149. Although the circumstances named in s 9(2) of the ACL are more comprehensive than those listed in Article 6.1(a)-(c) of the EU Directive.

[995] See chp 4, par 2.3.3; and chp 6, par 4.

Kellam and O'Keefe remark in the Australian context that "consumer expectations" regarding a product are essentially shaped by the information they receive, stating that

> [C]onsumer expectations of a product's quality, purpose and safety are powerfully and primarily influenced by marketing, and especially by advertising….Packaging, instructions for use and warnings on a product also contribute to create in consumers preconceptions as to what a product can deliver. Recognising this, a representational theory of product liability makes manufacturers, suppliers and retailers answerable for the information they…make available to consumers, and the adequacy of that information in the course of marketing and selling their product.[996]

Goods must not merely be of poor quality or inoperative to be regarded as defective for purposes of product liability in terms of the ACL. Kellam and Arste accordingly describe the consumer expectations test for a safety defect as provided in section 9(1) as follows: "it is an objective test based on the community's knowledge and expectations rather than the subjective expectations of the injured party. It is not enough that the product does not function or is of substandard quality. It must also be unsafe." The said authors however point out that this definition does not require goods to be risk-free.[997]

Although the definition of "safety defect" contains no express reference to the various types of product defect, Kellam and Arste remark that the definition does however encompass potential defects relating to a product's design, form, structure or composition. It further encompasses defects that arise due to some manufacturing problem in the product's construction or assembly and also includes defects relating to the product's presentation caused by inadequate warnings, instructions or directions.[998] The definition is thus wide enough to encompass manufacturing, design and warning defects.

Tsui points out that together sections 9(1) and 9(2) provide the components that make up the concept of "safety defect" for purposes of the product liability regime

[996] Kellam and O'Keefe (1996) *TPLJ* 4.
[997] Kellam and Arste (2000) *WMLR* 149.
[998] Kellam and Arste (2000) *WMLR* 149-150.

captured in the ACL, namely: safety, persons generally, the expectations that persons generally are entitled to and the relevant circumstances. Like Kellam and Arste, she remarks that "safety" and "defect" are however relative concepts, requiring an objective test or standard.[999]

Some cases were reported under the TPA which, by virtue of the similarity between section 9(1) and the former section 75 AC(2) of the TPA, is instructive in interpreting the concept of a "safety defect" and the consumer expectations test in section 9 . In *Glendale Chemical Products Pty Ltd v ACCC*[1000] the defect concerned was the failure to warn consumers against a reasonably foreseeable misuse of caustic soda, namely mixing it with hot water in a confined space such as a drain pipe.[1001] In 1995, the injured person, Mr Barnes, and the ACCC[1002] instituted separate legal actions against Glendale Chemical Products due to Mr Barnes sustaining injuries caused by a defective product. The facts were that Mr Barnes purchased caustic soda to remove debris in his shower drain. The label read "use cold water", "contact with eyes and skin should be avoided" and "rubber gloves and safety glasses should be worn when handling the product."[1003] However, he relied upon a friend's advice and used hot water mixed with the chemical to clean the shower drain. This resulted in the mixture splashing onto his face, causing serious burns to his face and eyes. M. Barnes claimed damages[1004] and alleged that the product should have contained a warning stating "Do not use the product in conjunction with hot water."[1005] The ACCC also sought an order requesting the defendant to pay compensation, to correct its

[999] Tsui (2016) *Thesis* 178.
[1000] (1998) 90 FCR 40, a matter brought in terms of the TPA.
[1001] The court acknowledged (at 631) that manufacturers could not foresee all the possible ways that a consumer might use or misuse a product but indicated that this specific misuse was indeed foreseeable. The manufacturer in this case had marketed the product as suitable for cleaning drain pipes, which is what the plaintiff bought it for. It was also reasonably foreseeable that the soda might be poured straight into a drain that had hot water in it, or that the consumer may have used it in conjunction with hot or boiling water. The court stated: "Goods will not be safe even if, having regard to the goods, they operate as intended. S 75AC makes it clear that this section applies even if there is no inherent defect in the goods in question. Thus, it is clear that a substance which is, for example, marketed as being suitable for a particular purpose without warnings as to the particular way in which that purpose should be achieved may have a defect because use in some ways would not be safe."
[1002] S 75AQ of the TPA provided that the ACCC may commence a liability action on behalf of persons who have suffered a loss from a defective product.
[1003] At 631. See also Kellam and Giblett (2000) *CLJ* 11 for a summary and discussion of the case.
[1004] At 634. See also Kellam and Giblett (2000) *CLJ* 23.
[1005] At 635. See also Kellam and Giblett (2000) *CLJ* 11.

advertising and to relabel its product to warn consumers about the use of caustic soda with hot water.

The court incorporated a representational theory into its judgment[1006] stating that "liability focuses on the expectations created in consumers by the way in which a manufacturer, supplier or retailer presents or markets its products – instructions or warnings determine what a consumer can reasonably expect from a product."[1007] *In casu*, it was held that consumers must be aware of risks and decide to accept them or not, based on given warnings and/or instructions.[1008] Ordinary consumers were not expected to know of the dangers associated with the use of caustic soda and hot water in confined spaces;[1009] and the defendant, as the supplier of the product, had a duty to provide a warning to consumers, which it failed to do, thus constituting a breach of such duty to warn.[1010] The lack of warnings resulted in the product containing an "instructional" defect hence the plaintiff was awarded compensation.[1011]

In *Hampic Pty Ltd v Adams*[1012]a manufacturer of cleaning products distributed a cleaning liquid to the Newcastle City Council where Adams worked as a cleaner. The container contained inadequate instructions on its use. Adams used the product in accordance with the instructions but was badly burnt. Poor labeling was held to have rendered the product unsafe.[1013] The court held that a duty existed to warn consumers of risks and dangers in connection with the use of goods, and that this duty is a continuous one.[1014] It further held that it is not possible to foresee all possible uses of goods and that goods that are inherently unsafe can be safe for purposes of section 9(1) if clear and comprehensive warnings and instructions are used.[1015]

[1006] At 636. See also Kellam and Giblett (2000) *CLJ* 8.
[1007] At 636.See also Kellam and Giblett (2000) *CLJ* 9.
[1008] At 637.See Kellam and Giblett (2000) *CLJ* 10.
[1009] At 637. See Kellam and Giblett (2000) *CLJ* 17.
[1010] At 638. See Kellam and Giblett (2000) *CLJ* 23.
[1011] At 639. See Kellam and Giblett (2000) *CLJ* 17.
[1012] (1999) NSWCA 455 .See Kellam and Arste (2000) *WMLR* 162 for a discussion of this case.
[1013] At 459. Kellam and Giblett (2000) *CLJ* 10.
[1014] Product Liability in Australia par 2.3.
[1015] See also *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 284 ALR 1 (on appeal) at par 191; and Coorey (2015) 590.

In *Morris v Alcon Laboratories (Australia) Pty Ltd,*[1016] the court made the following observations about the "circumstances" that should be taken into account when determining whether goods contain a safety defect:

> In determining the extent of the safety of goods, s 75AC(2) requires that the court have regard 'to all the relevant circumstances'…The nature of 'relevant circumstances' is assisted by para (a) - para (f) of s 75AC(2). But those paragraphs neither set outer parameters of the relevant circumstances nor specify a minimum qualification to be met by such circumstances. That is because they are enumerated in inclusive circumstances only. Whether or not any part of the paragraphs can be satisfied in any particular case will depend on whether the evidence in that case gives rise to a finding of one of the inclusive circumstances. Absence of evidence supporting a finding of the existence of any of the matters set out in the pars does not mean that the court is still not to have regard to all the relevant circumstances as they arise in the particular case nor that the requirements of s 75AC(1) necessarily cannot be satisfied. Absent evidence satisfying a finding of any of the circumstances in the pars may mean that an applicant will have more difficulty in making out the requirements of s 75AC(1) understood in the context of the opening words of s 75AC(2). It does not have to have the necessary consequence that those requirements cannot be made out where the evidence in the case supports the appropriate finding. It means only that the evidence in the case is not the sort that falls within para (a) – para (f).

In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd*[1017] it was confirmed that the Australian consumer expectations test is an objective test to be determined with regard to the expectations of the reasonable person and not with regard to the subjective knowledge or expectations of the individual. In *Bachelder v Holden Ltd*[1018] the court indicated that the test for safety defect in section 75 AC(2) does not require a plaintiff to identify the safety defect with "any particular level or precision." However it indicated that the section provides a non-exhaustive list of factors that the court is obliged to consider in determining whether a product contains a safety defect.[1019]

[1016] (2003) FCA 151 at par 16-17; and Coorey (2015) 590.
[1017] (2004) FCA 853 at par 186. See also Coorey (2015) 589.
[1018] (2009) VSC 29 at par 14. The court stated that the fact that it may be more difficult for a defendant to establish a defence under s 142 if the safety defect is not or cannot be identified with precision does not alter the proper construction and operation of s 9.
[1019] Coorey (2015) 589.

As pointed out in Chapter 6[1020] the consumer expectations test as included in the definition of a "defect" in the EU Product Liability Directive, has over the years attracted much criticism.[1021] Notably, the consumer expectations test in the Australian product liability regime has also been met with similar criticism.[1022] Tsui however argues that the criticism of the test in section 9 of the ACL as failing to provide an "objective standard against which (safety and defect) may be measured"[1023] is unfounded, as she argues that the standard is dependent upon the specific nature of the product or service being supplied, rather than a generic yardstick of general application. Thus she states that whether a product is safe depends on the kind of defect it is alleged to suffer and how that particular defect is assessed.[1024] Tsui nevertheless admits that interpreting the consumer expectations test in section 9 has its challenges. As regards the words "persons generally" she submits that the ACL poses an interpretational problem as it is unclear who "persons generally" are. She refers to the three possible groups that have been identified in literature:[1025] the "hypothetical average consumer",[1026] the "foreseeable users of the product",[1027] and persons "holding the accumulated knowledge of the community" which would include expert knowledge. Tsui argues that while the first two categories are plausible, there is an argument to be made that the third category (which includes expert knowledge) should not form part of what persons generally are entitled to expect. She refers to the case of *Graham Barclay Oysters Pty Ltd v Ryan*[1028] discussed in more detail below, where the court rejected the idea that the reasonable expectations of a consumer should be measured against the knowledge of an expert on the basis that the manufacturers liability provisions are meant to protect consumers and should be assessed from the consumer's point of view. Tsui accordingly argues that the same reasoning would apply to the Part 3-5 provisions of the ACL, thus excluding the knowledge and expectations of the expert in determining what persons generally were entitled to expect. She therefore concludes that "persons generally" refer to the mentality and expectations of the reasonable consumer, including users of the

[1020] See chp 6, par 4.
[1021] Hermann (1991) *FICCQ* 251 and 253; and Tsui (2016) *Thesis* 63.
[1022] Malkin and Wright (1993) *TLJ* 73; and Hammond (1998) *TLJ* 128.
[1023] As per Hammond (1998) *TLJ* 25.
[1024] Tsui (2016) *Thesis* 178-179.
[1025] Tsui (2016) *Thesis* 180.
[1026] Howells (1996) *CCLJ* 12.
[1027] Hammond (1998) *TLJ* 26.
[1028] (2000) 177 ALR 18 (on appeal).

relevant product as well as innocent third parties who could foreseeably be harmed as a result of use of the product.[1029]

As indicated above, it is important to note that, the expectations of consumers for purposes of section 9(1) are not determined *in vacuo* but are gauged with collective reference to "all the relevant circumstances" including those mentioned specifically in sections 9(2)(a) to (f). Tsui indicates that the requirement that defectiveness of goods must be determined *inter alia* with reference to the manner and purpose for which the goods were marketed (as per section 9(2)(a)) means that consideration must also be given to *whom* the relevant products are marketed to.[1030] The Explanatory Memorandum to the ACL indicates that instructions and warnings would vary according to who the target audience is.[1031] While a lay person cannot expect to receive detailed instructions when purchasing a product aimed at trained professionals with a pre-existing knowledge base, they are nevertheless entitled to expect a high degree of safety where the goods are marked as simple and safe.[1032] As regards sections 9(2)(b),(c) and (d) she remarks that it is trite that the presentation of a product acts as a consumer's main source of information and will thus influence a consumer's expectation of the safety of the product.[1033] Kellam and Clarke indicate that this involves two obligations on the part of the manufacturer, namely to properly disclose matters that pertain to the quality of the product and to refrain from making representations about a product which "raises the safety expectations of a consumer unduly."[1034] Section 9(2)(e) considers what might reasonably be expected to be done with, or in relation to, a particular product, including any potential secondary uses or misuses.[1035] Where a manufacturer becomes aware that a potential misuse of the product may result in harm, and such misuse is reasonably to be expected, Stapleton indicates that failure to warn against such misuse could result in an instructional or warning defect.[1036] In accordance with section 9(2)(f), the time of a product's supply is also relevant. Tsui thus points out

[1029] Tsui (2016) *Thesis* 181.
[1030] *Ibid*. Own emphasis.
[1031] Explanatory Memorandum at 5.
[1032] Tsui (2016) *Thesis* 182.
[1033] *Ibid*.
[1034] Kellam, Clarke and Glavac (2013) *CCLJ* 29.
[1035] Explanatory Memorandum at 7.
[1036] Stapleton (2007) *RL* 1013.

that when determining product liability, the relevant time is the time when the goods were put into circulation by the manufacturer. If goods would have met the community's expectations at that time, meaning they were "state of the art" at the time of their supply, they are not to be regarded as defective at a later point in time solely due to an increase in community knowledge and understanding of that product or because a safer product became available at a later stage.

4. Statutory defences to defective goods actions

4.1 Introduction

As indicated in paragraph 2.4 above, section 142 of the ACL (similar to section 75AK of the TPA) sets out the defences that manufacturers may raise in response to a defective goods action. These defences are "broadly comparable" to the defences contained respectively in Article 7(b),[1037](d),[1038](e)[1039] and (f)[1040] of the EU Product Liability Directive.[1041] Notably Australia chose to also incorporate the notorious development risk defence in their product liability regime.

4.2 Section 142(a): No safety defect exists at the time of supply

The defence provided for in section 142(a) distinguishes between safety defects in electricity (section 142(a)(i)) and safety defects in any other case (section 142(a)(ii)). In the case of electricity, it is a defence to a defective goods action if the manufacturer can establish that the safety defect in the goods that are alleged to have caused the damage, did not exist at the time that the electricity was generated, being a time before it was transmitted or distributed.[1042] In terms of section 142(a)(ii) it is a defence to a defective goods action if the manufacturer can establish that the

[1037] Art 7(a) provides, like s 142(a) of the ACL, for a defence if the defect did not exist at the time of supply. See chp 6, par 5.1.1.
[1038] Art 7(d) provides, like s 142(b) of the ACL, for a defence where the defect is based on compliance with mandatory regulations. See chp 6, par 5.1.4.
[1039] Art 7(e) provides, like s 142(c) of the ACL, for a development risk defence. See chp 6, par 5.1.5.
[1040] Art 7(f) provides, like s 142 (d) of the ACL, for a defence that is available to a component manufacturer. See chp 6, par 5.1.6.
[1041] Kellam (1992) *PLJ* 20.
[1042] As a discussion of electricity as a defective product falls outside the scope of this thesis, this part of the defence in s 142(a)(i) will not be dealt with further.

goods alleged to have caused the loss or damage did not contain a safety defect *at the time it was supplied* by the *actual* manufacturer.[1043]

This defence, although differently worded and distinguishing between electricity and other goods, mirrors the defence provided by Article 7(b) of the Directive which allows a producer to escape liability if he can prove that the defect did not exist at the time that the goods were put into circulation or that it came into being afterwards. Notably the defence in section 142(a) makes no reference to a defect that came into being after the goods were supplied, thus avoiding any confusion about whether a manufacturer would need to not only prove that the defect was not present at the time of supply of the product but also that it came into existence afterwards.

For purposes of the defence in section 142(a)(ii) the relevant time is the time of the supply of the goods, that is before they left the control of the actual manufacturer. As reference is made to the time of the "supply" of the goods regard must be had to section 2[1044] of the ACL, which defines "supply" to include the "resupply…by way of sale, exchange, lease, hire or hire-purchase" by the actual manufacturer to the next person within the supply chain. Coorey points out that for purposes of section 142(a)(ii) an actual manufacturer of goods does not include persons who hold themselves out to be the manufacturer of the goods when they have not actually manufactured those goods, nor does it include an importer of the goods.[1045]

The gist of the defence is that actual manufacturers cannot be held liable for defects which occurred later in the distribution chain. The Trade Practices Commission provided guidance in this regard by stating that a manufacturer will be required to prove, on a balance of probabilities, either that "the manufacturing process, quality control systems and pre-delivery checks applied to the defective product itself (i.e. not merely to goods of that type) were such that the defect could not have arisen prior the product's leaving the manufacturer's control; or [that] the defect was due to the subsequent act or omission of a third party." Subsequent acts or omissions would include incorrect installation of a component; failure of a learned intermediary

[1043] Own emphasis.
[1044] See par 2.1 above.
[1045] Coorey (2015) 599.

to provide appropriate instructions or warnings; or instructions or warnings by a later supplier which contradict or detract from the manufacturer's instructions or warnings.[1046] This defence will therefore protect the original manufacturer should, for example, subsequent tampering or improper handling of the goods transpire;[1047] or if there was poor storage of product; or faulty installation, or if servicing or repair caused the defect.[1048] However, Kellam points out that proof of this defence is "difficult…[and] manufacturers will have to lead evidence of their production process and quality assurance system, inspection, storage and dispatch procedures."[1049]

In *Effem Foods Ltd v Nicholls,*[1050] a case decided under the TPA, the defendant, Effem Foods Ltd., manufactured a chocolate bar called "Snickers" which the plaintiff bought at a news agency shop. When she began eating the bar she bit into a safety pin which injured her. She instituted action under section 74D and 75AK of the TPA against Effem for failing to supply goods which were of merchantable quality and free from defects. In defence Effem relied on the former sections 74D(2)(a)(i)[1051] and 75AK(1)(a)[1052] of the TPA, arguing that the defect in the Snickers bar did not exist at the time that they supplied it and that it must have occurred after the Snickers bar left their control.[1053]

The court of first instance rejected Effem's defence as it was of the view that there was a very remote chance that a safety pin would accidentally enter the manufacturing product line and pass undetected through a metal detector at the end of the process. However the court did remark that it was possible that the safety pin could have been inserted into the Snickers bar when it was in the news agency.[1054] The plaintiff was awarded damages and Effem subsequently appealed the judgment based on the possibility that the safety pin was inserted in the Snickers bar when it

[1046] Trade Practices Commission guide (1993) 11.
[1047] Kellam (1992) *PLJ* 20.
[1048] Product Liability in Australia par 8.12.
[1049] Kellam (1992) *PLJ* 20.
[1050] (2004) NSWCA 332.
[1051] S 74D(2)(a)(i) lists a defence against a claim that goods are not of a merchantable quality, namely that "…the goods are not of merchantable quality by reason of: (i) an act or default of any person (not being the corporation or a servant or agent of the corporation)."
[1052] S 75AK(1)(a) states that "In a liability action, it is a defence if it is established that: (a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time."
[1053] *Effem Foods Ltd v Nicholls* (2004) NSWCA par 17.
[1054] *Effem Foods Ltd v Nicholls* (2004) NSWCA at par 22.

was in the news agency. The appeal court however dismissed the appeal and held that Effem did not discharge its onus of proof of satisfying the requirements for the statutory defences under sections 74D(2)(a)(i) and 75AK(1)(a) of the TPA. The appeal court stated:[1055]

> The defence under s 74D(2)(a)(i) required the defendant to prove, on the civil onus on the balance of probabilities, that the safety pin was present in the Snickers bar 'by reason of an act or default' of a stranger 'occurring after the goods had left the control of the corporation'. The defence under s 74AK(1)(a) required it to establish that 'the defect…did not exist' when the goods were delivered by the manufacturer into the supply chain.….[Counsel], for the claimant, submitted that the first defence was made out if the system of manufacture was such that the possibility of the pin getting through undetected was extremely remote, and there was evidence that the bar could subsequently have been interfered with. The defence in his submission was not restricted to proof of actual interference. A circumstantial case could also be sufficient. He submitted that proof of those matters would also establish the other defence. In my judgment these submissions are not supported by the statutory text. S 74D(2)(a)(i) relevantly requires proof that the defect arose from the act of a stranger after the goods left the control of the manufacturer. S 75AK (1)(a) requires proof that the defect did not exist at that time. At least in this case I can see no practical difference in the scope of these defences. The first requires proof that the defect occurred after supply, the second that it did not exist at the time of supply. The defences are simply two sides of the same coin.

In *Carey-Hazell v Getz Bros (Aust) Pty Ltd*[1056] the court made the following comments in regard to the defence formerly contained in section 75AK of the TPA: "The defence under s 75AK requires that it be shown that the defect found in the goods did not exist at the time they passed from the manufacturer's control. It does not require the manufacturer to establish that it occurred at a later time, although if this were possible it would obviously deny the earlier existence of the defect."

Thus, all that the actual manufacturer has to do in order to rely on the defence in section 142(a)(ii) is to provide evidence that the goods did not contain the alleged

[1055] *Effem Foods Ltd v Nicholls* (2004) NSWCA par 34.
[1056] (2004) FCA 853 par 207.

safety defect at the time that it supplied such goods. The manufacturer is not required to provide proof that the defect indeed arose at a later stage - as long as it can prove that the goods were not defective at the time the alleged defective goods were under its control and specifically the time of supply. Notably section 142 does not state that such time should be the time the goods were supplied to the plaintiff - hence it is submitted that it appears that even though the actual manufacturer might not have directly supplied the goods to the plaintiff such manufacturer will nevertheless have this defence to its avail even where the goods were supplied to a retail distribution channel comprising of various other persons. As pointed out, this defence has limited application in the sense that it is only to the avail of the actual manufacturer and cannot be relied on by further distributors in the supply chain.

4.3 Section 142(b): Compliance with a mandatory standard

Section 142(b) of the ACL provides that it is a defence to a defective goods action if the manufacturer can establish that the goods alleged to have caused the loss or damage, were *only* defective as a result of compliance by the manufacturer with a mandatory standard in force for goods of that kind at the time that the goods were supplied.[1057] This defence thus mirrors the defence in article 7(d) of the EU Product Liability Directive although it should be noted that it is slightly differently worded and refers to mandatory "standards" whereas the Directive refers to mandatory "regulations." It also specifically uses the word "only" so as to avoid any confusion about the legislature's intention that the defence will not be available where the defect can be ascribed to other causes in addition to compliance with mandatory standards. It thus means that the non-compliance with the mandatory standard should have been the *sole cause*[1058] of the defectiveness of the goods, to the exclusion of any other causes.

Section 2 of the ACL (similar to former section 75AA of the TPA)[1059] defines a "mandatory standard" as a standard:

> (a) for the goods or anything relating to the goods; and

[1057] Coorey (2015) 601.
[1058] Own emphasis.
[1059] S 75AA of the TPA.

(b) that, under a law of the Commonwealth, a State or a Territory, must be complied with when the goods are supplied by their manufacturer, being a law creating an offence or liability if there is such non-compliance; but does not include a standard which may be complied with by meeting a higher standard.[1060]

This defence must be read with section 9(4) of the ACL (similar to the former section 75AC(4) of the TPA),[1061] which states that an inference that a product contained a safety defect is *not* to be made "*only* because there was compliance with a commonwealth mandatory standard for them; and such standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer."

If a manufacturer raises the "compliance with a mandatory standard" defence in terms of section 142(b),[1062] section 148 of the ACL (similar to the former section 75AL of the TPA)[1063] will instantly apply.[1064] Section 148 compels the defendant to, "as soon as practicable after raising that defence",[1065] provide the Commonwealth with a notice of the action and the defence as outlined in section 142(b) of the ACL.[1066] The notice has the consequence that it will join the Commonwealth as a defendant to the matter.[1067] Upon the parties addressing the court on their respective matters, the court may conclude that if the plaintiff would have succeeded with the defective goods action against the defendant (other than the Commonwealth) if it were not for the defence of "compliance to a mandatory standard" being pleaded and proven.[1068] In such instance the court will enter judgment against the Commonwealth[1069] and require it to pay the plaintiff for the loss or damage sustained.[1070] The court may furthermore award a costs order as it deems just.[1071]

[1060] The latter provision of this section can be interpreted to mean that the standard must not be the minimum requirement but a higher standard could exist. See Kellam (1992) *PLJ* 20.
[1061] S 75AC(4) of the TPA.
[1062] As originally established in terms of s 75AL of the TPA.
[1063] S 75AL of the TPA
[1064] Kellam (1992) *PLJ* 20.
[1065] S 148(1) of the ACL.
[1066] *Ibid*.
[1067] S 148(2) of the ACL.
[1068] S 148(3) of the ACL.
[1069] S 148(3)(b) of the ACL.
[1070] S 148(3)(a) of the ACL.
[1071] S 148(3)(c) of the ACL.

Harland thus points out that this defence relating to compliance with a mandatory standard differs from the "similar" defence under the EU Directive, because in the event that a manufacturer proves the defence under Australian law, the federal government will be liable to compensate the plaintiff if the mandatory standard that led to the defect in the product was imposed by Federal law.[1072] Notably Kellam also indicates that this is not a defence that will be of frequent application.[1073]

However this defence was raised some years after Kellam's aforementioned remark in the seminal case of *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd*.[1074] Merck & Co Inc. (US) developed, manufactured and supplied pharmaceutical products. It had a subsidiary in Australia, named Merck Sharpe & Dohme (Australia) Pty Ltd. The pertinent facts were that Merck US developed a new anti-inflammatory drug named Rofecoxib. This drug was incorporated into another drug named Vioxx. Vioxx was registered on the Australian Register of Therapeutic Goods. It was marketed in Australia for a period of time but was withdrawn from the market due to testing which resulted in adverse cardiovascular experiences. The plaintiff, who was suffering from back pain, was prescribed Vioxx by his doctor. After two years of taking Vioxx the plaintiff suffered a serious heart attack.[1075]

The plaintiff subsequently instituted an action against Merck US and Merck Australia alleging a breach of duty of care and contravention of the former TPA provisions, by representing, during the marketing of Vioxx, that the product was safe. Merck however relied on the "mandatory standards defence" in former section 75AK(1)(b)[1076] of the TPA (and also the defence in former section 75AD[1077]). It submitted that the conditions of registration of Vioxx on the Australian Register of Therapeutic Goods did not permit it to manufacture Vioxx outside "the approved specifications" and did not permit it to add information to the product information,

[1072] Harland (1992) *JCP* 202.
[1073] Kellam (1992) *PLJ* 20.
[1074] (2010) ALR 266 par 1.
[1075] (2010) ALR 266 par 79.
[1076] S 75AK(1)(b) of the TPA states that it is a defence if there was a "defect only because there was compliance with a mandatory standard for them."
[1077] S 75AD of the TPA provides that in order for a claimant to hold liable a corporation defendant for defective goods causing injuries, certain elements must be met, namely that the goods were manufactured by it, there was a subsequent supply of goods, and they were defective whereby an injury ensued. Thus causation is important – see par 2.1 above for a more detailed discussion.

except in accordance with the processes for amendment established by the Therapeutic Goods Administration ("TGA"). Merck submitted that the chemical composition of Vioxx, and the form of the product information, existed by reason of its compliance with the conditions imposed by the TGA. Merck further submitted that, where the TGA asked it to include a warning in relation to cardiovascular events in the product information, and where there were discussions between it and the TGA in relation to the form of the words to be used in that warning, any defect in Vioxx existed "only because of compliance with a mandatory standard."[1078]

The court however held that Merck did not prove the "mandatory standards defence" in the former section 75AK(1)(b) of the TPA and stated:[1079]

> Reading section 75AK(1)(b) with sections 75AC and AD, the question is whether the safety of Vioxx was not what persons generally were entitled to expect only because of compliance with a mandatory standard as defined in section 75AA. I have held that the safety of Vioxx was less than what persons generally were entitled to expect because, as a matter of composition, the composition of Vioxx had the potential to increase the risk of suffering a myocardial infarction, in circumstances which included the absence of any relevant information or warning communicated to the applicant's doctor. It was not because of the mandatory standard that the composition of Vioxx was as it was. Nor was it because of such a standard that Dr Dickman was not warned. It may have been because of a mandatory standard that [Merck] could not change the composition of Vioxx without amending the product information, and that the product could not be amended without the approval of the TGA. But those circumstances were not what made the safety of Vioxx less than persons generally were entitled to expect. Neither did they have any relevance to the failure of [Merck] to warn Dr Dickman, even without amending the product information. As I have held, the existence of the product information (whether in its amended or unamended form) provided no impediment to [Merck] giving such a warning to Dr Dickman or to any other general practitioner.[1080]

[1078] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) ALR 266 par 84.
[1079] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) ALR 266 par 92.
[1080] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) FCA 180 par 924.

Thus, the Australian subsidiary in attempting to rely on the former section 75AK(1)(b) and section 75AD of the TPA, was unable to establish that *only* its compliance with a mandatory standard (to the exclusion of other causes) was the *sole* reason that the safety of the goods was not what persons generally were entitled to expect. From the *Peterson*-case it is thus clear that unless it can be proven that compliance with a mandatory standard is the actual and sole reason why goods were defective, the defence will fail.

4.4 Section 142(c): State of scientific or technical knowledge (development risk defence)

Section 142(c) of the ACL provides that it is a defence to a defective goods action if the manufacturer can establish that the defect, alleged to have caused the loss or damage, could not be discovered given "the state of scientific *or* technical knowledge existing at the time the goods were supplied by the manufacturer." The Australian development risk defence was adopted directly from Article 7(e) of the EU Product Liability Directive,[1081] and is largely similar to its EU counterpart except that the Australian legislation opts for "scientific *or*[1082] technical knowledge"[1083] whereas the European defence requires "scientific *and*[1084] technical knowledge."[1085] Thus a manufacturer has a lesser burden of proof under the Australian development risk defence as he does not have to prove the existence of both scientific *and* technical knowledge.

Given the relevance of the development risk defence from a pharmaceutical industry as well as patient well-being perspective, Tsui remarks that "something was required to act as a medium between balancing the risks of a drug which had high therapeutic value against the risk of a patient suffering or dying due to the withholding of a drug for over-extensive testing purposes."[1086] She points out that there had also been some concerns that insurers would refuse to insure unforeseeable loss or injuries[1087]

[1081] See chp 6, par 5.1.5. See also Kellam (1992) *PLJ* 20.
[1082] Own emphasis.
[1083] S 142(c) of the ACL.
[1084] Own emphasis.
[1085] Art 7(e) of the Directive 85/374/EEC.
[1086] Tsui (2016) *Thesis* 221. See also Tsui (2013) *QULR* 134; and Newman-Martin (2011) *AUCLHPS* 11-13.
[1087] *Ibid*.

and that costs could not be passed on to consumers, as the costs of some medicines were capped and states:[1088] "It was on the back of these concerns that the ACLR recommended that the defence be included. Manufacturers would thus have a continuing obligation to inform and update themselves on advances in knowledge and incorporate them into future products."

Note should also be taken that the deeming provision in section 147(2) as discussed in paragraph 2.1 above does however not apply for purposes of section 142(c). This means that a supplier will not be deemed to be the manufacturer of alleged defective goods where the development risk defence is relied on.[1089] Consequently it appears that the development risk in section 142(c) is restricted to the actual manufacturer of goods only.

Like in the EU, the development risk defence is also controversial in Australia. Tsui aptly remarks that the development risk defence is actually controversial enough to warrant its own thesis.[1090] The Australian development risk defence raises the same issues and concerns as its EU counterpart.[1091] As in the EU the main difficulties with this defence are deciding how the state of knowledge can be established, for example, does knowledge have to be accepted by the scientific community only or another community, or which proportion of the chosen community is considered;[1092] "at what point does speculation, hypothesis or theory become knowledge";[1093] and must the knowledge be determined in hindsight at a certain point in time?[1094] Additionally, there is the view that this defence may introduce considerations similar to those applied under the common law of the negligence.[1095]

Like with the EU development risk defence, case law on the Australian development risk defence is also scarce: at the time of writing this thesis only two cases have been reported in Australia where the development risk defence was considered, both

[1088] *Ibid.*
[1089] Coorey (2015) at 588
[1090] Tsui (2016) *Thesis* 212-213.
[1091] See chp 6, par 5.1.5.
[1092] Product Liability in Australia par 8.12.
[1093] Kellam and Arste (2000) *WMLR* 153.
[1094] *Ibid*.
[1095] Product Liability in Australia par 9; and Stapleton (2000) *WLJ* 383.

in the Federal Court, and both upheld on appeal to the Full Court, namely *Peterson v Merck Sharpe & Dohme Pty Ltd*[1096] (hereinafter *Peterson*) which was subsequently appealed in *Merck Sharpe and Dohme Pty Ltd v Peterson*[1097] (hereinafter *Merck*) and *Ryan v Great Lakes Council* (hereinafter *Ryan*) which was subsequently appealed in *Graham Barclay Oysters Pty Ltd v Ryan* (Hereinafter *Barclays Oysters*).[1098]

Tsui points out that, as the court recognised in the *Peterson*-case,[1099] the development risk defence contemplates the existence of a defect "capable of being discovered" by reference to the current state of science and technical knowledge. It is not concerned with the kind of contextual circumstances as outlined in section 9 such as the presentation of the product or its reasonably intended use.[1100] Tsui further indicates that doubts about the scope of the development risk defence are clear in the few cases that have attempted to determine the extent of protection a manufacturer is entitled to in safety defect cases, and whether Part 3-5 of the ACL operates on a strict liability basis.[1101] She refers to the court in *ACCC v Glendale*[1102] which significantly stated that Part VA of the TPA entailed strict liability because "goods can have a defect even if a supplier was not aware of it, so long as scientific or technical knowledge would enable the defect to be discovered."[1103] The court however also noted that Part VA was clearly "not intended to be an insurance policy against all loss and that if the defect is such as scientific or technical knowledge would *not* enable a supplier to discover it, the section will not apply."[1104] Tsui remarks that this contradictory statement about the nature of strict liability thus begs the question whether a product liability regime that allows for the development risk defence can really be said to be strict?

[1096] *Peterson v Merck Sharpe and Dohme* (2010) 266 ALR 1; *Peterson v Merck Sharpe and Dohme (*Australia) Pty Ltd (2012) HCA Trans 105; *Peterson v Merck Sharpe and Dohme (Aust) Pty Ltd* (No 6) (2013) FCA 447; and *Peterson v Merck Sharpe and Dohme (Aust) Pty Ltd (No 7)* (2015) FCA 123.
[1097] (2011) 284 ALR 1.
[1098] (2000) 177 ALR 18.
[1099] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) ALR 266.
[1100] Tsui (2016) *Thesis* 214 - she indicates that it is unfortunate that both the *Peterson* and *Merck* judgments refer to the defence in "state of the art"' terms.
[1101] See Tsui (2016) *Thesis* 2197 where she discusses *ACCC v Glendale* (1998) 40 IPR 619 on appeal and *Graham Barclay Oyster Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 177 ALR 18 on appeal.
[1102] (1998) 40 IPR 619.
[1103] *ACCC v Glendale* (1998) 40 IPR 619 at 630; and Tsui (2016) *Thesis* 217.
[1104] *Ibid*.

In *Ryan*[1105] the type of defect concerned was a manufacturing defect. The facts of this case were that Graham Barclay Oysters Pty Ltd and other oyster growers grew oysters at Wallis Lake, in Australia. Grant Ryan, several members of his family and a group of other consumers contracted the Hepatitis A virus as a consequence of eating oysters that were contaminated due to pollution of the lake. Ryan instituted a representative action against Graham Barclay Oyster Growers and the other oyster growers and distributors, the Great Lakes Council (the Council) and the State of New South Wales (the State). Ryan claimed that each respondent owed him a duty of care, which it breached with the result that Hepatitis A was contracted. He also made claims under the former TPA against Graham Barclay Oysters and the other oyster growers and distributors.[1106]

The trial judge inter alia held that Graham Barclay Oysters established the development risk defence in section 75AK(1)(c) of the TPA, stating as follows:[1107]

> S 75AK(1)(c) provides a defence to an action under s 75AD…'if it is established that…the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable the defect to be discovered.' The paragraph obviously intends the defence to be unavailable if the goods were supplied notwithstanding the possibility of discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, *discovery and supply were mutually exclusive: the only test that would reveal the defect would destroy the goods*. Accordingly it seems to me that the defence applies.[1108]

As pointed out by Tsui, the trial court thus indicated that while the risk of contamination was known of, *however because* the process of discovery inevitably also meant the destruction of the oysters, the defect was held to be "undiscoverable" in the circumstances. She remarks that it was on this (somewhat confusing) understanding of "undiscoverability" that the defence was made available.[1109]

[1105] *Ryan v Great Lakes Council* (1999) FCA 177.
[1106] *Graham Barclay Oyster Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 177 ALR 18 at par 22.
[1107] *Ibid*.
[1108] *Graham Barclay Oyster Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 177 ALR 18 at par 27. Own emphasis.
[1109] Tsui (2016) *Thesis* 219.

On appeal to the full Federal Court, in *Graham Barclay Oysters*[1110] it was held that the "scientific and (*sic*) technical knowledge" referred to in the development risk defence is based on an objective test, rather than on a subjective test comprising of the actual knowledge of the manufacturer. The time to assess whether the state of scientific and technical knowledge was such as to enable the safety defect to be discovered is the time when the relevant goods in question were *supplied* by the manufacturer.[1111] Furthermore, for purposes of section 142(c), the goods concerned do not have to be directly supplied to, or acquired by, the person who suffered the loss or damage.[1112]

In three separate judgments (by Lee, Lindgren and Kiefel JJ), the Federal Court held, in relation to the claim under the TPA and the defence under section 75AK(1)(c), *inter alia* that the evidence established in 1996 (when the goods were supplied) meant that the state of scientific or technical knowledge was not such as to enable the presence of Hepatitis A to be discovered in oysters sold. Thus the oyster growers had established the defence under former section 75AD of the TPA. Notably Kiefel J stated that:[1113]

> Section 75AK(1)(c), however, provides that it is a defence to such a claim if it is established that the defect could not be discovered, having regard to the state of scientific or technical knowledge at the time of supply. His Honour held that the defence was available, since the only test capable of detecting the virus-flesh testing - would destroy the oyster. Discovery and supply were therefore mutually exclusive. *I would respectfully agree with his Honour's conclusion that the defence was available. The evidence relating to flesh testing was that it was problematic; it often failed to detect a virus; it frequently gave false negatives; and it could only be undertaken by samples which, so far as concerned oysters, could not be presumed to be representative. It is in this latter sense that I understand his Honour to say that the only effective test was to destroy each oyster to be offered for sale. The test could not in any sense be regarded as a proper or sufficient means of detection.* In my view,

[1110] (2000) 177 ALR 18; and see also Coorey (2015) 603.
[1111] Explanatory Memorandum at par 12.44. Author's emphasis. Coorey (2015) 603 points out that this may not necessarily be the first time that goods of that kind were supplied by that manufacturer.
[1112] Explanatory Memorandum at par 12.44.
[1113] *Graham Barclay Oyster Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 177 ALR 18 at par 27.

> therefore, it could not be said that scientific knowledge was such as to enable the virus to be detected within the meaning of s75AK.[1114]

Lindgren J also made the following notable observations about the development risk defence:

> If the problem of 'false negatives' had not existed and if it had been appropriate to test by sample, an interesting question would have arisen as to whether the expression 'such as to enable that defect to be discovered' in section 75AK(1)(c) was to be construed as importing a modifying notion of reasonableness or practicability. Let it be assumed that extrapolation from sample to bulk was valid, but that the testing of the sample had to take place at a laboratory a considerable distance from the grower's establishment, the cost of the testing was great and the results could not be known for some days. A question would have arisen whether it could be truly said in these circumstances that the state of scientific or technical knowledge enabled the defect to be discovered.

By describing a hypothetical situation where a manufacturer was faced with significant difficulties in its quest to discover if the impugned product was defective, and asking about the manufacturer's obligation in such a case, Tsui argues that the court in the *Barclay Oyster*-case had posed a question which goes to the heart of the controversy over the development risk defence, namely: "[T]o what lengths is a manufacturer legally obliged to go before satisfying themselves (and the court) that the defect was undiscoverable at the time of supply?"[1115]

The application of the development risk defence in Australian product liability law appears to be somewhat shrouded in mystery. Tsui remarks "[A]ustralian judges have shown virtually no interest in decisions outside of Australia" meaning that they did not consider European case law on the development risk defence despite having taken over the defence from the EU Product Liability Directive.[1116] She indicates that

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[1114] *Graham Barclay Oyster Pty Ltd v Ryan (Wallis Lake Oyster Case)* (2000) 177 ALR 18 at par 35. Author's emphasis. Similar comments were made by Lee J at par 70 and Lindgren J at pars 541-545.
[1115] *Ibid*.
[1116] Tsui (2016) *Thesis* 195.

in Australia the courts appear to have preferred the "reasonable approach"[1117] to the application of the development risk defence but have not made any attempts to explain why they opine that such approach is preferable. She however argues that the reasonableness approach is indeed the preferable approach for purposes of application of the Australian development risk defence.[1118] The reasonableness approach requires the need for the law to appreciate the practical limitations and difficulties encountered by the industry, and that those realities generally necessitate some leniency towards manufacturers.[1119] Accordingly the reasonableness approach evaluates whether the manufacturer's actions were reasonable in light of industry realities and limitations at the relevant time.[1120] Tsui is of the view that the reasonableness approach to development risks would resonate with Part 3-5 of the ACL. This is *inter alia* because "technological and innovative development of industry" was a relevant policy objective of Part VA, and continues to be so relevant under Part 3-5 of the ACL.[1121] According to Tsui, the adoption in Australia of a narrow approach to the application of the development risk defence would result in a legal burden for certain industries and would inhibit innovation, deprive the community and the public of beneficial products, and put Australian goods at a disadvantage in the overseas market.[1122]

Notably Tsui also considers the applicability of the development risk defence specifically to the various types of defect, namely manufacturing, design and warning or instructional defects. Her conclusion is that by virtue of *Barclay Oysters* the development risk defence is thus applicable to manufacturing defects under current Australian law.[1123] With regards to *Peterson* and *Merck,* Tsui however remarks: "It is through his Honour's (rather confusing) application of the development risk defence that the conflation of design and instructional defects in Vioxx becomes very evident." She indicates that in the *Peterson* case the question of Vioxx's design appeared either (incorrectly) assumed to be defective or just did not arise at all. She

[1117] Tsui (2016) *Thesis* 220. See Chp 6 par, par 5.1.5 where the narrow and the reasonable approach in the context of development risks are discussed.
[1118] *Ibid*.
[1119] *Ibid*.
[1120] *Ibid*.
[1121] *Ibid*.
[1122] *Ibid*.
[1123] Tsui (2016) *Thesis* 222.

further points out that it was however in the context of whether the development risk applied to the instructional defect that the court *finally* acknowledged that Vioxx may in fact have two types of defects, namely instruction (situational) and design (composition) defects.[1124]

Tsui indicates that in the *Peterson* matter the development risk defence would not apply to the instructional defect, as evidence indicated that the risk in this specific case was indeed suspected. That was the "requisite knowledge", which excluded the operation of the defence, indicated by the court as follows:[1125]

> on one view at least, by the terms of section 75 AC a defect is a *situation* rather than a particular aspect of the composition of the goods in question. And it is a situation the existence of which must be determined as a matter of judgment only after consideration of all relevant circumstances. In the present case, I have effectively held that persons generally were entitled to expect that MSDA would have given practitioners a warning which would have conveyed some idea of the signal of risk…The state of scientific knowledge was such as would have enabled such a warning to be given. It was such as enabled MSDA to know of that element of the situational defect as was constituted by the risk signal.

However, Tsui points out that in the *Peterson* case suspicion was not sufficient enough to exclude the operation of the defence in relation to the design defect in the goods. That the drug contained a design defect would have required confirmation of the risk relating to the use of Vioxx, which was not available at the relevant time.[1126] In this regard the court stated:

> At the scientific or technical level as such, I would hold that the defect could not have been so discovered. The defect of course, is the inadequate safety of the goods themselves. Vioxx was unsafe in that sense because it increased the risk of myocardial infarction. However, it was not until September 2004 that that increase in risk could be 'discovered' in the sense of established at the scientific level. Merck was at the forefront of research in this regard….Merck's own knowledge was the state of scientific knowledge to which s 75 AK(1)(c) refers…….The defect was something inherent in Vioxx as a matter of

[1124] Tsui (2016) *Thesis* 223.
[1125] *Ibid*.
[1126] *Ibid*.

> *composition*. I consider that the intent of s 75AK(1)(c) is that if *that* defect could not be discovered according to the state of scientific or technical knowledge, *the defence should be available, notwithstanding that enough was suspected about the product to activate an implied obligation to give warnings of the kind mentioned in s75 AC (2)(d).* For the above reasons, I propose to uphold MSDA's defence under s 75 AK(1)(c).

Tsui remarks that this outcome is confusing and perplexing for two reasons: First, the defence was interpreted in two different ways, which resulted in two different outcomes. The suspicion that Vioxx was associated with cardiovascular risks was sufficient to exclude the operation of the defence in relation to the failure to warn claim. Yet on the other hand, that very same suspicion could not exclude the defence in relation to a design defect claim. What Tsui finds even more worrying is that there was never an express acknowledgement that Vioxx suffered a design defect; it was automatically assumed that Vioxx was defective in its design due to the existence of side effects.[1127] She however points out that until the question of whether Vioxx was defectively designed had been answered, the development risk being applied to the design component, should not have been an issue.[1128]

Tsui further remarks:[1129] "There is no explanation for the threshold discrepancy between these two defects in the context of the development risk defence; it occurred suddenly and inexplicably. It is clear that Jessup J [the trial judge] himself recognised this when His Honour concluded the findings with the comment that "the defence should be available, notwithstanding that enough was suspected about the product to activate an implied obligation to give warnings." Unfortunately, these issues were never addressed on appeal. The Full Federal Court upheld and endorsed Jessup J's conclusions."[1130]

Tsui indicates that the two cases of *Merck* and *Barclays Oysters* as discussed above are hardly sufficient to provide significant insight into the treatment of the development risk defence by Australian courts., However given that both cases were

[1127] Tsui (2016) *Thesis* 224.
[1128] Tsui (2016) *Thesis* 224-225.
[1129] Tsui (2016) *Thesis* 224.
[1130] Tsui (2016) *Thesis* 213 and 214.

appealed to higher courts who agreed and adopted the approach taken at first instance, she states that it appears that Australian courts overall are "*not prepared or do not feel the need* to undertake any detailed jurisprudential analysis in relation to the development risk defence any time soon." She points out that in both the aforementioned cases "*the courts have regrettably made little effort in their attempts to discern the individual components of this defence and its scope of interpretation*." Tsui however opines that in "bypassing" an analysis of what the defence entails, Australian judges have failed to appreciate the nuances of the development risk defence and the policy objectives that underpin its enactment. She comments: "*Their choice to adopt the reasonable interpretation is as a result of luck, rather than considered and intentional judicial decision-making*."[1131] She further points out that the defence has been applied on an *ad hoc*, case by case, basis which subjects the defence to further arbitrary and capricious interpretation in future cases. For a provision that could result in significant implications for both consumer interests and commercial interests, Tsui finds such an approach extremely undesirable.[1132] Note should however be taken that Tsui's eventual opinion is that the application of the development risk defence should be restricted to design defects.[1133]

It would therefore seem that the only two Australian cases that explicitly dealt with the development risk defence have not succeeded in demystifying the defence. The current position is thus that, in line with (but without taking account of) the position in the EU, the defence is pegged on an objective test applied in terms of a reasonable approach and gauged with reference to the time the goods were supplied by the manufacturer. The development risk defence in Australia is further not limited to design and warning or instruction defects but also, by virtue of *Barclay Oysters*, to manufacturing defects although Tsui argues for a limited approach in which the defence is available in respect of design defects (and by implication warning defects) but not for manufacturing defects.

[1131] *Ibid*.
[1132] *Ibid*.
[1133] Tsui (2016) *Thesis* 268.

4.5 Section 142(d): Goods was comprised in another good

Section 142 of the ACL states that it is a defence to a defective goods action "if the manufacturer can establish that the goods alleged to have caused the loss or damage was comprised in another good, and the safety defect only existed because of the design, marking, instruction or warning given by the manufacturer of that other good." This defence mirrors the defence provided by Article 7(f) of the Product Liability Directive except that it attempts to provide more certainty as to its scope by indicating that the "only" cause of the defect should have been the design, marking, instruction or warning given by the manufacturer of the final goods. It also specifically mention markings and warnings whereas the Directive only mentions design and instructions.[1134]

For purposes of section 142(d), the Explanatory Memorandum to the ACL indicates that goods can be comprised in another good if, for example, it is a part of, or an ingredient of, or component of, another good.[1135] Therefore, component part manufacturers may raise a defence that the safety defect arose due to an act of the manufacturer of goods in relation to the finished product, and that their component parts were manufactured to specification and did not cause the harm complained of.[1136] The component part manufacturer must further plead that the safety defect in the finished product resulted from the design in the finished product, their markings, or their instructions or warnings.[1137]

Coorey thus remarks that a "component" manufacturer may be liable if loss or damage is caused by the safety defect in a component of the goods, and if that defective component is included in the final goods, which is manufactured by another person. However a component manufacturer will not be liable if the safety defect in the final goods is attributable only to the design, marking, instruction or warning given on the final goods by another manufacturer.[1138]

[1134] See chp 6, par 5.1.6.
[1135] Explanatory Memorandum at par 12.46. Note that the word "good" and not "goods" is used.
[1136] Kellam (1992) *PLJ* 21.
[1137] Ss 142(d)(i)-(iii).
[1138] Coorey at 605.

Like in the EU, it is to be noted that this defence is limited to the component manufacturer and does not avail the manufacturer of the "whole" or "final" goods into which the component was fitted.[1139]

4.6 Limitation defences

4.6.1 Prescription

Although not listed specifically under the statutory defences in Article 138 to 141, the ACL has followed the approach taken in the EU Product Liability Directive to also provide for specific limitation periods to apply to defective goods actions. These limitation periods therefore also provide a statutory defence to manufacturers. It should be borne in mind that Australia, like the EU, is a federation comprising of various states and accordingly it makes sense to have a standardised approach to prescription of product liability claims. Section 143(1) thus provides for a prescription period of three years from the date that the plaintiff is aware of the alleged loss or damage, the safety defect of the goods and the identity of the person who manufactured the goods. As pointed out in paragraph 2.1 above the ACL has, by means of section 147, also incorporated a process similar to Article 3(3) of the Product Liability Directive in terms whereof a plaintiff may require a supplier to disclose information about the identity of manufacturer of the defective goods. This process is therefore relevant in enabling the plaintiff to become aware or to ought to reasonably have become aware of the identity of the manufacturer as stated in section 143(1). It is submitted that it would not be competent for a plaintiff to ward off a prescription defence by indicating that he was not aware or could not reasonably have become aware of the manufacturer if he failed to make use of the enquiry process provided by section 147. It should further be pointed out that all that section 143(1) does is to standardise the prescription period for product liability claims - it does not alter the legislation of the various states that deal with aspects such as delay and suspension of prescription. Notably the application of the prescription period in section 143(1) is expressly made subject to the period of repose provided for by section 143(2) so that it is clear that the three year prescription period should

[1139] See chp 6, par 5.1.6.

be calculated within the constraints imposed by the period of repose applicable to product liability claims under the ACL.[1140]

4.6.2 Period of repose

Section 143(2) provides for a period of repose by indicating that a defective goods action must be commenced within 10 years of the supply by the manufacturer of "the goods to which the action relates." Although a bit differently worded, this provision is largely similar to the period of repose provided for in Article 11 of the EU Directive. As pointed out by Coorey, the ten year time period of repose mentioned in section 143(2), commences from the time when the particular goods in question were supplied by the manufacturer, and not when goods of that nature were first supplied.[1141]

5. Conclusion

For Australia, being a federation of states wanting to adopt a strict product liability regime, the EU was an obvious choice. In 1992 when Australia transitioned to a strict product liability regime the regime introduced by the EU Product Liability Directive in 1985 was still a young regime with very little case law to allude to the latent problems in this regime. In fact Australia was so impressed with the EU regime that they modelled Part VA of the TPA nearly verbatim on the Product Liability Directive. However, as Tsui points out, contrary to the expectation that Australia would look towards EU literature and jurisprudence for guidance on how to interpret their product liability regime, very little case law has been generated in Australia in respect of the former Part VA of the TPA and on the later re-enactment of these strict product liability provisions in the ACL. It has also been noted remarkably little has been written by academics in respect of the Australian strict product liability regime enacted in Chapter 3 Part 3-5 of the ACL.

[1140] Also see Utz (2015) *ICLG* 56.
[1141] Explanatory Memorandum at par 12.49.

In essence the Australian strict product liability regime is very similar to the regime introduced by the EU Product Liability Directive. It is underpinned by the notions of consumer protection balanced against the protection of an innovative and sustainable industry. Unlike the Directive which is a separate document containing the EU product liability regime, the product liability provisions in the ACL are however part of a comprehensive consumer law framework. The Australian regime, like the EU regime, also applies to persons and not merely those who fit the description of consumers. It further applies only to movable goods used for private purposes. The TPA and subsequently the ACL, has taken over the generic definition of "defect" in Article 6 of the Product Liability Directive and the same consumer expectations test that is applied in the EU is also applied in Australia. Like in the EU no distinction is made between manufacturing, design, warning or instruction defects. The time at which a product is supplied also takes centre stage in this dispensation as it informs the determination whether a product can be defective, either as measured generally against the concept of a safety defect as contained in Article 9 or specifically for purposes of the development risk defence. The TPA and subsequently the ACL has however elaborated on all the relevant circumstances that have to be taken into consideration to determine whether a product is defective as viewed through the prism of a consumer expectations test by indicating those aspects of the presentation of the product that specifically have to be considered. The Australian case law relating to the concept of "defect" and the application of the consumer expectations test does however not provide any new insights into this aspect of the product liability regime.

That the purportedly strict product liability regime adopted in Australia in 1992 is in fact not that strict becomes abundantly clear when one considers that they have opted for the same construction as that on which the EU model, which has been revealed in Chapter 6 to be a hybrid model, is based. This construction entails that the initial application of the regime is strict in the sense that proof of fault is not required to found a product liability claim and the benefit of this approach is clearly to make it easier for plaintiffs to pass the initial stage of proving a product liability claim. This is indeed an improvement compared to the difficulties inherent in having to prove negligence on the part of the manufacturer. However the defences which are

made available to the supply chain, especially the development risk defence puts paid to any doubts about whether the Australian regime is absolutely strict.

Insofar as these defences are concerned, Australia has taken over four of the defences contained in the EU Product Liability Directive albeit that the wording of these defences differ slightly, mainly for purposes of providing greater clarity regarding their application. It entrenches the principle that the manufacturer should be able to escape liability for defects that arose later down the distribution line and also exonerates the manufacturer for liability that arose as a result of compliance with mandatory standards. In the latter regard it differs from the EU defence as it imposes liability for such defects on the Commonwealth. The development risk defence in Australia has not shrugged the controversy it has generated under the Product Liability Directive and the two cases in which the defence was raised do not serve to provide a clear picture of the interpretation and application of this defence. It however appears, as pointed out by Tsui, that the Australian courts are applying the "reasonable approach" to the development risk defence which also, as pointed out by Mildred, appears to be the approach taken in the EU. Opposed to the EU where it appears that the development risk defence will apply to design and warning or instruction defects only the *Barclay Oysters* case confirms that in Australia the development risk defence can also be raised in respect of manufacturing defects. Whereas the position in the EU appears to be that the defence may be raised by subsequent suppliers in the supply chain the ACL by virtue of section 147(2) however makes it clear that in Australia this defence is restricted to the actual manufacturer of goods.

Notably the defence that the EU Product Liability Directive avails to manufacturers of component parts has also been taken over in the Australian regime. It has been pointed out that this latter defence is limited to manufacturers of component parts only and not to the manufacturer of the final goods into which such components were fitted. Australia also copied the notion of a standardised prescription period of three years for product liability claims to avoid fragmented application of the prescription periods across its territories and states. It has likewise provided for a ten year period of repose to ease the problems associated with proof of defectiveness in products that have been released on the consumer market. This has been done to avoid

situations where manufacturers face perpetual liability for such defects which would give rise to a consistent level of anxiety over possible product liability claims in respect of goods that were manufactured and supplied over the course of many years.

The gist is that Australia regarded the EU Directive as an appropriate model to adopt and although the Australian product liability regime has been in existence for more than 25 years it has not been deemed necessary to effect any major changes to this model. Two inferences may be drawn from this: either that the Australian model has not been used enough in practice to warrant a detection of all its flaws that require reform *or* that a developed and innovative jurisdiction such as Australia is satisfied that the EU model is a workable and adequate model also for their jurisdiction.

Part D

Chapter 8: Conclusions and Recommendations

1. General conclusions

In the modern consumer market the risk of being injured by, or suffering harm caused by defective products, is pervasive. However, there is general consensus that attaining perfect product safety is impossible - meaning that product accidents are prone to happen from time to time. As indicated in Chapter One, this is where the law of product liability steps in on both an *ex ante* and an *ex post* level. On an *ex ante* level a well-designed product liability regime has a deterring effect which results in manufacturers complying with higher standards in order to avoid defectiveness in their products as well as engaging in product recall procedures to withdraw defective products from the consumer market. *Ex post*, a product liability regime serves mainly a redress and compensation function which arguably also has a deterring effect.

The concept of a defective product being central to product liability law, a pivotal consideration in designing a product liability regime is how it will deal with the concept of defectiveness. This will depend on the type of liability that the contemplated product liability regime seeks to impose on the manufacturer and if it so wishes, the rest of the supply chain. If the intention is to have strict liability that applies unreservedly to the whole supply chain it makes sense to take a generic approach to the concept of defect without distinguishing between manufacturing, design and warning or instruction defects. The notion would then be that if a product manifests a defect that causes harm the fact that the product was defective is condemned and liability is imposed regardless of the nature of the defect. In such a regime product defectiveness can then be determined objectively by taking into consideration factors such as how the product was presented and marketed, its reasonably intended use and the time at which it was supplied. However, if the intention is to purposively design a hybrid product liability regime, like with the US Restatement (Third) Product Liability, where strict liability is imposed for certain types of defects but a fault-based approach is taken to others, then the need becomes clear to move away from a generic concept of defect that tars all defects

with the same brush. In such an instance the trifurcation of the concept of defect and the immediate action of assigning strict or fault-based liability depending on the type of defect would then serve to brand such a regime as being a combination of strict and fault-based liability. Again, in such a regime it would then also be possible to determine whether a product has a manufacturing, design, warning or instruction defect by applying an objective test which takes into consideration the same type of factors as mentioned above which would include presentation of the product, its reasonably intended use, time of supply and so forth.

What would however be the position if a regime desires to adopt a product liability approach that is strict but nevertheless not absolutely strict, because although it wants to protect consumers, it also comprehends the need to protect industry? The hallmark of such a purportedly strict product liability regime would be that it does not require proof of negligence and because, from the perspective of faultless liability, the manufacturer's conduct and fault, is irrelevant, it follows that it is also irrelevant whether such conduct can be traced back to a manufacturing mistake or a design defect or failure to warn or give appropriate instructions to enable the product's safe use. In such a regime one would then arguably introduce escape routes for manufacturers not via a trifurcation of the concept of defect, because the argument would be that in principle all defects, regardless of their type, attract strict liability. One would thus rather absolve manufacturers by means of extending certain defences to them. But how would one formulate these defences to avoid the notion of fault being imported into the product liability regime and tainting its apparently strict character? Where for example these defences inter alia entail that the manufacturer's *conduct* is scrutinised then the absence of words such as "reasonable" which is classic negligence rhetoric will not mask the *de facto* position - which is that negligence would nevertheless be introduced through the back door via defences such as the development risk defence.

It has been the contention of this thesis that absolute strict liability is not an appropriate fit for a product liability regime given the many competing interests at stake. Even in a regime that declares itself to be undoubtedly pro-consumer there is always the need for some measure of balancing in favour of a sustainable innovative industry which in itself also yields benefits to, and is essential for, consumer welfare.

Granted, in some jurisdictions the scales may be tilted more towards consumers than industry and in others they may be more balanced. However taking a system that is a *de facto* hybrid between strict and fault-based liability and passing it off as a strict product liability regime creates consumer expectations of its own, namely that manufacturers will always be held accountable for harm caused by their defective products. While the US openly declares its product liability regime to be hybrid in nature, this is not the case in the EU and Australia - although it has been demonstrated in Chapters 6 and 7 respectively that these regimes are actually also hybrid in nature. One comprehends that South Africa, in its quest to adopt a strict liability regime, deemed it fit to look towards the EU and Australia, as both of these jurisdictions regard their product liability regimes as "strict." However neither of these two regimes nor the regime introduced by the CPA fit the mould of a purely strict product liability regime. Acknowledging the true nature of a specific product liability regime and interpreting it in accordance with such nature will inevitably create more certainty than being drawn into a maze of speculation about the nature of such regime which may delay redress for product liability victims.

It has also been concluded that the much criticised consumer expectations test is not as unworkable as it has been made out to be. Where consumer expectations are toned down by consumer entitlements such as legislative provisions specifying what consumers are entitled to expect from products, application of the consumer expectations test becomes much less of a guessing game. It also informs whether the consumer's expectations are reasonable. Insofar as innocent bystanders are concerned it may be concluded that application of the consumer expectations test is not appropriate because, arguably, bystanders have no expectations, let alone ones to which they are entitled, in respect of the product which eventually harmed them. However it is submitted that a counter-argument may be that at the least their (conscious or subconscious) expectation is that products acquired by other persons will not be unsafe and cause harm to them as bystanders. Accordingly it is submitted that it is not necessary to condemn the use of the consumer expectations test in product liability regimes but that by positioning this test alongside provisions that inform *what* consumers are *entitled* to expect from products, the consumer expectations test is stripped of its character as a standalone test for product defectiveness. The result is then that consumer expectations become a prism

through which to view other factors that may contribute to product defectiveness and which may include considerations such as risk-utility balancing. Having regard to the various factors that impact on product defectiveness it is therefore sensible to provide guidance in product liability legislation regarding some of the factors that should be taken into consideration to determine whether a product contained a defect, but not limiting these factors, so as to allow sufficient flexibility during such determination.

It is further clear that the time at which goods are developed, manufactured and supplied should always play a very important role in any product liability regime as it particularly informs the question whether a specific product was defective. Science and technology evolves and just as we have over the years come to realize that the earth is not flat so does our knowledge evolve with time to accommodate the realization that products we thought were safe a couple of years ago are actually not that safe or that they need to be made safer. The question is however *how exactly* is time relevant in this context? One the one hand, time can be relevant in the sense that, at the time of manufacturing the product and putting it into circulation, the product objectively conformed with the prevailing state of knowledge (scientific and/or technical) and therefore it cannot be held to have been defective just because a better and safer product subsequently became available. This would imply US "state of the art"-rhetoric. On the other hand, one can argue that although the product contained a defect at the time it was supplied, liability for such defect should not be imposed because, at the time the relevant product was developed and put into circulation, the state of scientific and/or technical knowledge was objectively such that it would not enable the defect to be discovered (i.e. the EU development risk defence). Thus, the state of the art defence operates against a finding of defectiveness whereas the development risk defence acknowledges defectiveness but operates against a finding of negligence. Despite their apparently nuanced differences it is however submitted that the US state of the art-defence and the EU development risk defence are actually not that different and that they are premised on the same line of thinking, namely that the *time* at which goods were supplied should play a definitive role in whether product liability should be imposed. The reason being because *that* time will determine whether a product could have been made safer or not. It may be argued that the morality of the state of the art defence,

namely to have regard to the time at which goods were produced in order to conclude that at that specific time goods that complied with certain standards and could not be made more safe were not defective, is more evident than that of the development risk defence which exonerates a manufacturer for objectively undiscoverable development risks. However if one delves deep into the essence of the state of the art defence one would argue that it is actually also founded on the premise that, having regard to the state of scientific and technical knowledge at the time of its production and supply, the safety defect was undiscoverable and therefore the product could not be made safer hence it is held not to be defective. To use the classic example of the vehicle without safety belts – if the car was supplied in the 1930s when all cars were very slow and were manufactured without safety belts, the Americans would regard such a vehicle as “state of the art” and not defective. The Europeans on the other hand would argue that, given the objective state of scientific or technical knowledge at the time that absence of a safety belt made the vehicle defective, the particular defect could not be discovered. In both instances then the manufacturer would be able to escape liability if the car was subsequently involved in an accident wherein people suffered injuries that could have been prevented if safety belts were a standard feature of cars at that time. It would only be a number of years later when vehicles were manufactured that could be driven at dangerously high speeds, that the need for safety belts as an essential safety device would become evident and that lack of safety belts would become a standard safety feature, thus rendering a vehicle without safety belts defective.

2. Conclusions regarding the product liability regime introduced by the CPA

The main focus of this thesis was to evaluate the purportedly strict product liability regime *ex delicto* introduced by the CPA, specifically how it treats the concept of defect and what the nature and extent are of the statutory product liability-specific defences it introduces. This exercise was conducted by having regard to the evolution of modern product liability, certain foundational principles that underpins modern product liability law and how this area of law developed in the US which is generally hailed as the birthplace of modern product liability law. The South African

common law regime of product liability *ex delicto* was interrogated and the regime introduced by the CPA was subsequently juxtaposed against the common law regime to facilitate an understanding how these two regimes differ. Subsequently, given that South Africa's product liability regime mirrors the purportedly strict EU regime as well as that of Australia who modelled their regime closely on the EU Product Liability Directive, the product liability framework in these two jurisdictions were explored in order to ascertain what guidance they may provide on dealing with, adapting and interpreting the features of the new regime introduced by the CPA.

Chapter 2 and 3 of this thesis accordingly served to enlighten the reader regarding the respects in which the purportedly strict product liability regime introduced by the CPA differs from the regime afforded by the South African common law of product liability. In sum, these differences entailed that the CPA now defines the concept of product defectiveness for purposes of product liability *ex delicto*, it has discarded the onerous obligation of having to prove negligence on the part of the manufacturer, it imposes joint and several liability on the whole supply chain and provides for a list of product liability specific-statutory defences. It was also pointed out that by virtue of section 2(10) of the CPA the common law of product liability has retained its relevance as it now operates parallel to the regime introduced by section 61 of the CPA.

It however appears that South Africa is in quite a unique position having regard to the product liability regime introduced by the CPA. At first glance this regime appears to have been modelled on the EU Product Liability Directive but on closer inspection it actually seems to be more similar to the Australian product liability regime contained in the ACL, which is an adapted version of the EU Product Liability Directive. Like the CPA, the ACL is also a comprehensive consumer law framework incorporating product liability as one of the various areas which it governs. Like Australia, South Africa has also retained its negligence-based common law regime of product liability *ex delicto* which operates parallel to the statutory regime introduced by the ACL. The similarity between the South African and Australian regimes becomes even more evident when one compares aspects such as the factors to be taken into account to determine defectiveness and the defences that have been introduced. In essence though one would conclude that despite resembling the

Australian regime's wording, the notions incorporated in the South African regime introduced by the CPA can clearly be traced back to the foundational provisions of the EU Product Liability Directive, given that the Australian "strict" product liability regime has been taken over directly from the EU although the wording of the ACL differs in some respects, mainly for purposes of clarity.

The uniqueness of the South African regime is however further that although it appears *prima facie* to be very similar to the EU and Australian regimes, it is also in a sense very different. Whereas the regimes in the EU and Australia apply to all persons, the CPA's product liability regime currently only applies to persons who fit the definition of "consumer" which appears not to include bystanders. Whereas, for purposes of determining the extent of damages to be awarded, the EU and Australian regimes require thatmovable goods be acquired or consumed for private purposes, the South African "strict" liability regime applies to movables and immovable and does not, for purposes of determining damages, require the relevant goods to be acquired or consumed for private purposes only. The CPA places no caps on the amounts that may be recovered hence it provides for limitless liability. It has not taken over the EU defence in Article 7(c) relating not supplying a product for gain or in the course of business given that the CPA in any event applies only to suppliers who act in the course of their business. It further contains no development risk defence for manufacturers nor does it provide for a statute of repose to contain the (especially evidentiary) risk from product liability claims being instituted many years after a product was supplied. Other than the EU and Australia whose regimes contain limitation (prescription) provisions for standardizing purposes and which does not group the prescription defence together with the product liability specific defences, the CPA also contains prescription provisions that it has specifically elevated to the level of a statutory defence as contained in section 61(4).

As demonstrated in Chapter Four, South Africa, like the EU and Australia employs the generic concept of "defect" in section 61 and although it specifically makes reference to warning and instruction defects in section 61(1)(c) it does not trifurcate the concept of defect for purposes of imposing different types of liability. However it does provide rather elaborate definitions of various levels of defectiveness by virtue of the separate definitions in section 53 of "defect", "failure", "hazard" and "unsafe."

Clumsy and cluttered drafting consequently obscure the application of these definitions within the realm of product liability and as pointed out, the definition of "unsafe" contains inherent contradictions by virtue of incorporating also the definitions of defect, failure and hazard. One may conclude that, from a product liability perspective, it might have been better to have merely stated that a product is defective when it is unsafe and to then leave it up to the courts to decide, using a consumer expectations test incorporating aspects like those mentioned in section 55(4) and 55(5)(b), whether the product indeed contained a safety defect. In fact Kriek argues that the definitions of failure, hazard and unsafe should be discarded in favour of a generic definition of "defect."[1142] However it must be borne in mind that the product liability provisions in section 61 is but a part of the broader Chapter H which also contains provisions relating to sale of goods, consumer guarantees and services. So for example, would the definition of "defect" inform defectiveness from a contractual perspective for purposes of section 55(2)(b) or the word "failure" would serve to inform the interpretation to be afforded to the concept "good working order' as stated in section 55(2)(b). As indicated, virtually all the respects in which goods can be defective for purposes of section 55 would also enable such goods to injure and cause harm to persons. Given that the CPA seeks to extend greater consumer protection especially to vulnerable consumers it may be argued that the explanations afforded to the various concepts defined in section 53 was intended to serve such purpose even though they do not necessarily meet the standard for plain language that one would expect from an Act that espouses the use of plain and understandable language. These definitions have also clearly been inserted to provide guidance to the courts when they have to decide whether a product is defective.

Accordingly it is argued that the solution would not be to do away with all these definitions as each of them has a function and doing away with them would then require all the sections in Chapter H (i.e. section 54 to 61) to be purged and stripped from these concepts - which may have negative or unintended consequences. It has been pointed out in Chapter Four that the second part of the definition of "defect" as contained in section 53(1)(a) (ii) appears to be the one most suited to explain the

[1142] Kriek (2017) *Thesis* 385-386.

concept of “defect” as it appears in section 61 and it is suggested that courts also follow this approach. In any event that definition refers to the concepts of “failure”, “hazard” and “unsafe” and therefore if a court wishes to determine whether the type of defect that a product contained was such that it entailed a product failure or rendered the product hazardous or made it unsafe, it can revert further to the specific definitions of those concepts for clarification.

Insofar as the statutory defences introduced by the CPA are concerned, it appears that they are similar to the defences contained in section 142 of the ACL which in turn mirror similar defences in Article 7 of the EU Directive, with the exception that, as pointed out above, South Africa has chosen not to take over the notorious development risk defence and has introduced a prescription defence as part of its list of product liability specific defences. As such it is submitted that the statutory defences introduced by the CPA relating to defectiveness as a result of compliance with public regulations; lack of defectiveness at a specific point of supply; and defectiveness as a result of compliance with instructions by a prior supplier, appear to have a sound basis. Notably the South African defence contained in section 61(4)(a) which provides that a supplier can escape liability if the defect in the product did not exist at the time of its supply, is broader than its Australian counterpart that limits the defence to the time the product was supplied by the actual manufacturer. The reasons for not incorporating the development risk defence into South African product liability law has unfortunately not been well-documented. One can therefore only surmise that it had something to do with the fact that the defence has been shrouded in controversy since it was first introduced by the EU Product Liability Directive and also because the defence has been regarded as re-introducing negligence into what was otherwise intended to be a strict product liability regime. From the perspective of a jurisdiction that was adamant about transitioning to a strict product liability regime with the main objective of extending greater consumer protection one can comprehend that South Africa opted against adopting the “negligence-infused” development risk defence. The approach that was however subsequently taken by the South African legislature is questionable – dropping the words referring to the technical and scientific knowledge from section 61(4)(c) and creating a defence for distributors and retailers only which prima facie bears no relation to development risks (unless one hangs onto the original intention for this

defence to have a development risks–based character), seems strangely out of character for a purportedly strict product liability regime. Not only has the "remnant-defence" eventually introduced by section 61(4)(c) been criticised for re-introducing fault into the CPA product liability regime but it also appears that it negates, from a contractual perspective, the development in our common law which imposes strict liability on merchant sellers as alluded to in Chapter Two.

As indicated in Chapters 6 and 7, the development risk defence in both the EU and Australia, has not yet reach a level of interpretation where the exact nature and scope of application of the defence is clear. As such it is submitted that it is still an open question whether the defence should only be available for design and warning or instruction defects or whether it should not also extend to manufacturing defects. It has been pointed out that the EU appears to be following the former approach whereas the position in Australia subsequent to *Barclays Oysters* is that the defence is available in respect of manufacturing defects also. Academic opinion on the topic is also divided with heavyweights such as Stapleton illuminating the anomaly of not extending the development risk defence to manufacturing defects also whilst Tsui, whose doctorate focuses mainly on the development risk defence advocates for its application only to design (and by implication warning and instruction defects). Yet another aspect of the defence is whether it should be limited to the actual manufacturer of a product. At least it appears that both jurisdictions are following the broader reasonable approach when determining the extent of scientific and /or technical knowledge to be taken into account for purposes of determining whether the threshold for proof of undiscoverability have been met.

It is therefore submitted that the question from a South African perspective should be whether the watered down defence in section 61(4)(c) in its current format should be retained at all? Further, and maybe even more importantly, what is the effect of the South African product liability regime not providing a development risk defence to manufacturers? It must be borne in mind that we have a large population of vulnerable consumers who suffer from fatal illnesses such as AIDS, tuberculosis and various types of cancers. We are further part of a continent that is plagued by other life-threatening diseases such as malaria and Ebola. Pharmaceuticals can save thousands of lives that would otherwise be lost to these diseases. If producers of

pharmaceuticals know that they would be operating in a regime where there is no option for undiscoverable development risks to exonerate them from liability and where their suppliers are jointly and severally liable and class actions can provide collective redress to thousands of consumers, it is likely that they will either stop innovating or withdraw from such a jurisdiction or only make their products available at very high costs (necessitated by the need to insure themselves comprehensively against liability). As Goldring and Richardson aptly remark: "I wonder if Flemming would have introduced penicillin or Pasteur smallpox vaccination if in doing so they had known that they were risking all they possessed if unforeseeable adverse consequences resulted."[1143]

The recent Ford Kuga debacle[1144] in South Africa where these vehicles are alleged to have a defect that caused them to burst into flames as well as the Listeriosis crisis[1145] where a number of people died from having eaten contaminated processed meat, might at first glance justify a sigh of relief that South Africa in its quest to extend greater protection to its consumers, have steered clear from the development risks defence which might have exonerated Ford and the meat manufacturer Enterprise Foods, from liability. However sight should not be lost of the fact the Ford Kuga and Listeriosis–cases have not yet made their way to the courts and that there is thus still a possibility that a court may find that, for example, it has not been proved that these products were defective or that they did not actually cause the harm complained of. Also, as was pointed out in both Chapters 6 and 7, the development risk defence is a difficult defence to rely on due to its very high burden of proof. Therefore, even though manufacturers might be quick to raise such a defence, the chances of proving the defence is slim meaning that the opportunity for the defence to thwart a product liability claim, established without the shackles of negligence, will be slim. In short, the introduction of such a defence will arguably not have the effect of negating the existence of the product liability regime introduced by the CPA.

It was indicated that a statute of repose generally seems to be an appropriate solution to the fact that it becomes marginally more difficult from an evidential

[1143] Goldring and Richardson (1977) *ALJ* 135.
[1144] Ford Kuga debate(2017); and Ford Kuga accountability (2018).
[1145] WHO Listeriosis (2018); and Listeriosis update (Sep 2018).

perspective to deal with product liability claims if a number of years have prescribed since the particular defective product was supplied. However, South Africa's choice not to adopt a repose period cannot be faulted if one bears in mind that many diseases caused by defective products only manifest several years after the plaintiff came into contact with the product, such as for example silicosis from working with asbestos products. Thus it would have the potential of unduly depriving many such plaintiffs and their dependants of their legitimate claims if a period of repose was incorporated into section 61.

Finally, it can be concluded that South Africa's product liability regime is no longer "lagging behind" but that it is largely on par with the regimes of the EU and Australia. As pointed out, the alleged differences between the EU and US regimes which had American commentators unjustifiedly referring to the EU Directive as being based on outdated 1965 rhetoric, are in reality not differences but rather the result of different ways of formulating the same line of thought. Thus it can also not be said that South Africa in following the EU product liability regime as subsequently recaptured in the Australian ACL, took over an outdated regime. Rather one can breathe a sigh of relief that our legislature chose not to adopt the outright hybrid approach in the US Restatement (Third) that would have required vulnerable consumers to provide often complex and technical evidence of a Reasonable Alternative Design (RAD) before manufacturers could be held liable for design defects.

3. Recommendations

It is submitted that the following recommendations would serve to augment the product liability regime introduced by the CPA:

3.1 Recommendation One:

It is recommended that the word "defect" as it appears in section 61(1)(b) be accompanied by the words "as defined in section 53(a)(ii)" in order to clarify that is only in the context of defects as described in section 53(a)(ii) that the product liability provisions of section 61 have application.

3.2 Recommendation Two:

The provisions of section 55(4) and 55(5)(b) insofar as they contain the consumer expectations test and factors to be taken into account for determining product defectiveness, should also be incorporated verbatim into section 61 to avoid any uncertainty as to whether these aspects are relevant to determining defectiveness for purposes of section 61. Alternatively, section 61 should at least contain a provision indicating that product defectiveness is also to be established in accordance with the factors mentioned in section 55(4) and 55(5)(b). It is further suggested that section 55(5)(a) that states that it is irrelevant whether the defect was latent or patent, should be scrapped.

3.3 Recommendation Three:

It is recommended that the definition of "unsafe" in section 53(d) be scrapped and substituted with the following definition: "Unsafe means that due to a characteristic, particular goods present an extreme risk of personal injury or property damage to persons."

3.4 Recommendation Four:

A process similar to Article 3(3) of the Product Liability Directive and section 147 of the ACL should be incorporated into section 61. It is possible that consumers would want to know the identity of the actual manufacturer of goods as they may regard a claim against the actual manufacturer to provide a better chance to get proper redress than if they, for example, sued an out-of-pocket retailer. Such provision should be tailored to make it clear however that it will not limit the right of the plaintiff to hold any or all persons in the supply chain liable for harm caused by a defective product.

3.5 Recommendation Five:

Further research should be conducted into the feasibility of adopting a development risk defence in South African product liability law and, if feasible, what the nature and extent of such a defence should be.

3.6 Recommendation Six:

The current defence in section 61(4)(c) should be scrapped as it is unfair to extend such defence merely to distributors and retailers and not to importers. The exact

nature of this defence is in any event unclear. The defence in its current format also operates against the vested principle of strict liability of merchant sellers.

3.7 Recommendation Seven:

There appears to be no sound basis for introducing a special product liability prescription defence into South African law as the rationale for the prescription provisions in the EU Product Liability Directive and the ALC appears to have been for standardizing purposes, which is not necessary in South Africa as it is not a federation of states with different national legislation. Accordingly it is submitted that the prescription defence in the section 61(4)(d) should be repealed as it is in any event clear that product liability claims under section 61 constitutes “debt” to which the Prescription Act in any event applies.

3.8 Recommendation Eight:

The definition of “consumer” should be expanded to also include innocent bystanders.

4. Suggestions for further research

It is submitted that product liability in South Africa has over the years developed into a fertile area for research but that unfortunately it has not yet generated the level of research nationally that one would have expected. Accordingly there is a dearth of academic opinion when it comes to South African product liability law. Specific areas of research that are in dire need of research include product recall as well as the nature and extent of the duty to warn and also the specific application of product liability laws to products such as pharmaceuticals and motor vehicles. Clearly, the development risk defence is also worthy of a thesis.

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