

MODERN TRENDS IN PRODUCTS LIABILITY

by

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submitted in part fulfilment of the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF JM POTGIETER

FEBRUARY 2002



0001867193

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SUMMARY

This dissertation examines the most important developments and modern trends in the products liability law of the United States, the European Union, Australia and New Zealand. The United States has influenced international products liability forever. The European Union followed the United States, but learned from their mistakes. The lessons are reflected in the European Directive. In turn, Australia followed the European Directive but its close neighbour, New Zealand, managed to address products liability in their own unique way.

In contrast, South African products liability law has not seen much development recently. Good guidelines can however be found from comparative law for the future development of products liability law in South Africa. In the conclusion of this dissertation, consideration will be given to the necessity of South Africa following the modern international trends in products liability.

INTRODUCTION

In a world unfamiliar to South African business, there is a battle in progress with lawyers, lobbyists, victims and vested interests, establishing bridgeheads for long expensive courtroom battles. In earlier times, courts were taxed primarily by dilemmas posed by snails in soft drinks. Today, products liability rules are complex and mysterious and can be governed by the simultaneous operation of common and statute law. Each and every country obviously has a different set of systems. Within the larger picture the developments in this area of law can be seen as a larger movement within the law this century to come to terms with modern circumstances. These include the phenomena of large distant enterprises, mass marketing and a dramatic increase in scientific and economic knowledge. The typical case profile is a manufacturer who produces on a mass basis, a consumer who buys because of the attraction of advertising or labeling, and a complex scheme of distribution including exporters, importers, retailers and wholesalers.

Products liability constitutes a fundamental economic issue and legal topic. Neither a court regime that is constantly expanding and increasing the monetary value of liability, resulting in the increase in the cost of a product or permanent recall of a useful product, nor the classical *laissez-faire* environment, which will result in cavalier abuses creating personal damage, serves consumer protection and business development. The balance is no doubt in the middle.

Liability for defective products has been a major social and legal issue in the United States since early in the 20th century. In 1916, *MacPherson v Buick Motors Co*¹ extended the manufacturer's liability to any foreseeable user or bystander, and in 1962, *Greenman v Yuba Power Products*² added strict liability to theories supporting compensation for victims. In 1965 the Restatement (Second) published Section 402A announcing a formulation of strict tort liability. The new doctrine swept the country so fast that only a decade later strict liability had supplanted negligence in most states as the primary theory in product liability cases. The stresses and strains that followed in the wake of Section 402A included liability interpretations that proved too strict, too slanted in favour of recoveries and too chilling of technological innovations. The activism of United States' courts embraced in their substantive reasoning generated widely differing results and struggled to find a balanced approach. There is a bewildering array of conflicting case law across the 51 jurisdictions. Institutional factors, such as the use of juries, the contingency fee system, the availability of punitive damages and class actions combine to produce huge awards. Businesses have sought relief from state legislatures and Congress regarding products liability, contending that the shifting legal standards make them vulnerable to even the most suspect claim. Now, three decades after the Restatement (Second), the draft of the Restatement (Third) has triggered much reasoned debate. Many commentators feel that the reforms of the Restatement (Third) are only fair to big business and not to the consumer.

¹ (N.Y. 1916) 111 Ne 1050.

² Cal. 1962, 377 P2d 897.

In modern and recent times, perhaps partly in response to the developments in the United States, judicial and public attention in the European Union and Australia has focused on contentious products liability issues such as liability for design defects or unknown risks, and liability for pure economic loss, as well as upon the social rationales and objectives of products liability rules themselves. It took Europe nine years of debate before the European Directive was adopted in 1985 which is roughly modeled on Section 402A of The Restatement (Second) of Torts of the United States. The Directive introduces into the European Union in one fell swoop a concept of liability for defective goods which national judges might have taken generations to develop and national legislatures might never have tackled.

Australia was influenced by the developments in the United Kingdom and Europe. As a result, Australia introduced a regime of strict liability in 1992, which is based on the Directive of the European Union. An unique approach to products liability can be found in New Zealand. The right to sue for damages for personal injury has been abolished by statute and replaced by a state funded no fault accident compensation scheme. However, in the event of property damage and/or economic loss, the product liability case will be regulated by tort law.

South African products liability law has not seen much debate and development recently. A comparative evaluation is already evident in *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd*³.

³ 1975 2 SA 457 (W) 461 to 464.

CHAPTER ONE

THEORETICAL OVERVIEW OF PRODUCTS LIABILITY

1. THE TERM “PRODUCTS LIABILITY”

The scope of the term “products liability” is quite broad and it is not easy to define. The term is commonly used to refer to the delictual liability, either strict liability or negligent liability, for defective products, of a commercial supplier, manufacturer or producer of products for injury, death and/or damage to property other than the product itself, and tends not to include liability in contract. The vague boundaries of the term “products liability” are reflected in the various publications on the subject, which include a mosaic of references to contract, delict and statute.¹ The definition offered by Tebbens: “liability of a professional supplier of a product for damage caused by that product”, seems to include both delict and contract.² Stapleton states that “product liability does not constitute a satisfactorily coherent field of legal organization”.³ De Jager regards product liability as “*die aanspreeklikheid van vervaardigers teenoor verbruikers met wie geen kontrakte gesluit is nie*”,⁴ and Martinek states that “the law of delict governs the South African product liability cases”.⁵

¹ Howells(1) 2; Hodges(1) 1; Stapleton(1) 9; Tebbens 3; Freedman(1) 43.

² Tebbens 4.

³ Stapleton (1) 9.

⁴ De Jager(3) 348.

⁵ Martinek 424.

The term “products liability” can be questioned on various grounds. In a negligence-based system, it is the conduct of the manufacturer which is judged, and the liability flowing therefrom is better described as “manufacturer’s liability”, “seller’s liability” and “producer’s liability”, rather than “products liability”. A strict liability system imposes liability because of some objective defect in the product which more closely connotes with the term “products liability”.

Be that as it may, in conformity with general usage, the term “products liability” will be employed in this dissertation. The study will focus on legal liability placed on the producer, distributor, importer, retailer or other supplier of products for defective products or conduct resulting in defective products, which encompasses all legal rights under delict and statute.

2. TYPES OF “PRODUCT DEFECTS”

To distinguish the stage where the defect in a product might have originated, three types of defects are frequently distinguished in local and international literature: Manufacturing defects, design defects and warning defects.

2.1 Manufacturing defects

Manufacturing defects are concerned with the physical processes of manufacturing, assembling, packaging, inspecting and testing of the product, and is 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. These manufacturing defects can be caused not only by mechanical irregularities in the production process but also by human inadvertence.⁶ The defective product, therefore, does not conform to the manufacturer's own specification.⁷ However, the product will also be compared with products of the same price and description to determine defectiveness.⁸

Manufacturing defects should not be underestimated since damage resulting from these defects can be serious. Products such as food, drugs or chemicals, even if limited to a small number of defective items in a batch, can result in serious health hazards and can involve the recall of the entire batch which might negatively impact on the manufacturer's other products and/or similar products of a competitor in terms of unsaleability.

One category of manufacturing defects that can cause conceptual difficulty is a product that contains a natural impurity that renders it dangerous, such as blood products infected by the AIDS virus.⁹ Other examples are trichinosis in pork,¹⁰ fish bone in fish soup¹¹ and a pearl in oyster soup.¹² These defects did not occur during the manufacturing process but are inherent defects found in the product.

⁶ De Jager(1) 8 - 9; Fischer and Powers 57; Freedman(1) 50; Howells(1) 14; Tebbens 7 - 8; Powers 782; Newdick(1) 290 - 291; Fischer(2) 343.

⁷ Hunziker and Jones 30 - 31 provide the following examples: A jar of peanut butter has a piece of glass in it and a car's torsion bar does not perform within specified limits.

⁸ Beerworth 104.

⁹ United States courts have dismissed design defect cases based on strict liability on the basis that blood is an unavoidably unsafe product and that furnishing of blood is not the sale of a product but rather part of the furnishing of a medical service (*Kozup v Georgetown University*, 663 FSupp 1048 (DDC1987)). In fact, nearly every United States jurisdiction either judicially or legislatively rejected strict products liability for blood products (*Roberts v Suburban Hospital Association Inc* 73 Md App. 1, 532 A2d A1081, 1086 n.3 (1987)).

¹⁰ *Scheller v Wilson Certified Foods Inc.* 114 Ariz. 159, 559 P2d 1074 (Ariz App. 1976).

¹¹ *Webster v Blue Ship Tea Room Inc.* 347 Mass 421, 198 NE2d 309 (1964).

2.2 Design defects

Design defects are much more complex than manufacturing defects and generally are defects common to the product line. They do not occur in random sample and relate to the manufacturer's decision to construct his goods in a certain way.¹³ Such a 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.¹⁴

In practice, manufacturers have a variety of designs for a product from which to choose. They also have the option of not marketing the product at all. Their set of choices ranges from the cheapest versions of the products to the most expensive versions with various levels of safety. In a competitive environment a manufacturer will always choose to produce the safer product if it can do so at less cost. The main trade-off from the standpoint of the manufacturer is how much extra cost it should incur to improve product safety. To argue that all products should be completely safe, is incorrect and impractical. Improved safety always comes at a cost. For example, a car can be built like a tank but nobody will be able to afford it.¹⁵

¹² *Matthews v Campbell Soup Co* 380 Fsupp 1061 (d Tex. 1974).

¹³ Fisher and Powers 57; Howells(1) 14; Newdick(1) 292; De Jager(1) 10 - 12.

¹⁴ Tebbens 8.

¹⁵ Beerworth 104; Hunziker and Jones 99.

Design encompasses 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.¹⁶

Certain categories of products that may cause serious injuries place a burden from the outset on a manufacturer to create safe designs, for example electronic equipment where an electrical shock may cause injuries from respiratory paralysis and ventricular fibrillation to severe burns.

Design defects are also harder to identify. An external standard is needed because these products cannot be identified as being defective by simply comparing them to the manufacturer's other products. The repercussions of a defectively designed product are more serious for the manufacturer since all products in the line, whether motor vehicles, toys, pharmaceutical products and medical services, are condemned rather than an isolated few.¹⁷

2.3 Warning defects

Warning defects usually involve defective written communication such as instructions and/or warnings accompanying the product and are often grouped together with design defects because warning defects share some of the same

¹⁶ Schwartz 14.

¹⁷ Howells(1) 14; Beerworth 104; Fisher and Powers 57.

characteristics.¹⁸ A duty to warn of dangers posed by a product exists even though there is absolutely nothing wrong with the product.¹⁹

Another issue is how the product will interact with the product user. In particular, does the product include sufficient information for the user to be informed of the risk of its use and the necessary precautions? Injuries generally are the result of the interaction of the behaviour of the user and the technological characteristics of the product within the context in which the product was being used. A manufacturer must give adequate information so as to enable the product to be used as intended and so that the user is adequately warned of risks which he may encounter in using the product. In practical terms, the risk is transferred from the manufacturer to the user. The essence of a warning is that it allows the user to confront and avoid the risk which it describes in an otherwise dangerous product. Therefore, the user needs to be apprised of the risk in making a decision about purchasing the product even though knowledge of the risk would not have rendered the product any safer.²⁰

Another reason for adequate warnings is the difference in risk information possessed by the manufacturer as compared with the consumer. The manufacturer is responsible for the product design and has a larger base of direct research to draw upon in forming assessments. However, manufacturers should not be expected to provide warnings with respect to information that they cannot reasonably expect to have.

¹⁸ De Jager(1) 9 - 10; Phillips(1) 5; Tebbens 8; Howells 14.

¹⁹ In *Greiner v Volkswagen Aktiengesellschaft* 540 F2d 85 (3d Cir 1976) a duty to warn of rollover danger of a Volkswagen Beetle existed even though there were no design defects.

²⁰ Stapleton(1) 252; De Jager(1) 9 - 10.

It is clear from the aforementioned that warning defects should not be underestimated since unsatisfactory product information can turn an intrinsically safe product into an unsafe product.²¹

3. POSSIBLE PARTIES IN PRODUCTS LIABILITY

3.1 General

Potential liability in a product liability action rests with all the parties in the chain of distribution and marketing of a product. The extent of such potential liability will depend on the standard of liability applied in each country. An attempt is made to briefly identify all the parties which may be involved in a products liability dispute:

3.2 The consumer

The consumer can be defined as a person who purchases or uses goods or services for consumption, which includes us all.²² An example of a user of goods and services is Mrs Donoghue,²³ who became ill after consuming ginger beer that contained the remains of a decomposed snail, which had been purchased for her by a friend. However, the definition of consumer is much wider since bystanders, which happens to be injured by some defect in a product, are included.²⁴

²¹ Fisher and Powers 57.

²² Tebbens 2.

²³ *Donoghue v Stevenson* [1932] All ER 1.

²⁴ *Stenett v Hancock* [1939] 2 All ER 578.

3.3 The manufacturer

In most cases, the manufacturer is not difficult to identify. The manufacturer includes the manufacturer of the finished product and the component manufacturer.²⁵ Needless to say, for the component manufacturer to come into the picture, the component part, or some aspect of the design intimately related to that part, must be defective. Moreover, such liability only applies if the component part has been “merely incorporated” into the final product, and not substantially changed.

3.4 The retailer

The standard of liability imposed on the retailer will depend on public policy of a particular country.²⁶ The retailer is not normally involved in the actual manufacturing of the product and it would thus be difficult to find the retailer negligent in the manufacture of a product. If the retailer undertakes inspecting or assembling the product before it is sold, it may be found liable for failure to take reasonable care in the course of such assembly or inspection.²⁷ In strict liability it is argued that the public has a right to rely on the integrity of the seller, who is in a better position to put pressure on the manufacturer to provide safe products.²⁸

²⁵ An early leading decision in the United States of America is *Suvada v White Motor Co* 32 Ill2d 612, 210 NE2d 182 (1965).

²⁶ Beerworth 11; Fischer and Powers 588.

²⁷ Beerworth 128 and 135.

²⁸ Beerworth 128.

3.5 **The seller of used products**

A person who engages in buying or selling used products, which have been manufactured by someone else. It is still possible for a seller to do something intrusive with the product prior to sale, in which case he may be held liable.²⁹

3.6 **Distributors and wholesalers**

Distributors and wholesalers are regarded as intermediaries, which include importers and foreign exporters. In general, they have no opportunity to discover or correct such defects, have no relationship with the plaintiff and the plaintiff has not in any sense relied upon the expertise of such middlemen.³⁰ However, wholesalers, distributors and the like are often the most visible and accessible persons in the chain of production, distribution and supply.³¹

3.7 **Own branders**

In strict liability systems liability have been extended to those who have associated their names with a product. Most prominent among these are licensors, franchisers, and trade-mark owners. However, there is a problem since displaying the appropriate wording on the package can give the own brander a marketing advantage without being held liable for a defective product. For

²⁹ Shapo 12.05[3].

³⁰ Beerworth 3 and 128, *Little v Maxam Inc.* 310 Fsupp 875 (D Ill 1970); *Pimem v Graybar Electric Co* 27 App Div2d 309, 278 NYS2d (1967); *Johnston v Water Sausage Corp* 733 P2d 59 (1987).

³¹ Beerworth 12.

example, if the package stated: “*produced and packaged by x for y*”, X cannot be regarded as an own brander.³²

4. THE PRODUCTS

The term “products” generally refers to a tangible item.³³ Most products liability actions do involve tangible items. However, in the context of products liability law, this term has been expanded to include intangibles, such as electrical power.³⁴ The term “product” does not include services, advice and information.³⁵

Jane Stapleton considered development in information technology and specifically software that involves intellectual property.³⁶ In the information technology arena the commercial value of a software encoded disk is not the physical matter on which the information is recorded but the information itself. This information is viewed apart from the physical matter and raises the area of intellectual property. The information can therefore be regarded as a service and even if the information causes physical damage it will not be regarded as product liability. Software is intangible which is at some stage reduced to a hard-copy format such as a computer disc. Defective embedded software chips used in heart-lung machines, aircraft and manufacturing machinery may result in

³² Shapo 2[a], Beerworth 47.

³³ Fischer and Powers 681 - 683 deal with an extensive list of court cases in the United States of America. All of the product types listed there are tangible except for electricity and natural gas.

³⁴ Fischer and Powers 657 sites two types of cases involving the sale of electricity. The one involved a plaintiff who touched an overhead line with a ladder or antenna and the other a power surge through the plaintiff's meter that caused a fire and other damage.

³⁵ Stapleton(1) 323 - 324.

³⁶ Stapleton(2) 9.

disastrous consequences. Software programs are not goods *per se*. The fact that the software program can be reduced to a permanent hard copy, is irrelevant.

However, where a person supplies the tangible goods through which defective information in the software program causes injury, gray areas appear. It seems as if the defectiveness of the software information can render the accompanying tangible goods, a defective one. The producer of the software (who is also the producer of the product) can therefore be held liable. Where the software producer only supplied the software program, he cannot be held liable because of the concept of product generally in use in the product liability arena does not include such software. Information given simpliciter is excluded from products liability.

To expand the definition of “product” to software, especially in the area of design defects where the service giver is not also the producer of the intangible product, the difficulty arises in how far this extension can be taken. Why not include defective services in which no goods are involved at all? However, the legal concept of products liability purports to impose liability for defective goods and not defective services.

5. THE EARLY DEVELOPMENT OF PRODUCTS LIABILITY (UNTIL 1963) IN THE USA AND UNITED KINGDOM

In simpler times, products were relatively harmless and for the most part consisted of innocuous inanimate objects such as furniture, cooking utensils and clothing. The consumer also generally dealt directly with the producer of the goods desired. The nature of these goods and the consumer's relationships with the producer was such that the consumer usually had a fair idea of the workings and the quality of the product he was buying. Where dangerous products were involved, such as knives, the damage caused would have been put down to misuse.³⁷

The following excerpt from the Code of Hammurabi³⁸, the King of Babylon, demonstrates the ancient concept of ensuring the safety of persons from faulty workmanship:

“If a builder builds a house for a man and does not make its construction firm and the house which he has built collapses and cause the death of the owner of the house, that builder shall be put to death. If it causes the death of the son of the owner of the house, they shall put to death a son of that builder. If it causes the death of a slave of the owner of the house, he shall give to the owner of the house a slave of equal value. If it destroys property, he shall restore whatever it destroyed and because he did not make the house that he built firm and it collapsed, he shall rebuild the house that collapsed

³⁷ Howells(1) 3.

³⁸ Jasper 3.

at his own expense. It a builder builds a house for a man and does not make its construction meet the requirements and a wall falls in, that builder shall strengthen the wall at his own expense.”

Henry III’s Assize of Bread and Ale in 1266 was the first legislative control in the late thirteenth century English law over the supplier of unwholesome food.³⁹ The law that followed⁴⁰ dealt with adulterated as opposed to defective products.⁴¹

With the advent of industrialization through automation and mass production and an urbanized society, the relationship between consumer and producer changed dramatically.⁴² Manufactured goods have become increasingly complex, as have the means of production.⁴³ In the age of mass consumption it is rarely possible for the consumer to have any type of personal relationship with a manufacturer. Most consumers are no longer in a position to ascertain readily the quality of goods they are purchasing, yet their demands and expectations have never been higher. The result is that whilst largely the consumer is provided with a vast array of satisfactory products, consumption may cause injuries, death or property damage. The advent of television, magazine advertising and the internet has also led to a more informed consumer, but also one with greater expectations.⁴⁴

³⁹ Howells(1) 3; Murphy 29; Tebbens 2.

⁴⁰ Adulteration of Food and Drink Act 1860; Pharmacy Act 1868.

⁴¹ Howells(1) 3.

⁴² De Jager(1) 2; Tebbens 2.

⁴³ Van der Walt(1) 224.

⁴⁴ The internet sites dealing with products liability are numerous. The following advertising slogans by attorneys in the United States of America are not uncommon: “We are continuing to accept catastrophic personal injury cases in California and wrongful death cases throughout the United States involving the antidepressants: Luvox, Paxil, Prozac and Zoloft”, <http://www.bhagd.com/>; “...is currently accepting clients who have been diagnosed with heart valve damage or primary pulmonary hypertension after consumption of diet pills Pondimin, Phentermine or Redux”, <http://www.sillbeades.com/>; and even “Injured and need cash now”, <http://members.theglobe.com/>.

Products liability case law probably started with the famous English case *Winterbottom v Wright*,⁴⁵ which is not a pure product liability case because it did not involve a defect in a product but a negligent omission to repair something adequately under a contractual obligation. The Court of Exchequer held privity of contract a requirement for liability even on a negligence or tort theory. In this case the defendant Wright supplied and serviced mail coaches for the Postmaster-General along a certain line of road. The plaintiff was the driver supplied under a separate contract between the Postmaster-General and one Atkinson and when a latent defect in the construction of one of the coaches caused an accident, laming the plaintiff permanently, he brought action against the supplier. The latter had a contractual duty to keep the coaches in a “fit, proper and safe” condition. The action was dismissed since there was no duty owed to the plaintiff, since the contract was with the Postmaster-General alone.

This case permitted judges to dismiss cases as a matter of law regardless of the defectiveness of a product. In particular, it was used to protect manufacturers from liability in tort to the ultimate victims of their negligently-made products⁴⁶ and was applied in both the United Kingdom and the United States of America.⁴⁷

The *Winterbottom* restriction was overlooked in a few English cases. In *Heaven v Pender*⁴⁸ the court imposed on the supplier of goods a tort duty of care for a non-privity plaintiff with respect to defects in the goods of which the defendant actually knew and in *Indermaur v Dames*⁴⁹ the plaintiff who successfully sued in tort was an entrant who

⁴⁵ ISZ ER 402 1842.

⁴⁶ *Longmeid v Holliday* (1951) 6 Exch 761.

⁴⁷ *Fischer and Powers* 3.

⁴⁸ (1883) 11 QBD 503.

⁴⁹ (1866) LR 1 CP 274.

was injured on the defendant's premises where he had gone as a result of his employment by a third party.

Dissatisfaction with privity created by the *Winterbottom* case grew and led to the English decision in *Donoghue v Stevenson*⁵⁰ whereafter non-privy plaintiffs could make negligence claims. In this case, Mrs. Donoghue became ill after consuming a ginger beer contaminated with the remains of a decomposed snail, which had been purchased for her by a friend. The House of Lords recognised that as a consumer she was entitled to recover.

The development of products liability in America⁵¹ started with *Thomas v Winchester*⁵² where the plaintiff purchased extract of dandelion for his wife, but the pharmacist supplied him with a potentially toxic substance, belladonna, instead. The defendant was a manufacturing pharmacist engaged in the production and sale of certain vegetable extracts for medicinal purposes. The pharmacist was held liable for damages resulting from his negligence in putting his label of a harmless medicine on a bottle containing a potentially toxic substance. The court stated that the rule of privity, which generally led to non-liability, did not apply to products that were imminently dangerous to human life.

In *Loop v Litchfield*⁵³ there was a defect in a small balance wheel used on a circular saw. This defect was pointed out by the manufacturer to the buyer. Five years later, the machine having been leased by its purchaser to another, the wheel broke. Holding

⁵⁰ (1932) AC 562.

⁵¹ *MacPherson v Buick Motor Co* 111 NE 1050 (1916).

⁵² 6 NY 397 (1852).

⁵³ 10 42 NY 351 (1870).

that the manufacturer was not liable to the lessee, the court excluded the wheel from the imminently dangerous category.

In *Lossee v Clute*⁵⁴ the court followed the *Loop* case in finding that a steam boiler that exploded was not in the imminently dangerous category.

Then in *Devlin v Smith*⁵⁵ the court held that the constructor of a scaffold was liable for the death of a painter who was killed when the scaffold gave way while he was painting the dome of a court building. Having built the scaffold for the use of the workmen, the contractor owed them a duty to build it with care, irrespective of his contract with the employer.

*Satler v Ray Manufacturing Co*⁵⁶ followed, holding that an exploding coffee urn was imminently dangerous if not carefully and properly constructed.

Negligence further evolved in the United States of America in 1916, with Judge Cardozo's ruling in the landmark case of *MacPherson v Buick Motor Co*⁵⁷ when liability was extended to a manufacturer of defective automobile wheels. Judge Cardozo extended the privity exception for things "imminently dangerous" and held that it applied if "the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made". Judge Cardozo rejected the notion that this duty was founded only upon contract:

⁵⁴ 51 NY 494 (1873).

⁵⁵ 89 NY 470 (1882).

⁵⁶ 88 NE 1063 (1909).

⁵⁷ 111 NE 1050 (1916).

“We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in law.”⁵⁸

As to the defendants’ contention that the duty is only owed to the purchaser of the product, namely the retail distributor, Judge Cardozo responded:

“The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of today. The principle that danger must be imminent does not change. They are whatever the needs of life in a developing civilization require them to be.”⁵⁹

The negligence establishment in *MacPherson* was overtaken by judicial reform in favour of the consumer. The first step was liability for express warranty shorn of the restriction of privity of contract in which one member of the family purchased a product for other members of the family.⁶⁰ In *Henningsen v Bloomfield Motors Inc*⁶¹

⁵⁸ Fischer and Powers 6.

⁵⁹ *Id* 6.

⁶⁰ *Id* 343.

⁶¹ 32 NJ 358, 161 A2d (1960); Another interesting case is *Greenberg v Lorenz* 9 NY2d 195, 213 NYS2d 39, 173 NE2d 773 (1961) where the New York Court of Appeals held that a plaintiff who was injured by

Chrysler made an automobile and sold it to the dealer Bloomfield. Bloomfield resold it to Henningsen. While Henningsen's wife was driving it, "something went wrong" with the steering gear, and the car turned sharply to the right into a wall. Mrs Henningsen was injured and brought action against both Chrysler and Bloomfield. The court held both defendants liable, without any showing of negligence and without privity of contract.

The culminating point was the judgment in *Greenman v Yuba Products Inc*⁶² in which the court abandoned all attempts to harmonize products liability with accepted contractual principles like those applicable to implied warranties or even principles of negligence and imposed a straightforward strict liability in tort. The plaintiff was injured when a combination power tool, which could be used as a saw, a drill or a wood lathe, proved to be defective and let fly a piece of wood. He sued the manufacturer, who defended on the ground that notice of the breach of warranty had not been given to him as required by the American Uniform Sales Act. The court held that liability was simply a strict one in tort. The effect of the decision was the acceptance of an intellectual basis for the transition from warranty to strict liability in tort.⁶³

In summary, early development in products liability revolved around the theory of negligence and the expansion of the contractual theory of warranty. However, regardless of whether the cause of action was framed in negligence or warranty, the nineteenth century plaintiff injured by a product could recover only if he was the

adulterated food could recover for breach of implied warranty even though her father had purchased the food.

⁶² 27 Cal Rptr 697 (1963).

⁶³ Fischer and Powers 51.

direct purchaser of the product. If he was not, the rule of privity of contract barred any action on the contract, and any claim for breach of warranty, and any negligence action since the duty was owed only to the direct purchaser of the product. The courts did evolve some exceptions to the rules, in particular for foodstuffs and other products “imminently dangerous to life and limb”. The tone set for products liability in the United States of America by the *MacPherson* case for nearly four decades evolved to strict liability adopted in the *Greenman* case. The evolution of foreign products liability henceforth resulted in legislative enactment not only in the United States of America but influenced further development on various continents that will now be considered in detail.

CHAPTER TWO

UNITED STATES OF AMERICA

1 GENERAL

There is no single law in the USA dealing with products liability but 50 state systems with responsibility for the development and enforcement of products liability law. This has resulted in a number of diverse product liability cases and a prominence of the subject in the eyes of the general public and legal practitioners. Although product liability cases in the USA are heard before a jury, many issues which in certain countries would be dealt with as substantive law issues are treated in the USA as evidential issues or as either preliminary matters concerning whether there is a viable issue or matters for review when assessing the reasonableness of a jury verdict.¹

2. *RES IPSA LOQUITUR* AND THE *ESCOLA* CASE

The main extension to the principle laid down in *MacPherson*² was through the application of the tort doctrine of *res ipsa loquitur*.³ Under this doctrine, the plaintiff need not directly prove the defendant's negligence but instead may rely solely on the circumstances of the incident if:

¹ Howells(1) 201.

² *MacPherson v Buick Motor Co* 111 NE 1050 (1916).

³ This rule literally means: "the thing speaks for itself".

- (1) The instrumentality causing the plaintiff's injury was under the exclusive control of the defendant;
- (2) The circumstances of the accident are such that it would not ordinarily occur without negligence; and
- (3) The plaintiff did nothing that would have contributed to his injury.⁴

The rule was relaxed in *Escola v Coca Cola Bottling Co of Fresno*⁵ where the court upheld a claim against a soft drink manufacturer for injuries caused when a bottle exploded. However, Justice Traynor⁶ in the same case stated that "it should now be recognised that a manufacturer incurs an absolute liability when an article that he places on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings". Justice Traynor gave two reasons: the ability of the manufacturer or seller to "spread" the losses among its customers, and the role of strict liability in encouraging safety research and development.⁷ It took nearly two decades for Justice Traynor's views to begin to be accepted.⁸

3 THE RESTATEMENT (SECOND) OF TORTS

3.1 General

⁴ A comprehensive discussion of the doctrine as applied in the USA is given in Shapo 24.01 - 24.12.

⁵ 24 Cal2d 453, 150 P2d 436 (1944).

⁶ At 901.

⁷ Howells(1) 207 - 208.

⁸ *Greenman v Yuba Power Products Inc* discussed in Fischer and Powers 24 - 32 and 45 - 49.

Just prior to the *Greenman*⁹ decision, the American Law Institute had commenced studying the rules governing the liability of producers for defective products.¹⁰ It took two years after the *Greenman* decision for the American Law Institute to adopt the theory of strict products liability in Section 402A of the Restatement (Second) of Torts.¹¹

The Restatement (Second) of Torts is commonly viewed as initiating a revolution in the law of torts.¹² Unlike common law countries where tort/delict law serves to restore the relationship between parties that has been upset through negligent behaviour, the Restatement (Second) of Torts became one of the most modern policy instruments for regulating harm-causing activities and providing compensation to the injured.

However, the distinction between manufacturing defects, design defects and defective warnings were not anticipated in Section 402A. Section 402A only anticipated manufacturing defects.¹³ There was unanimous agreement amongst the founders that design defect cases were to be controlled by traditional negligence law. This resulted in modern courts using the risk-utility test or developing alternative tests for design and warning defects.¹⁴

Section 402A of the Restatement (Second) of Torts of 1965 states:

⁹ *Id.*

¹⁰ Fischer & Powers 48 - 49.

¹¹ The Restatement (Second) of Torts was adopted in 1965. Prior to adoption the 1961 draft Restatement (Second) recommended a Section 402A introducing strict liability, but limiting it to "food for human consumption"; Howells(1) 208.

¹² Priest(2) 2303.

¹³ The distinction is important especially when considering whether the further development of products liability in South Africa is necessary.

¹⁴ Stapleton(1) 247.

“Section 402A. Special Liability of the 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 a product, and
 - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

- (2) The rule stated in subsection (1) applies although
 - (a) The seller has exercised all possible 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.”

There are also various Comments to Section 402A which will be considered below.¹⁵ As will be seen, although the Comments were included to shed light on

¹⁵ Comment b – history; Comment d – scope; Comment e – products not considered to be raw materials; Comment f who is regarded a seller; Comment g – meaning of defective condition; Comment h – exceptions to defect; Comment i – meaning of unreasonably dangerous; Comment j – exceptions to common allergies; Comment k – meaning of unavoidably unsafe; Comment l – users and consumers; Comment m – warranty; Comment o – non-users; Comment p – further processing; Comment q – components.

the interpretation of Section 402A, they are unhelpful and misleading.¹⁶ Furthermore, these Comments take on radically different meanings from those commonly given to them today.¹⁷

Although the Restatement (Second) of Torts will receive particular attention below, it is not binding on a state unless adopted by that state's courts or legislature, but it is nevertheless commonly adhered to.¹⁸

3.2 **The defect**

The “defect” concept has caused some trouble in the USA. The phrases “defective condition” and “unreasonably dangerous” as they are used in the Restatement (Second) are applied differently in the various states or not used at all. Furthermore, even within a given jurisdiction, the approach used often varies over time.¹⁹

At first glance, Section 402A seems to create a bifurcated standard to determine defectiveness.²⁰ Comment g provides that a “defective condition” is one “not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”

Comment h states that a “product is not in defective condition when it is safe for normal handling and consumption”.

¹⁶ Priest(2) 2301.

¹⁷ *Id* 2303.

¹⁸ Clark 18.

¹⁹ Fischer and Powers 57 - 58.

²⁰ Howells(1) 210 - 211.

Neither one of the aforementioned Comments distinguishes between manufacturing and design defects. The description in Comment h provides more detail as to the meaning of defective condition: the defective condition of a product “may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product from decay or deterioration before sale, or from the way the product is prepared or packed”. Any attempt to include a design defect in this description is vague.²¹

Comment i give substance to the phrase “unreasonably dangerous”:

“The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. 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 its characteristics.”

Comment i limits liability where the consumer was fully aware of the product’s harm-causing potential. The reason for this Comment is to distinguish defects from unavoidably dangerous products such as tobacco and alcohol.²²

²¹ Priest 2301.

²² *Id* 2319.

Other than Comments g, h and i there are no other descriptions of the defect requirement. These Comments also provide evidence that strict liability in Section 402A was only intended for manufacturing defects and not specific enough to contain strict liability to other defects.²³

3.2.1 Consumer expectations

The consumer expectation test of Comment i is rooted in the warranty remedies of contract law and requires that harm and liability flow from a product characteristic that frustrates consumer expectations.²⁴ This standard is similar to that of merchantability, as defined in the sales article of the Uniform Commercial Code,²⁵ with the difference that the Code does not require the goods to be “dangerous” as a condition to merchantability.

Comment i indicates that certain hazards that are common knowledge to the consumer will not result in liability. In *Fanning v Lemay*²⁶ the court held that shoes that became slippery when wet, with no allegation of specific defects, are non-defective as a matter of law. The court explained that it is common knowledge to consumers about the increased slipperiness of wet shoes worn by millions of people.²⁷ The same logic is applied to vehicles on a frozen highway. In *Zidek v General Motors*

²³ *Id* and 2327.

²⁴ Keeton(2) 37; *Gray v Mainitowoc Co Inc* App Grc 185, 771 F2d 866.

²⁵ Section 2 – 314 (2)(c).

²⁶ 38 Ill.2d 209, 211 – 212, 230 NE2d 182, 185 (1967).

²⁷ Also see *Vance v Miller-Taylor Shoe Co* 147 Ga App 812, 251, SE2d 52, 53 (1978).

*Corp*²⁸ it was held that “the fact that all vehicles will slide on ice or other slippery surfaces does not *per se* make them an unreasonably dangerous product.” The extent to which the court regards certain products as not being able to be made entirely safe is illustrated in *Colson v Allied Product Corp*²⁹ where a rotary motor, although potentially dangerous, was suited for its intended use.

An objective test is used to determine whether a particular danger is unexpected.³⁰ The court looks to the expectations of the ordinary person who uses the product, rather than the individual plaintiff, or the public generally.

The “ordinary” consumer contemplated in the Restatement (Second) becomes a mixed question of behavioural fact and evolving law. For example, in *Mustang Fuel Corp v Youngstown Sheet & Tube Co*³¹ the plaintiff brought suit for the rupture and explosion of a natural gas pipeline. The trial judge referred to “the ordinary consumer who would purchase 37 miles of high pressure pipes,” while holding that the pipe was not “dangerous to an extent beyond that reasonably contemplated by an ordinary purchaser of pipe” under industry specification.

There are various cases holding that a consumer must take care of his own interests, especially if he is educated, and he must shoulder even

²⁸ 66 Ill App 3d 82, 384 NE2d 509 (1978).

²⁹ 640 F2d 5, 6 (1981).

³⁰ *Maas v Dreher* 10 Ariz App 520, 460 P2d 191 (1970).

³¹ 411 Fsupp 705, 707 – 708 (WD Okla 1976).

more of a burden of self protection if he is knowledgeable in a given product area.³²

Although it seems as if the consumer expectation test works well for many defects and products there are instances when this test falls short. Expert testimony may be required where matters are involved with respect to which an ordinary consumer has no knowledge at all. This is true in especially medical and complicated engineering matters and often involves design defects.³³

The ordinary consumer expectation test is not very useful when it comes to obvious dangers since in that situation the consumer cannot expect the product to be safe.³⁴ Some commentators believe that obviousness of danger is only one factor to be considered by the fact finder in determining whether a product is defective.³⁵

The unreasonably dangerous aspect of Comment i is criticized as a misleading term which suggests that the product must be more than dangerous and it requires the consumer to prove that the defendant was negligent. Many courts in the USA have completely rejected consumer

³² *Classic Bowl Inc v AMF Pirispotters Inc* 402 F2d 463 (7th Gr 1968): An attorney negotiating for specialized bowling-alley equipment; *Wege v Harris* 420 SE2d 255, 256 (Tex Gr App 1967): A livestock buyer who knows cattle must be self reliant on the question of their age; *Brinck's Inc v American Dist Tel Co* 413 F2d 359 (7th Gr 1969): The company which acted for a leading supplier of security services are required to show a certain skepticism about statements that a burglar alarm system is invulnerable.

³³ Phillips(1) 12 - 13.

³⁴ Shapo 8-15, Howells(1) 12.

³⁵ Fischer and Powers 172, Phillips(1) 12.

expectations as a conclusive test of defect.³⁶ Courts³⁷ and writers³⁸ have criticised the rule.

The test may not always further the policies underlying strict liability. Rather than discouraging unreasonably dangerous designs, the rule might have the effect of encouraging them in an obvious form. The test also may be unfair to third parties in some situations. For example, in some cases the user is aware of a danger that presents a risk to a third party who is ignorant of it and powerless to protect himself. The user may not be as strongly motivated to protect the third party as he would be to protect himself for a similar danger, or a person purchases an obviously dangerous machine for use by an employee with lesser knowledge of the risk.

Some states that rejected the consumer expectation test in whole or partially have adopted alternative tests:

3.2.2 Risk–utility³⁹

A commentator of the risk-utility test states:

“A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person

³⁶ *Micaleff v Miehle Co Div of Miehle Goss Cexter* 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976).

³⁷ *Knits v Minster Mach Co* 69 Ohio St2d 460, 432 NE2d 814 (1982); *Pike v Frank G Hough Co* 2 Cal3d 465, 85 Cal Rptr 629, 469 P2d 229 (1970); *Brown v Quick Mix Co Div of Koehring Co* 75 Wash 2d 833, 454 P2d 205 (1969); *Heaton v Ford Motor Co* 248 Or 467, 435 P2d 806 (1967); *Akers v Kelly Co Inc* 173 Cal App3d 633, 651, 219 Cal Rptr 513, 524 (1985).

³⁸ *Keeton*(1) 861; *Marschall* 1065; *Phillips*(2) 797; *Powers* 75 - 77 ; *Wade*(2) 820; *Fischer* 339.

³⁹ Also referred to as risk-benefit.

would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed.”⁴⁰

The risks and benefits of concern in products liability, as laid out by Wade,⁴¹ are as follows:

- (1) The usefulness and desirability of the product, its utility to the user and the public as a whole;
- (2) The safety aspects of the product, the likelihood that it will cause injury and the probable seriousness of the injury;
- (3) The availability of a substitute product that would meet the same need and not be as unsafe;
- (4) The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- (5) The user’s ability to avoid danger by the exercise of care in the use of the product;
- (6) The user’s anticipated awareness of the dangers inherent in the product and their availability, because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

⁴⁰ Keeton(2) 30 and 37 - 38.

⁴¹ Wade 837 - 838; Wertheimer 1431.

The critics of the risk-utility test have called for its abandonment, since it is not a precise legal doctrine that can be implemented by the courts.⁴² Nevertheless, American courts have used the risk-utility test widely.⁴³

However, it is clear that risk-utility is not a definitive test. How is the performance of a product with respect to the seven factors to be measured and, once measured, how are these values to be aggregated to assess whether the product passes or fails the test? The seven factors do not constitute a checklist of pertinent considerations or a series of tests that should be undertaken.⁴⁴

Consider each factor in turn:⁴⁵

- (1) Utility of the product. The usefulness and desirability of a product is reflected in the price consumers are willing to pay;⁴⁶
- (2) Likelihood of injury. This aspect is important;
- (3) Availability of substitute products. The utility of a product should already have taken substitutes into account;
- (4) Manufacturer's ability to alter the product. The issue here is not whether safer alternatives are available, but whether from a total risk-utility perspective the best product was selected;

⁴² Schwartz(2) 358.

⁴³ *Cepeda v Cumberland Engineering Co Inc* 76 NJ 174, 286 A2d 816; *Gomulka v Yavapai Machine and Auto Parts Inc* Ariz Ct App Div 1 No 1 CAV-CIV 9043.

⁴⁴ Schwartz(2) 358; Viscusi 73 - 75.

⁴⁵ Viscusi 73 - 75.

⁴⁶ Stigler 70 - 72.

- (5) Cheapest cost avoider: The user's ability to exercise precautions is relevant, particularly if he or she can reduce the risk more efficiently than the manufacturer;
- (6) Awareness of danger: Risk awareness is crucial for efficient product choice and for precautionary behaviour and warnings are central in this regard. If producers are cognisant of the risks and purchase a product voluntarily, then the presumption should be that the product passes the risk-utility test; and
- (7) Spreading the loss: The mechanism referred to here is the shift of the costs to consumers by means of product prices to either the expected costs of accidents borne by the producer and/or the costs to transfer the liability risk to insurers in terms of premiums. However, insurance or the spreading of loss does not establish an appropriate basis for liability.

Many jurisdictions have adopted the risk-utility test:

Oregon

In *Phillips v Kimwood Mach Co*⁴⁷ the plaintiff was injured while feeding fiberboard into a sanding machine during his employment with a wood products manufacturer. It was alleged that the sanding machine of which each sanding head had a rapidly moving belt which revolved in the direction opposite to that which the pieces of fiberboard moved through the machine was equipped with pinch rolls which prevented sanding heads from forcefully rejecting it, ejected a thin sheet of fiberboard which became mixed with other thick sheets and caused

⁴⁷ 269 Or 485, 525 P1d 1033 (1974).

the machine to regurgitate the piece of fiberboard back at the plaintiff, hitting him in the abdomen and causing him injuries. The defect complained of was that there were no safety devices to protect the person feeding the machine. The court distinguished mismanufacture and faulty design.

The case of mismanufacture is much easier because the item in question is capable of being compared with similar articles made by the same manufacturer.

In the case of a product that is claimed to be dangerously defective because of misdesign all the products made to that design are the same. The court was of the opinion that to determine whether a design is unreasonably dangerous the only consideration is whether, taking into account the surrounding circumstances and knowledge at the time the article was sold, and determining therefrom whether a reasonably prudent manufacturer would have so designed and sold the article in question had he known of the risk involved, there is no difference between strict liability from misdesign and negligence.

The court proceeded by indicating that the manner of injury may be so fortuitous and the chances of injury so remote that it is reasonable to sell a product despite the danger. In design cases the utility of the article may be so great and the change of design necessary to alleviate the danger in question may so impair such utility that it is reasonable to market the product as it is, even though the possibility of injury exists and was realised at the time of sale.

The following aspects as part of a risk-utility test was proposed in *Rix v General Motors Corp.*⁴⁸

- “(2) A product may be in a defective condition unreasonably dangerous if the manufacturer should have used an alternative design.
- (3) In determining whether an alternative design should have been used, the jury should balance so many of the following factors as it find pertinent at the time of manufacture:
- (a) The reasonable probability that the product as originally designed would cause serious harm to the claimant.
 - (b) Consideration of the reasonable probability of harm from the use of the original product as compared to the reasonable probability of harm from the use of the product with the alternative design.
 - (c) The technological feasibility of an alternative design that would have prevented claimant’s harm.
 - (d) The relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design.
 - (e) The time reasonably required implementing the alternative design.”

⁴⁸ 723 P2d 195 (1986).

California

Another typical product liability case where the defectiveness of the product turns on the question of whether the misuse is foreseeable because manufacturers design products to be reasonably safe in light of anticipated misuse, is *Dosier v Wilcox & Crittendon Co.*⁴⁹ In this case the plaintiff was injured during the rigging process. He attached a hook to a 1700 pound counterweight which gave way and the counterweight fell on his arm. The main issue in this case was whether the plaintiff's use of the hook for lifting was reasonably foreseeable by the manufacturer, or in other words whether the hook was being used in a way intended by the manufacturer, because there is no duty to warn against a use that is not reasonably foreseeable. There was sufficient evidence to support a finding of nonforeseeability, therefore a verdict in favour of the defendants.

3.2.3 The *Barker v Lull Engineering Co*⁵⁰ approach

In this case the plaintiff was injured at a construction site while operating a highlift loader manufactured by the defendant. The loader tipped partially over, and plaintiff jumped off the loader and attempted to scramble away. He was injured when some lumber on the lift fell and hit him. Plaintiff claimed that the loader was defectively designed in several respects, including that it should have been equipped with "outriggers", a roll bar, and seat belts.

The *Barker* test incorporates two alternative tests:

⁴⁹ 45 Cal App3d 74, 119 Cal Rptr 135 (1975).

⁵⁰ 20 Cal 3d 413, 143 Cal Rptr 225, 573 P2d 443 (1978).

- (1) A product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or
- (2) A product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

The reasons for this definition in California are:⁵¹

- (1) The term "unreasonably dangerous" unfairly burdens the consumer with proof of negligence; and
- (2) An acknowledgement that "it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not".

The first test, the expectations of the ordinary consumer, cannot be viewed as the yardstick for evaluating design defect: "In many situations the consumer would not know what to expect because he would have no idea how safe the product could be made."⁵² The second part of the first test uses the word "proximate

⁵¹ *Id* at 433, 573 P2d at 456, 143 Cal Rptr at 238.

⁵² Wade(1) 829.

cause” which is unclear and superfluous.⁵³ Findings of proximate cause and defect involve the same policy inquiries. It is repetitious and misleading to ask whether the defect was the proximate cause of the damage. The policy question is asked once when the court weighs the various factors to see whether the product is defective.⁵⁴

The second test reduces the burden on the consumer and shifts the locus of proof to the defendant who must prove that the product is free from defects. Since the defendant usually has superior knowledge and expertise, the second test seems fair. The judgment in favour of the defendants was reversed.

The *Barker* test was adopted in other jurisdictions⁵⁵ and significantly expands the scope of liability in the following ways:

- (1) By using the two tests of defect in the disjunctive, it insures that the plaintiff will recover if the product fails either test. Some products are defective under risk-utility but not under consumer expectations and some products are defective under consumer expectations but not risk-utility; and
- (2) Shifting the burden of proof on the question of whether the utility outweighs the risk. In analyzing this aspect of the *Barker* test, Professor Epstein states:⁵⁶

⁵³ Green 621.

⁵⁴ Wade(1) 837 - 841.

⁵⁵ *Caterpillar Tractor Co v Beck* 593 P2d 871 (Alaska 1979); *Dart v Wiebe Mfg* 147 Ariz 242, 709 P2d 876 (1985).

⁵⁶ Epstein(3) 651.

“The careful division of burdens in the second portion of the test says that plaintiff need only show design features that might be implicated in the accident, leaving it to the defendant, at great expense, routinely to justify each feature as best he can.

With this distribution of the burden, the plaintiff can always show some way in which the product might have been changed in order to avert the accident, as it is always possible to generate some improvement at some price. All product related accidents have become presumptively actionable.”

3.2.4 Negligence with imputed knowledge

The Oregon Supreme Court has developed a test based upon a modification of the traditional negligence approach:

“A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved.

Strict liability imposes what amounts to constructive knowledge of the condition of the product.”⁵⁷

Both Wade and Keeton⁵⁸ embrace the test but disagree whether it is a test of negligence. The Oregon Court states that “the Wade and Keeton formulations of the standard appear to be identical except that Keeton would impute the knowledge of dangers to the manufacturer at time of trial, while Wade would impute only the knowledge existing at the time the product was sold.”

The drawback to this test is the use of the term “negligent”. The imposition of constructive knowledge is not new. This is often done when circumstantial evidence is strong enough to permit an inference that the defendant had knowledge of the defect.⁵⁹

3.2.5 A functional test

Through the concept of defect the courts implement the values of the American society.⁶⁰ The answer to the question of appropriate amount of safety in the product takes various factors into consideration. If the court in America has doubts about whether a product is defective, then the question of defect is to be given to the jury.⁶¹

⁵⁷ *Phillips v Kimwood Mach Co* 269 Or 485, 525 P2d 1033, 1036 (1974).

⁵⁸ Wade(1) 837 - 841; Keeton(2) 37 and 38.

⁵⁹ Fischer and Powers 80; Shapo 5.06[2].

⁶⁰ Vandall(1) 57.

⁶¹ *Leichtamer v American Motors Corp* 67 Ohio St2d 453, 424 NE2d 568 (1981); *Turner v General Motors Corp* 514 SW2d 497 (Texas Civ App 1974); *Gimshaw v Ford Motor Co* No 19-77-6 (Orange Country (Cal) Super Ct March 30 1978); *Schwinn Sales South v Waters* 126 Ga App 385, 190 SE2d 815 (1972).

Although the jury system is not implemented and supported internationally, the balancing of operating factors taken into consideration by the court is of significant importance:

- (1) The court must consider that the primary reasons for strict liability are to shift the loss from the consumer to the seller and that the loss should be borne by the person who created it;⁶²

- (2) The court should weigh the product's utility including:
 - (a) Style or aesthetic appeal;⁶³
 - (b) The alternative designs;⁶⁴
 - (c) The substitute products;⁶⁵
 - (d) The likelihood of injury;⁶⁶
 - (e) The nature of the injury;⁶⁷
 - (f) The cost of making the product safer;⁶⁸
 - (g) The availability and effectiveness of warnings;⁶⁹
 - (h) The ability of the seller to obtain insurance or otherwise carry the loss;⁷⁰

⁶² *Greenman v Yuba Power Products Inc* 27 Cal Rptr 697 (1963) ; *Escola v Coca-Cola Bottling Co* 24 Cal2d 453, 150 P2d 436 (1944).

⁶³ *Dreimonstok v Volkswagenwerk AG* 489 F2d 1066 (4th Gi 1977).

⁶⁴ *Grimshaw v Ford*; *McCormack v Handcraft Co* 278 Minn 322, 154 NW2d 488 (1967); *Ellis v Rich's Inc* 233 Ga 573, 212 SE2d 373 (1975).

⁶⁵ *Hines v Joseph's Hospital* 86 NM 763, S27 P2d 1075 (1974).

⁶⁶ *McCormack v Hanksraft Co* 278 Minn 322, 154 NW2d 488 (1967).

⁶⁷ *Gulf Refining Co v Williams* 183 Mis 723, 185 So 234 (1938).

⁶⁸ *Schwinn Sales South v Waters* 126 Ga App 385, 190 SE2d 815 (1972).

⁶⁹ *Crane v Sears Roebuck & Co* 218 Cal App2d 855, 32 Cal Rptr 754 (1963).

⁷⁰ *Greenman v Yuba Power Products Inc* 27 Cal Rptr 697 (1963); *Henningsen v Bloomfield Motors* 32 NJ 358, 161 A2d 69 (1960).

- (i) The impact on society of finding the product defective;⁷¹ and
- (j) The experimental nature of the product.⁷²

In practice the abovementioned aspects are examined only to determine if there is some reason why the loss should not be placed on the seller. The weight allocated to each issue will vary with the facts of each case.

3.3 **Warning defects**

3.3.1 **General**

In respect of warnings the Restatement (Second) adopted a test in comment j, which reads as follows:

“Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use ... where the product contains an ingredient ... whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product ... the seller is required to give warning against it, if he has knowledge, or by the application of reasonably developed human skill and foresight should have knowledge of the presence of the ingredient and the danger.”

⁷¹ *Schemel v General Motors Corp* 384 F2d 802 (7 Cir 1976).

⁷² Restatement (Secnd) of Torts, Section 402A, Comment k (1965).

Under the Comment j standard, negligence and strict liability in warning cases seem to be functional equivalents.⁷³ Constructive knowledge embraces knowledge that should have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act.

The majority of courts agree with Comment j that there is no liability for failing to warn about undiscoverable risks.⁷⁴ However, there are courts that hold defendants strictly liability for a failure to warn of risks that were scientifically unknowable at the time the product was marketed.⁷⁵

The importance of a duty to warn should not be underestimated as illustrated in the case of *Greiner v Volkswagen Aktien Gesellschaft*⁷⁶ where a duty to warn of rollover danger of a VW Beetle existed even though there was no design defect. Thus a duty to warn case is likely to come much closer to imposing “absolute” liability than either manufacturing or design defects.

It is also true that extraordinary cases have been tried, for example, a claim that an automobile was defective because the manufacturer failed to warn that attempting to start a manual shift automobile without depressing the clutch could result in the movement of the automobile.⁷⁷

⁷³ *Sterling Drud Inc v Yarrow* 408 F2d 978, 992 (8 Cir 1969); *Chambers v GD Searle & Co* 441 Fsupp 377, 380 (Dmd 1975); *Incollingo v Ewing* 444 Pa 263, 285 n8 282 A2d 206, 220 n8 (1971).

⁷⁴ *Payne v Soft Sheen Prod Inc* 486 A2d 712 (DC App 1985)

⁷⁵ *Beshaba v John-Manville Prods Inc* 90 NJ 191, 447 A2d 539 (1982): asbestos; *Little v PPG Indus Inc* 19 Wash App 812, 579 P2d 940 (1978): chemical.

⁷⁶ 540 F2d 85 (3 Gr 1976).

⁷⁷ *Conti v Ford Motor Co* F2d 195 (3 Cir 184).

The following issues will be considered to determine whether there is a warning defect:⁷⁸

- (1) The dangerous condition of the product;
- (2) The purpose for which the product is used;
- (3) The form of any warnings given;
- (4) The reliability of the third party as a conduit of necessary information about the product;
- (5) The magnitude of the risk involved; and
- (6) The burdens imposed on the supplier by requiring that he directly warn all users.

A balancing of the aforementioned issues is necessary in the light of the fact that no single set of rules could possibly be advanced that would automatically cover all situations.

3.3.2 Adequacy of warning⁷⁹

A warning must be adequate in that the reasonable user is likely to read it, and that it sufficiently alerts the user both to the nature and degree of the danger and how it can best be avoided.

⁷⁸ Fischer and Powers 216 – 261; Shapo 19.11.

⁷⁹ See in general Fischer and Powers 218.

The manufacturer's duty to warn extends to providing directions that describe how to avoid the risk or danger associated with a product and the means for using the product safely.

Relevant factors include:

- (1) A mild suggestion about the danger may convey no idea of the extent of the danger. It must fairly apprise a reasonable user of the nature and extent of the danger.
- (2) Bland instructions which if followed would involve no risk are not a substitute for skull and crossbones warnings where misuse will have lethal results.
- (3) The warning must be displayed in such a way as to reasonably catch the attention of the persons expected to use the products.

Manufacturers must not be tempted by this labyrinth of liability to over warn, since such over warning may itself lead to liability.

The principles are illustrated in the following cases:

In the American case *Campos v Firestone Tire & Rubber Co*⁸⁰ the court held that where the user is someone in a menial job who may not be able to read English, perhaps the warning should be in pictorial form. It seems that manufacturers

⁸⁰ 98 NJ 198, 485 A2d 305 (NJ 1984).

have little assurance that even if the warning is communicated it will be deemed sufficient.

In *McFadden v Haritatos*⁸¹ the plaintiff's son parked the plaintiff's car over hay that came up to the base of the doors. The hay caught fire and destroyed the barn. The court ruled that the following warning in the owner's manual was not "of sufficient clarity and intensity to adequately communicate the nature of the danger and the means of avoidance to those who will foreseeably use the automobile":

"Do not drive through, idle, or park your car over combustible materials such as grass or leaves. They could touch the hot exhaust system and ignite."

In *Spruill v Boyle-Midway Inc*⁸² the plaintiffs were parents of a sibling of fourteen months old who died as a result of chemical pneumonia caused by the ingestion of a small quantity of the defendant manufacturer's product: "Old English Red Oil Furniture Polish". The label had the following relevant warning:

"Contains refined petroleum distillates. May be harmful if swallowed, especially by children."

The court characterised the product as inherently dangerous since one teaspoon full could kill a child. The court ruled that the defendant's contention that the

⁸¹ 86 App Div2d 761, 448 NYS2d 79 (1982).

⁸² 308 F2d 79 (1962).

product was not used for its “intended use” is not an inflexible formula and should anticipate the environment that is normal for the use of the product even if such use is incidental to the actual use.

An adequate warning must embody two characteristics:

- (1) It must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use;
- (2) The content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.

The court held that the abovementioned warning was not printed on the label in such a manner as to assure the user’s attention and the wording of such warning was not of such a nature to convey the conception of the actual dangerous character of the product.

In *Edwards v California Chemical Co*⁸³ the court distinguished between instructions and warnings. The plaintiff, an illiterate, who was taking care of golf grounds, became ill of arsenic poisoning following the use of Ortho Standard Lead Arsenate. The court found that the label only indicated how to use the insecticide but not how to use it safely by means of protective clothing and a respirator. There was a label warning of danger, which was red and reflects a skull-and-cross-bones together with a large word “Poison”. The Court held that

⁸³ 245 So2d 259, cert denied, 247 So2d 440 (1971).

there is a duty to instruct in addition to a duty to warn when it is reasonably necessary.

In *Rhodes v Interstate Battery Sys Of AM Inc*⁸⁴ the plaintiff sought damages for personal injuries suffered in an explosion occurring when he struck a match and loosened the vent caps on an automobile battery manufactured and distributed by the defendant. A warning of the danger was printed on the cell cover of the battery.

The court held that the language embossed on the vent caps was an adequate warning of the potential danger to the plaintiff and that the battery was therefore not defective. The plaintiff's failure to read the warning constituted contributory negligence, which precluded the plaintiff from recovering.

In *Hahl v Sterling Drug Inc*⁸⁵ a four-year-old child swallowed one and a half ounces of Camphopenique, an over-the-counter topical analgesic. The parent's seven-year-old child misplaced the lid to the container after use earlier in the evening. The matter was remanded for retrial so that a jury could decide on the adequacy of the warning. However, the court indicated that a warning is not adequate if it minimizes the danger associated with the product.

A warning that is otherwise adequate will not exonerate the manufacturer if he undermines its effectiveness. In *Maize v Atlantic Ref Co*⁸⁶ the plaintiff's decedent died as a result of inhaling the fumes of a poisonous cleaning fluid named

⁸⁴ 772 F2d 1517 (1984).

⁸⁵ 805 F2d 1480 (1986).

⁸⁶ 352 Pa 51, 41 A2d 850 (1945).

“Safety-Kleen”. The name of the product was printed on four sides of the container in large letters. A warning was printed on the can in much smaller letters. The prominent display of the word “Safety” could well make the cautionary note seem unimportant. It could even prevent the user from reading the entire label.

3.3.3 **Obvious or known dangers**⁸⁷

In deciding what kind of warning to give, the producer must be able to take into consideration the knowledge and expertise of those who may reasonably be expected to use the product. If the product is marketed to professionals, who are aware of its dangers and how to deal with them, he may reasonably give a much less detailed warning than he would have to give to members of the general public.

Generally there is no duty to warn of open and obvious dangers whether recovery is sought on a negligence or strict basis.

The American courts have diversified views on this issue:

In *Camachov Honda Motor Co Ltd*⁸⁸ the court held that a warning is required as to the danger of a motorcycle without leg guards while in *Miller v Dvornick*⁸⁹ the court held that the danger of a motorcycle without guards is open and obvious.

⁸⁷ Fischer and Powers 248 - 261; Shapo 19[1]; Hulsenek and Campbell 101 – 102.

⁸⁸ 701 P2d 628 (Colo 1987).

⁸⁹ 501 NE2d 160 (Ill App Ct 1986).

Besides the aforementioned patent danger issue there is also the issue that there is no duty to warn of matters of common knowledge. Again the court results in America are not always what is expected.

3.3.4 Instructions⁹⁰

Warnings must be distinguished from instructions. A warning apprises the user of the risks associated with the product. Instructions explain how to use the product.⁹¹

Instructions unaccompanied by a warning of the consequences of failing to follow the instructions could result in liability. This is because the user may fail to understand the significance of failing to follow the instructions. He may, for example, regard the instructions as being concerned with the efficient use of the product and have nothing to do with safety.

In *Jackson v Corning Glass Works*⁹² a plaintiff was injured by a glass splinter after the corning glassware he had stacked precariously in a cupboard, fell down. A jury verdict in excess of one million dollars was reversed by the Rhode Island Supreme Court on grounds that the danger was obvious and a matter of common knowledge.

⁹⁰ Shapo 19.01[1]; Fisher and Powers 230 - 231.

⁹¹ *Edwards v California Chemical Co* 245 SO2d 259, 247 SO2d 440 (1971).

⁹² 538 A2d 666 (RI 1988).

The “common knowledge rule” has been used often in America to defeat the claims of plaintiffs who, having been injured by a drunk automobile driver, have tried to sue the producers of the alcoholic beverage.⁹³

The Restatement (Second) states:

“[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous or potentially so ... when the danger, or potentiality of danger, is generally known and recognized.”⁹⁴

3.3.5 Who to warn⁹⁵

The manufacturer’s obligation is to use reasonable care to protect the people who are likely to be injured by his goods. Manufacturers of consumer goods, which are individually packaged and sold, usually must warn the user or consumer. A warning given to a non-consuming purchaser such as a retailer or wholesaler will not satisfy the manufacturer’s obligation.

3.3.5.1 Bulk seller’s rule⁹⁶

When products are sold in bulk to sophisticated industrial users for use in the manufacturing process the supplier can escape liability by adequately warning and training the purchaser. This seems fair because of the difficulty of warning

⁹³ *Morris v Adolph Coors Co* 735 SW2d 578 (Tex App 1987).

⁹⁴ Comment j.

⁹⁵ *Hulsenbek and Campbell* 96 - 99; *Fischer and Powers* 261 - 282.

⁹⁶ *Fischer and Powers* 267.

the individual employees, and because of the reasonableness of relying on the purchaser to protect his employee. In *Goodbar v Whitehead Bros*⁹⁷ the plaintiffs, 132 present and former employees of a foundry, sued twelve manufacturers who supplied the foundry with silica sand and related products used in the casting process. Plaintiffs have each contracted silicosis. They claim that the defendants breached a duty to warn them directly of the risks of contracting silicosis by working with their products.

Section 388 of the Restatement (Second) applies: In a negligent failure to warn claim, the analysis under Section 388 is that the supplier of a chattel is liable when he:

- (1) Supplies a defective or dangerous product;
- (2) Has no reason to believe that the user lacks knowledge of this defect or dangerous condition; and
- (3) Cannot reasonably rely upon the purchaser/employers to supply necessary warnings to plaintiffs, the ultimate users of the product.⁹⁸

The court held that the plaintiffs' contention that the silica-related hazards are latent to be without merit for two reasons. First, the product is made available to a sophisticated employer who supplies it for use to its employees. Secondly, the silica was not latent as far as the foundry was concerned.

⁹⁷ 591 Fsupp 552 (1984).

⁹⁸ Fischer and Powers 262.

The court also considered the difficulties that a sand supplier face in attempting to warn a foundry's employees of the hazards inherent in the use of sand, which include:

- (1) The identification of the users or those exposed to its products would require a constant monitoring by the suppliers in view of the constant turnover of the workforce;
- (2) The manner in which the sand products are delivered in bulk;
- (3) No written product warnings placed on the railroad cars would ever reach the workers involved in casting or those in the immediate vicinity due to the way the loose sand is unloaded, conveyed, and kept in storage bins until needed;
- (4) Only the foundry itself would be in a position to provide the good housekeeping measures, training and warnings to its workers on a continuous and systematic basis necessary to reduce the risk of silicosis;
- (5) The sand suppliers must rely on the foundry to convey any safety information to its employees;
- (6) The confusion arising when twelve different suppliers and the foundry each try to cope with the task of instructing the workforce; and
- (7) In a commercial setting, it would be totally unrealistic to assume that the suppliers would be able to exert pressure on a large, industrial customer.

3.3.5.2 Learned intermediaries⁹⁹

The American courts have a large respect for the learned intermediary doctrine, which has generally been accepted.

Under this doctrine the manufacturer of pharmaceuticals has no duty to warn the patient directly. The justifications for the doctrine are that the patient places reliance upon the physician in seeking medical advice and that as a professional the physician has an obligation to inform himself of the dangers of the drug and to conform to the medical standards in informing the patient.

Whether or not the intermediary must warn the patient is governed by the law of informed consent. Under that rule, the physician may sometimes be required to pass on some or all of the warnings to the patient. At other times, he may weigh the risks and benefits and make the decision to prescribe the drug without informing the patient.¹⁰⁰

The doctrine has been applied not only to exempt manufacturers from a failure to warn customers but to pharmacists who under United States practice, simply carry out the orders of a physician, professional nurses¹⁰¹ and risks of treatment with potentially dangerous medical equipment.¹⁰²

⁹⁹ Thompson(2) 135.

¹⁰⁰ *Id* 129.

¹⁰¹ *Walker v Merck & Co Inc* 648 Fsupp 931 (MD Ga 1986).

¹⁰² *Kirsch v Picker Inter Inc* 753 F2d 670 (8 Gr 1985): X-ray machine: *Terhune v Robins Co* 90 Wash2d 9, 577 P2d 975 (1975): Intrauterine device.

The doctrine does not apply to non-prescription drugs. Here the manufacturer must warn the customer directly.¹⁰³

The courts in the USA are split on how far to expand the learned intermediary doctrine. In *Davis v Wyeth Laboratories Inc*¹⁰⁴ polio vaccine was distributed in a mass immunization program in which the drug manufacturer participated. The court required that warnings be given directly to the consumers because the drug “was dispensed to all comers at mass clinics without an individualized balancing by a physician of the risks involved”.¹⁰⁵ In the *Reyes* case the court required that the consumer be warned directly and not as in this case, at her parent’s request by a nurse at a public health clinic. In *Walker v Merck & Co Inc*¹⁰⁶ a practical nurse administered measles vaccine to the plaintiff in a local program designed to inoculate certain high school students. The court held that the manufacturer did not have to warn the students directly.

The doctrine was expanded in *Givens v Lederle*¹⁰⁷ to apply in certain cases where the drug is prescribed by the patient’s doctor. In this case polio vaccine was administered by the patient’s doctor in his office. The doctor testified that the administration did not differ from that of a public health center. The court ruled that the rationale of the *Reyes* case applied.

¹⁰³ *Torsiello v Whitehall Laboratories Div of Home Products Corp* 165 NJ Super 311, 398 A2d 132 (1979) cert denied 8 NJ 50, 404 A2d 1150 (1979); *Michael v Warner/Chilcott* 91 NM 651, 579 P2d 183 (1978) cert denied 91 NM 610, 577 P2d 1256 (1978).

¹⁰⁴ 399 F2d 121 (9 Gr 1968).

¹⁰⁵ *Id* 131.

¹⁰⁶ 648 Fsupa 931 (MD 1986).

¹⁰⁷ 556 F2d 1341 (5 Gr 1977).

The courts are also split on the question of whether manufacturers of birth control pills must directly warn the consumer. The majority of courts hold that the duty is to warn the prescribing physician only.¹⁰⁸ In the *Macdonald v Ortho Pharmaceutical Corp* case the court indicated that a Food and Drug Administration Regulation requires that a warning directly to the consumer accompany birth control pills. Such a violation can constitute negligence *per se*.

3.4 Changes in technology and knowledge of risks

In *Feldman v Lederle Laboratories*¹⁰⁹ the plaintiff developed gray teeth as a result of taking a tetracycline drug, declomycin. The Appellate Division affirmed that prescription drugs are a special category of products and that drug manufacturers would not be strictly liable for failing to warn of a side effect that was unknown when the drug was sold.

The *Feldman* case considered Comment k to Section 402 A of the Restatement (Second), which provides:

“There are some products which, in the present state of human knowledge are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably

¹⁰⁸ *Brochu v Ortho Pharmaceutical Corp* 642 F2d 652 (1 Gr 1981).

¹⁰⁹ 87 NJ 429 A2d 374 (1984).

leads to a dreadful death, both the marketing and use of the vaccine are fully justified notwithstanding the unavoidably high degree of risk, which they involve.

Such a product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines and the like, many of which for this very reason cannot legally be sold except to physicians or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of the lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk.

The seller of such products, again with the qualification that they are properly prepared and marketed and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.”

Comment k suggests that strict liability should not apply to certain unavoidably unsafe products, especially prescription drugs.

The *Feldman* case argues that the question whether a drug is unavoidably unsafe should be decided on a case-by-case basis and that prescription drug manufacturers should not be given a blanket immunity from strict liability manufacturing and design defect claims under Comment k.

Some courts agree with the case-by-case approach of *Feldman*.¹¹⁰ Other courts declare that all products within broad categories are unavoidably unsafe.¹¹¹

The majority of cases that apply Comment k have involved drugs, vaccines, blood and medical devices.¹¹² Schwartz¹¹³ believe that the Comment only applies to the aforementioned type of products. Not all courts agree since Comment k are occasionally applied to other products.¹¹⁴

Courts in the USA are split on the question of whether inability to discover the risk associated with the product at the time of sale or distribution will excuse the manufacturer from liability. Generally, ignorance of risk would never excuse a manufacturer. However, the following exceptions are generally made:

- (1) Drugs, Vaccines, Blood and Medical Devices;
- (2) Failure to Warn; and

¹¹⁰ *Kearl v Lederle Laboratories* 172 Cal App 3d 812, 218 Cal Rptr 453 (1 Dist 1985).

¹¹¹ *Collins v Ortho Pharmaceutical Corp* 186 Cal App 3d 1194, 231 Cal Rptr 396 (5 Dist 1986) American Federal Drug Administration (FDA) approval, and which are accompanied by adequate warnings.

¹¹² *Wilkinson v Bay Shore Number Co* 182 Cal App 3d 594, 227 Cal Rptr 327 (1986) citing numerous cases.

¹¹³ Schwartz(3) 1141.

¹¹⁴ Asbestos: *Borel v Fiberboard Prod Corp* 493 F2d 1076, 1088 to 1089 (5 Gr 1973) cert denied 419 VS 869, 95 SCt127, 42 Led2d 107 (1974); Bulk Sulfuric Acid: *Walker v Stauffer Chem Corp* 19 Cal App3d 669, 674, 96 Cal Rptr 803, 806 (1971); Natural Gas: *Gross v Nashville Gas Co* 608 SW2d 860 (Tenn App 1980).

- (3) Design Defects: Some courts hold that reasonable inability to discover a risk is an excuse¹¹⁵ while other courts disagree.¹¹⁶

4 PRODUCTS LIABILITY REFORM

4.1 General

Although the products liability theory that developed in the USA is impressive, it is important to consider the effects of the evolution of products liability in the United States of America on the economy, consumer, manufacturer and any other related party. This analysis provide valuable insight into the likely impact that changes to the products liability dispensation of South Africa will have. Examples of recent incidents:

- (1) In July 1988, a Beverly Hills oral surgeon, Dr Andrew Glassman, obtained an out of court settlement of \$6,3 million for product related injuries. Dr Glassman's wrist injury was incurred when he fell off a rented horse while trying to hit a polo ball. His suit claimed that his saddle had loosened because of a defective strap.¹¹⁷
- (2) The plaintiff in *Moran v Fabergé*¹¹⁸ won her case after she and a friend attempted to make a scented candle by pouring perfume over a lit candle.

¹¹⁵ *Heritage v Pioneer Brokerage & Sales Inc* 604 P2d 1059, 1063 - 1064 (Alaska 1979).

¹¹⁶ *Robertson v General Tire and Rubber Co* 123 Ill App3d 11, 78 Ill Dec 587, 462 NE2d 706.

¹¹⁷ New York Times, 30 July 1988; Viscusi 1.

¹¹⁸ 273 MD 538, 552 to 553, 332 A2d 11, 20 (1975).

The court held that the product was defective for not having a warning alerting users to the flammability hazard.

There are also examples of products which have been forced off the market by litigation:

- (1) The anti-morning sickness drug Bendectin;
- (2) The Copper-7 in trauterine device; and
- (3) The Pertussis vaccine.¹¹⁹

According to Viscusi¹²⁰ federal products liability lawsuits involving personal injury increased six-fold from 1975 to 1989 of which asbestos litigation forms a substantial part. The damages associated with products liability litigation also increased and nearly doubled from 1980 to 1988, mostly due to increased medical costs. Out of court settlements indicate that small claims tend to be overcompensated relative to the amount of economic damage and large claims tend to be undercompensated. The industry particularly hit by products liability is the private aircraft industry. American firms produced over 17 000 private planes in 1979. Production decreased to 1085 by 1987. The leading producer, Cessna, which accounted for 9000 planes in 1979, ceased production altogether. Beech dropped its production from 1214 to 195 over that period. The cost of liability now averages \$100 000 per plane produced. Aircraft companies are sued

¹¹⁹ Howells (3).

¹²⁰ 8 - 13.

in 90% of all crashes involving fatalities or serious injuries, even though pilot error is responsible for 85% of all accidents.¹²¹

Products liability suits also impacted on stock market prices of firms. The dollar value of the stock market losses range from \$2,64 million in the case of a suit against Rockwell International over allegedly defective New York subway cars to a high of \$176,35 million for a suit against Eli Lilly seeking a ban on Orflex.¹²²

The pharmaceutical industry was also effected. Robins was forced to re-organise under federal bankruptcy law and set up a fund for almost \$3billion to pay for liability claims arising from the Dalkon Shield intrauterine device.¹²³

Even where products liability lawsuits did not result in bankruptcy, exit from the market or stock market repercussions, it had a dramatic effect on companies in respect of bad publicity and legal costs. Even in cases where the plaintiffs are not successful, legal costs will be shared if an insurance company is involved and investors might take a more conservative stance.

A 1987 Report issued by the Conference Board¹²⁴ concluded that the impact of the alleged crisis was relatively small:

“[W]hile exerting some negative impact on corporations and on society, product liability has also motivated management to positive

¹²¹ *Id*, referring to Stimpson (1988).

¹²² *Id* 38, these figures only reflect the loss on the day of the newspaper coverage and not additional losses.

¹²³ *Id* 40, citing the Wall Street Journal, 7 November 1989.

¹²⁴ Weber 17.

actions – for example, improving product safety, product use and warning labels, and manufacturing quality.”

This study was based on a survey of risk managers of the Fortune 1000 companies regarding the impact of products liability litigation and insurance practices on their firms.

A second research project in 1988 targeted smaller firms and it was found to be worse affected, more in line with the commentators that argued a product liability crisis.¹²⁵ The Task force identified three main causes of the alleged crisis:¹²⁶

- (1) Insurance: In general between 1974 to 1984 there had been an increase in product liability insurance cost. However, no evidence could be found that these increases were justified;
- (2) Manufacturing Practices: Of the 655 appellate cases studied by the Task Force, 140 constituted construction defects of which 58 resulted in verdicts for the plaintiffs, and a further 46 being remanded. Plaintiffs were less successful in design cases; and
- (3) Tort Litigation Systems: Although the data was conflicting, there was an indication that the number of claims rose. There was not certainty whether the size of judgments increased.

¹²⁵ McGuire 3.

¹²⁶ Other causes cited were that inflation increased consumer awareness, the increase in the number and complexity of products and product misuse.

Many commentators proposed some changes to existing legislation and products liability theories and the Task Force itself drafted Acts to resolve the alleged problems, which will now be considered.

4.2 Viscusi

The proposals advocated by Viscusi focus on a fundamental restructuring of both liability rules and damages assessment of which the objective should be to foster appropriate incentives for accident deterrence and to provide insurance for accident victims.¹²⁷ The retention of strict liability for manufacturing defects is regarded feasible but in the case of design defects a reformulation of the risk-utility test that more closely resembles a formalized negligence standard, is proposed.¹²⁸

Design defects are singled out since manufacturing defects only generate random losses but design defects can affect the entire product line of which all of the costs associated with the losses can be charged to the producer.¹²⁹

The alternative risk-utility test proposed by Viscusi¹³⁰ include three separate measures to be evaluated in sequence:

- (1) The purchaser's risk-utility index should be considered. The objective of this test is to ascertain whether the manufacturer would have marketed the

¹²⁷ Viscusi 11.

¹²⁸ *Id* 11 - 12.

¹²⁹ *Id* 12.

¹³⁰ *Id* 78 - 81.

product on the basis of a benefit-cost test. The informational standard to be used in making such judgments is what the producer should have known about the risk, which will involve research undertaken by the manufacturer. The test does not assume that manufacturers had advance knowledge. The issue is whether a manufacturer making a socially oriented product risk decision is behaving in the correct manner given the state of knowledge at the time, which Viscusi refers to as a “state of the risk information” defense and does not involve a comparison with alternative designs.

- (2) The second test objective is to establish the product mix that maximize this net surplus accruing to both the producer and the consumer subject to the first test being met.
- (3) The third test is the social benefit cost test. If the product has adverse effects on parties other than the purchaser, these should be taken into account. The favourable effects must also be taken into account.

Each measure examines a different set of factors:

- (1) The purchaser’s risk-utility measure concerns the average consumer and entails three factors:
 - (a) The value of the product to the consumer;
 - (b) The purchase price of the product; and
 - (c) Cost of an unexpected injury.

- (2) Benefits and cost to society entails:
 - (a) Excise tax represent a net gain to society above the cost of producing a product;
 - (b) There may be benefits to other parties such as workers; and
 - (c) Cost imposed on third parties.

These measures operate in a specified negligence standard: Did the manufacturer exercise an appropriate degree of care for the consumer's welfare in the design of the product? Viscusi distinguishes the negligence standard and his risk utility test as follows:

- (1) The question being posed in a negligence case is one of fault. In terms of the risk-utility test, a manufacturer need not know the risk or have "constructive knowledge" of the risk or be inflicting an intentional harm. Rather, the issue is whether the product design passes a particular test of desirability, assuming that the defendant had knowledge of the risk; and
- (2) The risk-spreading objective does not arise under negligence but is a component of the risk-utility analysis.

The other area according to Viscusi¹³¹ that requires reform is damages, especially for pain and suffering and other non-economic damage. Juries have been inconsistent in establishing such damages. Depending on the injury category, pain and suffering and non-economic damages constitute 30% to 50% of the total

¹³¹ *Id* 114 - 116.

award. Furthermore, due to the contingency fee structure of one third, it is argued that the high non-economic awards are a method of juries to compensate accident victims for their legal costs.

Therefore, consideration must not only be given to the award but also to attorney fees. The proposal indicates that pain and suffering awards must be governed by an advisory schedule, economic damages must remain unchanged and attorney fees would be addressed through a separate awards component based on a standardised fee schedule.¹³²

Caps are also considered but since it will affect very few products liability claims and will have little financial impact, it is not considered a worthwhile alternative.

4.3 Federal products liability reform

Federal product liability reform is being proposed to preserve tort as a means to keep dangerous, defective products off the market while eliminating over deterrence caused by excessive and uncertain liability. In the aviation market balance was achieved in the General Aviation Revitalization Act (GARA) of 1994, which created a federal eighteen year limit on litigation involving noncommercial aircraft.¹³³ This law resulted in thousands of new jobs and planes manufactured.

¹³² Such a proposal was also considered in the report of the American Law Institute (1990).

¹³³ Schwartz and Behrens(2) 1363 and 1374.

The Federal Interagency Task Force made two proposals:¹³⁴

- (1) Small business must be enabled to have a better and fairer opportunity for purchasing insurance in the liability insurance market.¹³⁵ Legislation resulted¹³⁶ which allowed small business to form self-insurance pools and purchasing groups; and
- (2) Since self-insurance options alone will not address the product liability crisis, they drafted a model law¹³⁷ for use by the states.

Products liability reform legislation has been considered in every subsequent congress. It went through the lengthy political structure and was finally vetoed in 1996.¹³⁸ The drafters hoped that the model law would be voluntarily adopted by the states but only two states¹³⁹ adopted the model law which was eventually vetoed by the state governors.

Although the most recent bill, which has gone through many changes and debates, is before the Senate, commentators are pessimistic as to its adoption.¹⁴⁰

The following type of reform proposals was considered and is contained in the most recent draft of the bill:

¹³⁴ Federal Interagency Task Force on Product Liability, Final Report (1976); Howells(1) 228 - 230.

¹³⁵ Id VII – 142.

¹³⁶ Liability Risk Retention Act.

¹³⁷ Model Uniform Product Liability Act 44 Fed Reg 62.714 (1979).

¹³⁸ Schwartz and Behrens(2) 1364; Goodman 298 - 301; Lebow 666 - 667.

¹³⁹ Connecticut and Kansas.

¹⁴⁰ Howells 233 - 234.

(1) The definition of a product is inclusive, referring to “any object, substance, mixture, or raw material in a gaseous, liquid, or solid state which is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient.”¹⁴¹

(2) The bill defines manufacturer as:

“any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who (i) designs or formulates the product (or component part of the product), or (ii) has engaged another person to design or formulate the product or component part of the product”.¹⁴²

(3) A cap is placed on punitive damages equal to the greater of two times the sum of the amount awarded to the claimant for economic loss and non-economic loss of \$250 000.¹⁴³

(4) Each defendant’s liability for non-economic losses shall only be several and not joint.¹⁴⁴ Each defendant shall only be liable for the amount of non-economic loss that is in direct proportion to the defendant’s percentage of responsibility for the harm caused.¹⁴⁵

¹⁴¹ Section 100(14)(A).

¹⁴² Section 101(11)(A).

¹⁴³ Section 108(b)(1).

¹⁴⁴ Section 110.

¹⁴⁵ Section 110(b)(1).

- (5) Claimants may include an offer of settlement in the complaint.¹⁴⁶
- (6) Alternative dispute resolution is encouraged.¹⁴⁷
- (7) Strict liability is abolished for the product seller.¹⁴⁸ A claimant must show that the product that caused the harm was actually sold by the seller defendant. A plaintiff must also show that the seller's own lack of reasonable care or breach of an express warranty was the proximate cause of the harm incurred.¹⁴⁹ Actions for failure to warn may be brought against a seller only if the seller failed to supply the consumer with those warnings received from the manufacturer.¹⁵⁰
- (8) Compensation benefit awarded to a plaintiff must be offset against damages awarded.¹⁵¹
- (9) The most important aspect of the Bill is to impose strict liability for construction defects and breach of warranties but premise liability for design defects and failure to warn on a negligence standard.¹⁵²

¹⁴⁶ Section 201.

¹⁴⁷ Section 202(a).

¹⁴⁸ Section 302.

¹⁴⁹ Section 302(a)(1)(c), 2(c).

¹⁵⁰ Section 302(b)(1) to (2).

¹⁵¹ Section 305.

¹⁵² Much the same as the proposal made by Viscusi.

4.4 Restatement (Third) of Torts

The Tentative Draft No.1 of the Restatement (Third) of Torts: Products Liability of 1994 changes section 402A by requiring the plaintiff to show an alternative feasible design in order to prevail in a design defect case.¹⁵³

This represents a significant change in the definition of defect under section 402A of The Restatement (Second) of Tort since an alternative feasible design is not a necessary part of the plaintiff's case. The result is that a plaintiff must not only show that the product failed the risk utility test but also that an alternative feasible design at the time of manufacture did exist.

This change creates a problem in respect of unavoidably unsafe products such as cigarette manufacturers which will be protected from liability simply because their product cannot be redesigned to eliminate its dangers.

4.5 O'Connell

O'Connell is critical of the tort system and prefers no-fault solutions.¹⁵⁴ He proposes a neo no-fault system, which resolves all boundary disputes by making the scheme a voluntary elective one. Under this system the manufacturer will be given a period to make an offer to pay the plaintiff's economic losses¹⁵⁵ by periodic payments.

¹⁵³ Wertheimer(1) 1434 - 1440.

¹⁵⁴ O'Connell 318 - 319.

¹⁵⁵ Such as wage cost, rehabilitation cost and medical cost.

Agreement between the parties in respect of losses exceeding \$5000 will have to be approved by the court. The plaintiff will not be able to refuse the offer unless there is intentional injury.

The manufacturer would be able to make the offer, then join any other potentially liable parties, and have the liability apportioned between them by agreement or arbitration.

O'Connell indicates that there might be criticism against his scheme since the injured party is not given any option to accept the offer and only the defendant can initiate the scheme.

Alternatives proposed by O'Connell include the following:

- (1) Allow the plaintiff to reject the offer but counter with a cap for the damages for pain and suffering;
- (2) Allow the plaintiff to reject the offer but counter with an increase in the burden of proof on the plaintiff;
- (3) Only allow recovery of non-economic damages that are substantial;
and
- (4) Refer the matter to arbitration.

Howells¹⁵⁶ convincingly indicates that O'Connell's idea is flawed in the following respects:

¹⁵⁶ 236.

- (1) Since it is an elective on the part of the defendant, it results in pre-trial negotiations, which already settle 95% of cases;
- (2) The benefits are exclusively in favour of defendants; and
- (3) Where the plaintiff is allowed to reject the offer, the plaintiff is burdened with more restricted liability and damage rules.

5 CONCLUSION

The development of products liability was going at a steady pace until the adoption of Section 402A of the Restatement (Second) of Torts. The matter was complicated by the fact that Section 402A only meant to apply to manufacturing defects whereas design and warning defects should have been dealt with by the principles of negligence. The application of Section 402A to design and warning defects led to diverse tests for defectiveness. The matter has progressed to the stage that a Restatement (Third) is under consideration that will place the burden of proof in design cases on the consumer.

The following problematic issues can be singled out:

- (1) It is prudent to consider the application of different standards (negligence and strict) to different product defects (manufacturing, design and warning);
- (2) The test to be used in the case of strict liability should be clearly defined to create certainty amongst consumers and manufacturers alike and ensure that obviously dangerous products are excluded;

- (3) Certain essential products such as pharmaceuticals also need to be excluded from the workings of strict liability;
- (4) The capping of damages to protect a growing industry;
- (5) Setting up alternative dispute resolution structures to curtail legal costs;
and
- (6) Abolish joint and several liability.

CHAPTER THREE

EUROPE

1. THE EUROPEAN DIRECTIVE

1.1 General

In general, up until 1985 the European Union had no legislation, rules or codes specifically regulating products liability. In most countries the plaintiff had to invoke the traditional legal theories of contract or tort/delict.¹ The European Union's Directive on products liability was adopted and notified to the member states in 1985.² However, there are now the original 13 national laws plus the new national laws enforcing the Directive in existence.³

The mass of rules may be of some benefit to consumers and may achieve within the European Union a satisfactory protection against damages caused by defective products, but it did not make it easy for industry to comply with all the different national rules in addition to the Directive's provisions.⁴

¹ Culhane 20.

² Jones and Stewart 133 - 142; Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 28 OJ Eur Comm (No L 210) 29 (1985).

³ Nilles 729 - 732.

⁴ Leloczky.

Although the Directive, which is known as No. 85/374/EEC, has no direct force as a legal instrument in the member states' legal systems, it is, according to Article 189 of the Treaty of Rome, "binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and method". The Directive provides a three-year term from the date of notification, which was July 30, 1985, for enforcement.

There are several significant differences between the Restatement (Second) of the United States and the Directive. While the Restatement (Second) and the Directive both pursue strict liability, the underlying means of achieving the goal are different and therefore the consequences of the Directive will probably not mirror the United States experience.

1.2 **Article 1: Liability**

"The producer shall be liable for damages caused by a defect in his product."

The Directive places strict liability on producers for all damage caused by their defective products, whether or not they were at fault in causing the harm. The four necessary elements for strict liability are the product, the producer, the defect and the damage.⁵ Exceptions are described in Article 7(a) to (f).⁶

⁵ Corr 237; Hulsenk and Campbell 19; Kelly and Attree 4 - 5.

⁶ *Infra* 90 - 94.

That the Directive is a compromise after years of debate is reflected in the difference between the accepted article 1 and the following proposed article 1:⁷

“The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.”

1.3 **Article 2: Product**

“For the purpose of this Directive ‘product’ means all movables, with the exception of primary agricultural products and game, even though incorporated into another moveable or into an immovable. ‘Primary agricultural products’ means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. ‘Product’ includes electricity.”

This article raises a few simple questions such as: Do all the member states have the same understanding of the term “product”? What is a “moveable”, and what is an “immovable”? What are primary agricultural products and when is electricity defective?

⁷ Commission of the European Communities, Memorandum on the Approximation of Laws of Member States relating to Product Liability: Working Document No. 1 to the attention of the working group “Product Liability” (August 1974 and October 1979).

It is clear that the concept of product has been used in a very wide sense, which encompasses goods not designed primarily for private consumption, and electricity which is not even material but considered to be an item. Furthermore, the product does not have to be a consumer product.

Article 2 defines the product as a moveable, therefore the Directive does not cover immovables and services, and the consequences of their defects are still ruled by national laws.⁸

Components are also included which can be temporarily or permanently incorporated into other products. It would seem that if a component is defective then the finished product into which it is incorporated is also defective. The consumer, however, must still prove defectiveness under article 6 in respect of both the component and the finished product. Consumers will prefer to sue the manufacturer of the finished product since the consumer will not have the expertise or information to discover that the defect was traceable to a particular component and then ascertain the identity of that component manufacturer.⁹

To determine what is “moveable” will depend on the member state’s civil law. Usually civil law makes a distinction between moveable and immovable property, but in general it is possible to say that movables are the contrary of real property and services that by chance are not covered by the Directive.¹⁰

Although buildings as such are obviously excluded, building materials were at

⁸ Hulsbenk and Campbell 20.

⁹ *Id* 20.

¹⁰ *Id* 20; Kelly and Attree 2.

one stage movable and are intended to be covered.¹¹ It would seem that movables, which are subsequently attached to buildings or land and become immovable, are also included.

The producer is not liable for damages arising from “primary agricultural products”¹² as long as they do not undergo any kind of processing or packaging.

The main reason for this exemption is that the producer of agricultural products had no control over the risk of their being defective. These are also products, which are swiftly perishable, which makes quality control and the provision of instructions and warnings extremely difficult. The notion of “initial” and “processing” has been interpreted differently in each national law enacting the Directive. Although most foods would initially qualify for exemption, they are all subjected to some form of activity in order to render them edible or safe or to preserve them. After a product had undergone initial processing and a defect is then introduced, the producer will be liable under the Directive. For example, when the fish was caught it was already contaminated with mercury, therefore no liability exist. But if the fish was contaminated whilst canned, the fish will no longer be exempt.¹³

Member states are free to derogate from the Directive. The justifications put forward include:

¹¹ Explanatory Memorandum 1976 EC Bull. Supp L11 Para 3.

¹² Article 15(1)(a) of the Directive provides for an option by means of which primary agricultural products and game will gain the quality of “product” and become a source of strict liability even though they have not undergone any kind of processing.

¹³ Hulsenbek and Campbell 19 - 21; Kelly and Attree 7.

- (1) Primary agricultural products are particularly prone to hidden defects caused by environmental factors beyond the producers control and to deterioration during storage;
- (2) It is difficult to tell where in the production process the defect arose and the practice of mixing bulk supplies often makes it difficult to trace the producer; and
- (3) The production of agricultural produce is already highly regulated.

Modern farming is a business as much as a manufacturing industry since it takes full advantage of all technical advances.

Is computer software a product?¹⁴ The EC Commission on Consumer Affairs in 1989 issued an opinion stating that software always should be considered a product.¹⁵

General contention is that computer software is intangible and neither goods nor electricity. However, where the software is incorporated into a final product the manufacturer of the final product could be liable for defective software or information.¹⁶

¹⁴ Howells 28.

¹⁵ *Id* 28.

¹⁶ Whitaker 125.

1.4 Article 3: Producer

- “1. Producer means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, putting his name, trade mark or other distinguishing feature on the product present himself as its producer.
2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.
3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person within a reasonable time, of the identity of the producer or the person who supplied him with the product. The same shall apply, in case of an imported product, if this product does not indicate the identity of the importer referred to in Paragraph 2, even if the name of the producer is indicated.”

These provisions define the persons liable for damages arising from a defective product. Paragraphs 2 and 3 list some persons from previous suppliers to importers, who are vicariously liable. The inclusion of an own brander in article 3(1) is intended to catch chain stores and the like who are generally economically powerful and who by representing themselves as producers should take responsibility for the product. The own brander has not been involved in any way in the manufacture of the product but sells the product labeled with only his name on it, thereby presenting himself as the sole producer. The precise labeled wording may be significant in determining whether a person/company presents himself/itself as a producer. The qualifying words “presents himself as its producer” indicate that a person who adds his mark to a product by means of advertising or quality endorsement should not be classed as a producer.¹⁷

Article 3 also effects and influence’s some unexpected markets. The notion of producer certainly includes franchisers as well as franchisees¹⁸ and it will be the plaintiff’s decision whether to sue one or both of them. The Directive cast suppliers in the role of guarantors standing by to provide compensation where the manufacturer is unable.¹⁹ However, suppliers are only liable as producers in the event of so called unidentified products, that is products that do not contain details of the producer’s identity. The purpose of this extension is clear: not to leave a consumer without someone to sue merely because the producer cannot be identified.

¹⁷ Howells(2) 60.

¹⁸ Van Empel 169.

¹⁹ Culhane(2).

This provision is not without any problems. The Directive allows the injured consumer to sue each supplier in the chain. The difficulty is how the injured consumer may be able to identify all or any of the members in the chain when he does not know who they are.

The Directive provides that no liability will be placed on the supplier if he informs the injured consumer within a reasonable time of the identity of the producer or of the person who supplied him with the product. A reasonable time is not defined. Hodges is of the opinion that the injured consumer must notify the supplier of the claim within the limitation period and the supplier must give the information within a reasonable time of first hearing about the claim, so that the injured consumer can pursue his claim within the limitation period. A period of a month or so is claimed to be reasonable. However, the more difficult it is for the supplier to identify the producer, the more time will be required to be reasonable.²⁰

Generally an importer is only liable for failure to take reasonable care. However, under the Directive the first importer into the European Union is classed a producer. A number of defenses are available to the first importer.²¹

The injured consumer need not identify and sue a manufacturer outside the European Union, thereby avoiding problems with foreign law. It is not clear

²⁰ Hodges(2) 62 - 63; Kelly and Attree 6; Hulsensbek and Campbell 23.

²¹ See article 7 of the Directive.

whether the importer is the carrier who transports the product across the border or the person who instructs the carrier.²²

1.5 Article 4: Proof

“The injured person shall be required to prove the damage, the defect and the causal relation between defect and damage.”

It is up to the injured consumer to prove the grounds of their claims and that damage was suffered because the product was defective. They have the burden of proof as to damages and defect and the causal relationship between them. This burden of proof provides the sole protection for industry against unjustified and frivolous claims. Because of the difficulty to prove the connection between defect and damage, some member states have adopted national laws to ease the injured consumer’s task of establishing the causal relationship.²³

1.6 Article 5: Joint liability

“Where, as result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.”

²² Hodges(2) 60 - 61; Kelly & Attree 5 - 6; Hulsenk and Campbell 22 - 23.

²³ Hodges(2) 66 - 70.

This article specifies that where two or more persons are liable for the same damage, they should be liable jointly and severally. An injured consumer who has a choice of defendants may choose to sue all or select one who has the “deepest pocket” or weakest defense, since all will be liable to him for the full amount.²⁴

In the event that one of the liable parties has indemnified the injured consumer the party has a right of recovery against the others in proportion to the risk attributable to each. In the case of an importer, he will have a right to recover against the manufacturer outside the European Union for the amount paid to the plaintiff.

1.7 Article 6: Defect

- “1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including
- (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.

²⁴ Hodges(2) 65.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.”

This article deals with the concept of defectiveness, but unfortunately the concept leaves a lot of room for argument and uncertainty. The wording does not require the industrial production to be absolutely safe before a manufacturer can escape liability but the minimum requirement is the safety the common person in the street is entitled to expect from the product, taking all the circumstances into account. The expectation is not the personal and subjective evaluation of product safety of the injured party, but rather it is determined by the legitimate expectations of consumers generally. The measure of safety the public is entitled to expect is a matter of fact and will vary from product to product and from case to case. The test is referred to as the consumer expectation test, which is also used in the United States.²⁵

The Directive does not cover contractual problems owing to products' unsuitability for use. These are ruled by the national laws on the sale of goods, insofar as it is possible to say that the defectiveness of a product does not derive from its unsuitability for use.

Article 6(1)(a) refers to the “presentation of the product” which encompasses the general presentation of the product to the public, as well as the direct and private presentation of the product to the final

²⁵ Hodges(2) 52 - 53; Hulsenbek and Campbell 24; Corr 235.

consumer. General presentation is done by means of publicity and marketing strategies. Both try to instill in the consumer's mind the idea of the product's quality and safety. This provision will influence the container and packaging of the product, especially instructions, warnings, certifications of safety and any accompanying literature. The wording appears wide enough to cover the manner in which it is displayed or arranged, and encompass promotional material and advertisements. The presentation of a product could raise or lower consumer expectations.²⁶ An example will be that producers will make consumers to believe that certain safety features can only be expected of luxurious models.

Article 6(1)(b) speaks of the use to which the product "could reasonably be expected" to be put to use. The producer cannot be considered liable for damages from misuse of the product. However, what is the situation if misuse occurs? The Directive does not define misuse of the product, but states which product uses can be the sources of strict liability. Accordingly a use from which liability could arise has been defined as a use that is foreseeable.

Article 6(1)(c) states the factor of the "time when the product was put into circulation". The appraisal of the defectiveness is related to the time the product was put into circulation and with regard to other samples of the same services. This means that the norms at that time will apply and the fact that better norms have been discovered does not imply that the

²⁶ Hodges(2) 53 - 54.

products are defective. The consumer can thus not always demand the same degree of safety in use of older products as in use of newer ones. The fact that a product becomes dangerous only after extensive use or after its stated or reasonable life does not imply that it is considered to be defective.²⁷

The following criticism has been raised against this test:²⁸

- (1) Consumers do not have the data with which to form accurate expectations;
- (2) The consumer has no detailed understanding of products, which involves complex technology;
- (3) Consumers can also be unwilling to contemplate that they will be injured themselves and so underestimate the risk;
- (4) Consumer expectations are conditioned by the environment in which the customer functions which is highly influenced by producers who uses marketing and advertising to fashion consumer perceptions;
- (5) Does consumers in different countries have the same expectations?

²⁷ Hulsenbek and Campbell 25; Hodges(2) 54 - 55; Kelly and Attree 7 - 8.

²⁸ Howells(4) 31.

- (6) Consumers may have various opinions on the level of safety, which can be expected of a specific product;
- (7) Consumers must be credited with a certain amount of cynicism. They must expect that no production line will produce 100% perfect products. It can therefore be argued that a loss, which is recoverable under a negligent doctrine, may not be recoverable under a consumer expectation doctrine;
- (8) The logic of this test demand that if a product presents an obvious danger then the product cannot be defective since the consumer could not have expected it to be safe. The test also means that warnings will often be sufficient to exculpate producers from liability;
- (9) The consumer expectation test may result in pragmatic answers when the loss involves children, bystanders, thin skull cases; and
- (10) Consumers tend to overvalue short-term losses and gains and undervalue long-term objectives.

1.8

Article 7: Defences

“The producer shall not be liable as a result of the Directive if he proves:

- (a) That he did not put the product into circulation; or
- (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
- (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 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 case the 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 instruction given by the manufacturer of the product.”

1.8.1 General

The defenses available to a manufacturer do not differ dramatically under the Directive or the Restatement (Second). There are some significant defenses afforded by the Directive but not permitted under the Restatement (Second). However, some USA states have gone beyond the Restatement (Second) in providing defenses.

The Directive limits recovery to a period of three years²⁹ and all rights granted to consumers are extinguished after the injuring product was put into circulation for ten years.³⁰

1.8.2 Burden

The Directive places the burden on the defendant to establish the defense.³¹

1.8.3 Put into circulation (Article 7(a))

Producers are not liable if they did not put the product into circulation, and the defective product reached the market through *force majeure* or the act of a third party – for instance, stolen products that are resold and cause third party

²⁹ Article 10.

³⁰ Article 11.

³¹ Hodges(2) 71.

personal injuries. Neither are producers liable for defects that came into being after the product was put into circulation or which probably did not exist at the time the product left the factory. Producers cannot be held liable for defects caused by the improper handling of the goods during distribution. Producers also are not bound for damages caused by improper use of the product by the injured party and if there is third party interference, such as improper maintenance or partial repairs. In all these cases, there is a reversal of the burden of proof and producers bear the onus of producing the evidence to avoid liability.³²

1.8.4 Mandatory regulations (Article 7(d))

Producers are not liable if the defect arises because of compliance with mandatory regulations issued by public authorities. In these cases, liability for defect rests with the public authority that issued the regulations. Adherence to and compliance with privately agreed on regulations or standards do not provide grounds to discharge the producer from liability. The defect must have been caused by compliance. If there were any way within the bounds of the regulations that a safe product could have been produced there would be no defense.³³

³² Hodges(2) 71 - 72; Hulsensbek and Campbell 27.

³³ Hodges(2) 74 - 75.

1.8.5 Component manufacturers (Article 7(f))

Components produced which are in compliance with the instructions, design and standards provided by the manufacturer of the final product can void the component producer from liability. The reason is that the component manufacturer has no opportunity to evaluate the product's performance or design. The risk presented by the final product will determine whether the component manufacturer will be able to invoke this provision, which is presumably the extent to which he could have influenced the design of the component product and his freedom to select certain technical methods in manufacturing.³⁴

1.8.6 Development risks (Article 7(e))

It was controversial whether producers should be liable for defects existing at the time the product was put into circulation but that could not have been discovered because of the state of technology at that time. Development risks are not a source of liability, but member states can derogate from this provision and impose this kind of liability if it pre-existed the Directive or they may choose to introduce it in their national legislation.³⁵

The critics of the Directive contend that the goals of strict liability are not furthered by the inclusion of the development risk defense.³⁶

³⁴ Hodges(2) 84; Hulsenkamp and Campbell 27 - 28.

³⁵ Corr 240 - 241; Mathewson 1292 - 1293; Hodges(2) 75 - 83.

³⁶ Economic and Social Committee, 22 O.J. Eur. Comm. (No C114) 17 - 18 (1979); Nilles 765 - 767.

There is a general fear that a product, which was not defective when put on the market, should subsequently become so merely because technology had so advanced that the product was no longer up to an acceptable standard. This is especially so with design and warning defects because every design can be improved and every warning can be made more explicit and comprehensive.

Professor Henderson provides four-prototypical cases:

- (1) Subsequent increases in knowledge regarding risks and hazards;
- (2) Subsequent increases in knowledge regarding precautions or risk reduction measures;
- (3) Subsequent changes in public attitudes toward risk; and
- (4) Subsequent changes in attitudes towards precautions.³⁷

All four of the abovementioned cases would fail the Directive's consumer expectation test since an older product which fails to incorporate a subsequent developed precaution could not possibly violate a consumer's reasonable safety expectations, especially if the time when it was put on the market is taken into account.

The narrowing of liability contained in article 6(2) should adequately deal with the change in the public's attitude towards risk. Likewise changing consumer attitudes toward a given risk will not trigger liability, so long as the risk was known but not objected to, at the time of manufacture and distribution.

³⁷ Henderson 921.

Without a specific development risk defense it might well be that subsequently discovered risks or hazards would be subject to judicial hindsight, especially design defects.

To achieve the purposes of strict liability the tests should be objective. If knowledge exists somewhere, sufficient to have enabled “the existence of the defect to be discovered” the defense must be denied.³⁸ It would be irrelevant to the issue of liability that the manufacturer in question could not have discovered it. It is, therefore, possible to impose liability without any suggestion of fault on his behalf.

Article 15(3) of the Directive provides that the Commission shall submit to the European Union Council a report on the effect of court rulings on development risks on “consumer protection and the functioning of the Common Market.”

1.8.7 Private purposes (Article 7(c))

Manufacturers are not liable for products made for private purposes. Strict liability only applies to products intended to be sold, hired, distributed or manufactured in the course of the manufacturer’s business. Somebody who makes a playpen for his children and lends it to his neighbour will not be liable for damages due to a defect in the playpen.³⁹

³⁸ Newdick 127.

³⁹ Hodges(2) 74.

1.9 Article 8: Contributory fault

- “1. 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 product and by the act or omission of a third party.

2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the 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.”

Strict liability has been militated in accordance with the injured party's contributory fault. The Directive and, therefore, the national product liability laws, regard the injured person's contributory fault as a defense in part or in full to the manufacturers liability. National courts will have the discretion as to the extent to which the producer's liability is to be reduced or extinguished if the injured person is at fault.⁴⁰

1.10 Article 9: Damage

“For the purpose of Article 1, “damage” means

- (a) damage caused by death or by personal injuries;

⁴⁰ *Id* 86.

- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500ECU, provided that the item of property:
- (i) is a type ordinarily intended for private use or consumption and
 - (ii) was used by the injured person mainly for his own private use or consumption.

This article shall be without prejudice to national provisions relating to non-material damage.”

Article 9 states that producers of defective products are liable for damages caused by death, personal injury and harm to certain items of property, whereas “non-material” damage remains regulated by national laws. Article 9 does not treat death or personal injury as damage in itself but rather as a source of damage. The Directive does not contain any limitation as to injured persons. A bystander or a person injured while working or on business is covered. But strict liability for property damage is limited to items intended for private use only. To determine the private nature of property, both objective and subjective criteria have been established. The first requirement is that the item must be ordinarily intended for private use or consumption – thus the Directive does not cover a defective crane. But since a lot of articles are used in business as well as privately, a further condition was necessary. The item has to be used by the damaged party to satisfy his own personal needs.⁴¹

⁴¹ Hulsbenek and Campbell 26 - 27.

Any damage to property is indemnifiable under the Directive only if it exceeds the threshold of 500ECU (European Currency Unit). This deductible was included in an attempt to avoid claims for smaller private property damages, thereby keeping industry's costs low. It is argued that it is unfair to discriminate on the basis of price. Furthermore the threshold has been applied differently in the member states.⁴²

1.11 Article 10: Limitation period

- “1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for 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 should reasonably have become aware, of the damage, the defect and the identity of the producer.
2. The laws of the member states regulating suspension or interruption of the limitation period shall not be affected by this directive.”

To balance producers' strict liability, Article 10 provides a limitation period of three years, which begins to run from the day on which the

⁴² Hodges(2) 131.

plaintiff gained, or should have gained, knowledge of the damage, the defect and the producers' identity.⁴³

It is not perfectly clear whether the limitation period begins from the date on which the injured party had knowledge of one of the prerequisites or from the date on which the damaged party became aware of all the elements necessary to take legal action.⁴⁴

Paragraph 2 states that member state's rules on suspension and interruption of the limitation period remains unaffected. These provisions are implemented and integrated by those in Articles 11 and 16.

1.12 Article 11: Statute of repose

“Member states shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.”

⁴³ Hulsbek and Campbell 28.

⁴⁴ Hodges(2) 86 - 87.

This statute of repose was included to protect product producers, especially having regard to the apportionment of the burden of the proof detailed in Article 7(b) and the repeal in Article 7(e).

Since a product is destined to become more and more obsolete over time, it is increasingly difficult to establish whether it was defective at the time of its distribution. Another reason is that a product is subject to wear and tear over time, which makes it increasingly difficult to determine whether the defect existed at the time the product was put into circulation. In view of that difficulty, mindful of the reversal of the burden of proof provided in Article 7(b) and considering that it is rather unlikely that a defective product will cause its first damage after 10 years, the Directive drafters decided to include an absolute limitation of liability of 10 years running from “the date in which the producer put the product into circulation.” If a legal suit has been started against the producer, then the liability is not extinguished until the final decision of the case has been issued.⁴⁵

In certain cases the period of repose can create an unjust restriction, for example where damage is latent and does not become manifest for many years, as with medicinal products.⁴⁶

⁴⁵ Hulsbek and Campbell 29; Kelly and Attree 10 - 11.

⁴⁶ A case in point is the claim by children of women who took diethylstilboestrol and now with the possibility of claims by grandchildren (Hodges(2) 87).

1.13 Article 12: Exclusion of liability

“The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.”

The Directive limits the producers' freedom to contract. Under Article 12 producers can neither restrict nor bar their potential liability arising from the defects of their products by means of appropriate clauses, provisions or standard conditions of contract. If such clauses are inserted in a contract, they are ineffective even if the consumer has approved them specifically in writing.

1.14 Article 13: Existing rights

“This Directive shall not affect any right 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 at the moment when this Directive is notified.”

1.15 Article 14: Nuclear accidents

“This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by Member States.”

Personal injuries and property damage caused by nuclear accidents are not covered. This class of accidents remains covered in Europe by the Conventions on Civil Liability for Nuclear Accidents signed in 1960 and 1963, both of which were implemented and integrated by a protocol signed in Paris in 1982, or by pools of insurers.

1.16 Article 15: Alternatives

1. “Each Member State may:
 - (a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive product also means primary agricultural products and game;
 - (b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be 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.

2. A Member State wishing to introduce the measure specified in paragraph 1(b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof. The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter.

However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member State may take the proposed measure immediately.

If the Commission does submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7(e) and of paragraph 1(b) of this Article have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7(e).”

1.17

Article 16: Quantum limit

- “1. Any Member State may provide that a producer’s total liability for damage resulting from death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU.

2. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the Common Market of the implementation of the financial limit of liability by those Member States which have used the option provided for in Paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Paragraph 1.”

The last option the Directive offers member states are set out in Article 16, Paragraph 1. Member states, while enforcing the Directive in their legal systems, may choose to limit at 70 million ECU the producers' liability for damages resulting from items having the same defect. The maximum ceiling is so high that its usefulness has been debated, although the limit should be sufficiently high to adequately compensate the victims of a Thalidomide type disaster.⁴⁷ It can validly be asked whether the 70 million ECU is renewed for each model or strand of a product in respect of identical items; what is meant by an item; if one component or material causes a defect in several products, is liability to be limited in relation to damages resulting from the component of each individual unit? Other problems include whether money is paid on a first come first served basis or are all the claims to be proportioned and if so who decides the deadline for claims. If the option is exercised, the limitation could apply only within the boundaries of the member state

⁴⁷ Howells(4) 38.

with the ceiling. If the damage arose in a member state without a ceiling, the producer, even if a citizen of a member state with limited liability, would have unlimited liability.⁴⁸

1.18 Other articles

Articles 17 and 19 determine which products are subject to strict liability under the Directive and which are governed by the old national product liability laws. The Directive only applies to products that have transferred to the distribution network after the member states measures enforcing the Directive in their national systems have come into force.

Therefore, within the same line of products, producers face two kinds of liability, depending on the date the product has been distributed or, as the Directive states, has been put into circulation. This situation should not produce a major problem as we move further into the future.

Article 18 provides for the definition of the ECU and determines the exchange rate for each national currency.

Article 20 provides that all member states should have implemented the Directive by July 30, 1988, but prior to implementation they had to file with the Commission a copy of the measures they would enforce.

⁴⁸ Hodges(2) 89; Hulsbenk and Campbell 28 - 29.

1.19 Intellectual property

The Directive does not impose strict liability for defective advice. However, if faulty instructions accompany a product, they may render the product defective and liability will ensue under the Directive.⁴⁹

2 IMPLEMENTATION OF THE DIRECTIVE IN THE EUROPEAN UNION

Although all the European Union States adopted the Directive some deviated from the Directive in terms of the optional provisions and/or the compulsory provisions. The countries with significant deviations are now considered.

2.1 Austria⁵⁰

The Directive was implemented in Austria by way of the Federal Act of 21 January 1988 on liability for defective products (PHG).⁵¹

The PHG is based on the Directive and follows each provision except for the following:⁵²

- (1) According to the explanatory notes of the PHG, the assembler may also be liable;

⁴⁹ Hodges(2) 51 - 52.

⁵⁰ Kelly and Attree 17.

⁵¹ (*Bundesgesetz vom 21.1.1988 über die Haftung für ein fehlerhaftes Produkt – Produkthaftungsgesetz*, BGBI 99/1988 [PHG]).

⁵² Hodges(2) 210 - 213; Kelly and Attree 25 - 37.

- (2) Re-importers are specifically addressed and are business entities which re-import a product that has been manufactured in Austria and exported afterwards. The reason for the introduction of the liability of the re-importers was to provide the injured person with an Austrian entity which can be held liable. It is argued that in the case of a re-import the national producer can be held liable anyway and, therefore, it is not necessary to have a second liable person in Austria;
- (3) The PHG contains more specific provisions defining product and defect:

 - (a) A product is any tangible product; and
 - (b) A product is defective if it is not safe considering all the circumstances. The PHG does not focus on the subjective expectations of the injured person, but considers only the general opinion of the average prospective user;
- (4) Damage to property suffered by a businessman can also be recovered and is, unlike the Directive, not limited to damage to the property of the consumer. However, liability for the property damages of a businessman can be excluded by direct agreement with the (later) injured person;
- (5) Producers are obliged to take precautions for the settlement of damage claims under the PHG in a way and to an extent which is customary in fair business practice. This can be done by insurance contracts or balance sheet provisions; and

- (6) The maximum amount of 70 million ECU in the Directive does not apply in Austria.

2.2 Belgium

The Directive has been implemented into Belgian law in the form of a specific Regulation.⁵³

Although the Regulation follows the Directive the following issues are noteworthy:⁵⁴

- (1) It is explained that software in the *travaux préparatoires* is also considered as a product;
- (2) The legislators believed that the concept of entry into circulation had to be explained and it was defined as follows:

“The first action by which a producer gives effect to his intentions in respect of his product either by transferring it to a third party or by using it for the benefit of the same”,⁵⁵

- (3) No compulsory insurance is required; and
- (4) The three options left at the discretion of member states were not implemented.

⁵³ Belgian Official Gazette of 22 March 1981.

⁵⁴ Kelly and Attree 75 - 76.

⁵⁵ Article 6.

2.3 Denmark⁵⁶

The Directive has been implemented into Denmark in Act 371 of 9 June 1989 almost word for word with only the following amendments:

- (1) Denmark has elected to exclude raw agricultural products from the scope of the Act;⁵⁷
- (2) The Act defines “distributor” as one who professionally markets the product without having manufactured it;⁵⁸
- (3) The distributor is liable as guarantor for the product liability of the manufacturer in relation to the injured and in relation to subsequent businesses in the chain of distribution;⁵⁹
- (4) Manufacturer may be liable jointly and severally according to the terms of section 5 in the Directive. Additionally, liability among several manufacturers is shared between them if there is no agreement to that effect in relation to:
 - (a) the cause of the defect;
 - (b) the individual manufacturers’ opportunity and capability of controlling the product;
 - (c) possible product liability insurers; and
 - (d) other circumstances.⁶⁰

⁵⁶ Kelly & Attree 90 - 92; Hodges(2) 273 - 274; Andersen 705 - 713.

⁵⁷ Section 3.

⁵⁸ Section 4.

⁵⁹ Section 10.

- (5) No limitation has been introduced on the liability for serial damage; and
- (6) The Act defines a “manufacturer” rather than a “distributor”.

2.4 Federal Republic of Germany⁶¹

On 1 January 1990 the Product Liability Act came into force thereby implementing the Directive.⁶²

The German Parliament has availed itself of the discretionary scope provided for in the Directive in favour of industry and agriculture:⁶³

- (1) Primary agricultural products and game are not covered by the Act;⁶⁴
- (2) Liability for development risks has been excluded;⁶⁵
- (3) The reasonable period of time within which a supplier can avoid liability by specifying the producer, importer or other supplier has been fixed at

⁶⁰ Section 11.

⁶¹ Kelly and Attree 152 - 156; Hodges(2) 359 - 360; Zekoll 809 - 818.

⁶² Act on Liability for Defective Products (*Gesetz über die Haftung für Fehlerhafte Produkte*) of 15 Dec 1989 *Bundesgesetzblatt* 2198 *et seq.*

⁶³ Martinek 634.

⁶⁴ Section 2.

⁶⁵ Section 2(5).

one month from the date of the appropriate request from the injured person;⁶⁶

- (4) A specific provision is included that compensation shall be paid:
 - (a) For medical treatment, pecuniary loss experienced during illness, funeral expenses;⁶⁷
 - (b) For loss of financial support suffered by a third party dependent on the injured deceased;⁶⁸ and
 - (c) By periodic payments for future loss of earnings or future needs or future support of a third party;⁶⁹
- (5) A limitation of the producer's total liability has been provided for;⁷⁰
- (6) The Product Liability Act does not apply to medicinal drugs.⁷¹ Drugs in the sense of the Act are only those dealt with in the Drug Act; and
- (7) The threshold requirement in article 9 of the Directive was implemented as a deductible figure from each and every claim.

⁶⁶ Section 4(3).

⁶⁷ Section 7 and 8.

⁶⁸ Section 7.

⁶⁹ Section 9.

⁷⁰ Section 10.

⁷¹ Section 15.

2.5 Ireland

The Directive was implemented in Ireland by the Liability for Defective Products Act 1991 and varies little in its enactment from the Directive.⁷² Ireland did include primary agricultural products and game, which have not undergone initial processing within the ambit of the new Act, and also did not derogate from the state of the art defense in the Directive. Finally, Ireland decided not to impose a limit on a producer's total liability for damage resulting from death or personal injury.

2.6 Italy⁷³

The Directive was implemented in Italy by means of a Decree.⁷⁴

The basic principle introduced by the Decree is that the producer is liable for the damages caused by the defects of his products as a consequence of the mere fact of having put it into circulation.

The Decree differs from the Directive in the following respects:

- (1) The Decree stipulates that the consumer must ask the seller in writing to disclose the name of the producer or importer. The supplier has a time of three months from the date of the request to disclose the identity of the producer or of the importer. The request must contain

⁷² Cowley 34.

⁷³ Kelly and Attree 229 - 231; Hodges(2) 454 - 456.

⁷⁴ Presidential Decree No 224 of 24 May 1988 (*Infortuni sul lavoro e igiene prevenzione degli*) DPR.

information on the product and the date and the place of purchase and can be made before commencing the proceedings. If the injured party fails to ask the seller to disclose the name of the producer or importer, the supplier can disclose it within three months of commencement of the proceedings. The supplier may also at the first hearing ask the court to grant a further three-month term within which the seller may disclose the name of the producer;⁷⁵

- (2) The Decree, unlike the Directive, specifies that a product is to be considered defective when it does not provide the same degree of safety as that “normally offered by any other product of the same series.”;⁷⁶
- (3) The Decree seems to expand the exception: “for the sole reason that a better product is subsequently put into circulation”⁷⁷ with corresponding provisions which refer to “better product that has at anytime been put into circulation”;⁷⁸
- (4) The Decree does not put a ceiling on the amount of damages that can be awarded thus exercising the option granted by Article 7(1) of the Directive; and

⁷⁵ Section 7.

⁷⁶ Article 5(3).

⁷⁷ Article 6(2) of the Directive.

⁷⁸ Article 5(2).

(5) Although the defenses reflect the provisions of the Directive there are some differences:

(a) Whilst article 7(b) of the Directive excludes the liability of the producer if the latter proves that “it is probable that the defect did not exist at the time the product was put into circulation by him or that the defects came into being afterwards”, article 6(b) of the Decree requires that “the defect did not exist at the time when the product was put into circulation by [the producer]”. The difference appears to be substantial.

However, in article 8(2) the Decree seems to reintroduce the wording of the Directive when it states that in order to exclude the liability pursuant to article 6, “it is sufficient to prove that in the circumstances, it is probable that the defect did not yet exist at the time when the product was put into circulation”.

(b) Article 6(d) of the Decree could contradict article 6(e) of the Directive, which excludes the liability of the producer if it is proven that the defect could not have been discovered taking into consideration the existing “state of the art”.

(c) Article 6(e) of the Decree adopts a wording which is not the same as article 7(e) of the Directive. Article 6(e) refers to the fact that scientific and technical knowledge did “not yet allow the product to be considered as defective”. This wording seems to introduce a

subjective element in the appraisal of the state of scientific and technical knowledge, which appear to be in contrast with the Directive.

- (d) The Decree, unlike the Directive, specifies when a product is considered as “put into circulation”:⁷⁹
- (i) It is delivered to the purchaser or the user or an employee or agent of the former even if such delivery is made for the sole purpose of testing or otherwise inspecting the product.⁸⁰
 - (ii) The product is not delivered directly to the purchaser or user but is delivered to the carrier or forwarding agent for delivery.⁸¹
 - (iii) In the case of forced sale, the debtor has not specifically indicated the defect to the bailiff at the time of the attachment or within 15 days of the attachment by lodging in court appropriate notice or by notifying the creditor.⁸²
- (e) The Decree does not reproduce article 8(1) of the Directive, which states that the liability of the producer is not excluded by the contributory act or omission of a third party.

⁷⁹ Article 7.

⁸⁰ Article 7(e).

⁸¹ Article 8(2).

⁸² Article 7(3).

- (f) Article 10 of the Decree differs from article 8(2) of the Directive by stating that contributory negligence should be evaluated in the light of article 1227 of the Code.
- (g) The Decree has also chosen not to include primary agricultural products and game in the definition of a product.
- (h) The Decree in respect of the right to obtain compensation which is distinguished within 10 years can be avoided not only by the commencing of proceedings but also by the admission of the party which is liable or the presentation of a statement of claim in the liquidation of the producer or any other liable party.⁸³

2.7 Luxembourg⁸⁴

The Directive was implemented in Luxembourg by a Law of 21 April 1989 regarding the liability deriving from defective products (the "Law on Defective Products".)

In accordance with article 8 of the Law of Defective Products, the legal provisions implementing the Directive do not prejudice the rights of the plaintiff to claim compensation for the damage suffered on the basis of the

⁸³ Article 14(1)(2).

⁸⁴ Kelly and Attree 257 - 259; Hodges(2) 475 - 476.

common law of contractual or extra-contractual liability or on the basis of any other specific laws on liability. This choice of the Luxembourg legislator presents a number of difficulties and it is foreseeable that the co-existence of the general rules of liability in contract and liability in tort with respect to defective products and the specific rules contained in the Law of Defective Products will give rise to conflict.⁸⁵

Differences from the Directive:

- (1) The development risk defence is not included;
- (2) Agricultural products and game excluded under the Directive are not referred to in the Act. The definition of “product” is:

“all movables even though incorporated into another movable or into an immovable”,⁸⁶

Accordingly, agricultural products and game are included; and

- (3) The definition of damage also differs from the Directive.⁸⁷ Damage does not include two specific types of damage (humans or property) but includes “any damage” with the exclusion of damage by nuclear accidents.

⁸⁵ Kelly and Attree 259.

⁸⁶ Section 2(1).

⁸⁷ Section 2(4).

2.8 Portugal

The Directive was published in the Official Journal of 25 July 1985, which were some months before Portugal's accession to the European Union on 1 January 1986. The Directive was finally implemented on 6 November 1989 in Decree Law.⁸⁸

The Decree departs from the Directive in the following ways:

- (1) No mention is made of electricity but the accepted view in Portuguese law, taking into account the definition of movables and immovables given in articles 204 and 205 of the Portuguese Civil Code, is that electricity is classified as a moveable object, which will make the specific inclusion superfluous;⁸⁹
- (2) Article 7(1) provides that the liability of the producer may be reduced or disallowed when, taking into account all the circumstances, the damage has also been caused by the fault of the injured person, but this has not been drafted also to include "any person for whom the injured person is responsible". The reason for this omission on the part of the Portuguese Legislator probably lies in the fact that he deemed the inclusion of persons for whom the injured person is responsible as superfluous in the light of the rule of article 491 of the Portuguese Civil Code. This article states that those responsible for invigilating others are responsible for the

⁸⁸ DL 383/89.

⁸⁹ Kelly and Attree 331.

damage they cause to third parties, so that the damage caused by a person the injured person is responsible for would be the same as damage caused by the injured person himself and consequently any reference in DL 383/89 to persons for whom the injured person is responsible would be unnecessary. According to Kelly and Attree,⁹⁰ the flaw in this logic is that the *caveat* provided for in article 491, which excludes the liability of the invigilator if he can prove that he fulfilled his duty to invigilate or that the damage would have occurred even if such a duty had been fulfilled. Such *caveat* falls outside the scope of the Directive; and

- (3) The reasonable period within which a supplier must respond to a request to identify the producer or a preceding supplier is fixed at three months. Furthermore, the supplier who receives the request may identify any previous supplier and not, as the Directive states, just the supplier who supplied him.⁹¹

2.9

Spain⁹²

The Consumers and Users Protection Law of July 1984 (Consumers Act) was published before Spain became a member of the European Union. Wesolowski and Harris⁹³ indicate that there is a clear conflict between the provisions of the Directive and the Consumers Act:

⁹⁰ On page 332.

⁹¹ Section 2(2)(b).

⁹² Hodges(2) 459.

⁹³ Wesolowski and Harris 168.

- (1) The Consumers Act, unlike the Directive, provides for a wide range of products in article 28: food, hygiene, products, cosmetics, pharmaceutical products, health services, gas, electricity, white line products, lifts, transport vehicles, motor vehicles, toys and products intended for children;
- (2) The Consumers Act, unlike the Directive, does not say anything about development risks; and
- (3) The Consumer Act, unlike the Directive, does not define the term manufacturer and does not include agricultural products in the definition of product.

Spain remained in default to implement the Directive until 1994 when Spain passed an Act on civil liability concerning damages caused by defective products.⁹⁴ The delay in implementing the Directive was caused by differences between several departments within the Government concerning article 13 of the Directive and the maximum amount for a producer's total liability.⁹⁵ In general, the Act follows the Directive very closely. The Act has not used the option allowed by article 15 of the Directive to include primary agricultural products and game in the definition of a product.

⁹⁴ Ley 2/1994 of 6 July.

⁹⁵ Muller 418.

2.10 United Kingdom

The Directive was implemented by means of the Consumer Protection Act in 1987 (CPA), which came into force on 1 March 1988.

The general layout and wording deviates from the Directive resulting in differences, which are highly significant. Anomalous provisions when compared with the Directive are:

- (1) The CPA defines “product” as any “goods and electricity” and also includes the term “substances”. This raises the possibility that the CPA will catch computer software;⁹⁶
- (2) The difference in interpretation of “initial processing” in article 2 of the Directive led to the preference of “industrial process” in the CPA rather than “initial process”;
- (3) A different interpretation has been given to the state of the art defense. Section 4(e) of the CPA provides a defense if “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”.

⁹⁶ Article 1(2).

Section 4(e) introduces a subjective test, whereby the defense would be available provided the manufacturer can demonstrate that his own failure of discovery was excusable. This test closely resembles a negligence test.

It is argued on the one side that the purpose of the defense in the Directive is undermined since there is no means of knowing to what standard the producer should be held and on the other hand that the defense is not the result of logical decision making but rather a compromise reached due to differences of opinion between member states.

The European Commission has commenced proceedings under article 169 of the Treaty of Rome against the United Kingdom for failing to correctly implement the Directive, but no formal proceedings have as yet been laid before the European Court;⁹⁷

- (3) The threshold provided in article 9 of the Directive was implemented in the CPA to mean that claims exceeding the threshold are satisfied in full. Other member states applied the threshold differently.⁹⁸

⁹⁷ Hodges(2) 82.

⁹⁸ *Id* 671.

3 CONCLUSION

The aim of the Directive was to harmonise the legislation of member states. This aim flowed from the Treaty of Rome, where it is stated that among the European Union's tasks are to establish a common market and to ensure that competition within the European Union is not distorted as a consequence of different national provisions.⁹⁹

It is argued that the aim of harmonization was never achieved as the Directive takes the form of an extension of or a supplement to individual member states' product liability rules, which remain in force without change.¹⁰⁰ However, according to the preamble of the Directive, the Directive is intended to provide the opportunity for gradual and more extensive harmonization. There are not many regions in the world such as the European Union, and the aim of harmonization will not be shared by all countries.

The importance and value of the Directive is its approach to the liability of manufacturers. The basis of liability is strict which flows from the heavy burden placed on the consumer who presumably has no knowledge of the design and manufacturing deficiencies of the product and can only achieve such knowledge with great difficulty. This rationale is shared by the countries under discussion. However, the burden is placed on the manufacturer, who incurs the cost of damages, litigation and insurance. These two factors should be carefully weighted in a developing country such as South Africa.

⁹⁹ Hulsbek and Campbell 17.

¹⁰⁰ *Id* 18.

CHAPTER FOUR

NEW ZEALAND

1 GENERAL

The New Zealand legislature, on October 20, 1972, adopted a radically new approach towards compensation for death or personal injuries suffered in accidents, which includes products liability. The scheme was the vision of Sir Owen Woodhouse who, in a relatively short period, managed to persuade the New Zealand government to jettison the tort system in favour of a compensation system.¹ Sir Owen Woodhouse indicated that the following principles should underpin a compensation scheme:

- (1) Accident compensation is a community responsibility;
- (2) There should be comprehensive entitlement regardless of fault or cause;
- (3) The goal should be as far as possible to achieve the complete rehabilitation of the injured person;
- (4) Compensation should not be based on welfare principles of need but rather should provide real compensation to achieve income maintenance and also recognize that permanent bodily impairment is a loss in its own right regardless of its effects on earnings; and

¹ Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967), also called the Woodhouse Report; Harris 361 - 362.

- (5) The system should be administratively efficient.²

The scheme is currently governed by the Accident Compensation Act (ACA) 1982.³ The ACA returns to an earlier common law theory of responsibility based on causation.⁴ The causal theory of responsibility undergoes a change in the ACA. In common law the causal agent must be a distinct individual before there arises the responsibility to provide compensation, but the ACA adopts the premise that society as a whole is the relevant agent of most accident producing activities. Consequently, the responsibility to compensate all accidents falls on the community as a group.⁵

The ACA adopts the real compensation principle: the replacement of a loss which is capable of objective assessment and to return the victim as far as possible to the *status quo ante*.⁶

Therefore, the right to sue for damages for personal injury resulting from defective products has been abolished and replaced by the state-funded “no fault” ACA.⁷ However, New Zealand retains traditional tort principles for non-personal injury cases.⁸

² Howells 291 - 292.

³ The original 1972 Act only covered workers and motor vehicle accidents.

⁴ Hodges(2) 173.

⁵ Gaskins 242 - 243.

⁶ *Id* 240 - 241.

⁷ Kellam(1) 131.

⁸ Howells(1) 291; Kellam(1) 136.

COVERAGE

The scheme applies to anyone who suffers “personal injury by accident”⁹ in New Zealand, which include the following:

- (1) The physical and mental consequences of any such injury or of the accident;
- (2) Medical, surgical, dental or first aid misadventure;
- (3) Incapacity resulting from an occupational disease or industrial deafness; and
- (4) Actual bodily harm arising under section 105B of the ACA.¹⁰

Excluded from the definition are “damage to the body or mind caused by a cardio-vascular or cerebra-vascular episode unless the episode is the result of effort, strain or stress that is abnormal, excessive or unusual for the person suffering it, and the effort, strain or stress arises out of and in the course of the employment of that person as an employee and, as already noted, damage to the body or mind caused exclusively by disease, infection, or the aging process.”¹¹

In *Wallbuton v Acc*¹² the Chief Justice of New Zealand said that personal injury by accident covered:

⁹ Section 2; Kellam(1) 133.

¹⁰ Howells(1) 293.

¹¹ *Id*; Gaskins 259.

¹² (1980) 5 ACC 56.

“(a) an event which was not intended by the person who suffers the misfortune; and (b) an event which although intended by the person who caused it to occur, resulted in a misfortune to him which he did not intend”.

In *G v Auckland Hospital Board*¹³ the court stated that the concept of whether an event is an accident should be viewed from the victim’s perspective: this was said on the basis that rape was an accident even though it involved an intentional tort.

3 COMPENSATION

Earning Related Compensation (ERC) is payable after the first week of disability until the retirement age at a rate of up to 80% of the injured person’s previous salary depending on the degree of his incapacity. This is subject to a maximum ceiling, which is pitched at a high level. If the accident occurred “out of the course of employment”, the injured person’s employer must pay him his full wage for the first week, but otherwise the first week goes uncompensated. Once the level of benefit is fixed, it cannot be reduced should the injured person’s capacity to work improve. Where the accident results in death, the deceased’s family can claim ERC up to the level the deceased could have claimed had he survived. The maximum claim of the spouse is half of ERC, whilst children can claim one-sixth of ERC which rises to one-third if there is no surviving parent. The scheme allows for lump sum payments for non-economic losses, which involves an individual assessment of losses along common law lines. Up to NZ\$17000 can be awarded for permanent loss or impairment of bodily function

¹³ (1976) 1 NZLR 638.

or the loss of any part of the body: a schedule gives percentages for the most common impairments to assist in calculating what percentage of the maximum should be awarded. Up to NZ\$10 000 can be awarded for loss of amenities or the capacity to enjoy life, including loss from disfigurement, pain and suffering which includes nervous shock and neurosis.

Other heads of compensation payable include reasonable health care costs, related transport and subsistence expenses, funeral expenses, the reasonable cost of necessary constant personal attention and rehabilitation and retraining assistance.¹⁴

4 ADMINISTRATION

The administration of the scheme is organized by the ACC, a state run agency. The practical skills of the insurance industry are drawn upon by using the state-owned insurance offices as a premium collecting agency and claims handler. The more complex, large or significant claims are referred to ACC's regional offices or national headquarters.

The dissatisfied applicant has the right to a review hearing, which is usually carried out by a hearing office within the ACC; if he wishes he could appeal to the ACC's Appeal Authority, which is staffed by a single judge. Further appeal on a point of law is possible to the administrative division of the Supreme Court and from there to the Court of Appeal.

¹⁴ Howells(1) 294 - 295; Gaskins 249 - 258.

5 FUNDING

Contributions are made through levies on employers and the self-employed, the owners of cars and by payment from general revenues. The earner's scheme is financed by a levy on all employers based on the size of their payroll. This fund covers all compensation to earners regardless of whether the accident occurred at work. The levy is based on the industrial activity classification of workers. The scheme provides for employers with bad safety records to be penalized by a rate of up to 100% in excess of the normal rate. Conversely, those with good rates can be rewarded by rebates of up to 50% of the normal rate. The Motor Vehicle Accident Scheme covers all personal injuries caused by, through or in connection with the use of a vehicle in New Zealand. It is funded by a levy which forms part of the annual vehicle registration fee. Anyone who falls outside these two schemes is covered by the Supplementary Scheme, which is financed from general taxation.¹⁵

6 PREVENTION OF ACCIDENTS

Two early attempts to assess the effect of the ACA on accident rates came to different conclusions. Looking at the effects on road accidents, Brown concluded that the removal of tort liability for personal injury did not have any adverse effect on driving habits.¹⁶ However, he noted that there are several features which might make road accidents unique: internalizing the costs may have little effect as people highly prize the right to drive and are willing to pay accordingly; the

¹⁵ Kellam(1) 132; Howells(1) 297 - 298.

¹⁶ Brown 976.

tortfeasor runs a great risk of injuring himself in any accident and so is likely to drive safely in any event; dangerous driving is usually a criminal offense and such a prosecution is likely to carry more stigma than a negligence claim dealt with by an insurance company. Brown specifically mentions products liability as an area in which civil liability may be a stronger sanction because of the damage resulting from any adverse publicity surrounding the case.

There are two different points of view on the alleged deterrent role of tort liability. Miller, endorsed by Porter,¹⁷ puts forward three types of evidence to support his claim that accident rates are increasing:

- (1) His personal observations, *inter alia*, of construction workers in Wellington who did not use safety helmets; farmers on the Ontago Peninsula who allow visitors to drive across a rough track with no warning sign; to view penguins and seals; and the lack of protective clothing worn by rugby players;
- (2) Newspaper reports of accidents; and
- (3) Statistics. Miller indicated that between 1981 and 1983 head injuries from accidents increased from 18 762 to 22 954 and rose again to 28 081 in 1988.

In respect of Miller's personal observations, social policy cannot be based on anecdotal evidence. Similarly, newspaper reports are not capable of scientific

¹⁷ Howells(1) 299 - 300.

analysis and the statistical figures might be explained by an increase in the reporting of accidents.

7 CASE LAW

Case law relating to products liability seems to be few and far between. Whincup cites two cases where the courts have held that where the nature and/or extent of a drug's adverse side-effect may be reasonably expected by the physician to be likely to arise from the prescribed course of treatment, then there would not be a personal injury by accident.¹⁸ The two cases are *Re Stopford*,¹⁹ involving known complication of a high dosage of a drug and *Re Murtagh*,²⁰ where events and pain under anaesthesia were not considered to be a rare or unusual occurrence.

8 CONCLUSION

The no-fault system adopted in New-Zealand is a dramatic change from the traditional views on the development of accident compensation in general and more specific, products liability, of which the following three issues can be singled out:

- (1) The system comprehensively covers all personal injury caused by accident, whether at work, on the road, in the home, or elsewhere;

¹⁸ Howells(1) 294.

¹⁹ [1984] NZACR 783.

²⁰ [1984] NZACR 801.

- (2) A government corporation provides the benefits, which are funded in such a way as to create significant externalities; and
- (3) The system has completely replaced the common law action for personal injury caused by accident.

The concepts of community responsibility and real compensation enabled New Zealand to justify extending benefits to a greatly enlarged number of victims. However, the burden placed on the persons for the funds that must be available for such a scheme is enormous. Reform is already under consideration by government, which is concerned with the containment of cost:

- (1) Employers' premiums are being experience rated;
- (2) ERC will continue, but will cease after twelve months;
- (3) No payments for pain and suffering; and
- (4) Lump sum payments to be replaced with non-taxable disability allowance.²¹

²¹ Howells(1) 303.

CHAPTER FIVE

AUSTRALIA

1 HISTORICAL BACKGROUND

Historically, Australian product liability was based on the principles of breach of contract, a claim in tort under the principle in *Donoghue v Stevenson*,¹ Div2A of Part V of the Trade Practices Act 1974² and a claim for compensation for loss or damage resulting from misleading and deceptive conduct, which was seen as being inappropriate in modern conditions.³ Although there was initial resistance from industry,⁴ the Trade Practices Amendment Bill was enacted on 9 July 1992, inserting Part VA into the Trade Practices Act 1974. Part VA did not, however, codify Australian products liability law. The remedies which it conferred were in addition to other rights and remedies.⁵ This modern trend will now be considered in more detail.

2 PART VA OF THE TRADE PRACTICES ACT

2.1 General

¹ [1932] AC 562.

² Div2A requires manufacturers and importers to honour contract-like obligations based on the terms implied in some contracts by the Sale of Goods Act 1923 (NSW).

³ Kellam(1) 15 - 16; Harland 339; Travers(1) 1006.

⁴ Boas 112.

⁵ Travers(1) 1006; Kellam(2) 25.

The Trade Practices Amendment Bill (Act) applies to all goods supplied on or after 9 July 1992. The Act introduces into the Trade Practices Act 1974 a new Part VA, which deals with product liability. The Act is based on the European Product Liability Directive. When Part VA was added to the Trade Practices Act, it was claimed that its enactment would bring Australia's product liability law into line with emerging international standards. Part VA did not codify Australian product liability law. The remedies conferred were in addition to other rights and remedies.⁶ There are suggestions that Part VA should be adopted as the sole source of product liability law. Travers⁷ argues that a coherent product liability law must focus on qualities that make a product defective, rather than on legal theories and that Part VA is the one which focuses most closely on the defectiveness of products. Boas⁸ comprehensively evaluated the failure of Part VA to reform products liability. He is of the view that Part VA does not go far enough in providing manufacturers with sufficient incentive to protect consumers from defective products and that it failed to live up to the claim of the government that a person suffering from a product-related loss will be given a right under Part VA to compensation without the need for reliance on common law negligence.

2.2 Defective goods

The most important aspect and basic principle of Part VA is that it makes the importer or the manufacturer strictly liable for defects in goods. The onus of proof is upon the plaintiff who must prove on a balance of probabilities that the

⁶ Travers(1) 1006; Kellam(2) 18; Boas 112; Harland 337.

⁷ Travers(1) 1012.

⁸ Boas 112 - 147.

product supplied by the manufacturer was defective and that the defect in the product was the cause of the loss.⁹ Goods are broadly defined under the Trade Practices Act 1974 and include:

- (1) Ships, aircraft, and other vehicles;
- (2) Animals, including fish;
- (3) Minerals, trees and crops; and
- (4) Gas and electricity.¹⁰

Goods are defective when they do not provide the safety which “persons generally are entitled to expect”.¹¹ This is an objective test because it is the knowledge and expectations of the community which will determine whether a product is defective, and not the subjective knowledge and expectations of the plaintiff.¹² An assessment of the degree of safety to be expected will take all circumstances into account, including:

- “(a) the manner in which, and the purposes for which, they have been marketed; and
- (b) their packaging; and
- (c) the use of any marks 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

⁹ Harland 337; Kellam(1) 19; Kellam(2) 18.

¹⁰ Kellam(2) 19.

¹¹ Section 75AC(1).

¹² Harland 337; Travers(1) 1008; Travers(2) 517.

- (e) what might reasonably be expected to be done with or in relation to them; and
- (f) the time when they were supplied by their manufacturer.”¹³

A product will not be held defective simply because a safer product is later supplied:

- “(3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.”¹⁴

A manufacturer will not be held liable where a product is defective because it complied with a Commonwealth mandatory standard for the product which was not the safest standard, having regard to the level of scientific or technical knowledge at the time.¹⁵

Where the sole cause of the defect was the compliance with a mandatory standard of the Commonwealth, the Commonwealth is liable for compensation to the plaintiff. If more than one corporation is liable for the same loss, the defendants are individually and collectively liable.¹⁶

¹³ Section 75AC(2).

¹⁴ Section 75AC(3).

¹⁵ Section 75AC(4).

¹⁶ Section 75AL.

2.3 Damages

A manufacturer's liability to compensate for loss or damage caused by defective goods is covered in four separate sections of the Act:

- (1) An injured individual is able to recover from a manufacturer of defective goods compensation for loss suffered as a result of the injury.¹⁷ A manufacturer will not be liable for any loss in a product liability action for an amount which has been, or could be, recovered under workers' compensation law or law which gives effect to an international agreement;¹⁸
- (2) A manufacturer is liable to compensate a person who is not in a business relationship with an injured person, for any loss or damage that person may have suffered as a result of the injured person's injuries or death;¹⁹
- (3) A manufacturer is liable to compensate a person for the loss of personal property, being goods acquired for personal, domestic or household use (commercial property is therefore excluded), which a person used or intended to use, and which have been destroyed or damaged because of a defective product;²⁰ and

¹⁷ Section 75AB.

¹⁸ Section 75AI.

¹⁹ Section 75AE; Kellam(2) 19.

²⁰ Section 75AF; Kellam(2) 20.

- (4) A manufacturer is liable for loss due to damage caused by a defective product to land, buildings or fixtures acquired or used privately, or intended for private use.²¹

2.4 Defences

The express defences,²² which a manufacturer may raise, are:

- (1) The defect alleged to have caused the loss did not exist at the time of supply by the manufacturer;
- (2) The goods were defective solely because they complied with a mandatory standard;²³
- (3) The state of scientific or technical knowledge at the time when they were supplied by their manufacturer was not such as to enable that defect to be known; and
- (4) In the case of a component parts manufacturer, it may show that where its goods are comprised in finished goods, the defect is due to:
 - (a) the design of the finished goods, or
 - (b) the markings, instructions or warnings.

²¹ Section 5 AG.

²² Section 75AK; Kellam(1) 23 - 24; Kellam(2) 20.

²³ Travers(1) 1010 - 1011.

- (5) The defect came into existence after the product left the manufacturer's control.

Other defenses also exist because the elements contained in Section 75AD must be satisfied for liability to attach:

- (1) The manufacturer did not supply the product;
- (2) The product was not supplied in trade or commerce; and
- (3) The product was not defective.

The defences contained in Part VA are broadly comparable to the defenses in the Directive. While not a defence to liability in the true sense, the Act also provides that contributory acts or omissions by the plaintiff reduce the amount of compensation payable by an amount determined in light of all the circumstances. No reduction of compensation recoverable by the plaintiff results from acts or omissions of third parties (although a manufacturer may seek contribution or indemnity under general legal principles from the third parties).²⁴

2.5 Who is liable?

Part VA follows the EU Directive in making a broad class of defendants in the manufacturing chain individually and collectively liable for losses caused by defective products.

²⁴ Section 75AN; Travers(1) 1009; Kellam(1) 24.

2.5.1 **Manufacturer**

A “manufacturer” is broadly defined in the Trade Practices Act²⁵ to include:

- (1) Manufacturers;
- (2) Component part manufacturers;
- (3) Own branders;
- (4) Importers; and
- (5) Assemblers.

2.5.2 **Supplier**

Part VA provides assistance to a plaintiff who wants to bring a liability action but does not know who manufactured the goods. Plaintiffs can serve a written request to suppliers of goods to give particulars of:

- (1) The manufacturer of the goods; or
- (2) The supplier of the goods to the supplier.²⁶

If this request is not completed within a reasonable time (which is not defined) then the supplier is deemed to have manufactured the goods. In Article 3 of the European Directive, suppliers must indicate the identity of the importer of the

²⁵ Kellam(2) 18; Kellam(1) 22 - 23.

²⁶ Section 75 AJ; Kellam(1) 23.

goods, even if the name of the manufacturer appears on the product. This requirement does not appear in Part VA.²⁷

2.5.3 Own branders

A corporation is held to be a manufacturer of goods when it holds itself out to be so, whether by:

- (1) Affixing its name or trademark on the goods;
- (2) Having goods manufactured under license for the corporation and own branded; or
- (3) Permitting someone to promote the goods as those of the corporation.²⁸

Whether animals such as livestock are manufactured, is not clear.

Part VA does not alter a claimant's existing rights, which may allow compensation to be recovered for loss or damage to the defective goods themselves. Damage to commercial property is also excluded.

²⁷ Kellam(2) 19.

²⁸ Section 74A; Kellam(2) 19.

2.6 Procedural matters

2.6.1 Class actions

The Trade Practices Commission may file a claim on behalf of named claimants who must consent to the claim being made.²⁹ As the Commission already has the power to bring representative actions in respect of breaches of Part V Trade Practices Act³⁰ but has only done so on rare occasions, this provision may only have limited impact in practice.³¹

2.6.2 Burden of proof

Under Part VA claimants have to prove on a balance of probabilities that a defect existed in the product causing injury. This burden which is initially borne by the plaintiff should be treated as discharged if, on the evidence whether direct or circumstantial and in the circumstance of the case, it is reasonable to infer the loss was caused by a defect in the goods.³²

The EU Directive itself does not contain any provision that courts draw an inference of defect where it is reasonable in the circumstances.³³

²⁹ Section 75AQ.

³⁰ Section 87IB.

³¹ Kellam(2) 21.

³² Section 74AJ; Kellam(2) 21.

³³ Article 4 of the Directive states: "The injured person shall be required to prove damage, the defect and the causal relationship between defect and damage."

2.7 Time limits

A plaintiff must commence an action within three years of becoming aware both of the loss and the identity of the manufacturer. A repose period is also provided. After ten years in the case of property damage or 20 years in respect of personal injury from the time the goods were supplied by the manufacturer, a claim can no longer be brought.³⁴

3 COMPETING LAWS

Part VA competes with other similar but different laws which simultaneously govern Australian products liability law.³⁵ Did Australian products liability law benefit from this situation? Travers argue that a different analysis must be applied in each situation depending on whether a claim is formulated in tort, under Part VA or under Div2A. The application of these different legal approaches needlessly complicates the exercise of solving products liability problems. Travers indicates that the multiplication of remedies must be justified if it increased the level of protection to consumers, but can find nothing that do so. Travers proposes that Part VA should be adopted as the sole source of products liability law for Australia. The result would be simpler, more efficient and without any reduction in the level of protection available to consumers.³⁶ Because Part VA is so recent it is not yet possible to measure its effect.³⁷

³⁴ Section 74AN; Kellam(2) 21.

³⁵ Travers(1) 1006; Kellam(2) 25.

³⁶ Travers(1) 1011 – 1012.

³⁷ Harland 345; There are yet as far as could be established, no reported cases on Part VA.

4 CONCLUSION

Australian product liability is an amalgam of actions based on statute, tort and contract. Part VA of the Trade Practices Act follows the European Directive very closely and only introduce an additional cause of action for consumers, which is a compromise between the interests of consumers and industry.

CHAPTER SIX

SOUTH AFRICA

1. GENERAL

Unlike the American products liability environment, it is relatively easy to find one's way through the South African law of products liability. There are only a handful of court cases.¹ Boberg and Neethling, Potgieter and Visser² contain a brief overview, Van der Walt³ is silent and Burchell⁴ offers little assistance. As in the other countries under consideration, there are contractual remedies available to the purchaser.⁵ In addition to these contractual remedies, the South African plaintiff has a delictual action with fault as its cornerstone.⁶

¹ To be discussed *infra*.

² Boberg 121; Neethling Potgieter Visser 321.

³ Van der Walt(2).

⁴ Burchell 18.

⁵ Briefly, if the defendant expressly or implicitly guarantees against any defects which are later indeed present, he commits breach of contract. The defendant may even claim for consequential damages (De Wet and Van Wyk 339). A problem is that in practice a contractual guarantee often contains qualifications, where the defendant limits his liability to replacement or repair, or the guarantee's content is so vague that what is guaranteed becomes indeterminable (Van der Walt(1) 226). Furthermore, exemption clauses may effectively nullify consumer protection (De Jager(3) 348; McQuoid-Mason 57). Besides a possible guarantee, the plaintiff also has the *aedilician* actions, namely the *actio rehibitoria* and the *actio quanti minoris* in the case of hidden defects (De Wet and Van Wyk 343; Snyman(1) 177 - 178; McQuoid-Mason 57). The plaintiff can claim the purchase price (*actio rehibitoria*) or the reduction of the purchase price (*actio quanti minoris*). Generally, the plaintiff would not be able to claim consequential loss. If the defendant is a producer who publicly professes to have attributes of skill and expert knowledge of the particular product, the plaintiff may also be able to claim consequential damage (*Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A); *Senrachim Ltd v Prinsloo* 1997 (2) SA 1 (A)). It seems as if there are limited possibilities of claiming consequential damages contractually for the plaintiff in South Africa.

⁶ De Villiers 174; Neethling Potgieter Visser 322.

2 THE THEORY OF PRODUCTS LIABILITY.

2.1 General

Although products liability is not a new field in South Africa,⁷ there is very little on this topic. Products liability is based on delict, in particular *Aquilian* liability, and the requirements of wrongfulness and negligence deserve particular attention.⁸ Wrongfulness constitutes, *inter alia*, a breach of a legal duty to take reasonable steps to prevent damage.⁹ Negligence is present when the defendant's conduct failed to meet the standards of a reasonable man in the circumstances.¹⁰ Many of the factors taken into consideration in determining wrongfulness are again taken into account when determining negligence.¹¹ However, it should not be inferred that wrongfulness and negligence are thereby equated.¹² For determining negligence, only those circumstances which the reasonable person would have foreseen, may be taken into consideration, whereas all factors, including those coming to light after the act in question, are relevant to the issue of wrongfulness.¹³ Due to the plaintiff's difficult burden of proof, the fault requirement has been tapered by use of the procedural device of *res ipsa loquitur*.¹⁴ This can result in a move towards strict liability.

2.2 Wrongfulness

Traditionally wrongfulness lies in the infringement of a subjective right where grounds of justification are absent. According to this approach, wrongfulness

⁷ The following articles date back to 1964 - 1974: Van der Walt(1); Davids(1); Davids(2); McQuoid- Mason.

⁸ Neethling Potgieter Visser 322.

⁹ *Id*; Neethling Potgieter Visser 127.

¹⁰ *Infra*, the discussion of the *Combrinck* and *Gibbs* cases; Van der Merwe and De Jager 90 - 91; Neethling Potgieter Visser 49.

¹¹ Neethling Potgieter Visser 40 - 137.

¹² Neethling Potgieter Visser 151 - 154.

¹³ *Id*.

¹⁴ *Id*; Martinek 424; Neethling Potgieter Visser 149 324.

attaches not only to the action but also to the result.¹⁵ Where a non-defective hair colouring product therefore causes the hair of the plaintiff to fall out, the defendant would have acted wrongfully unless a ground of justification exists.¹⁶

In principle, the causing of damage by a defective product is wrongful. The presence of a defect in the product is a prerequisite for wrongful conduct. If there is no defect, damage arising from the product, is not wrongful.¹⁷

A product is considered defective if it is unreasonably dangerous, and a product is unreasonably dangerous if it does not meet the expectations of the reasonable consumer with regard to its safety.¹⁸

To determine whether a defect exists, the state of the art must also be considered. Some products are dangerous at a specific point in time due to the state of scientific knowledge at the time.¹⁹

“Unreasonably dangerous” and “state of the art” are principles which are also found in American and European law.²⁰

2.3 **Fault**

Not only must the action be wrongful, but there must also be fault, usually in the form of negligence, on the part of the manufacturer in order to establish liability. The defendant’s conduct must be tested against the care of a reasonable man in the

¹⁵ De Jager(3) 355; Neethling Potgieter Visser 35.

¹⁶ Van der Walt(1) 240.

¹⁷ Neethling Potgieter Visser 322.

¹⁸ Neethling Potgieter Visser 323; De Jager(1) 632 – 633.

¹⁹ *Id.*

²⁰ Par 402A of the Restatement (Second) of Torts and Article 1 of the European Directive on Products Liability.

particular circumstances. The fault requirement is satisfied by showing that the plaintiff's damage was reasonably foreseeable, that a reasonable person would have guarded against it, and that the defendant failed to do so.²¹

In *Cape Town Municipality v Paine*²² Innes CJ decided that negligence had to do with a failure to keep a duty of care. He decided that in Roman-Dutch law a duty of care arises whenever a *diligens paterfamilias* would have foreseen and guarded against harm. In this case the plaintiff, a spectator at a sporting function, was injured when he stepped on the grandstand and his foot went through the woodwork. Innes CJ decided that the municipality had a duty to spectators to take reasonable care to ensure that their sport grandstand remained safe and since they had not kept this duty they were negligent.

It is very difficult to prove fault on the part of the manufacturer. The plaintiff does not have access nor understands the technological production process of the manufacturer, and can therefore not obtain the proof required.²³ This is one of the main reasons why America and Europe found it necessary to change their products liability law by shifting the burden of proof to the manufacturer.

2.4 *Res ipsa loquitur*

Fault on the part of the seller or manufacturer is difficult to prove.²⁴ The burden of proof has been alleviated by a specific application of the doctrine of *res ipsa loquitur*.²⁵ De Jager explains the application of the doctrine as follows:

²¹ Boberg 194; Neethling Potgieter Visser 323.

²² 1923 AD 207.

²³ Neethling Potgieter Visser 324.

²⁴ Van der Walt(1) 242.

“*Res ipsa loquitur* beteken slegs dat uit die skadestigtende gebeure op sigself beskou ‘n afleiding van nalatigheid gemaak kan word. So ‘n afleiding is slegs geregverdig indien die skadestigtende gebeure volgens ervaring nie sou plaasvind indien iemand nie nalatig was nie”²⁶

This means that if the plaintiff can prove that he suffered damage resulting from the use of a defective product and that the defect had existed at the time when the product was put into commercial use, then a factual inference of negligence is drawn which can only be rebutted if the defendant can show that he has exercised reasonable care.²⁷ Van der Walt predicted that *res ipsa loquitur* would do for South Africa what it did for the United States of America, where it led to an irrefutable inference of negligence.²⁸ A similar erosion of the fault principle in favour of strict liability has yet to take place in South Africa.

3 COURT CASES

The court cases relating to delictual products liability are so few and far between that each can be considered:²⁹

3.1 *British Chartered Co of SA v Lennon Ltd*³⁰ and *Lennon Ltd v British South African Company*³¹

²⁵ Neethling Potgieter Visser 324 and the *Combrinck* case, where it was indicated that it would be possible for the plaintiff to use *res ipsa loquitur*.

²⁶ De Jager(3) 363.

²⁷ Van der Walt(1) 240 and 248.

²⁸ *Res ipsa loquitur* shifts the onus regarding the proof of fault to the manufacturer, who can only exculpate himself by disproving negligence on his part. Van der Walt(1) 249.

²⁹ The summary of the *Lennon*, *Cooper*, *Combrinck* and *Gibb* cases are taken from De Jager(1) 582 - 596.

³⁰ (1915) 31 TLR 585 PC.

³¹ 1914 AD 1.

The plaintiff was the purchaser of cattle dip from the manufacturer-seller for damages sustained due to the death of 80 cattle. The claim was based on defective instructions relating to the strength of the mixture. The court *a quo* awarded the plaintiff damages to the value of 2000 pounds. On appeal Innes J held: "In these circumstances there would, apart from a defense of contributory negligence, be no doubt whether as to the liability of Lennon's. And the liability would be founded, not on any breach of contract, but on '*culpa*', in having delivered to the respondent, for use as a cattle dip, a substance poisonous and dangerous in itself, with directions which were wrong and misleading, and bound, if acted upon, to lead to disaster."³² The contributory negligence of the plaintiff will counteract the claim: "By the exercise of reasonable care he would have avoided the consequences of negligence."³³ The court held that the manager of the plaintiff was negligent and that the appeal must succeed.³⁴ According to De Villiers J there is no doubt that the claim is based on the *lex Aquilia* and that the contributory negligence of the plaintiff can negate any claim.³⁵

3.2 *Cooper & Nephews v Visser*³⁶

This case also involved cattle dip, not from a manufacturer as in the *Lennon* case, but from a dealer. The instructions accompanying the dip indicated that the dip was safe for sheep with mange. The plaintiff alleged that the dip contained too much arsenic, and that the instructions were therefore incorrect. The appeal court held that the plaintiff did not prove that the death of the sheep was due to a high percentage of arsenic. Other contributory factors could have been the condition of the sheep and

³² *Id* 15.

³³ *Id* 15 - 16.

³⁴ *Id* 21.

³⁵ *Id* 5 - 6. The contributory negligence of the plaintiff was a complete defence in 1914. However, the Apportionment of Damages Act, 34 of 1956 changed this principle. In terms of this act the damages recoverable will be reduced to the extent of the plaintiff's contributory negligence (Joubert 172).

³⁶ 1920 AD 111.

weather conditions. There was also the possibility that the percentage of arsenic could have been influenced by the arsenic that the plaintiff's employees added to the mixture in the dip hole. Therefore, the appeal did not succeed due to the plaintiff not proving a proximate cause between the dip and the death of the sheep.³⁷ It was again confirmed, this time by Solomon J, that the plaintiff's claim is based on delict.³⁸

3.3 *Combrinck Chiropraktiese Kliniek v Datsun Motor Vehicle Distributors (Pty) Ltd*³⁹ and *Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd*⁴⁰

In both these cases the court had the opportunity to give future direction to products liability, although the circumstances were not typical to products liability. In *Combrinck* the plaintiff hired a vehicle from a hiring company. The hiring company indemnified itself against liability for defects in the vehicle. The plaintiff instituted the *actio legis Aquiliae* against the manufacturer for patrimonial loss due to the unuseability and repair of the hired vehicle. The plaintiff alleged that the defendant and its employees must have ensured that the vehicle is in a good condition and fit for its intended use. For purpose of the exception raised by the defendant, the court found it unnecessary to determine whether the act of the defendant was negligent but rather whether it was unlawful.⁴¹

In *Gibb* a building contractor ordered scaffolding boards from a dealer in building material. A defective scaffolding board caused injuries to an employee. The plaintiff claimed 90% of the injured employee's damages from the defendant based on the *actio legis Aquiliae*. Coetzee J did a comprehensive investigation of Anglo-

³⁷ *Id* 117 - 118.

³⁸ *Id* 114.

³⁹ 1972 4 SA 185 (T).

⁴⁰ 1975 2 SA 457 (W).

⁴¹ *Id* 190.

American law and made the following comment: “Our own 66 cm screen is still an impending event but one can confidently forecast that in this sector of the law lies a fertile field for academic research and disputation which may proliferate as we progress along the road of industrialization. Possibly the rather humble saligna scaffolding board may still set this ball rolling one day.”⁴²

The court held that according to the principles of delictual liability, it is possible that a dealer can be held liable for defective products sold to the public. It must first be determined whether there was a duty to inspect, and if so, whether the necessary reasonable precautions were taken.⁴³ The duty to inspect will depend on whether a reasonable man in the same circumstances would have inspected the product. If a *diligens mercator* in the position of the defendant would expect the client to conduct an investigation which will identify the defect, then the defendant will not be liable *ex lege Aquilia*: “He then does not foresee danger and when that is not foreseen, there is nothing to guard against; hence the duty to take this kind of care is not established.”⁴⁴

According to De Jager the decision can be interpreted in two ways:⁴⁵ Negligence assumes the existence of a duty of care. Negligence can only exist if a *diligens mercator* in the position of the dealer would have foreseen damage and would have taken steps to prevent it. If a *diligens mercator* in the position of the plaintiff would have expected the customer to inspect the product, then the *diligens mercator* would not have foreseen the damage. The absence of a duty of care is at the forefront, rather than the violation thereof. Or, the dealer has a duty to take reasonable care. To determine whether reasonable care was taken and the duty of care was complied with, the duty of care must be evaluated in terms of the circumstances. The content

⁴² *Id* 460 - 461.

⁴³ *Id* 464 - 465.

of the duty depends if a reasonable man in the position of the defendant would have foreseen damages and taken steps to prevent the foreseeable damages. The duty to inspect is therefore not part of the defendant's duty of care and he was therefore not negligent. If this is the ground for the decision then the non-negligence is based on the non-violation of a duty of care and not on the non-existence thereof.

3.4 *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Ceigny (Edms) Bpk*⁴⁶

Doornbult purchased a herbicide from Bayer, which in turn procured it from Ciba-Ceigny. The maize cultivated by Doornbult did not appear in the official list of seeds. Doornbult sought to hold Bayer *ex contractu*, and Ciba-Ceigny *ex delicto*, liable for damage to its crops after applying the herbicide. The contractual claim was settled out of court but the delictual claim received consideration. Doornbult formulated its claim in typical duty of care terminology: Ciba-Ceigny had a duty to carry out all tests necessary for ascertaining the safety of its product and to warn against the application to the maize in question, and Ciba-Ceigny committed a breach of duty by omitting to carry out all the necessary tests or to issue a warning that the herbicide is harmful to or had not been tested for this type of maize.⁴⁷ Ciba-Ceigny distinguished between negligence (the duty of care of a reasonable man) and wrongfulness (reasonable steps to prevent the damage). The duties could be concretized as follows:

“The defendant was a distributor of a herbicide which by its very nature was intended to examine certain types of plant life, but simultaneously not to harm the crop it was meant to protect. *In casu* this was maize, which is cultivated on

⁴⁴ *Id* 465.

⁴⁵ De Jager(1) 597.

a large scale. Consequently there was not only a genuine risk of damage, but also a potential of extensive damage. As a result the defendant could reasonably be expected to carry out intensive tests on a representative variety of maize cultivars under different climatic and soil conditions. It could not, however, reasonably be expected to include in its testing programme every cultivar in existence and every possible climatic and soil condition. Since the production and marketing of maize seed is state controlled, it is submitted that the duty could at most extend to those cultivars, which have been registered and appear in the official seed catalogue. At least the duty could hardly extend to ornamental varieties or exotic varieties such as Waxy mealie.”⁴⁸

To the possible application of *res ipsa loquitur*, De Jager commented as follows:

“It would seem that the plaintiff in the Doornbult case could not have successfully relied on the *res ipsa loquitur*: the damage to its crop could possibly have been caused by an occurrence which did not necessitate an inference of negligence, such as a deficiency in nutrients or the fact that the plaintiff had used seed of an inferior quality.”⁴⁹

3.5 *Bayer South Africa (Pty) Ltd and Another v Viljoen*⁵⁰

This is an appeal case where Viljoen successfully sued Bayer for damages to his crop of grapes caused by an infestation of powdery mildew, it being alleged that the infestation was due to the lack of effectiveness of the fungicide. The action was based on negligent misrepresentation flowing from an invitation on the label to

⁴⁶ An unreported case discussed by Van der Merwe and De Jager.

⁴⁷ Van der Merwe and De Jager 83 - 84.

⁴⁸ *Id* 89.

⁴⁹ *Id* 92.

⁵⁰ 1990 2 SA 647 (A).

contact a representative of Bayer for further assistance. The court held that Viljoen failed to prove that the representation made on the label of the product was incorrect. There was considerable evidence that the fungicide did control powdery mildew effectively. The court also held that Viljoen had not proved that he had used the fungicide as directed on the label and as advised by the representative. Lastly, the court held that no representation made by Bayer was negligently made and that *res ipsa loquitur* could not be applied to the case.

5 CONSUMERISM

Although there is no consumer movement directed at products liability, it is important to consider the level of consumer knowledge, awareness and education. The higher these levels the closer South Africa are to consumerism in products liability. A consumer is a person who buys goods or pays for services to satisfy his or her own needs, rather than, say, for purposes of resale. Nearly all people in South Africa are consumers and with the increasing technological progress the threat of products causing injury, death or property damage is very real. The expression of consumer interests is being formed on an individual level, but it will probably not take much longer to establish an appropriate representation of collective consumer interests.

Consumer protection has become an important legal issue and various Acts of Parliament govern transactions between the consumer and supplier.

To prevent exploitation of consumers through misleading advertising and other means, the Harmful Business Practices Act was passed in 1988. In terms of this Act, the term "business practice" includes any agreement, arrangement or understanding, scheme, method of trading or distribution and any advertisement or type of

advertising. A harmful business practice is defined as any practice that may harm relations between business and consumer or unreasonably prejudice or deceive the consumer. The Act provides for the establishment of a Business Practices Committee which is empowered to hold investigations during which evidence may be taken under oath, and it may demand to examine any book or other article relevant to the investigation. An investigation is announced in the Government Gazette. The Minister of Economic Co-ordination and Public Enterprises may prohibit the practice by which time the committee's report should be finalized.

Once the report has been made, the Minister may order that a maximum price or charge be set or, by notice in the Government Gazette, he may declare the business practice to be unlawful, or that particular restraints be applied. The Business Practices Committee does not receive representations directly from the public. Instead, complaints laid with any of the consumer organizations are channeled to the South African Coordinating Consumer Council, which, in turn, places the matter before the committee.

The Trade Practices Act, 1976, prohibits any person from:

- (1) Publishing or displaying any advertisement which is false or misleading in material respects, or
- (2) Making, in connection with the sale or lease of goods or the provision of a service, any false or misleading statement or representation in regard to the nature, properties, advantages or uses of the goods or service being offered or the manner in which the conditions upon which or the prices at which the goods or service may be obtained.

Traders found guilty of contravening any of these provisions may be fined up to R2 000 or imprisoned for up to two years, or both.

Brief mention can also be made of the Credit Agreements Act, 1980 which is primarily aimed at limiting the supply of credit.

The Gauteng Consumer Affairs Court has been established according to the Gauteng Consumer Affairs Act, to hear cases against companies or persons accused of conducting unfair business practice. The powers of the Consumer Affairs Court is very similar to the Business Practices Committee and can issue an order to discontinue an unfair business practice and can be fined a maximum of R200 000 or be sentenced to a maximum of five years in prison or both.

A Gauteng Office of Consumer Affairs, which is part of the Gauteng Department of Finance and Economic Affairs, has also been set up. The objectives of the Gauteng Office of Consumer Affairs are to help resolve consumer complaints, refer cases to the Gauteng Consumer Affairs Court, educate consumers and inform consumers.

Consumers can lodge any kind of complaint with the office including complaints for damage, injuries or death caused by defective products. The complaints officer, who will mediate between the consumer and the supplier to resolve the complaint, will investigate the complaint.

If the complaint cannot be resolved, it will be handed over to the Consumer Protector, who is in charge of investigating cases referred to the Consumer Affairs Court. When this investigation is over, the Consumer Protector will consider all the facts of the case and if deemed necessary, the case will be heard in the Consumer Affairs Court.

Since the Gauteng Office of Consumer Affairs will educate consumers by means of various educational programmes and consumer workshops the era of consumers being unaware of their rights has lapsed.

CHAPTER SEVEN

CONCLUSION

Within the global picture of the law of civil obligations, the developments in the area of products liability can be seen as part of a larger movement within the law the previous century to come to terms with modern circumstances. These include the phenomena of large distant enterprises, mass marketing, a dramatic increase in the economic understanding of human activity, cross border business and the law of civil obligations of international consumers. South Africa was “protected” against this movement due to sanctions up until 1992. The variety of products available in South Africa, such as shoes from Portugal or Italy, video-recorders from Japan, shirts from Korea and denims from the United States reflects business at international level. These go hand in hand with the import of raw materials and the export of products, or vice versa. Furthermore, South Africa is importing and exporting consumer goods from and to countries which already accepted regimes of strict products liability. Conflict of laws principles has brought strict liability much closer to home. Manufacturers can now be held strictly liable for consumer goods exported whilst an overseas manufacturer will experience the benefit of a liability regime in South Africa which is more favourable than in his/her own country. As South Africa continues to expand its export trade, imports increase and consumers become more educated and collective, the country will need to re-examine its law in relation to products liability.

Pressure might also come from the major trading partners of South Africa to ensure protection and indemnification of overseas customers against possible claims for damages. The last thing South Africa wants, is to lose its competitive edge by failing to modify its municipal law so as to conform to the trends in the world. Fortunately, to date, no pressure from major trading partners were forthcoming.

The development of products liability law is slow. The courts rarely have the opportunity to consider pure product liability cases and when they do, they are inert to change legal precedent. The few product liability cases might lull South Africa into a false sense of security, hoping that one day *res ipsa loquitur* will come to the rescue by establishing a stricter form of products liability.¹ On the other hand, it will be short sighted to merely accept the international development towards strict liability and to argue that South Africa should blindly follow suit.

This dissertation considered various countries in which products liability underwent further development. All of the countries under consideration started out with negligence-based actions.² In the USA and the UK strict liability was applied to products imminently dangerous to life.³ Further development in the USA involved the absolving of negligence and privity of contract in favour of the present straight strict liability in tort. The European Union and Australia soon followed suit.

It is just a matter of time before the rise of consumerism in South Africa catches onto products liability.⁴ South Africa is currently in the ideal position to be proactive and have the legislature consider the further development of products liability, considering the interests of both industry and the consumer. Many lessons can be

¹ See 157 – 158 above.

² See 25 - 30; 84; 134; 142; 154 – 157 above.

learned from the countries that have been considered to ensure that the interests of industry and the consumer are balanced, and to avoid certain pitfalls:

1. The American law distinction between manufacturing defects, design defects and warning defects must be retained.⁵ The Restatement (Second) of Torts did not anticipate this distinction although there was unanimous agreement between the founders that design defects should be controlled by the law of negligence.⁶ The draft Restatement (Third) of Torts attempts to rectify this omission by requiring the plaintiff to show an alternative feasible design.⁷ No such distinction was made in the European Directive or the Trade Practices Act.
2. It must be clearly stated to which party strict products liability applies or does not apply.⁸ The Restatement (Second) of Torts, European Directive and Trade Practices Act include importers, suppliers and own branders, in addition to producers, under their strict liability regimes. The European Directive and the Trade Practices Act allow the supplier a defense if it can inform the plaintiff of the identity of the producer.⁹
3. The Restatement (Second) of Torts, the European Directive and Trade Practices Act adopted the following defenses:

3.1 The defect did not exist at the time the product was put into circulation;¹⁰

3.2 The defect is due to compliance with mandatory regulations;¹¹

³ See 26 – 27 above.

⁴ See 164 – 166 above.

⁵ See 13 – 18 above.

⁶ See 33 above.

⁷ See 80 above.

⁸ See 18 – 21 above.

⁹ See 90 and 149 above.

¹⁰ See 99 and 147 above.

¹¹ Id.

- 3.3 The state of scientific and technical knowledge at the time of circulation was such that a defect could not be discovered;¹²
- 3.4 The manufacturer did not put the product into circulation;¹³ and
- 3.5 The defect did not exist at the time the product was put into circulation.¹⁴

In addition, a balance must clearly be found between stimulating industrial development, consumer protection and international developments. This comparative study identified various options to achieve this balance:

- 1. Limit the liability of enterprises. This can be achieved by capping the overall liability resulting from a single event, instituting deductibles to avoid small claims, recovery of only injury, death and property damage claims and limiting the recovery period to three years;¹⁵
- 2. A state funded scheme for personal injuries, such as in New Zealand;¹⁶
- 3. Limit the liability to consumer goods only;¹⁷ and
- 4. Protect certain industries, for example agriculture.¹⁸

Perhaps the most difficult issue in products liability is the formulation and content of the test for strict liability. The Restatement (Second) of Torts, European Directive and the Trade Practices Act prescribes the consumer expectation test.¹⁹ Although the consumer expectation test works well for many defects and products, there are instances where the test falls short.²⁰ Especially in the United States the criticism of

¹² Id.

¹³ See 98 and 148 above.

¹⁴ See 99 above.

¹⁵ See 106 – 107 and 152 above.

¹⁶ See 133 – 141 above.

¹⁷ See 105 and 146 – 147 above.

¹⁸ See 88 – 89 above.

¹⁹ See 37, 95 and 144 above.

²⁰ See 30 – 40 above.

the consumer expectation test resulted in the adoption of alternative tests. However, each of these alternative tests has been subjected to criticism.²¹

Despite the criticism, the drafters of the European Directive and the Trade Practices Act adopted the consumer expectation test which indicates that this test is currently the preferred test for strict liability in the field of products liability.

From the above it is clear that countries that have adopted strict liability have implemented a balanced approach between strict liability and consumer and industry protection. A balanced approach ensures that consumers are protected but not at the cost of industrial development. The actual formulation of a strict liability system for South Africa will be easy since the various strict liability issues in products liability and subsequent legislation in other countries are well documented. There is no reason why South Africa cannot commence an investigation into products liability to bring its own law in line with modern trends, preferably by means of appropriate legislation.

²¹ See 40 – 52 and 73 –76 above.

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