SUMMARY OF ARTICLE

For almost twenty years, the general delictual claim as found in par. 823 (1) BGB formed the basis for product liability claims against producers in Germany. In 1985, however, a European Directive on Product Liability was issued and in 1990 Germany enacted the Product Liability Act. Setting a strict liability standard, the Act was to operate in tandem with the existing general delictual claim. Since producers in any event find it very difficult to successfully defeat product liability claims based on par. 823 BGB, the Act should not drastically change the landscape of German product liability jurisprudence.

In South African product liability claims fall under the Lex Aquiliae which has fault as its cornerstone. Although our Courts are willing to assist a plaintiff by applying the doctrine of *res ipsa loquitur*, the German experience has shown that procedural devices do not provide a permanent solution to the problem of product liability. In the long run legislation is the best way to bring about a rational and equitable system of strict liability.

KEYWORDS

Product liability, strict liability, German law, par 823 (1) BGB, European Directive, European Product Liability, German Product Liability Act, *Drittschadensliquidation*, *Verträge mit Schutzwirkung für Dritte*, *res ipsa loquitur*.

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PART A: GERMAN PRODUCT LIABILITY

I. INTRODUCTION

Whenever a producer manufactures and puts into commercial use a defective product, there exists a danger that damage may result to users of such a product. Should this happen, the aggrieved party would investigate the possibilities of instituting a contractual or delictual claim for damages against either the seller of the product, or the producer himself. The problem in such a typical product liability situation where the product is sold by the producer to the seller and then again by the seller to the buyer is, however, that whilst the buyer would have a contractual claim against the seller by way of the contract of sale, no contract exists with the producer. This is a problem since ideally the buyer would like to sue the financially strong producer.

In German law one distinguishes between damage to a person or to the legal object itself (*Mangelschaden*) and consequential damage (*Mangelfolgeschäden*). Under the contract of sale (regulated under § 433 BGB), *Mangelschaden* can be recovered if the seller guaranteed a specific attribute which the product does not in fact have or if the seller has fraudulently concealed a defect[1]. Since this is seldom the case *Mangelschaden* is not often recovered. To make things worse consequential damage (*Mangelfolgeschäden*) normally involved with product liability claims is as a rule not recoverable under § 463[2]. Furthermore, contractual claims for cancellation and price reduction and claims for compensation on account of the absence of a promised quality have a very short prescription period of six months after delivery[3].

The second remedy available to the buyer would be an action for breach of contract. In German law this may take the form of an action for positive breach (*positive Vertragsverletzung* (pVV)). Positive breach covers the situation where the seller fails to

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1 § 463 BGB.

2 Max Vollkommer in: Othmar Jauernig, *Kommentar zum Bürgerlichen Gesetzbuch*, (1991, 6th ed.), § 463, n. 4.

3 § 477 BGB, only in the case of movables since the period is one year with immovable property. These periods may be extended by contract.

comply with a contractual duty which causes harm to a buyer[4]. Yet the pVV may only be employed to cover circumstances not normally set out in the BGB such as where defective performance under § 463 would not normally compensate for consequential damages[5]. In a product liability situation, however, the pVV is neutralised by the requirement of fault. The remedy presupposes fault on the part of the seller and fault is defined as a failure to observe the standard of care required in ordinary transactions[6]. If the seller can prove that he has complied with this duty[7], there is no fault and the pVV finds no application. A further problem is that in product liability situations the pVV has a short prescription period of six months[8].

Although normally no contractual relationship exists between the buyer and producer, attempts have been made in German literature to construct such a contractual relationship[9]. The Federal High Court of Justice in the landmark 1968 *Hühnerpest*[10] decision left no doubt, however, that a buyer could only rely on delictual claims as set out in § 823 I of the German Civil Code (BGB). For almost twenty years the general delictual claim provided in § 823 I of the BGB formed the basis of claims against the producer. In 1985, however, a European Directive on Product Liability was issued which paved the way for further legal development in this area both in Germany and in all other member states of the European Community. Following the guidelines of this Directive, the German federal government in 1991 enacted an Act on product liability which was to operate in parallel to the general delictual claim in terms of the BGB[11].

The purpose of this essay is to discuss this Product Liability Act as well as the development and operation of the general claim in Germany, and then after setting out the South African law in this area, to compare it with the position in Germany.

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4 Harry Duintjer Tebbens, *International Product Liability* (1979), 68.

5 Vollkommer (n. 2) § 463 n. 4 b aa. Unless the seller by his *Zusicherung* had guaranteed a specific quality in the thing sold which quality was absent at the time of the purchase.

6 § 276 BGB.

7 Vollkommer (n. 2) § 282 n. 1 d bb, § 285 BGB *analog*.

8 § 477 BGB *Gewährleistungsansprüche*. The prescription period is, however, thirty years when accessory obligations are breached (*Nebenpflichtverletzung*) § 195 f BGB.

9 Dieter Medicus, *Schuldrecht II Besonderer Teil* (1993), 47.

10 BGHZ 51, 91.

11 § 15 (2) *Produkthaftungsgesetz*.

II. DIFFERENT TYPES OF RISK A PRODUCT MAY HAVE

German legal literature divides defects into several categories: design defects, manufacturing defects, failure to warn and development risks. Since the duty of the producer is later specified with respect to these categories[12], it is essential to describe them briefly.

1. Construction or design defect

A construction defect (*Konstruktionsfehler*) occurs when the engineers, in drawing up the plans for the product, make an error which then causes all the subsequent products to be defective. An example would be where the brakes of a car are designed defectively causing all cars produced to have faulty brakes.

2. Manufacturing defect

With the manufacturing defect (*Fabrikationsfehler),* the construction plans are correct and the finished products appear to be in order, but during the fabrication process some kind of negligence or inattention has caused individual products to be defective. The well-known *Hühnerpes*t case[13] involved a manufacturing defect. In this case it was alleged that a batch of vaccine was defective, probably due to bacterial impurities which could have affected it during the bottling process.

3. Operating instruction defects

Where the producer has neglected his duty to give certain operating instructions to the consumer or to warn him of some inherent danger of the product, he is said to have made an *Instruktionsfehler.*

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12 See below, part A, *Sub* VI, 4.

13 BGHZ 51, 91.

4. Development risks

Certain products, for example, medicine, motorcycles, etc., while manufactured in accordance with the safety standards and technological knowledge of the time may be in commercial use for years before an inherent risk is discovered[14]. In German law such a risk is called a development risk (*Entwicklungsgefahr*), and the corresponding obligation on the producer to ensure the products remain safe is called a post-marketing surveillance obligation[15].

III. CONTRACTUAL CLAIMS AGAINST THE PRODUCER

1. Advantages of a contractual claim against the producer

Although the existence of a contract between the producer and the buyer is an exception, several legal constructs have been developed over the years in an attempt to find a legal basis for such a contract. If his action was dubbed by German law contractual, the plaintiff would obtain three advantages. First, while fault is an element of an action for breach of contract, the burden of proof under a contract may be more advantageous for a plaintiff[16]. The second advantage is found by comparing the strict liability provisions found in § 278 BGB with those in § 831 BGB[17].

The vicarious liability of the employer for employees who have unlawfully caused damage whilst carrying out delegated tasks is discussed under § 831 BGB. Since the presumption is that the employer has not supervised his workers closely enough, fault is not required[18]. According to the defence given in § 831 I 2, the producer has a chance to exculpate himself if certain requirements have been met with regard to the so-called *Verrichtungsgehilfen.* He has to show that i) he was careful in the selection, instruction, and training of his vicarious agents/employees and that he properly supplied them with the right kind of equipment or failing that, ii) the damage or injury would have occurred even if he had fulfilled the above-

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14 Hein Kötz, *Deliktsrecht* (1991), 161.
15 See below, part A, *Sub* IV, 3, c.
16 B.S. Markesinis, *A Comparative Introduction to the German Law of Torts* (3rd ed., 1994), 84.
17 See below, part A, *Sub* IV, 2, b.

mentioned duties[19]. Where, for example, a BMW worker has made a mistake in the manufacturing of a motor vehicle, the producer would be required to prove that with the hiring of workers the required care has been taken, supervision during the production process of the car has been sufficient, etc.

Under § 278 BGB the producer is held fully liable for the fault of those he has employed in the execution of his contractual obligations[20]. Since the possibility of exoneration by the producer which can be found in § 831 BGB, is absent in this case, a contractual claim is more beneficial.

A third advantage is that unlike with delict, so called pure economic loss can be recovered under contract. The disadvantage for the buyer, however, is that unlike the relatively long prescription period of three years with a delictual claim[21], a contractual claim prescribes in six months in the case of moveables[22].

2. Contractual theories to find a legal basis for a contract with the producer

(a) The theory of "transferred loss" (Drittschadensliquidation)

The general principle in German Law is that a claim for damages may only be brought by those who have indeed suffered loss[23]. In a situation, however, where the injured has a claim but no damage, and a third party damage, but no claim[24], a consistent application of this principle will be advantageous to the party at fault since he would escape liability. In these cases, however, where the damage has accidentally shifted from the injured to the third party (*zufällige Schadensverlagerung*) by way of the theory of transferred loss, German law allows the injured to claim the damages of the third party. In effect the buyer

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18 Nigel Foster, *German Law and Legal System* (1993), 234.

19 Markesinis (n. 16) 497.

20 An example would be loss of opportunity. A agrees with B to buy B's car at a price both consider to be extremely favourable. Before payment and delivery C offers a higher price and buys the car from B. Since A would now have to buy a similar car on the open market at a far higher price he has suffered a lost opportunity.

21 § 852 BGB.

22 § 477 BGB.

23 Vollkommer (n. 2) Vor § 249, IV.

sues in his own name that the seller makes good the damage of the third party[25]. The theory of transferred loss can be applied in four areas[26]. The area which comes closest to a product liability situation deals with the shift of damage due to the risk rule found in the BGB.

In a case where an object bought and sent to the buyer *via* a transportation company (§ 447 BGB), the risk of non-payment passes from the seller to the buyer. If the goods are damaged in transit, the buyer would still have to pay the sales price and would therefore suffer the loss, but since he is not owner and has no contract with the transport company he would have no claim[27]. On the other hand the seller would have a claim[28], but would have no loss. In order to prevent a flood of claims for the losses suffered by third parties, the German courts have limited the application of this theory[29]. In the area of product liability the Court in the *Hühnerpest* case emphatically rejected this construction because on the facts all the loss had been suffered by the farmer and there had been no accidental shift of damage[30]. The theory of "transferred loss" therefore has no application in a product liability situation.

(b) Guarantee

Another way of making the producer contractually liable to the ultimate consumer is by an express or implied guarantee by the producer to the ultimate consumer and on which the consumer relies[31]. Proponents of this theory argue that through for example the advertisement, the instructions for use, the appearance of a trade name, or even the presentation of the goods, the producer communicates to consumers that they can rely on a fault-free product. If they accept this offer by purchasing the product from the seller, a

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24 Geraint Howells, *Comparative Product Liability* (1993), 125. "A classic example would be where the risk, but not possession, of damaged goods had passed to a third party". BGHZ 40, 91, 100.

25 Medicus (n. 9) 47. A second possibility would be cession of the seller's claim to the buyer under §398 BGB. Where the seller has, however, already enforced his claim and is in possession of the money, the transfer of the money to the third party would according to Medicus occur under § 281 BGB. Medicus (n. 9) 275.

26 Wolfgang Thiele, Karl-Heinz Fezer, *BGB Schuldrecht Allgemeiner Teil* (1993), 156. *Mittelbare Stellvertretung, Treuhandverhältnisse, Obhutsverhältnisse and Obligatorische Gefahrenleistung.*

27 Medicus (n. 9) 277.

28 Whether by way of a pVV claim out of the transportation contract or by way of § 823 I due to property damage.

29 Hohloch, "Produkthaftung in Europa: Rechtsangleichung und nationale Entwicklungen im zehnten Jahr nach der Produkthaftungsrichtlinie", 1994 *Zeitschrift für Europäisches Privatrecht* 408.

30 BGHZ 51, 91, 93 et seq.

31 Markesinis (n. 16) 73.

guarantee is said to exist[32]. The advantage of this construction is that the guarantee operates regardless of fault.

The biggest problem with this theory is the fictional creation of *consensus* between the parties. The idea is that an advertisement is an offer for sale, and that the actual purchase of the product is an acceptance of this offer. Yet even if one accepts that a guarantee contract has come into existence, what is normally guaranteed remains only the delivery of a fault-free product and unless specifically covered in the contract, consequential damages that typically give rise to a product liability claim are not covered[33].

(c) Verträge mit Schutzwirkung für Dritte

A third contractual theory can be found in the attempts to discover contracts in favour of third parties (*Verträge zugunsten Dritter*) which are regulated by §§ 328-335 BGB. An extension from *Verträge zugunsten Dritter* is contracts with protective effects *vis - a` - vis* third parties (*Verträge mit Schutzwirkung für Dritte).* In terms of these contracts a consumer is incorporated into the protective scope of the contract between the manufacturer and the middleman thus giving the consumer himself a contractual basis for an action against the manufacturer[34].

Three requirements must be met before third parties would be covered by the protective contractual umbrella. First, the third party must come into contact with the performance of the contractual debtor (*Leistungsnähe*)[35]. An example would be the relationship between the child of a tenant and the landlord. Secondly, the contractual creditor must have a personal interest in protecting the third party (personal relationship) and thirdly the two elements must be recognisable to the contractual debtor.

In order to prevent the explosion of claims by third parties, the German Courts have been keen to keep this development within limits. Furthermore, since the personal relationship

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32 Kötz (n. 14) 159.
33 Medicus (n. 9) 47.
34 Markesinis (n. 16) 43.
35 Thiele/Fezer (n. 26) 159.

required as a rule does not exist in a contract of sale, this theory has limited application in a product liability situation.

IV. DELICTUAL GROUNDS

The plaintiff's claim would be directed at the party who had been at fault. Since in almost all product liability situations the seller as intermediary in the chain is not at fault, the producer would be the one being sued.

1. Grounds for liability

An aggrieved party who, due to damage suffered from a faulty product, wants to sue the producer has two options, namely the claim in terms of the Product Liability Act and the general statutory claim under § 823 BGB.

A producer is held liable under § 823 I BGB when the following requirements have been satisfied: i) there must be a violation of one of the enumerated rights or interests, namely, life, body, health, freedom, property, or any "other right" which was ii) unlawful, and iii) wilful or negligent, and there must be a causal link between the producer's conduct (which can be an act or an omission) and the plaintiff's harm[36]. In a product liability situation the element of fault is the most problematic. Fault exists when it has been proved that the producer has violated or neglected the duty of care (*Sorgfaltspflicht*) which is expected from him by the community and necessary in order to eliminate an unreasonable risk for consumers[37]. Thus the community expects the producer to distribute only safe products and when he distributes unsafe and defective products he violates this duty. The producer is therefore responsible for taking the necessary precautions in the production of his product to ensure that when the product is placed in commercial use the rights of third parties protected under § 823 I are not infringed[38].

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36 Markesinis (n. 16) 34.

37 Kötz (n. 14) 160.

38 Hans Eberstein, Markus Braunewell, *Einführung in die Grundlagen der Produkthaftung* (1991), 37.

2. Problems with the manufacturer's liability of § 823

(a) Burden of proof

Liability based on BGB § 823 I presupposes causation and fault (intent or negligence) and requires the plaintiff to prove that: 1) The product was defective; 2) the product was defective when it left the producer's premises; 3) the producer was at fault[39]. Fault is proved by showing that the producer has breached his duty of care (*Sorgfaltspflicht*). Since a plaintiff has very little insight into the workings of the producer's production process or factory it would be very difficult to prove at what stage of the production and by whom this duty had been breached[40]. In the past, therefore, the requirement of fault proved to be an obstacle for claimants.

(b) Exculpation for the producer

A producer may only be held liable for his own culpable actions and he is not automatically or vicariously liable for actions of other persons employed by him. However, § 831 BGB provides for a special kind of liability for actions of persons employed by and subject to the directives of the defendant. When faced with such a delictual claim the producer has a chance to exculpate himself if certain requirements have been met with regard to the so-called *Verrichtungsgehilfen*[41]. If the producer succeeds in exculpating himself, the plaintiff will have to sue the penniless employee.

3. The *Hühnerpest* decision

In 1968 with the *Hühnerpest*[42] decision, the German Federal High Court of Justice opened a new chapter in the history of product liability law of Germany. In this case a manufacturer sold vaccine which was insufficiently immunized to a veterinary surgeon who administered it to the chickens of a farmer. The vaccine caused the death of 4,000 chickens and the

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39 Klaus-Ulrich Link, Thomas Sambuc, "Federal Republic of Germany", in: Patrick Kelly, Rebecca Attree (eds) of *European Product Liability (1992), 147.*

40 Eberstein/Braunewell (n. 38) 16.

41 See above, part A, *Sub* III, 1.

42 BGHZ 51, 91.

farmer sought recovery under § 823 I BGB from the manufacturer who had supplied the vaccine to the surgeon. The Court considered and rejected the contractual theories and based the liability of the manufacturer on the grounds of § 823 I BGB. It was held that the manufacturer is presumed to be at fault, unless he rebuts this presumption by proving that there was no fault.[43] By reversing the burden of proof, therefore, the Court addressed the criticism regarding the difficult burden of proof which faces plaintiffs in product liability situations.

The Court held that while the plaintiff had to prove certain objective facts, the full burden of proof fell squarely on the shoulder of the producer. The Court divided the process into two stages:

(a) (i). The injured party has to prove that the product has been produced with a defect and that it was put into commercial use with such defect.

(ii) The injured party has to prove that the damage was caused by this defect and not by misusing the product (for example, the cause of the accident must have been the faulty brakes and not, for example, the fact that the driver was intoxicated).

(b) The producer must now prove that he was not at fault. He does this by proving that he and all workers who came into contact with the product complied with the expected duty of care *(Sorgfalt).*

4. Applying the *Sorgfalt* principle to the different types of product-defects

The basic principle is that liability exists because the producer has breached his duty of care (*Sorgfaltspflicht)* and not merely because he has constructed a defective product. The duty of care expected from the producer would differ depending on the type of risk the product carries.

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[43] Foster (n. 18) 233.

(a) Construction or design defect

With the construction or design defect, a high standard of care is expected from the producer[44]. During the whole construction/design process the producer must take every possible precaution to ensure that his product will operate safely so that risks are minimised. This involves choosing the correct material for the product (for example, if possible avoiding flammable or explosive material); overseeing the mechanics of the product (for example that the brakes of the car work); ensuring that packaging/bottling does not entail any risks for transportation (for example that mineral bottles are able to withstand the internal pressure[45]), etc.

Two questions which arise are: first , how safe must a product be?, and secondly, must the producer in taking safety measures, also envisage other uses of the product (for example, using a microwave to dry a cat)? The general principle is that while there is not one single safety standard for every sort of product, a product is not required to be foolproof[46]. As a starting point all products, for example motor vehicles, that have to be officially approved must comply with the required safety standards set in the specific industry. However compliance with such standards does not carry with it any automatic exemption from liability[47]. Secondly, the producer is only required to consider the intended use of the product, for example, using a microwave to cook food. With children's toys, however, this principle does not apply since the producer also has to consider that the toys may, for example, be placed in the mouths of children.

The question whether a product is *fehlerhaft* or not, is answered by asking if a careful (*sorfältiger)* producer wanting to protect consumers from an unreasonably great risk, would have constructed the product in the same way[48]. In order to establish this one has to determine if at the time of the production of the product, technology and science had developed to such an extent that this inherent risk could have been detected and if another

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44 Hans Taschner, Edwin Frietsch, *Produkthaftungsgesetz und EG-Produkthaftungs-Richtlinie* (1990), 46.
45 BGHZ 104, 323.
46 Kötz (n. 14) 161.
47 Howells (n. 24) 131.
48 Kötz (n. 14) 160.

construction was possible[49]. When, for example, someone is injured in a car accident due to the explosion of the petrol tank, the question would arise whether at the time of production, the risk could have been foreseen or detected (the explosion of the tank), and furthermore, whether the producer could have taken adequate steps to prevent this risk from materialising (for example, by constructing the tank with thicker walls). If the producer can prove that at time of production the risk could not have been detected, or that he had no other way of manufacturing the tank, he would have complied with his duty of care and would avoid liability.

(b) Manufacturing defect.

Since manufacturing defects can seldom be avoided completely, a producer must make use of quality controls in order to ensure that no defects creep in. Since he carries the full burden of proof the producer will be liable unless he can prove that he has kept his *Sorgfaltspflicht*. He has to show that during the production of the product he did the following :

"den Fertigungsablauf so organisiert, die Prüf- und Kontrollmaschinerie so ausgewählt und die für sein Personal bestimmten Diestanweisungen so abgefaßt hat, wie das bei Beachtung der im Verkehr erforderlichen Sorgfalt eines ordentlichen Herstellers erforderlich ist, um die Entstehung von Fabrikationsfehlern auszuschließen oder entstandene Fehler zu entdecken[50]*"*.

A possibility remains however, for a producer to escape liability by showing that the damage was caused by an "escaper" (*Ausreisser*) - a defective product which could not have been detected even by the best possible quality controls[51].

In the case of the manufacturing defect the injured party still has to prove first that the product was already defective when it had been brought into commercial use by the producer and then that this defect caused the damage. In the *Lemonade flask* case which concerned a recyclable lemonade bottle that had exploded in the face of a three-year old

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49 Kötz (n. 14) 161.

50 Kötz (n. 14) 163.

causing him to lose his right eye, the Court *a quo* was convinced on the facts the injured was not able to prove that the flask left the manufacturer's bottling plant with a small crack in it[52]. On appeal the burden of proof rule was once again amended. The Court felt that since a risk exists when glass bottles are re-used in this way, the producer has a duty to prove that the condition of the bottles was sound every time they were re-used (*Befundsicherungspflicht*). If the producer is not able to prove that he has complied with this *Befundsicherungspflicht* the Court will assume that the defect had originated before the product had been brought into commercial use. The producer then still carries the full burden to prove that he has kept his *Sorgfaltspflicht*.

(c) Development risks

When the risk of a product is only recognised after the product has been brought into commercial use, the question arises whether the normal duty of care (*Sorgfaltspflicht)* is required from the producer. Although the Pharmaceutical Products Act requires a *Sorgfaltspflicht* even after the production of medicine and drugs[53], § 823 BGB does not require such a duty. The manufacturer is therefore not liable if the state of scientific and technical knowledge at the time the product was put onto the market was not such as to enable the existence of the defect to be discovered.

The Courts have, however, determined that there is a post-marketing surveillance obligation (*Produktbeobachtungspflicht*)[54]. Especially with the production of new products, the producer has a duty to observe the commercial workings of his product for a time after it has been brought into use. Where a mistake which creates a risk for consumers is discovered, the producer has a duty to warn consumers of this risk. The *Produktbeobachtungspflicht* also entails that the producer has a duty to check publications in trade journals and specific periodicals in order to keep himself abreast with the latest product developments of his competitors in the market, which product developments could have a negative effect on his own product or on its application. However, if considerable

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51 BGHZ 51, 91, 105.
52 BGH HJW 1988, 2611.
53 §§ 84 ff.
54 Howells (n. 24) 134.

danger for the health or the lives of users cannot be averted by warning alone, a recall or "call-back" of the product may be necessary.

(d) Operating-instruction defects

When, if, and to what extent a producer must make buyers aware of a product's inherent dangers, or include instructions for use, depends on the facts of each case. Yet while no general rule exists the following factors will be taken into account by the Court when determining whether or not the producer has indeed breached his duty:

1. If at the time of the production of the product, technology and science had developed to such an extent that the inherent risk of the product could have been detected;

2. The extent of the risk, for example, with a drug which has potentially negative side-effects there exists a higher duty to warn consumers[55];

3. The average experience, proficiency and intelligence of the targeted consumer, for example, less warning could be given if the product was only intended for use by experts; and

4. Whether or not the warning was clear and unambiguous[56].

A situation may arise, however, that although at the time the product had been brought into commercial use, no instructions were necessary, at a later stage due to unpredictable factors the composition of the product changed, to such an extent that buyers would then need to be informed. The underlying principle here seems to be: the larger the danger to life and limb, the greater the need for the producer to become active and warn consumers[57].

In the *Apfelschorf* case[58] a farmer had bought insecticide to protect his apple trees from pests and even though the product had worked well during the first couple of years, the insects then developed an immunity against the product. The question before the court was whether there was a duty on the manufacturer to inform the users that the effect of the

55 Howells (n. 24) 132.
56 BGH BB 1971, 673.
57 Tascher/Frietsch (n. 44) 58.

product had changed. Accepting that the farmer had access to the same scientific material and research as the producer, the Court placed the full burden of proof on the farmer requiring him to prove at what stage the manufacturer should have detected the defect and communicated it to consumers. The farmer also had to prove whether the manufacturer had breached his duty by not informing the farmer of the defect. This equal treatment of the producer and the farmer by the Court has been criticised since the producer is in a better position than the farmer to detect later developing defects[59].

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58 BGHZ 80, 186.

59 Kötz (n. 14) 164.

PART B : THE GERMAN PRODUCT LIABILITY LAW

I. INTRODUCTION

1. The European Directive

The Product Liability Directive[60] is based on the concept of a single common market within the European Community and the EC Commission's desire to harmonise the law within the community. The first preamble of the Directive focuses on the fact that existing divergencies in the laws of member states concerning the liability of the producer for damage caused by his products may distort competition and affect the movement of goods within the common market[61]. A general approach to the liability of the producer was therefore needed to be applied throughout the Community[62]. All member states are allowed to use their own forms and methods of fulfilling the Directive, and in some cases even have a discretion[63] to differ from the Directive. The Directive also sets a time frame of ten years (ending in 1995) for all member states to implement the Directive[64].

2. German Product Liability Act

While each European state implemented the Directive in a different way, the German Product Liability Act which came into force on 1 January 1990, fairly accurately follows the provisions of the Directive. Just as prescribed by the Directive and argued for by German legal commentators[65], the German Act sets a new strict liability standard in place and emphasises consumer protection. The German Parliament has, however, used the discretion provided for in the Directive in favour of industry and agriculture since agricultural

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60 Stephen Weatherill, Paul Beaumont, *EC Law* (1993), 32. Unlike Community regulation which has the force of law in all member states, a directive sets out a general policy goal, but leaves it to each member state to implement the directive.

61 Cf. § 9 Directive of the Council of the European Communities of 25 July 1985 on the Approximation of the laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (EEC Treaty of 25/07/85).

62 Christopher Hodges, *Product Liability European Laws and Practice* (1993), § 1-009.

63 § 15(1)(b) EEC Treaty of 25/07/85.

64 § 15(3) EEC Treaty of 25/07/85.

65 H. J. Mertens, *Münchener Kommentar zum BGB* (1986), § 823, 319.

products, game[66] and medical drugs[67] are not included in the German Act. Further differences with the Directive are that the liability for development risk has been excluded[68] and the total liability of the producer for personal injuries has been limited[69]. The most important aspects of the Act will now be discussed.

II. PROVISIONS OF THE GERMAN PRODUCT LIABILITY ACT

1. Strict liability

Whereas § 823 BGB requires fault, the Act deals with strict liability and holds the producer liable without fault. A producer sued under the Act would be liable merely if the plaintiff could prove that the defective product of the producer caused damage to his health or property[70]. Whereas under a § 823 BGB claim the producer could escape liability by proving that he had complied with the required *Sorgfaltspflicht,* under the Act (even in cases of an "escaper" (*Ausreisser*)) the producer has very little chance of escape since liability is strict [71]. As mentioned above[72], since it is difficult for the plaintiff to prove that the product was free from defects at the time when it was put into commercial use, the Court will only ask whether, given all the circumstances of the case, the product would normally be expected to be free from defects[73].

2. Who is the producer?

The Act introduces a significantly broader concept than the concept in § 823 BGB of who is to be considered to be a producer. There is liability with regard to manufacturers of the final product, as well as to quasi-manufacturers (those who have manufactured a basic

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66 Agricultural products are excluded unless they have undergone initial processing: § 2 ProdHaftG.

67 § 15 ProdHaftG.

68 § 1 II no 5 ProdHaftG.

69 § 16(1) EEC Treaty of 25/07/85; § 10 1ProdHaftG .The Act places a cap of 160 million DM on liability for personal injuries which are caused by a single product; with regard to damage caused to property there is no limit.

70 § 1 ProdHaftG.

71 Eberstein /Braunewell (n. 38) 67. Although the Act deals with strict liability independent of the fact whether the producer has kept his duty of care or not, the duty. of care remains relevant since producers keeping the *Sorgfaltspflicht* may be able to neutralise a further claim brought under § 823 BGB.

72 See above, part A, *Sub* IV, 2 (a).

substance or component of the product), to importers into the Community, and in some circumstances also to suppliers. The Act furthermore includes as a manufacturer someone who represents himself as producer by attaching his name, trademark or other distinctive mark to the product[74].

3. What is a product?

The notion of "product" is defined in § 2 of the Act as a moveable thing, including parts of other moveable or immovable things. Electricity is expressly included among the products. By including parts of movable or immovable things in the definition, the Act makes the liability of the supplier of parts possible[75]. The Act exempts produce of the soil, of animal husbandry, bee-farming, fishing and hunting, unless such produce has undergone the first stage of processing[76]. It is disputed whether gas, water or even computer software can be regarded as products[77].

4. The property

A manufacturer will only be liable under the Act if the property in question is of a type generally intended for non-commercial use and if the property is in fact being used as such by the plaintiff[78]. If the use of the damaged property cannot clearly be classified as for private or business purposes, it depends on whether its owner (subjectively) has used it predominantly for private or for business purposes[79]. The plaintiff who uses his car for pleasure most of the time and only makes occasional business trips, does not therefore lose the protection of the Act. The Act, like the Directive, also refers to damage to property *other than* to the defective product itself[80]. If, for example, the plaintiff had purchased a car for private use and the brakes turn out to be faulty, thereby causing damage to the car, the Act does not apply, for the brakes were part of the product purchased.

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73 Link/Sambuc (n. 39) 155.

74 § 4 I ProdHaftG. Suppliers will be liable is they fail to inform the injured person of the name of the producer or their own supplier § 4 III ProdHaftG.

75 § 2 ProdHaftG.

76 § 2 ProdHaftG.

77 G. Schieman, in: Walter Erman, *Handkommentar zum Bürgerlichen Gesetzbuch* (1993), Anhang zu § 853, § 2.

78 § 1 ProdHaftG.

79 Link/Sambuc (n. 39) 152.

80 However, this does not affect cases where a supplier has provided a defective part, if this part damages the product into which it has been built. Link/Sambuc (n. 39) 152.

5. What is the meaning of "defective"?

In terms of § 3 I of the Act , a product is defective if it is not as safe as can reasonably or justifiably be expected considering all the circumstances. In particular these circumstances include its presentation, its use which may be reasonably expected and the time when it was put into circulation[81]. The producer must account for all the usual and reasonable use to which a consumer puts the product[82]. The inhalation of soluble substances contained in glue for the purpose of intoxication, for example, would be considered to be too unreasonable to be taken into account by the producer[83]. The term "defect" under the Act, therefore, does not seem to differ much from the meaning of "defect" under § 823 BGB.

6. Exemptions from liability

§ 1 (2) sets out the circumstances in which the producer would be exempted from liability. The obligation to pay damages is excluded if:

1. the producer has not put the product into circulation;

2. it is to be assumed, having regard to the circumstances, that the product was not defective when it was put into circulation;

3. the producer has neither manufactured the product for sale or for any other form of distribution for a consideration nor has manufactured or distributed it in the course of his occupational activities;

4. the defect is due to the fact that at the time when the producer put the product into circulation it complied with mandatory legal provisions[84];

5. discovery of the defect, based on the scientific and technical knowledge at the time when the product was distributed, was not possible[85].

While most of the above mentioned exemptions are clear, § 1 (2) 2 and § 1 (2) 5 will briefly be looked at. Under § 1 (2) 2 the producer is not liable if the assumption can be drawn that

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81 § 3 1 ProdHaftG.
82 Link/Sambuc(n. 39) 153.
83 Link/Sambuc(n. 39) 153, n. 7.
84 § 1 II no 2 ProdHaftG, translation as in: Markesinis (n. 16) 542.
85 § 1 II no 5 ProdHaftG.

the product was not yet defective when placed into circulation - in other words the defect occurred at a later stage, through use of it by the buyer or perhaps when it was being repaired. This subsection would, however, only have practical application in the case of a *Fabrikationsfehler*. Here the producer would show that due to quality control systems, product inspections, and constant observations, products are defect-free at the end of the manufacturing process. Since this particular product left his premises without fault, the defect must therefore have been caused at a later stage. In a sense then, the producer does not have to prove that the product was not defective when it left his premises but has only to indicate circumstances from which inferences can be drawn that the defect was not present. In the case of the *Instruktionsfehler* or the *Konstruktionsfehler*, however, this *Entlastung* is not available for the producer since the defect would be present from the start of the production process and the chances are minimal that the defect occurred after the product had been put into commercial use[86].

§ 1(2) 5 of the Act includes the so-called development risks defence. This defence states that the producer is not liable if the defect could not be discerned in accordance with the state of art at the time when the producer put the product into circulation. Yet even if the producer is able to exonerate himself under this section, he may nevertheless be answerable under the law of delict which imposes a *Produktbeobachtungspflicht* or post-distribution surveillance obligation on the producer. The duty to observe development risks for specific products therefore remains unchanged.

7. Damage

(a) Type of damage

With regard to personal damage, the Act explicitly covers damage which results from the death of a person or from injuries to body or health[87]. Included here are health care costs and other expenses incurred in an attempt to restore health, damage suffered in consequence of the injured's inability to work and even funeral expenses. Under the Act, however, no compensation for non-economic loss such as pain and suffering can be

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86 Eberstein/Braunewell (n. 71) 68.

87 § 7 ProdHaftG and § 8 ProdHaftG.

claimed. The Act also allows a claim for *Sachschäden* provided, of course, the criteria in section 1 are fulfilled[88].

(b) Limit on liability

§ 11 of the Act provides for a compensation threshold in that applicants have no claim where the damage of any nature is less than 1125 DM[89]. Although no limit is placed on claims for damage to property, the Act places a ceiling of 160 million DM on the liability for personal injuries which are caused by a product or a number of products with the identical defect[90]. Where the limit of 160 million DM is exceeded, all claims are reduced proportionally. It should be noted that the limit has also been introduced for damage which has only been caused by a single product, for example, an aircraft crashing over a large city[91].

(c) Contributory negligence

Contributory negligence on the part of the injured party is immaterial with regard to the liability of the producer but is taken into consideration when determining the amount of damages to be paid[92].

8. Time limitations

(a) Extinction of the claim

The Act excludes a claim if the particular product has been set into circulation more than ten years before the accident[93]. In these cases the plaintiff could, however, still base his claim on § 823 BGB.

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88 See above, part A, *Sub* IV, 4.
89 § 10 ProdHaftG.
90 § 10 I ProdHafG.
91 Hodges (n. 62) § 11-22.
92 § 6(1) ProdHafG.
93 § 13 ProdHaftG.

(b) Prescription

The claim prescribes after three years. The time of prescription runs from the time when the claimant knew or could have known of the damage[94].

9. The applicability of § 823 BGB

Par 15 II of the Product Liability Act makes it clear that besides the possibility of incurring liability in terms of the Act, liability on other grounds remains unaffected[95]. The general delictual claim under § 823 BGB is therefore still available. In cases where there is a claim for pain and suffering, or a claim for personal injury and *Sachschäden* exists which exceeds the 160 million DM ceiling, the plaintiff could sue under § 823 BGB. For claims under 1125 DM[96] and for damage to the product itself § 823 BGB would also still remain relevant. Furthermore, since the Act excludes a claim in cases where the object is intended and used for business purposes, the general delictual claim remains important for third parties in the commercial and business field. Despite minor differences between the Product Liability Act on the one hand and the delictual claim as set out in § 823 BGB on the other as mentioned above, there appear to be only two significant changes: first, the extension of the definition of the producer to include quasi-producers, importers into the community, subsidiaries, and so on; and secondly, the producer's burden of proof for the non-defectiveness of his product at the time when it was put into circulation.

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94 § 12 I ProdHaftG.

95 § 15(2) ProdHaftG.

96 § 11 ProdHaftG.

PART C: SOUTH AFRICAN PRODUCT LIABILITY

I. INTRODUCTION

Since product liability is a relatively new field in South African law most textbooks have very little on this topic and reported cases are few and far between. The question is briefly dealt with in Neethling, Potgieter and Visser[97], and Burchell[98] offers little assistance. Perhaps guidelines might be gleened from comparative study.

In South Africa the liability of a manufacturer of a defective product would fall within the ambit of the *Lex Aquilia* which does not provide for strict (no fault) liability. The ordinary requirements of an Aquilian action must therefore be satisfied[99] and wrongfulness and negligence must be proved. The wrongfulness of conduct is tested against a standard of reasonableness or the invoking of public policy[100]. Negligence is present when the duty of care of the reasonable man in the circumstances has not been kept. Due to the plaintiff's difficult burden of proof the fault requirement has been alleviated by use of the procedural device of *res ipsa loquitur*. This may result in a move towards strict liability. Besides the Aquilian action the purchaser may also have certain contractual remedies available against the seller[101]. I will briefly outline these before turning to the question of delictual liability.

II. CONTRACTUAL REMEDIES

If the seller guarantees against any defects which are later indeed present he commits breach of contract[102]. A problem, however, is that in practice a contractual guarantee often

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97 J. Neethling, J.M. Potgieter, P.J. Visser, *Law of Delict* (2nd ed., 1996), 314.

98 Jonathan Burchell, *Principles of Delict* (1993), 18.

99 Burchell (n. 98) 18, n. 10.

100 Burchell (n. 98) 38. See also Part C, *Sub* III, 1.

101 See *A. Gibb & Sonn (Pty.) Ltd. v. Taylor & Mitchell Timber Supply Co. (Pty.) Ltd.* 1975 (2) SA 457 (W).

102 J.C. de Wet, A.H. van Wyk, *Kontraktereg en Handelsreg* (5th ed., 1994), 339. Under the guarantee the seller may even claim the consequential damage suffered.

contains qualifications (the seller limits his liability to replacement or repair of the product) or it's content is so general or vague that what is guaranteed becomes indeterminable[103]. Besides a possible guarantee, the buyer also has the so-called aedilitian actions, namely the *actio rehibitoria* and the *actio quanti minoris* at his disposal[104]. Although the buyer can claim the purchase price (*actio rehibitoria*) or reduction of the purchase price (*actio quanti minoris)*, generally he would not be able to claim for consequential loss. However, if the seller is a producer who publicly professes to have attributes of skill and expert knowledge of the particular product, the seller may also be able to claim consequential damage[105]. It seems, therefore, that due to the limited possibilities of claiming consequential damage contractual remedies do not greatly assist the buyer.

III. DELICTUAL LIABILITY

In order to succeed with the *actio legis Aquiliae* the plaintiff must prove that the manufacturer acted wrongfully and culpably and that this behaviour caused damage to the plaintiff or to a third party. Although the existence of a human action and the causation of damage are usually not disputed, the elements of wrongfulness and fault often present problems.

1. Wrongfulness

In determining wrongfulness use is made of various "tests".

(a) The test : reasonableness.

Conduct is wrongful or unlawful if it is unreasonable, in other words, when in the light of all the circumstances the defendant is expected to behave in a manner which will not harm

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103 J.C. van der Walt, "Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk", 1972 *THRHR* 226.

104 For the requirements of the *actio redhibitoria* and the *actio quanti minoris* see De Wet/Van Wyk (n. 102) 343.

105 *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk. v. Botha and Another* 1964 (3) SA 561 (A). De Wet/Van Wyk (n. 102) 347 has the following comment on this decision, "Na hierdie uitspraak sal 'n voornemende verkoper verstandig wees om hom te gedra soos Lot se vrou, na haar terugslag, en geen woord te spreek en geen gebaar te maak nie."

the plaintiff[106]. Courts also refer to concepts such as the *boni mores*[107] and the legal convictions of the community[108] but each of these is merely a different expression of the general criterion of reasonableness.

(b) Infringement of rights and breach of a legal duty

Despite the fact that reasonableness remains the point of departure, a second test has been developed in terms of which wrongfulness is based **either** on the infringement of rights **or** a breach of a legal duty[109]. In the area of product liability, however, both our Courts and academic writers have followed the English approach that mere infringement of rights, (*gevolgsveroorsaking*) is not enough to establish unlawfulness but a breach of a legal duty is **also** required[110].

The producer has a general duty to take reasonable steps to ensure that defective products do not reach the market and that no harm ensues from the presence of the products on the market. This position was authoritatively set out by the Appellate Division in *Cooper v. Nephews & Visser*[111]. Interestingly enough, the Court held in *Combrink Chiropraktiese Kliniek v. Datsun Motor Vehicle Distributors*[112] that the manufacturer had no duty of care towards a member of the public who might purchase or hire it's vehicle. Snyman[113] believes that the *Combrink* decision is completely out of step with modern jurisprudence.

De Jager, also argues that the unlawfulness of the manufacturer lies in the breach of a legal duty:

> „In aansluiting by die *Regal-* en *Ewels-* saak word aan die hand gedoen dat die vervaardiger in die algemeen die plig het om dwarsdeur die produksieproses, en selfs daarna, redelike stappe te doen om te voorkom dat gebrekkige produkte die mark

106 *Administrateur Tvl. v. Van der Merwe* 1994 (4) SA 347 (A) 361H.
107 *Universiteit van Pretoria v. Tommie Meyer Films (Edms.) Bpk.* 1977 (4) SA 376 (T).
108 *Atlas Organic Fertilizers (Pty.) Ltd. v. Pikkewyn Ghwano (Pty.) Ltd. and others 1981 (2) SA 173 (T) 188G. Sage Holdings Ltd. v. Financial Mail (Pty.) Ltd.* 1991 (2) 117 (W) 129.
109 *Coronation Brick (Pty.) Ltd. v. Strachan Construction Co. (Pty.) Ltd.* 1982 (4) SA 371 (D) 380. See also *Minister van Polisie v. Ewels* 1975 (3) SA 590 (A) 596H.
110 F.J. de Jager, "Die grondslae van produkte-aanspreeklikheid ex delicto in die Suid-Afrikaanse reg",1987 *THRHR* 347, 358.
111 1920 AD 111. See Van der Walt, 1972 *THRHR* 228.
112 1972 (4) SA 185 (T).
113 P.C.A. Snyman, "Product liability in modern Roman-Dutch law", 1980 *CILSA* 177, 192.

bereik, of op die mark bly, en die belange van die verbruiker skend. Die vervaardiger tree onregmatig op indien hy hierdie plig skend en die verbruiker as gevolg daarvan skade ly."[114]

According to the approach in South Africa, therefore, the presence of a defect in a product and the breach of a legal duty are accordingly necessary prerequisites to wrongful conduct on the part of the manufacturer.

(c) The duty of care doctrine

Although wrongfulness is based upon either the infringement of rights or a breach of a legal duty, foreseeability is also sometimes used as a test for wrongfulness[115]. Foreseeability as a test for wrongfulness has its roots in the English law duty of care doctrine[116]. Although it is completely foreign to the principles of Roman Dutch law it has been received in South African law and despite criticism[117] courts continue to use the concept to ascertain wrongfulness[118]. Neethling argues that the use of the "duty of care" doctrine only leads to confusion between the test for wrongfulness and the test for negligence[119].

Comparing the position regarding unlawfulness with that in Germany, one sees that in German law the traditional attitude is that wrongfulness is present when a protected interest or right has shown to have been violated, and the defendant is unable to produce grounds of justification (*Rechtfertigungsgrund*)[120]. The traditional view has in fairly recent times been challenged by a host of distinguished academics. According to these authors, the mere violation of legally protected interests does not satisfy the element of unlawfulness but what is also needed is the simultaneous breach of a duty to secure the safety of the community (*Verkehrssicherungspflicht*). The new approach has also received the approval of the

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114 De Jager, 1987 *THRHR* 347, 359.

115 *Coronation Brick (Pty.) Ltd. v. Strachan Construction Co. (Pty.) Ltd.* 1982 (4) SA 371 (D) 380.

116 *Donoghue v. Stevenson* 1932 A.C. 562, H.L.

117 T.W. Price, "The Conception of 'Duty of care' in the *Actio Legis Aquiliae*", 1949 *SALJ* 171; 269 H.L. Swanepoel, "Bedenkings oor die Regsplig by Onregmatige Daad", 1959 *THRHR* 126, 198; Rumpff JA in *Natal v. Trust Bank van Suid Afrika Bpk.* 1979 (3) SA 824 (A) 833. For a staunch defence of the doctrine see R.G. McKerron, "The Duty of Care in South African Law", 1952 *SALJ* 189.

118 *Government of the Republic of South Africa v. Basdeo* 1996 (1) SA 355 (A).

119 J. Neethling, "Onregmatigheid, Nalatigheid; Regsplig, 'Duty of Care'; en die rol van redelike voorsienbaarheid - praat die Appelhof uit twee monde?", 1996 *THRHR* 682, 685.

120 Markesinis (n. 16) 74.

Federal High Court of Justice[121]. Both in South Africa and Germany the manufacturer must therefore not only have infringed a legally protected right, but he must also have breached a legal duty in order to have acted unlawfully. Furthermore, in both countries the inquiry into wrongfulness involves considerations of public and legal policy and the courts are required to render value judgements as to what society's notions of justice demand.

2. 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 manufacturer's conduct must be tested against the care that the reasonable man would have exercised in the particular circumstances. The fault requirement is satisfied by showing that the plaintiff's damage was reasonably foreseeable, that a reasonable man would have guarded against it, and that the defendant failed to do so[122]. An inquiry would proceed along the lines: What harm would the reasonable man have foreseen and what steps would he have taken to guard against it?[123]

In *Cape Town Municipality v. Paine* [124] 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. Since it had not complied with this duty it was held to have been negligent.

In *A. Gibb & Sonn (Pty.) Ltd. v. Taylor & Mitchell Timber Supply Co. (Pty.) Ltd.*[125], Coetzee J, adopted negligence as the criterion for product liability in South Africa. In this case the plaintiff, a building company, ordered scaffolding from a dealer (the defendant).

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121 BGHZ 24, 21.

122 P.Q.R. Boberg, *The Law of Delict* (1984), 194.

123 See also Jurgen Kemp, *Delictual Liability for Omissions*, (1978, LL.D., University of Port Elizabeth), 380.

124 1923 AD 207, 217. See also *Langley Fox Building Partnership (Pty.) Ltd. v. De Valence* 1991 (1) SA 1 (A) 12.

125 1975 (2) SA 457 (W).

Because of a defective scaffolding plank, an employee of a sub-contractor of the plaintiff sustained serious injury. The plaintiff paid damages to this employee. He (the plaintiff) alleged that the defendant was 90% negligent in regard to the employee's damage and accordingly claimed a contribution *ex delicto* from the defendant on the ground of contributory negligence. Coetzee J held that no duty of inspection had rested on the merchant seller of the defective plank to inspect the plank prior to delivery. In fact, the plaintiff had been under a duty to inspect the plank for knots before using it for scaffolding[126].

IV. STRICT LIABILITY IN SOUTH AFRICA?

In his doctoral thesis twenty years ago, De Jager[127] advocated the introduction of strict liability in the field of South African product liability law. Although this thrust has in large been supported in scholarly legal literature[128], neither the courts nor the legislature have shown any readiness to move towards a strict liability regime. Taking further into account our gernment's past emphasis on protection of local trade and industries, consumer protection is a relatively new concept in South Africa.

In the final analysis the introduction of the no-fault principle in the field of product liability in South Africa is a matter of legal policy depending on the degree of protection that is considered desirable for the consumer or a category of consumers on the one hand, or a specific trade or industry on the other hand[129]. On the one hand public policy requires that

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126 1975 (2) SA 475 (W) 458.

127 F.J. de Jager, *Die deliktuele aanspreeklikheid van die vervaardiger teenoor die verbruiker vir skade veroorsaak deur middel van 'n defekte produk* (1977, LL.D., Randse Afrikaanse Universiteit).

128 C.J. Hartzenberg, *Die opkoms van die risikobeginsel op die gebied van deliktuele vervaardigheids-aanspreeklikheid* (1979, LL.M., University of South Africa). Despite a detailed discussion of the American and Dutch law of manufacturer's liability, Hartzenberg gives little attention to the position of product liability in South Africa. De Jager, 1987 *THRHR* 347, 348. Although De Jager does not suggest that the fault principle should be abandoned in general, he argues that there are many policy factors that speak strongly for the imposition of strict liability of manufacturers. Snyman, 1980 *CILSA* 177, 192 emphasises that in order to protect their customers South African's trading partners who have already adopted strict liability, could put considerable pressure on South African producers and exporters. See also earlier remarks by J.C. der Walt, *Risiko-aanspreeklikheid uit onregmatige daad* (1974, LL.D., University of South Africa), 165.

129 S. Van der Merwe, F. De Jager, "Products liability: a recent unreported case", 1980 *SALJ* 83, 92.

the burden of accidental injuries from products be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained. On the other hand the introduction of strict liability could pose unnecessary restraints on producers and as manufacturing costs and insurance premiums increase it could further have an inflationary effect on the economy[130].

Once the decision has been taken to adopt the strict liability principle, this goal could be achieved in two ways, either by introducing new legislation or by proceeding along traditional Aquilian lines with the help of the procedural device *res ipsa loquitur*.

V. TEMPERING OF THE FAULT REQUIREMENT WITH RES IPSA LOQUITUR

1. The Definition

Since fault on the part of the manufacturer is difficult to prove[131] the plaintiff's burden of proof has been alleviated by a specific application of the doctrine of *res ipsa loquitur* (the facts speak for themselves)[132]. De Jager explains the doctrine as follows:

> „*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 algemene ervaring nie sou plaasvind indien iemand nie nalatig was nie."[133]

2. The view of the Courts

In the decision of *Bayer South Africa (Pty) Ltd. v. Viljoen*[134] the Appellate Division discussed the application of the doctrine to product liability situations. In this case a farmer sued the manufacturer and distributor of a fungicide, as well as the seller thereof, for

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130 J.P. Anderson, " Product Liability in Europe", 1991 *SALJ* 705, 708. The most volatile of all risk factors: an influx of the American lawsuit mentality. See also J.T. Severiens, "Product Liability", 1984 *Businessman's Law* 147, 149 who points out that under a strict liability system businessmen would act conservatively and fewer products would be introduced into the economy.

131 The reasons for this are similar to those in German law. See above Part A, *Sub* 4, 2 a. See also Van der Walt, 1972 *THRHR* 242.

132 Neethling/Potgieter/Visser (n. 97) 267. The Court in *Combrinck Chiropraktiese Kliniek (Edms.) Bpk. v. Datsun Motor Vehicle Distributors (Pty.) Ltd.* 1972 (4) SA 185 (T) 190 held that the plaintiff would be able use the *res ipsa loquitur* doctrine.

133 De Jager, 1987 *THRHR* 347, 363. For the origins of the phrase see Rumpff JA in *Groenewald v. Conradie* 1965 (1) SA 184 (A) 187H.

damages caused by the infestation of his grape crop with powdery mildew, it being alleged that the infestation resulted from the lack of effectiveness of the fungicide. The action against the manufacturer was based, however, not on a defect in the product, but on a negligent misrepresentation on the product label to the effect that the fungicide was suitable for use to control powdery mildew on grapes. The Appeal Court decided in favour of the manufacturer because the evidence showed that the representation on the label of the product was not incorrect, the farmer had not proved that he had used the product as directed, and there was no evidence that the manufacturer had made any representations negligently.

Despite deciding that negligence was absent *in casu* the Appeal Court nevertheless expressed its opinion that it was in principle not opposed to the application of the *res ipsa loquitur* doctrine to product liability situations. Milne JA, however stated that policy considerations dictated that the doctrine should only be applicable in instances where the facts were such as to give an inference of negligence[135]. For example, it is unlikely for snails to crawl into ginger beer bottles, as in a famous British case[136], without negligence on the part of the manufacturer[137]. An inference of negligence may therefore only be drawn from the circumstances which determine that the event would not have taken place had someone not been negligent[138].

Neethling and Potgieter[139] are of the opinion that in a product liability case negligence will probably be inferred if the consumer proves that he was prejudiced by a defective product and that the product was in this state when the manufacturer abandoned his control over it.

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134 1990 (2) SA 647 (A) 661.

135 In *Groenewald v. Conradie* 1965 (1) SA 184 (A) 187 Rumpff JA put it as follows: " Ten slotte is dit wenslik om te beklemtoon dat die gebruik van die uitdrukking *res ipsa loquitur*, streng gesproke alleen dan van pas is wanneer dit nodig is om enkel en alleen na die betrokke bebeurtenis te kyk sonder die hulp van enige ander verduidelikende getuienis."

136 *Donoghue v. Stevenson* 1932 A.C. 562, H. L.

137 See *Van Wyk v. Lewis* 1942 AD 438 where a swab was left in a patient's body after an operation.

138 S.M. Speiser, *The Negligence Case - Res Ipsa Loquitur* (1972), 31.

139 J. Neethling, J.M. Potgieter, "Nalatige wanvoorstelling: kousaliteit en *res ipsa loquitur* by vervaardigingsaanspreeklikheid", 1990 *De Jure* 372.

3. The defendant's evidential burden

Once an inference of negligence is drawn it can be rebutted by evidence about the care taken by the defendant, or by offering an alternative explanation which has a subjective basis and which is compatible with the facts of the case and leaves no room for an inference of negligence[140]. Holmes JA in *Sardi v. Standard General Insurance Co. Ltd.*[141] summed the matter up as follows:

> "The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility ... . At the end of the case, the Court has to decide whether, on all the evidence and the probabilities and the inferences, the plaintiff has discharged the *onus* of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence."

The doctrine of *res ipsa loquitur*, therefore, does not does not amount to a reversal of proof[142] and it does not create a rebuttable presumption of law casting the legal burden of disproving negligence on the defendant[143].

4. German law

Despite the superficial resemblance, *res ipsa loquitur* in South Africa is quite different in practice from the German *Beweis des ersten Anscheins* or as it is often called *Anscheinsbeweis*. In German law a distinction is made between statutory presumptions, created by law and non-statutory presumptions which have been developed by the courts[144]. Whereas a statutory presumption results in the reversal of the burden of proof a non-statutory presumption does not reverse the burden of proof but merely alleviates it. The *Anscheinsbeweis* is an example of a non-statutory presumption. This presumption arises, for example, when a product independently causes damage to a number of consumers[145]. The producer then has to remove the presumption by proving other possible causes which could have caused the damage. Although *Ansheinsbeweis* does not amount to a reversal of proof,

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140 *Arthur v. Bezuidenhout and Mieny* 1962 (2) SA 566 (A) 572.
141 1977 (3) SA 776 (A) 780.
142 Van der Walt, 1972 *THRHR* 248.
143 L. H. Hoffmann, D.T. Zeffert, *The South African Law of Evidence*, (4th ed.,1992), 533.
144 K.Schellhammer, *Gesetz-Praxis-Fälle, Ein Lehrbuch* (1994), 167.
145 BGH NJW 1987, 1694.

in its application it comes very close to it[146]. Due to the fact, however, that following the chicken-pest decision[147] the burden of proof is in any event on the producer the doctrine of *Ansheinsbeweis* finds very little application in product liability cases.

5. American law

In American law the application of the *res ipsa loquitur* brings an irrebuttable presumption of negligence which in effect shifts the *onus* regarding the proof of fault to the manufacturer who can only exculpate himself by disproving negligence on his part[148]. A gradual erosion of the fault principle in favour of strict liability, therefore, is achieved by means of the *res ipsa loquitur*. Due to progress and success in the field of industrialisation, Van der Walt predicts a similar erosion in South Africa. Neethling and Potgieter[149] are also in favour this approach:

> "Hoe dit ook al sy, waar beleidsoorwegings dit regverdig, behoort die howe nie terug te deins om 'n benadeelde verbruiker deur middel van die *res ipsa loquitur*- benadering tegemoet te kom nie."

Whether the procedural device of *res ipsa loquitur* would, as in America, be an effective vehicle to erode the fault principle in South Africa remains to be seen. An initial problem is that the application of the doctrine is not uniform and depends on the facts of each case[150]. On the facts of the *Bayer* case, for example, the damage to the plaintiff's grapes 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 the plaintiff had used seeds of an inferior quality. A second problem is that unlike the position in American law, the doctrine does not bring about a shift in the evidential burden and despite the application of the doctrine, the enquiry at the end of the case is still whether the plaintiff has discharged the onus resting upon him regarding the issue of negligence[151].

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146 H.J. Musielak, *Grundkurs ZPO* (2nd ed., 1993), 255.

147 See above, Part A, *Sub* IV, 3.

148 Van der Walt, 1972 *THRHR* 249.

149 Neethling/Potgieter, 1990 *De Jure* 375.

150 See above, Part C, *Sub* III, 5 . See also Speiser (n. 138) 438. Some courts in America have refused to apply the *res ipsa loquitur* doctrine to cases involving exploding bottles mainly on the ground that the defendant bottler was not in control of the bottle at the time of the explosion.

151 See *Osborne Panama SA v. Shell & BP South African Petroleum Refineries (Pty.) Ltd. and others* 1982

Dean Prosser[152], in condemning the doctrine, has argued that there is nothing distinctive about *res ipsa loquitur* and that it amounts to no more than a matter of common sense. He says: "The Latin catchword is an obstacle to all clear thinking." And as an English Judge [153]remarked: "If the phrase had not been in Latin, nobody would have called it a principle."

VI. LEGISLATION

1. Strict liability under a fault-based system?

Although no judicially developed doctrine of strict liability is on the cards[154], one wonders if the prevailing negligence doctrine is adequate to protect the legitimate interest of consumers. Undoubtedly our Courts will be faced sooner or later, as it has happened already in the United States and England, with claims by consumers that cigarettes have caused lung cancer, or the use of medical drugs physical or mental injury. Such cases will raise factual and legal issues of enormous complexity and the question arises whether they can adequately be dealt with on the basis of traditional negligence principles.

Some of the academics also seem to be of the opinion that the traditional doctrine of fault is no longer sufficient. Burchell, for example, believes that liability for physical injury caused by defective products is just as much one of the risks inherent in living in contemporary society as the risk of physical injury flowing from automobile accidents. He states:

> „They are both clearly identifiable areas where the traditional negligence criterion for liability is no longer ideal in achieving the just compensation of accident victims"[155].

Boberg states that although the device of *res ipsa loquitur* imposes a difficult enough evidential burden on the producer, „if a greater need arises, legislature will have to fill it"[156].

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(4) SA 890 (A) 897.

152 D. Prosser, "The Procedural Effect of Res Ipsa Loquitur", 1936 *Minn LR* 241, 258

153 Lord Shaw, in *Ballard v. North British R. Co.* (Scott) [1923] SC HL 43.

154 Boberg (n. 122) 195.

155 Burchell (n. 98) 247.

156 Boberg (n. 122) 194.

In his doctoral thesis written twenty three years ago J.C. van der Walt[157], also saw the need for legislation:

> "Die risiko's in 'n moderne samelewing is basies die produk van tegnologiese industriele omwenteling. Die snelheid en intensiteit van die moderne tegnologiese revolusie maak snelle en radikale regsingryping noodsaaklik. Dit kan uiteraard vandag slegs deur wetgewing geskied."

2. Further problems with a fault-based system

Even if under the negligence regime *res ipsa loquitur* is applied and the plaintiff obtains the benefit of an inference of negligence, the formal requirement that he proves negligence extends the litigation process and involves delay and expense, thereby increasing the pressure on the plaintiff to settle. A further problem with the fault based system is that wholesalers, retailers and importers will seldom be found liable. There is then the case of a product incorporating defective materials, or a defective part, manufactured by a third person for whom the defendant manufacturer of the completed product is not liable under existing law.

3. The trend : strict liability legislation

Following upon the European Product Liability Directive, countries in the European Community are presently imposing strict liability by way of legislation. Even in Japan, which is not a member of the European Community, a new Product Liability Act was enacted in July 1995[158]. With trade increasing between South Africa and Europe it is possible that European countries could place pressure on South Africa to protect their consumers[159]. The pressure to conform may not even come from outside the country but from within as was the case in England. There the injuries caused by the Drug Thalidomide coerced the UK to conform to the ECC Directive on product liability and to enact legislation for further consumer protection[160]. One envisages a statute along the lines of that adopted by Germany which substitutes strict liability for fault-based liability. The enactment

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157 Van der Walt (n. 128) 431.

158 Act 85 of 1994.

159 C. de Villiers, "Micro wave: macro damages", 1996 *Juta's Business Law*, Vol 4, Part 4, 174.

160 The Consumer Protection Act of 1987. Since the new legislation left the common law position in England unchanged, the principles stating the bounds of fault in product liability cases set out in *Donoghue v. Stevenson* still apply.

of such legislation would bring South African product liability law more or less into line with the law in the USA and Europe.

VII. SOME REMARKS IN COMPARATIVE PERSPECTIVE

1. A difference in approach

The justification for strict liability in Germany and in South Africa is the same. It is to ensure that products on the market are safe and that the cost of damges resulting from defective products are borne by those who market such products, rather than by those who are injured, and are powerless to protect themselves. Yet notwithstanding a common theoretical justification for a strict product liability regime, South Africa has remained faithful to the idea of fault whereas Germany has introduced both judicially and by way of legislation a strict product liability regime.

2. The role of the Courts

Prior to the coming of the German Product Liability Act, the Courts in Germany played a vital role by effecting strict liability along traditional lines[161]. With the chicken-pest decision[162], a quasi-strict liability under the cloak of procedural law was created. As was seen in the *Bayer*[163] decision, our Courts are willing to use the doctrine of *res ipsa loquitur* to steer the South African law of product liability into a new direction. Given the scarcity of product liability cases, however, there has been little opportunity for this exercise. It is my submission that even with the application of the doctrine of *res ipsa loquitur* the landscape of South African product liability jurisprudence will not be changed drastically. Unlike its cousins *res ipsa loquitur* in American law and *Anscheinsbeweis* in German law, which place a rebuttable presumption of negligence on the defendant, *res ipsa loquitur* in our law merely raises an inference of negligence. Notwithstanding the fact that the application *of res ipsa loquitur* is limited, I believe our Courts still have ample room to develop our law of product liability. They could, for example, adjust the evidential effect of *res ipsa loquitur*

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161 N. Reich, *Consumer Legislation in the Federal Republic of Germany* (1981), 178

162 See above, Part A, *Sub* IV, 3.

from merely an inference of negligence to a presumption of negligence or they could reverse the burden of proof by placing the burden of disproving negligence on the defendant.

3. The theoretical distinction between fault and risk based liability

Due to the procedural devices employed by the courts to aid the plaintiff such as the reversal of the burden of proof and the notion of *Anscheinsbeweis*, the theoretical distinction between fault and risk-based liability in German law has become blurred. The practical effect of the *Hühnerpest* decision is not the facilitation of the burden of proof in favour of the injured party, but the increasing impossibility for the manufacturer to exculpate himself. A system of strict liability has been created which still has fault as an element. In this regard the German Product Liability Act has brought legal certainty in that it regulates strict liability per definition without reference to fault.

4. The Product Liability Act compared with the general delictual claim

The most significant change brought about by the Act is the extension of the definition of a producer to include quasi-producers, importers into the community, subsidiaries, etc. Nonetheless although the Act was certainly necessary and it brought legal certainty there appears to be little difference between the Act and the traditional German product liability law[164]. Paying consideration to the fact that the German courts have had little occasion to apply and interpret the new Act, it seems as if the Product Liability Act will not radically change the German product liability law. The reversal of the burden of proof, coupled with high threshold required by the courts to discharge the burden in any event makes it almost impossible for producers to successfully defeat a product liability claim based on § 823 BGB[165].

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163 See above , Part C, *Sub* V, 2.

164 See above, Part C, *Sub* II, 9.

165 Michael Martinek, "Product Liability in Germany between *culpa* principle and no fault approach: the German

5. Lessons from Germany

Although strict liability should certainly be the goal for South Africa, due to the nature of our economy such a development would have to wait a few years. I believe that despite convincing arguments for a strict liability law in South Africa, it would add little in practice to the potential of traditional Aquilian delictual claims. If despite this factor, however, our courts succeed in developing the common law to such an extent that it comes close to strict liability, it will be justifiable for South Africa to enact a product liability act and in so doing join the strict product liability movement in Germany and in Europe.

VIII. CONCLUSION

In a product liability situation there is generally no contract with the producer. Prior to the *Hühnerpest* case in Germany, however, several contractual constructions such as the theory of transferred loss, the guarantee, and *Verträge mit Schutzwirkung für Dritte* had been intensively explored to hold the producer contractually liable. With its decision in the *Hühnerpest* case the German Federal High Court of Justice rejected these theories and based liability on delictual liability found in § 823 BGB. Prior to the *Hühnerpest* case a product liability claim against a producer under § 823 BGB had been criticised due to the difficult burden of proof borne by a plaintiff and the fact that the producer had the possibility to exculpate himself under § 831 BGB. The Federal High Court of Justice in the *Hühnerpest* case therefore reversed the burden of proof and required the producer to prove that he was not at fault. A producer can do this by proving that he and all the workers who have come into contact with the product have exercised the required duty of care (*Sorgfaltspflicht)*. However, the injured still has to prove that the defective product has been put into circulation with the defect and that his damage has been caused by this defect. In 1988 in the *Lemonade flask* case the court once again amended the burden of proof and decided that when glass bottles were re-used the producer had a duty to proof the condition of the bottles every time they were re-used (*Befundsicherungspflicht*).

Following the provisions of the European Directive on Product Liability the German

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experience confirming South African indolence (part 2)", 1995 *TSAR* 643.

Product Liability Act came into force in 1990 and now operates parallel to the general delictual claim of § 823 BGB. The Act deals with strict liability and holds the producer liable without fault. Among other things the Act introduces a broader definition of the term producer; only covers damage to property other that to the defective product itself; does not cover pain and suffering and sets out certain exceptions from liability. Besides the Act § 823 BGB still remains applicable in claims against the producer.

In South Africa the *Lex Aquilia* forms the basis of a product liability claim and the ordinary requirements need to be satisfied. Wrongfulness lies in the infringement of rights and a breach of a legal duty towards the public and fault is satisfied by showing that the plaintiff's damage was reasonably foreseeable and that a reasonable man would have guarded against it. Two questions are relevant for South Africa. First, do we want to adopt strict liability and second if indeed we do, do we proceed along traditional lines or do we want to adopt legislation?

In the light of the developments in Europe strict liability should certainly be the goal for South Africa. By application of the doctrine of *res ipsa loquitur* a gradual erosion of the fault principle in favour of strict liability might be achieved. The problem is, however, that the application of the doctrine is not universal to all accidents[166], the doctrine merely creates an inference of negligence and not a presumption of negligence and the doctrine does not **shift** the burden of proof from the plaintiff to the producer. Therefore, the plaintiff still has the difficult burden to prove that he has suffered damage due to the use of a defective product and that the defect existed at the time when the product was put into commercial use.

As was seen in the *Bayer*[167] decision, our Courts are willing to assist a plaintiff in a product liability case by applying the doctrine of *res ipsa loquitur*. The German experience, however, has shown that procedural devices such as the *Anscheinsbeweis* and the reversal of proof do not provide a permanent solution to the problem of the manufacturer's liability. The writer is of the opinion that in the long run legislation is the best way to bring about a rational and equitable system of strict liability. Due to the nature of the manufacturing

166 See above, Part C, *Sub* V, 2.

industry, however, such a development would have to wait a few years. Already faced with high interest rates, cheap imports and a very liberal Labour Relations, Act South African manufacturers would not be very amenable to such legislation. At this stage the best approach would be to leave it up to our courts to develop the law of product liability. If the development has reached a stage where it effectively comes close to strict liability, serious considerations could then be given to enact a product liability law based on the German model.

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167 See above , Part C, *Sub* V, 2.

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