

# LIABILITY FOR PRODUCTS IN THE CONSUMER PROTECTION BILL 2006: A COMPARATIVE CRITIQUE\*

Max Loubser  
BA LL.D. Phil (Oxon)  
Professor in Private Law, University of Stellenbosch

Elspeth Reid  
MA LLB DipLP  
Senior Lecturer in Law, University of Edinburgh  
Solicitor

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## 1 The background to reform

The Draft Consumer Protection Bill, recently published by the Department of Trade and Industry,<sup>1</sup> encapsulates a vision for a “new consumer law”,<sup>2</sup> which has as its objective the establishment of “a fair, accessible and sustainable marketplace for consumer products and services”.<sup>3</sup> The cultural change necessary to address South Africa’s lack of “a vibrant and strong consumer movement”<sup>4</sup> requires to be underpinned by legal certainty and accessibility. This is particularly important in areas of liability “characterised by imbalances in information and bargaining power between businesses and consumers”.<sup>5</sup> An important dimension to the proposed reform is therefore the creation of a strict liability framework to provide redress for consumers who have suffered harm due to defects in products. Until now, a consumer who was injured or who sustained property damage because of a safety defect in a product obtained redress from the producer or distributor only where it could be proved that the latter was at fault. Only three years ago, the Supreme Court of Appeal confirmed the fault requirement in relation to the manufacture, sale or distribution of goods and concluded that “if strict liability is to be imposed it is the legislature that must do it”.<sup>6</sup> In section

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<sup>1</sup> At <http://www.dti.gov.za/ccrdlawreview/DraftConsumerProtectionBill.htm>.

<sup>2</sup> As originally unveiled by the Department of Trade and Industry in its 2004 *Green Paper on the Consumer Policy Framework* (at <http://www.dti.gov.za/ccrdlawreview/conslawreview.htm>).

<sup>3</sup> Preamble to the Bill.

<sup>4</sup> *Green Paper* 7.

<sup>5</sup> *Green Paper* par 1.3. On the need to modernise consumer law in order to maintain consumer confidence see, eg, the UK White Paper *Modern Market: Confident Consumers* (1999) esp ch 6 at <http://www.dti.gov.uk/ccp/topics1/pdf1/consumerwp1999.pdf>.

<sup>6</sup> *Wagener & Cuttings v Pharmicare Ltd* 2003 4 SA 285 (SCA) per Howie JA par 38.

71 of the Bill, South Africa institutes a strict liability framework for compensation.

With the introduction of strict liability for products, South Africa will be brought into line with many other jurisdictions in the developed and developing world.<sup>7</sup> Whereas products liability was previously not regarded as a discrete category, the trend towards making separate provision gathered pace in the second half of the 20th century, reflecting an increased interest in broadening access to justice for consumers. In the 1960s, the American *Restatement (Second) of Torts* § 402A, provided the model for a distinct body of rules imposing liability on producers without subjecting the consumer to the exacting requirement of proving that the manufacturer was at fault.<sup>8</sup> Following the *Restatement* lead, many jurisdictions moved in the direction of strict, or stricter, forms of liability specifically for products. A landmark was reached in 1985 with the EC Directive on Product Liability<sup>9</sup> in implementation of which the member States of the European Union have introduced statutory frameworks for strict liability. This has been used extensively as a model, for example in the relevant sections of the Australian Trade Practices Act 1974, in the Pacific Rim generally, and in Latin America.<sup>10</sup> Meanwhile, in the United States, the continuing debate as to the appropriate level of liability for products culminated in § 2 of the 1998 US *Restatement Third, Torts: Products Liability*, which in effect combines a strict liability regime for certain types of product defect and fault-based liability for others. These developments form the background to analysis of the proposed South African legislation.

The framework chosen for South Africa appears to follow closely the European Directive. A strict liability regime is adopted, which makes no overt mention of fault, and indeed much of the wording appears to derive from the Directive and the UK Consumer Protection Act, 1987 based upon it. Given, however, that the experience of consumers in Europe, 20 years after the Directive, has been mixed, the essential question is whether the draft South African provisions can achieve their stated goal of establishing an effective system of redress for consumers.<sup>11</sup>

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<sup>7</sup> See the United Nations Guidelines for Consumer Protection, adopted in 1985 by Resolution 39/85 (available at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf)). The Guidelines aim to achieve adequate protection for consumers in all countries, “recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products”. There are many dimensions to the legal protection envisaged, but two of the prime objectives are “the protection of consumers from hazards to their health and safety” and “the promotion and protection of the economic interests of consumers”.

<sup>8</sup> For a comparison of European and Anglo-American perspectives on product liability prior to the 1960s, see Whittaker *Liability for Products* (2005) 5-6.

<sup>9</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products, OJ 1985 L210/29.

<sup>10</sup> For an overview of international developments see Reimann “Liability for Defective Products at the Beginning of the Twenty-first Century” 2003 51 *AmJCompL* 751 756 *et seq.*

<sup>11</sup> S 3 of the Bill.

## 2 What kind of liability is provided for?

Section 71(1) of the Bill provides that:

“Any producer, distributor or supplier of a good is strictly liable for any damage, as described in subsection (2), caused wholly or partly as a consequence of a product failure, defect or hazard in a good, or as a result of inadequate instructions or warnings provided to the consumer, and if in a particular case, more than one person is liable in terms of this subsection, their liability is joint and several.”

A “defect” is defined in section 1 as

“any characteristic of a good, component of a good, or aspect of a service supplied to a consumer, that renders the good, component, or service less useful, practicable or safe than persons generally are entitled to expect, having regard to the circumstances of the transaction”.

Thus the liability of producers, distributors and suppliers towards persons suffering damage as a result of a product failure or defect is clearly not limited to parties in a contractual relationship, and section 71(1) utilises concepts associated with the law of delict, albeit not exclusively; such as strict liability, damage, causation and joint and several liability. To be properly understood in the context of this section, these concepts require analysis in terms of the common law, in particular the law of delict, as discussed further below.

Most jurisdictions now regard product liability as a discrete area of delict or tort. The law of contract governs only actions by a purchaser in a direct contractual relationship with a producer or distributor.<sup>12</sup> The move from contract to tort in American product liability cases has been described as follows by Traynor J in *Greenman v Yuba Power Products Inc.*<sup>13</sup>

“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognised first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot be invoked to govern the manufacturer’s liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.”

An action in delict thus “short-circuits” the need for successive actions for breach of contract by the consumer against the retailer; the retailer against the wholesaler, and so on. The action in delict also obviates the

<sup>12</sup> Reimann “Product Liability in a Global Context: The Hollow Victory of the European Model” 2003 2 *European Review of Private Law* 128 144.

<sup>13</sup> 377 P 2d 897 (1963) 901.

need for the plaintiff to have acquired title of the product or to show reliance on the warranty of safety.

The South African Supreme Court of Appeal in the case of *Wagner v Pharmicare Ltd; Cuttings v Pharmicare Ltd*<sup>14</sup> effectively ruled out the development of common law strict liability rules by the courts, but took careful account of the debate on strict liability in academic literature and said of the arguments in favour “that virtually without exception they would hold good were imposition to be by the legislature”. The court indicated that legislation would be needed to produce a unified, comprehensive set of principles, rules and procedures for product liability, in contrast to an incremental, case-by-case development of such liability by the courts. The court noted that such reforming legislation would need to deal with issues such as the kind of products that would give rise to liability, the definition of defectiveness, the causing of harm by a combined use of products, the defences that should be available, and whether the damages recoverable should be the same as those recoverable with an Aquilian action.<sup>15</sup>

The essential questions posed by section 71 and related sections of the Consumer Protection Bill are therefore whether they create a comprehensive and logically coherent set of rules for strict product liability, as envisaged in the *Wagner* judgment; whether such rules are successfully grafted onto the South African law of delict; and whether the rules serve to promote the policy considerations underlying strict product liability.

### **3 What are the policy considerations underlying strict liability?**

No-fault liability of manufacturers or suppliers for harm resulting from defectively manufactured products, as set out in the Bill, rests on considerations of fairness and economic efficiency. The Preamble to the European Product Liability Directive states that

“liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production. . .”.

The arguments supporting this assertion are not considered in detail here, but the aspiration of achieving a fair apportionment of risk is essential background to the interpretation of the proposed legislation.

The ultimate consumer is normally unable to analyse or scrutinise products for safety, and implicitly takes it on trust that a product will not endanger life, health or property. In many cases manufacturing defects are in fact caused by the manufacturer’s negligence, but plaintiffs have difficulty proving it. Strict liability therefore comes to the aid of consumers harmed by defective products where proof of negligence

<sup>14</sup> 2004 4 SA 285 (SCA).

<sup>15</sup> Pars 30-35 of the judgment.

would be difficult or impossible.<sup>16</sup> The basic utilitarian or efficiency-based argument for strict liability is that

“the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur. . .”<sup>17</sup>

The manufacturer and other businesses forming part of the product supply chain can spread the costs of improved quality and safety control, either through insurance or through increased prices:

“The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”<sup>18</sup>

Apart from the “down-stream”, corrective or compensatory function of strict liability for defective products there is also an “up-stream”, preventative or deterrence function. In the USA, product liability litigation is seen as a powerful means to induce product safety, whereas in many other jurisdictions product safety is regarded as belonging primarily in the domain of public regulation.<sup>19</sup> The comment on the *Restatement Third, Torts: Products Liability* refers to the premise that tort law serves the instrumental function of creating safety incentives. Imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which sellers may escape their appropriate share of responsibility.

It should be acknowledged, however, that strict liability might not always achieve optimal economic efficiency. Some risks are unavoidable, particularly those arising from hidden design defects. A strict liability regime that holds the manufacturer automatically liable for harm resulting from defects might lead to manufacturers taking excessive precautions, pushing prices up beyond the level which reflects the potential costs to society of product defects, or driving producers out of the market. Also, product innovation may be inhibited by the threat of high damages awards based on strict liability.<sup>20</sup> Furthermore, from an insurance point of view, manufacturers are not always best placed to assess particular risks and to take out appropriate third-party insurance.<sup>21</sup> As far as physical damage to property is concerned, the consumer, who has more information about the value of the property and the uses

<sup>16</sup> US *Restatement Third, Torts: Products Liability* § 2 comment (a).

<sup>17</sup> *Henningsen v Bloomfield Motors Inc* 161 A 2d 69 (1960) 81.

<sup>18</sup> Per Traynor J in *Escola v Coca-Cola Bottling Co of Fresno* 150 P 2d 436 (1944) 440.

<sup>19</sup> Reimann 2003 2 *European Review of Private Law* 152-153. On the function of special product liability rules see generally Grubb (series ed) Howells (gen ed) *Butterworths Common Law Series: The Law of Product Liability* (2000) pars 1.25-1.33.

<sup>20</sup> Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* 5 ed (2003) 620; Hodges “Development Risks: Unanswered Questions” 1998 61 *MLR* 560.

<sup>21</sup> See generally Stapleton *Product Liability* (1994) ch 5.

to which it is put, may be in a better position to take out insurance covering the potential loss (although first-party or loss insurance is probably beyond the reach of many of the South African consumers whom this statute is designed to protect).

The debate on the policy considerations underlying strict product liability focuses to a large extent on the concept of reasonableness. Can the imposition of strict product liability be said to be fair and equitable if it disregards the reasonable foreseeability of harm? Under a fault-based system the negligence requirement, based mainly on the reasonable foreseeability of harm, acts as an important filter in the evaluative process to decide whether liability should be imposed. Would the elimination of the fault requirement mean that the fundamental requirement of reasonableness is discarded and that all risk of harm is indiscriminately transferred to manufacturers or suppliers? The answer is no: strict liability does not mean absolute liability and other filters for liability, based on reasonableness, should remain in place.

The argument made here is essentially that the criterion of “defectiveness” for the purposes of strict product liability should be linked to the requirement of wrongfulness, as understood in the South African law of delict. No-fault product liability still requires an assessment of wrongfulness, focusing on the qualities of the product, with reference to factors such as the potential for harm, benefits, costs and social utility of the product, in a process sometimes called “risk-utility balancing”. Society does not benefit from products that are excessively safe — for example, knives with blunt edges or cars designed with maximum speeds of 30 kilometres per hour — any more than it benefits from products that are too dangerous. Society benefits most when the optimal or reasonable standard of product safety is achieved. The setting of this standard essentially involves the element of wrongfulness.

In the context of product liability not only the characteristics of the product but also consumer behaviour should be tested according to a standard of reasonableness. It is fair to require that individual consumers bear reasonable responsibility for proper use of products. This prevents careless consumers from being subsidised by more careful ones, when the former are paid damages out of funds to which the latter are forced to contribute through higher prices.

#### **4 The appropriateness of reform to the existing structure of the law**

In the interest of legal certainty and logical coherence, the reform of the current fault-based delictual liability for defective products, as envisaged in the Consumer Protection Bill, should be as consistent as possible with the existing structure of the law, in particular the law of delict. The South African law of delict recognises wrongfulness and fault as separate elements of delict. The nature of and distinction between

these elements may be contentious in certain aspects,<sup>22</sup> but there is broad agreement on the distinct requirements of wrongfulness and fault. In the context of product liability, fault essentially means negligence, because there is mostly no question of intentional causing of harm.

In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,<sup>23</sup> a case where harm was caused to patients by a defective local anaesthetic (Regibloc), the elements of wrongfulness and negligence were distinguished as follows:

“In deciding the issues raised by the appeal it must be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent’s control, that it was administered in accordance with the respondent’s accompanying instructions, that it was its defective condition which caused the alleged harm and that such harm was reasonably foreseeable. It must also be accepted, as far as the law is concerned, indeed it was not disputed, firstly, that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured Regibloc being administered to the first appellant and, secondly, that that duty was breached. In the situation pleaded there would therefore clearly have been unlawful conduct on the part of the respondent: *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*.<sup>24</sup> The essential enquiry is whether liability attaches even if the breach occurred without fault on the respondent’s part.”

The court thus accepted that the manufacturer had wrongfully caused the harm to patients by selling products not conforming to its own specifications, in other words, products with a manufacturing defect. Liability could have been imposed had proof of negligence not been required

If the fault requirement for product liability is discarded, as intended by the Bill, the plaintiff would need to prove that; (1) a product (2) that is defective (3) caused (4) damage or harm (5) wrongfully. The requirements of defectiveness and wrongfulness are linked, because damage or harm resulting from the use of a product is not necessarily wrongfully caused — the concept of “defectiveness” plays a normative and limiting role in the process of determining whether the causing of harm by the manufacturing and supply of a product should be considered wrongful. This linkage between the concepts of wrongfulness and defectiveness in the context of product liability will now be examined in detail.

#### 4 1 Wrongfulness in the SA law of delict

The test for wrongfulness involves application of the standards of “legal convictions of the community” or the *boni mores*. This is generally recognised to be a hindsight-test — an *ex post facto* assessment of all the facts and a balancing of the interests involved, to determine whether the causing of harm unreasonably infringes the rights or interests of the plaintiff, or constitutes an unreasonable breach of duty on the part of the

<sup>22</sup> See generally Fagan *Negligence* in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in South Africa and Scotland* (2004) 498.

<sup>23</sup> 2004 4 SA 285 (SCA) per Howie P par 7.

<sup>24</sup> 2002 2 SA 447 (SCA) (footnote added).

defendant. The nature of that duty may be different according to whether the liability is fault-based or strict.<sup>25</sup>

In the context of product liability, the focus is on the existence of a duty not to cause harm to a consumer by the manufacture or supply of a defective product. Here wrongfulness essentially involves the question whether the defendant unreasonably caused harm to a consumer and, secondly, whether the law of delict should intervene.<sup>26</sup> To answer the general policy question whether the law of delict should intervene, with the effect of shifting the burden of harm from the plaintiff to the defendant, regard is had to a wide spectrum of considerations, including whether intervention by the law of delict could result in “opening the floodgates of liability”.

Wrongfulness in the context of product liability is closely linked to the question of defectiveness, because the causing of harm is not always necessarily wrongful in itself — the concept of a “defective product” plays a normative role in the process of determining whether the harm resulting from the manufacturing and supply of a product should be considered wrongful.

In *Herschel v Mrupe*,<sup>27</sup> Van den Heever JA stated that harm caused by a defective product involved the infringement of the rights of the user and a breach of duty by the manufacturer:

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

And in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*,<sup>28</sup> the court characterised the causing of damage to a consumer by a “hazardous” product as wrongful:

“If a manufacturer produces and markets a product without conclusive prior tests, when the utilisation thereof in the recommended manner is potentially hazardous to the consumer, such negligence on the part of the manufacturer may expose him to delictual liability to the consumer. . .Although the historical origin of the manufacturer’s liability is an agreement between the manufacturer and the distributor, the liability, which arises from the manufacture and distribution of the product, extends via the other contracting party to any third party who utilises the product in the prescribed manner and suffers damage as a result thereof. It follows as a matter of course that a manufacturer who distributes a product commercially, which, in the course of its intended use, and as the result of a defect, causes damage to the consumer thereof, acts wrongly and thus unlawfully according to the legal convictions of the community.”

<sup>25</sup> For a recent discussion of the nature of the duty when liability is based on negligence whether the duty should be described as a duty not to be negligent see Fagan *Negligence* 508.

<sup>26</sup> Neethling, Potgieter & Visser *Law of Delict* 5 ed (2006) 34.

<sup>27</sup> 1954 3 SA 464 (A) 486F.

<sup>28</sup> 2002 2 SA 447 (SCA) pars 64 470B-C/D and 66 D/E-G.

What do the standards of “the legal convictions of the community” or *boni mores* mean? These standards have been applied in a long line of cases by the Supreme Court of Appeal and have been usefully summarised in a few recent judgments.

In *Du Plessis v Road Accident Fund*,<sup>29</sup> the (admittedly quite different) question before the court was whether the right to support of one partner in a same-sex relationship could form the basis of a claim for loss of support against the person who negligently caused the death of the other partner, or, put differently, whether the killing of the deceased had to be considered to have been a wrongful act as against the plaintiff. The court held that the question had to be answered in the light of the prevailing *boni mores*. The legal convictions of the community were informed by the norms and values of society as embodied in the Constitution of the Republic of South Africa, Act 108 of 1996, which norms and values in this case indicated a wrongful infringement of the plaintiff’s right to support.<sup>30</sup>

In another recent case, *Minister of Safety and Security v Hamilton*,<sup>31</sup> the court referred back to the formulation in *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)*<sup>32</sup> to assess the wrongfulness or otherwise of an omission or failure to act:

“[9] . . . An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.

[10] In applying the concept of the legal convictions of the community the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the Legislature and Judges.”

The concepts of “the legal convictions of the community” and *boni mores* purport to be objective, normative standards for determining wrongfulness, but conclusions reached on the basis of these standards alone would be impenetrable to analysis and unverifiable. Courts do not hear evidence on the content of the legal convictions of the community or the *boni mores*. These are general standards or guidelines used by the

<sup>29</sup> 2004 1 SA 359 (SCA).

<sup>30</sup> Pars 17, 18 368E-F and 369A/B-C.

<sup>31</sup> 2004 2 SA 216 (SCA) par 16.

<sup>32</sup> 2003 1 SA 389 (SCA) per Kriegler J. Similar factors are noted in the discussion of wrongfulness in *Midgley & Van der Walt Delict* in LAWSA VIII part 1 first re-issue par 51, which concludes: “It is now openly acknowledged that the enquiry into wrongfulness involves considerations of public and legal policy and that courts are required to render a value judgment as to what society’s notion of justice demands, either to protect the plaintiff’s interests or to give judicial sanction to the defendant’s conduct.”

courts to assess reasonableness in the particular circumstances of the case, with the perspective of hindsight. Wrongfulness in the final analysis involves a value judgment, reached by (what should be) an open and structured process of reasoning, by reference to the proven facts; the relationship between the parties; the relevant policy considerations; the relevant provisions of the Constitution and of other legislation; the overall costs; the risks and utility of the defendant's conduct; and the possible alternatives to such conduct.<sup>33</sup>

## 4 2 Defectiveness and wrongfulness linked

As noted above, the concepts of defectiveness and wrongfulness are linked in that defectiveness plays a normative and limiting role in determining whether the causing of harm should be considered wrongful. It follows that defectiveness should be assessed in terms of the same general standards — in other words, the legal convictions of the community, *boni mores* and general reasonableness, as applied to the nature and qualities of the product and in particular its risks and benefits.

To date the South African law of delict has not developed detailed rules for different forms of product defects (manufacturing defects, design defects, or defects which derive from inadequate instructions or warnings issued with a product) and the courts apply the general principles relating to wrongfulness in this regard. Some commentators have interpreted the approach of the courts to mean that a product will be considered defective and damage to be wrongfully caused if the product is *unreasonably dangerous*. Van der Merwe & De Jager<sup>34</sup> have said the following on the application of the wrongfulness test in this regard:

“The test is flexible enough to take into account such factors as the type of product, the nature of the manufacturer's business enterprise, the customs and practices prevailing in a particular trade or industry, the amount of knowledge and expertise of potential purchasers and users of the product, abnormal use, and the specific stage in the production process during which a defect originated. The last mentioned factor may influence the duties of a manufacturer in different ways. At the stage of planning or design the manufacturer must take into account the most recent knowledge available in his field.”

## 4 3 Wrongfulness and negligence distinguished

Wrongfulness and negligence are, however, recognised as separate elements of delict. Boberg<sup>35</sup> explained the “distinction between reasonableness as a criterion of wrongfulness and reasonableness as a criterion of negligence” as follows:

<sup>33</sup> See, eg. *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) par 7; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) pars 14-32; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) par 6; *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) pars 11 and 31; *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA) par 13.

<sup>34</sup> “Products Liability: A Recent Unreported Case” 1980 *SALJ* 83 88.

<sup>35</sup> *The Law of Delict I* (1984) 269-270 and see also 33 38-40 273 and 381.

“Where wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged *ex post facto* and in the light of all relevant circumstances including those not foreseeable by the actor or beyond his control. Here the emphasis is upon the *effect* of the actor’s conduct, and a finding of wrongfulness expresses the law’s disapproval of the result that he produced. With negligence, on the other hand, the enquiry is whether the actor himself behaved unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him. Here the emphasis is upon the *actor’s role* in bringing about a consequence that has already been branded wrongful, and a finding of negligence expresses the law’s disapproval of the part that he personally played in producing it.”

Negligence entails the duty “to avoid reasonably foreseeable harm” and it is generally accepted that negligence involves a foresight-test: did the defendant-producer in the process of production take reasonable care to prevent foreseeable harm, in other words, did the producer conform to the standard of a reasonable person to foresee and prevent harm? The concepts of negligence and wrongfulness are essentially distinguished by a difference in perspective.<sup>36</sup> The test for negligence focuses on what is reasonably foreseeable and preventable at the time when the product was put on the market, whereas the test for wrongfulness and the linked question of defectiveness of the product focus on *all* the circumstances with hindsight, including the standard intended for the product by the manufacturer and the risks and benefits of the product in the light of the harm that it caused.

Under a fault-based system the negligence requirement acts as an important filter in the evaluative process to decide whether liability should be imposed. If the requirement of negligence is discarded to create strict liability, the question whether the product defect was reasonably foreseeable or discoverable is no longer relevant. In the assessment of defects relating to manufacturing, design or warnings/instructions, criteria such as “the standard intended for the product by the manufacturer”, “a reasonable alternative design” or “the provision of reasonable alternative instructions or warnings” should be applied with the knowledge of hindsight. The elimination of the fault requirement does not, however, mean that all risk of harm is indiscriminately transferred to manufacturers or suppliers. Strict liability does not mean absolute liability, and other filters based on reasonableness remain in place, in the form of the requirements of wrongfulness and “defectiveness”. No-fault product liability still requires an assessment of reasonableness, but it is done with hindsight, involving a process sometimes referred to as “risk-utility balancing”.

This method of assessment can be illustrated by reference to other areas of liability: if the question is whether a local authority is liable for harm caused by public property in a state of disrepair, such as a pedestrian’s injury resulting from a hole in a pavement,<sup>37</sup> a child’s injury

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<sup>36</sup> See Fagan *Negligence* 527.

<sup>37</sup> *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA).

on a broken merry-go-round,<sup>38</sup> or a shop-owner's loss through flooding from a burst pipe,<sup>39</sup> the wrongfulness and the negligence issues both involve consideration of the extent of the risk and of the possible harm, the cost of repair and the resources available to the local authority. However, wrongfulness will be assessed with knowledge of the state of disrepair and the resultant harm gained by hindsight. If, with such knowledge, repair would have been reasonable to expect, the failure to prevent the harm indicates that it was wrongfully caused. Where the local authority was unaware of the state of disrepair and could not reasonably have foreseen it, perhaps owing to the informational and organisational constraints under which it operates, the failure to repair and to prevent the harm is not negligent, but, under a strict liability regime the local authority will nevertheless be liable. Likewise, under a strict liability regime there is liability for causing harm to an unforeseeable plaintiff, whereas under a negligence-based regime there is no such liability.<sup>40</sup>

The relevance of these interrelated concepts of wrongfulness, defectiveness and negligence to the proposed reform of products liability is considered further below.

## **5 What is a “product failure, defect or hazard” according to the Consumer Protection Bill?**

The terms “product failure, defect or hazard” are not defined in the Bill. The definition of “defect” in section 1 broadly follows the wording of article 6 of the European Directive and closely follows the wording of section 3 of the UK Consumer Protection Act. A “defect” is a

“characteristic . . . that renders the good, component, or service less useful, practicable or safe than persons generally are entitled to expect, having regard to the circumstances of the transaction”.

(There is also a cross reference in section 1 to section 58(4) and (5), which is plainly incorrect in the current draft, but perhaps relates to section 50(4) and (5) dealing with the form of notices for persons of limited literacy or comprehension).

Furthermore, under the heading “General right to fair value, good quality and safety”, section 61(3) provides:

“The consumer of any goods has a right to receive goods that are free of any product failure, defect or hazard that would render the utility, practicability or safety of that good to be less than persons are generally entitled to expect, having regard to all the circumstances of its supply. . .”.

The wording of section 61(3), like that of the definition of “defect” in section 1, closely follows the wording of section 3(2) of the UK statute (not so closely article 6 of the Directive). Defects are qualities which

<sup>38</sup> *Cape Town Municipality v April* 1982 1 SA 259 (C).

<sup>39</sup> *Mostert v Cape Town City Council* 2001 1 SA 105 (SCA).

<sup>40</sup> *Workmen's Compensation Commissioner v De Villiers* 1949 1 SA 474 (C).

render the safety of the product “less than persons are generally entitled to expect having regard to all the circumstances of its supply, including but not limited to” certain specific considerations. Three factors are then listed, namely packaging and instructions; reasonably anticipated use; and time when the good was manufactured and supplied. There is a supplementary provision in section 61(4)(a) to the effect that the latent or patent nature of the defect is irrelevant and in section 61(4)(b) to the effect that the production of subsequent safer goods does not make older goods unsafe (an example might be older cars which lack the airbags fitted in newer models). In addition, section 61(5) contains the following general direction:

“A person must not produce or distribute an unsafe good, or knowingly supply such a good to a consumer.”

This final provision is puzzling: for its non-formulation of a right or remedy; for its introduction of the apparently separate category of “unsafe good”; and for prohibiting only the act of “knowingly” supplying such an “unsafe good”, thereby creating, if anything, liability only for intentional conduct. Similarly, a general good faith requirement on producers, set out in section 4(4), not to engage in unconscionable or misleading conduct, appears to add little in concrete terms to the remedies available to consumers.

The apparent purpose of section 61 is to set out contractual rights as between a “consumer” and “supplier” (both terms are defined in section 1), rather than general rules for strict liability outside a contractual relationship. Its definition of “product failure, defect or hazard” is substantially similar to the definition of “defect” in section 1 (thereby redefining an already defined term), but in listing the three factors (noted in the paragraph above), it elaborates on the circumstances to be taken into account to determine such a failure. This elaboration is helpful for giving more specific content to the circumstances relevant to assessing a failure, defect or hazard related to the utility, practicability or safety of a product.

Since the definition of “defect”, turning on what “persons generally are entitled to expect”, broadly follows the wording of the European Directive and closely follows that of section 3 of the UK Consumer Protection Act, it is important to consider the European experience of this “consumer expectations” or “legitimate expectations” approach to determining defectiveness.

## 5 1 The consumer expectations test: a workable standard?

The application of the “consumer expectations” or “legitimate expectations” test for defectiveness as prescribed in the Directive and contained in the UK legislation, and as also used in some American product liability cases, presents obvious difficulties. For instance, are consumers entitled to expect more than the exercise of reasonable care,

skill and knowledge? The test purports to be an objective, normative standard for determining defectiveness, but in practice the courts conduct an objective enquiry into the attributes, risks and benefits of a product and, inevitably, the application of the consumer expectations test in the final analysis involves a value judgment.

Prosser & Keeton<sup>41</sup> are critical of the consumer expectations test as an independent general standard for defectiveness:

“The meaning is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense he does not “expect” to be adversely affected by a risk or hazard unknown to him. In another sense he does contemplate the “possibility” of unknown “side effects”. In a sense the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury.”

Davis<sup>42</sup> has identified the reasons why most US courts have rejected the consumer expectations test, in particular where the alleged defect relates to design:

“Few courts adhere closely to the letter of section 402A’s consumer expectations test in proving design defect. The test has proved unworkable for a variety of reasons. First, it connotes a contract-based liability, encouraging the jury to rely intuitively on principles of bargaining and warranty. Second, if the product contains a defect which is apparent or obvious, the consumer expectations arguably include the apparent danger, preventing liability and therefore discouraging product improvements which could easily and cost-effectively alleviate the danger. Third, bystanders, who are widely recognized as protected by both tort and contract theories of products liability regardless of privity, cannot be said to have any expectations about a product which causes them injury.

Perhaps the most important criticism of the consumer expectations test as it relates to design defects is the impossibility of the task it requires: to define just what an ordinary consumer expects of the technical design characteristics of a product. While it can be assumed that consumers expect a certain level of safety, how is that level defined when it comes to specific design criteria? For example, what do consumers expect of the structural soundness of one type of metal as opposed to another with slightly different characteristics that, if used, would require changes in still other aspects of the design? If the ordinary consumer can be said reasonably to expect a product to be “strong,” how strong is strong? Is a general impression of strength or quality sufficient when it comes to technical design features? If so, how is that impression measurable against the actual condition of the design feature in question? These difficult questions led many courts to reject the consumer expectations test as the sole test for defective design.”

Stapleton,<sup>43</sup> similarly, is critical of the consumer expectations test as a

<sup>41</sup> *The Law of Torts* 5 ed (1984) 699 (footnote omitted).

<sup>42</sup> “Design Defect Liability: In Search of a Standard of Responsibility” 1993 39 *Wayne L Rev* 1217 236-237 (footnotes omitted).

<sup>43</sup> “Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective” 2000 39 *Washburn LJ* 363 376-378.

normative standard, describing it as “impenetrable to analysis”. It cannot mean that the courts must somehow determine the actual expectations of consumers generally. This would be a strange legal standard to adopt. People routinely miscalculate risks and sometimes people have an irrational expectation that nothing will or can go wrong. A legal norm cannot coherently or fairly be based on such a volatile standard. If it is accepted that the consumer expectations test means that the courts should determine what consumers are *entitled* to expect, the test is still unsatisfactory, because, as a normative concept, it cannot be rationalised: one may simply assert that in one’s opinion the design did not meet consumer expectations. As Stapleton points out, the consumer expectations test in effect requires a subjective value judgment by the court on what consumers are reasonably entitled to expect of a product. The risk-utility test, on the other hand, requires a balancing of certain “objective” factors, although in the end it comes down to the identical value judgment: did the product present an unreasonable risk to consumers?

Stapleton also shows that the difference between a hindsight perspective and a foresight perspective is critical to the application of the consumer expectations test in the case of an undiscoverable product flaw. The Thalidomide cases in Europe illustrate that if the level of safety of a product is assessed with hindsight according to consumer expectations, the result is a foregone conclusion. Consumers and the community generally clearly do not expect pregnancy drugs to deform babies. The crucial issue is therefore the time at which the level of safety of the product is to be assessed: at the time when it was supplied, or at the time of trial when its egregiously harmful effects are known?

## 5.2 The consumer expectations test: does it really entail strict liability?

Commentators on the European Directive have pointed out that the language of strict liability which it contains is not followed through, particularly in respect of design and warning or instruction defects. Article 6 requires the reasonable expectations of the consumer to be assessed in the light of “the use to which it could reasonably be expected that the product would be put”. The presentation of the product is a further consideration, and this is expanded in section 3(2)(a) of the UK Consumer Protection Act to include, as in the South African Bill,

“the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product”.

These phrases seem to indicate a negligence standard based upon the reasonableness of the manufacturer’s design or warning choices (perhaps based upon the rationale that a finding of defectiveness in design may

force the manufacturer to change the product design or even to stop supplying the product).<sup>44</sup>

The emphasis on what the consumer is “entitled” to expect, as opposed to actual consumer expectations, draws the courts back to a standard of reasonableness and the extent to which the conduct of the producer meets reasonable expectations is often considered relevant. Factors such as the costs of improving the safety of the product and any consequent loss in utility are therefore taken into account. Moreover, article 6(c) expressly provides that “the time when the product was put into circulation” is a consideration in assessing whether it is defective, thus permitting producers to escape liability by arguing that they have conformed to industry standard practice, in other words that they were not negligent.

In addition, the European Directive allowed member States the option of excluding the so-called “development risks” defence, so that the producer is 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”.<sup>45</sup>

However, most European member States retained this defence (which is also provided for in section 71(3)(c)(ii) of the Consumer Protection Bill), with the consequence that producers were provided with another means of escaping liability if they established absence in negligence in their conduct. This defence is discussed further in paragraph 11 below.

In the United States, the *Third Restatement* distinguishes between manufacturing, design and warning defects: a product is defective in terms of § 2(a) when at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. The definition of design and warning defects in § 2(a) and § 2(b) refers to “foreseeable risks of harm”; “a reasonable alternative design” and “the provision of reasonable instructions or warning”. The comment on these sections states that, in relation to these designs and warning defects (as opposed to manufacturing defects), the law has returned “to a reasonableness test traditionally used in determining whether an actor has been negligent”. This gradual retreat to the terminology of fault in American product liability law may be partly attributable to a desire to protect manufacturers, but it also derives from the very nature of design, warning and instruction defects that are almost impossible to define except in relative terms.<sup>46</sup>

It appears therefore that neither the US *Third Restatement* nor the European Directive has entirely eliminated elements of fault-based liability. This raises the question whether the proposed South African

<sup>44</sup> Grubb (series ed) Howells (gen ed) *Butterworths Common Law Series: The Law of Product Liability* (2000) 8.

<sup>45</sup> Art 15(b).

<sup>46</sup> See Reimann 2003 51 *AmJCompL* 778. On the tendency towards a risk/utility analysis see Stapleton *Product Liability* 235-236.

legislation, incorporating the consumer expectations test, does in reality provide for strict liability, as it professes to do. Could a producer, distributor or supplier evade strict liability if the design, warning or instruction defect was not reasonably foreseeable?

### 5 3 The standard for determining a defect in section 71

The measures contained in the Bill fail in the key requirement of achieving a workable standard for determining the defectiveness of a product. Section 71 refers to a “product failure, defect or hazard”, but only “defect” is defined. As discussed above, the European and US experience of the “consumer expectations” test adopted in this definition has opened up worrying questions as to its application. Moreover, there is a logical and necessary linkage between the standard for determining defectiveness of a product and the requirement of wrongfulness in the South African law of delict. In the absence of such a linkage there is no clear distinction between a foresight and a hindsight approach to establishing defectiveness; and a standard based on what persons generally are entitled to expect may well re-introduce elements of negligence, contrary to the stated aim of section 71 to introduce strict product liability. The introduction of a new and apparently independent standard, based on what “persons generally are entitled to expect”, creates uncertainty about the distinction, if any, between this standard and the “legal convictions of the community” or *boni mores* standard for determining wrongfulness.

For these reasons it cannot be said that the provisions on defectiveness of products contained in the Bill constitute a logically coherent set of rules that would effectively and consistently impose strict liability for damage caused by defective products. Moreover, the standard which the Bill purports to adopt cannot readily be grafted on to the principles of the South African law of delict.

What should be done? It is suggested that the definition of “defect” should be amended to do away with the “consumer expectations” test for defectiveness and to provide instead for the assessment of defectiveness and wrongfulness in terms of a general standard of reasonableness, assessed with hindsight. Specific reference to a hindsight approach will make it clear that producers, distributors and suppliers cannot evade liability on the ground that the defect was not reasonably foreseeable at the time of manufacture or supply.

There should be strict liability for the wrongful causing of harm by a defective product, with provision for a non-exclusive list of factors that could be taken into account by the courts in assessing defectiveness and wrongfulness, in much the same way as section 61(3) and section 61(4) of the Bill already provide for certain factors of this nature. Factors should include:

- the standard intended for the product by the producer;

- standards or duties prescribed by legislation for the product;
- the possible prevention of the harmful effect of the product by alternative manufacturing process or design;
- the risk, benefit, utility and cost of the product;
- the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to doing or refraining from doing anything with or in relation to the product (section 61(3)(a) contains a corresponding formulation);
- what might reasonably be expected to be done with or in relation to the product (section 61(3)(b) contains a corresponding formulation); and
- the time when the product was manufactured or supplied (section 61(3)(c) contains a corresponding formulation).

Broadly stated, the assessment of defectiveness and wrongfulness in terms of the factors just listed amounts to a cost-benefit-risk-utility analysis, with a hindsight perspective, to establish whether the product itself was unreasonably dangerous or the instructions or warnings accompanying the product were unreasonably deficient. This approach would be consistent with the current methodology of South African courts in assessing wrongfulness. The respective weight to be attached to the various listed factors in assessing defectiveness and wrongfulness will be in the discretion of the court.

The adoption of a unitary standard for determining defectiveness is not disputed (although it must be recognised that as currently drafted, that standard is unsatisfactory). There should be no rigid distinction between manufacturing, design and warning defects. The categorisation of defects would introduce uncertainty, because the categories will inevitably overlap.<sup>47</sup> But in practice, notwithstanding a unitary standard for defectiveness, different approaches are likely to be adopted according to the type of alleged defect at issue, as was the American experience of interpreting the *Restatement (Second) of Torts*.<sup>48</sup> In respect of manufacturing defects, the intended design and the operation of other products of the same type is likely to carry the most weight, whereas in relation to alleged design or warning defects, a cost-benefit-risk-utility approach to assessing the design or warning is likely to be followed.

<sup>47</sup> See, eg, *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk & Ciba-Geigy (Edms) Bpk* Case No I 5452/1976 (TPD) unreported, discussed by Van der Merwe & De Jager "Products Liability: A Recent Unreported Case" 1980 *SALJ* 83 89-90. The product in issue was a herbicide harmful to the plaintiff's "waxy" maize (an exotic variety not officially registered as a seed variety in South Africa) but not to registered varieties of maize. It could thus be regarded as suffering from a manufacturing defect (it was intended to be safe for all varieties of maize but a feature of the manufacturing process meant that it was damaging to some varieties); a design defect (it was designed to be safe for all varieties of maize but a feature of its design meant that it was in fact damaging to some varieties); or a warning defect (it was not intended to be safe for all varieties of maize and therefore required warnings for use with exotic varieties).

<sup>48</sup> See Van Gerven, Lever & Larouche *Cases, Materials and Text on National, Supranational and International Tort Law - Common Law of Europe Casebooks* (2000) par 6.3.4.

As it stands, the Bill in one instance provides for an absence-of-negligence defence, in the form of the “development risk defence”. This allows the defendant to raise the issue that the state of scientific and technical knowledge did not allow discovery of the defect at the time when it was under the defendant’s control. This exception to the general imposition of strict liability is supported for reasons considered further below.

It is suggested that the linking of defectiveness and wrongfulness on the basis of a general criterion of reasonableness, as outlined above, will promote clarity, predictability and coherence in product liability cases, not least because it fits into the existing structure of the law of delict and utilises the well-developed concept of wrongfulness. This approach will not, of course, remove all subjectivity from the assessment of defectiveness and wrongfulness. As Stapleton<sup>49</sup> has pointed out, in the application of many a legal standard, reasonable minds can differ and the difference cannot always be analysed definitively. Ultimately, the general reasonableness or cost-benefit-risk-utility analysis still requires a value judgment, but there should be a structured methodology for arriving at such a judgment.

#### 5 4 Suggested amendments to section 71 and the definition of “defect” in section 1

For the reasons set out above it is suggested that the provisions on strict liability for harm done by a defective product, as well as the definition of “defect” in the Consumer Protection Bill should be amended to read as follows (suggested deletions indicated by strike-through and additions by italics):

##### Section 71(1):

“Any producer, distributor or supplier of a good is ~~strictly~~ liable for any damage, as described in subsection (2), caused wholly or partly as a consequence of a ~~product failure~~, defect in the good ~~or hazard in a good, or as a result of inadequate instructions or warnings provided to the consumer~~, *whether or not there is intent or negligence on the part of the producer, distributor or supplier*; and if in a particular case more than one person is liable in terms of this subsection, their liability is joint and several.”

##### Section 1:

“‘defect’ means any characteristic of a good, *or component of a good, or aspect of a service supplied to a customer*, that renders ~~the good, component, or service less useful, practicable or safe than persons generally are entitled to expect~~, the causing of damage by the good wrongful, having regard to *all* the circumstances of the transaction, ~~subject to s. 58(4) and (5)~~; *including but not limited to*

- a) the manner in which, and the purposes for which, that good has been marketed, packaged and displayed, and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the good;
- b) the use of any trade description or mark, any instructions for, or warnings with respect to the use of that good;
- c) the range of things that might reasonably be anticipated to be done with or in relation to that good;

<sup>49</sup> 2000 39 *Washburn LJ* 363 376-378.

- the time when the good was manufactured and supplied;
- d) the production standards intended for the good by the producer;
- e) any production standards prescribed by legislation for the good;
- f) any measures available to the producer for the prevention of the harmful effect of the good;
- g) the possibility that the producer could reasonably have eliminated the harmful effect of the good by alternative manufacturing process, design or otherwise, taking into account factors such as the risk, benefit, utility and cost of the good;
- h) what might reasonably be expected to be done with or in relation to the good.”

## 6 Who is consumer?

The South African statute casts the net of consumer protection more widely than the European model. While the Directive relates only to products of a type ordinarily intended for *private* use or consumption and used by the injured person mainly for *private* use or consumption,<sup>50</sup> the statute has no such exclusion — whether in relation to its provisions generally or to the liability provisions specifically. Small businesses are taken within the definition of consumer, since this may include juristic persons, subject to separately determined upper limits on turnover and the value of the particular transaction.<sup>51</sup> In Europe, losses suffered to commercial property are generally adequately insured and are of a very different order from those to consumer property. Moreover, commercial consumers normally have ready access to legal assistance in order to pursue contractual and delictual claims. Since the same assumptions cannot be made of small businesses in South African, their inclusion in the framework of the statute is to be welcomed.

## 7 Who is liable?

Delictual liability does not arise at common law against a distributor of a defective product — occupying an intermediate position in the supply chain — unless it has in some way been at fault, as for example when it was required to inspect the product and failed to detect the defect. In some situations, however, the injured consumer is unable to identify the producer of defective goods, and, leaving aside contractual remedies against the seller, is therefore left without a remedy in delict. It is central, therefore, to a strict liability regime that liability should be imposed upon others in the supply chain as well as the ultimate producer of defective goods.

The strict liability provisions in section 71(1) thus apply to “any producer, distributor or supplier”, all terms as defined in section 1 of the Act. “Supplier” in particular has a wide meaning, in that “supply. . . includes sell, lease, exchange, hire, or hire-purchase”, as well as the provision of services. Thus those who lease out goods such as cars are liable in the same way as if the goods were manufactured by them. However, it is not clear how by “hire-purchasing” goods one can in any way be regarded as “supplying” them, although it is possible that the

<sup>50</sup> Art 9.

<sup>51</sup> S 5(2)(b).

wording is intended to mean “enter into a hire-purchase agreement to supply”. One further difficulty is how this wording affects the common triangular arrangement whereby a finance company buys goods from a retailer in order to supply them to a customer on hire purchase. The UK statute, for example, specifically removes the finance company from liability in such a situation as an “ostensible supplier”.<sup>52</sup> The draft South African wording, by contrast, would appear to leave it open that the retailer might be regarded as a distributor in this context *and* the finance company as the actual supplier (unless the latter can invoke the defence under section 71(c) that it was unreasonable to expect that it should have discovered the product defect). It must be questioned whether it was intended so to extend strict product liability to credit providers.

Rather puzzlingly, section 1 also defines “importer” as one who brings goods into the Republic of South Africa, and an implied warranty of quality is imposed, *inter alia* upon importers by section 62. However, section 71 does not expressly extend liability to this category, except in so far as that party can be regarded as a distributor or supplier in any event.<sup>53</sup>

The European Directive excludes liability from those who do not produce goods for economic purposes or who manufacture or distribute goods other than in the course of business.<sup>54</sup> The exact extent of that exclusion has not been entirely certain, and the question has arisen whether the Directive applies to organisations which provide public services but are regarded as operating a business that is commercial in character.<sup>55</sup> Section 5(5) of the South African statute removes any doubt in this area by specifically including suppliers who operate “on a for-profit basis or otherwise”. This has important implications in extending liability to public organisations such as those providing health care and services. At the same time, the definition of a “supplier” in section 1 as one who supplies goods etcetera “in the ordinary course of business” would appear to exclude, for example, individuals selling second-hand goods privately, and persons from whom the defective goods have been stolen.

## 7 1 Joint and several liability of producers, distributors and suppliers

Section 71(1) of the Bill follows the American Restatement<sup>56</sup> and, in

<sup>52</sup> S 46(2).

<sup>53</sup> Cf the European Directive which expressly extends the definition of producer and consequently liability to include those who import goods into the EC from outside the Community (art 3(2)).

<sup>54</sup> Art 7(c).

<sup>55</sup> Eg, in *Veedfald v Århus Amtskommune* Case (C203/99), 2001 ECR I-3569, 2003 1 CMLR 41, a hospital run by the defendant health authority damaged a kidney while preparing it for transplant to the claimant. The defendant argued that it was not liable under the Danish law transposing the Directive, as the product had not been put into circulation or manufactured for an economic purpose. However, it was held that the fact that the product was used for a publicly-funded medical service was not to detract from the “economic and business character” of the enterprise.

<sup>56</sup> § 1 imposes liability on “one who sells or otherwise distributes” a product; further defined in § 20 as anyone who “transfers ownership thereto either for use or consumption or for resale”.

Europe, the corresponding provisions in the French *Code Civil*,<sup>57</sup> in imposing joint and several liability on all who participate in the retail process, from the producer to the retailer. (This contrasts with the UK<sup>58</sup> and Australia,<sup>59</sup> for example, where suppliers and distributors become liable in turn, all the way up the retail chain, only in so far as they cannot identify from whom they obtained the goods.) The rationale for such wide-ranging liability is clear: all who participate in marketing a defective product contribute to the risk of harm. Distributors and retailers are thus encouraged to put pressure on manufacturers to produce safe products; and consumers who may not be able easily to identify the producer are thereby offered a readily accessible choice of defendants to pursue.<sup>60</sup> It should be noted, however, that the South African statute does not also provide expressly for a right of relief, for example, on the part of the supplier who has been forced to pay up where goods were in fact already defective when they left the producer. It is possible that the common law may be regarded as allowing a right of relief in these circumstances, but it is arguable that for the avoidance of doubt this right of relief should be expressly stated (as, for example, in article 1386-8 of the French *Code Civil*).

## 8 What kind of goods are included?

### 8 1 Land and buildings

The statute specifically includes in the definition of goods “an interest in land or any other immovable property”.<sup>61</sup> (The Directive, in contrast, includes only movables, although liability remains when a movable had been attached to an immovable).<sup>62</sup> Strictly construed, this brings within the ambit of the legislation for example structural or design problems causing buildings to be unsafe and hazards occurring on land sold by the defendant. Since damage to the product itself — that is, the land or buildings — would also appear to be recoverable,<sup>63</sup> the cost of strict liability claims in relation to transactions concerning immovables is potentially daunting. It must be questioned whether this in fact represents the legislative intention, especially given that many of those who stand to benefit are not members of the social groups whom the legislation is particularly designed to protect.

### 8 2 Information

The definition of “goods” also includes “any medium on which

<sup>57</sup> Art 1386-8.

<sup>58</sup> S 2(3).

<sup>59</sup> Trade Practices Act 1974 s 75AJ.

<sup>60</sup> See Reimann 2003 51 *AmJCompL* 764.

<sup>61</sup> S 1.

<sup>62</sup> Art 2.

<sup>63</sup> See par *infra*.

information is or may be written or encoded, and any thing written or encoded on any such medium". It appears thus to include not only the medium but also the information itself as a "good" for the purposes of liability. In this respect the South African provisions cut through some of the definitional issues raised by the European Directive in dealing with defective information. Strict liability in Europe has traditionally been regarded as focussed upon evaluation of a tangible end product rather than intangible information.<sup>64</sup> However, it is hard to justify the exclusion of strict liability in the case of mass-produced informational products like software packages, the distribution of which is analogous to other mass-produced tangible products. There is no clear basis for a distinction between the treatment of the producer of a defective plane, car or heart-lung machine, and the producer of the defective software which has caused such machinery to malfunction — arguably the latter should be subjected to the same liability regime as the producer of any other defective component part.<sup>65</sup> Moreover, it would appear anomalous to apply a different liability regime depending upon whether information *accompanying* the product has rendered it dangerous or whether defective information *obtained from* the product has instigated dangerous conduct (for example a recipe contained in a cookery book which encourages the use of poisonous mushrooms).<sup>66</sup> Other transactions concerning intellectual products such as computer programs may also involve both information and tangible movable goods:<sup>67</sup> for example, the production of architectural or engineering plans in electronic format on disk can be seen as the rendering of a service or the sale of a movable product, but, as in the other cases above, the main focus is in fact upon the provision of information.

At the same time, the possible consequences of admitting an open-ended category of information to this strict liability regime should be recognised. Strict liability for generally disseminated information, where the information is not acquired by means of a particular consumer transaction and where there is not necessarily any disparity in bargaining power, raises the spectre of indeterminate liability and may also invade the sphere of professional liability. The harmful consequences of defective information can have a considerably wider reach than the harm caused by defective tangible objects and it is therefore arguable that liability for the former should be limited by negligence, because the threat of strict liability could inhibit the socially and economically desirable free dissemination of ideas and theories. In many cases a tangible object incorporates the informational content, and the movable corporeal form of the defective end product will suffice to create strict liability. While this may have the effect of unfairly channelling liability to only one of the

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<sup>64</sup> See Stapleton *Product Liability* 330-331.

<sup>65</sup> See Stapleton *Product Liability* 333-334.

<sup>66</sup> Miller & Goldberg *Product Liability* 2 ed (2004) 322; Stapleton *Product Liability* 335.

<sup>67</sup> See generally Miller & Goldberg *Product Liability* 320-333.

parties responsible for a defective product — the producer of the end product — in such a case the party who is strictly liable would usually be in a better position than the end user to recover damages in turn, by proving negligence (if it exists) on the part of the provider of the defective information.

### 8 3 Blood and blood products

Given the open-ended definition of “goods” there would seem to be little doubt that, as in Europe,<sup>68</sup> it should extend to blood and blood products, and that blood providers, in particular the South African National Blood Service (SANBS), supplying such products for use in publicly-funded hospitals and clinics, should be regarded as potentially liable.<sup>69</sup> Clearly the prevalence of HIV and AIDS in South Africa creates special problems for the blood transfusion services. While in the 1980s SANBS sustained a low infection rate, the risk of being infected with HIV by screened blood escalated steadily throughout the 1990s and the risk is now 25 times higher than in the USA.<sup>70</sup> The effects of the introduction of strict liability for contaminated blood must therefore be carefully considered.

Currently the SANBS cannot be held liable for contaminated blood unless the plaintiff proves all the elements of a delict, including the wrongful causing of harm by the SANBS or a healthcare provider.<sup>71</sup> Negligence on the part of the SANBS may take the form of failure to screen or test the blood; failure to exclude a particular donor; failure to comply with applicable legislation, regulations or Standards for Practice; or that “the medical doctor who ordered the blood on behalf of the patient did not exercise reasonable care and competence in the ordering and administering of the blood”.<sup>72</sup> And in a recent interview,<sup>73</sup> Professor Anthon Heyns, the then CEO of the SANBS, stated that, because of the strict quality guidelines that are followed in blood transfusion services,

<sup>68</sup> See, eg. *A v National Blood Authority* 2001 3 All ER 289. This contrasts with the US where “blood shield” laws have been passed in most States to the effect that blood and blood derivatives are not to be treated as “products” for the purposes of product liability. For criticism of this protective regime, see Conk “Is there a Design Defect in the Restatement (Third) of Torts: Product Liability” 2000 109 *Yale Law Journal* 1087.

<sup>69</sup> As one who “grows, nurtures, harvests, mines, generates, refines, creates or manufactures” the good (s 1 of the Bill). For a discussion of the applicability of the wording of the Directive and the UK legislation to blood products, see Miller & Goldberg *Product Liability* par 9.68.

<sup>70</sup> Van Wyk *Liability for Blood Transfusion in South Africa* available online at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=7009>.

<sup>71</sup> See Van Wyk *Liability for Blood Transfusion in South Africa* at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=7009>. There are currently several pending cases in South Africa including two civil claims against the Natal Transfusion Service.

<sup>72</sup> Van Wyk *Liability for Blood Transfusion in South Africa* at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=7009>.

<sup>73</sup> Report by Hollemans in *Mail & Guardian* 16 Dec 2004. This interview was in reaction to controversies over the SANBS’ racial profiling system, according to which blood from black people is considered most risky, and is only used when there is no other blood available (available online at [http://www.mg.co.za/articlePage.aspx?articleid=193804&area=/ten questions/](http://www.mg.co.za/articlePage.aspx?articleid=193804&area=/ten%20questions/)).

“it is almost impossible to prove that [the SANBS was] negligent, so [the SANBS is] never going to be liable”, although an alternative ground for liability could be the failure to inform the blood recipient of all the material risks inherent in the process of transfusion.<sup>74</sup> The imposition of strict (or stricter) product liability therefore has far-reaching consequences for South African blood banks.

It must be acknowledged that without additional support, the SANBS, a section 21 company, may struggle to cope with the additional burden of claims which could potentially result from a strict liability regime. Contaminated blood cases involve liability for general, special and provisional damages, that is, “where the claimant, having established liability, satisfies the court that there is a real danger of further injury arising. Such awards enable the claimant to apply to the court for further substantial damages should that further injury arise.”<sup>75</sup> The implications are clearly illustrated by the Canadian experience. The Red Cross blood bank was rendered insolvent by incurring liability for some \$C8 billion. It was subsequently replaced by a non-profit agency regulated by Canada’s health department.<sup>76</sup> The Government ultimately stepped in to pay compensation to survivors who became infected by blood that had not been screened for infectious diseases such as AIDS and hepatitis.

Consequently it has been argued that strict liability and its concomitant risk of extensive damages awards against blood banks may put their viability, and the availability of blood for transfusion, at risk.<sup>77</sup> However, as Eckert<sup>78</sup> has noted:

“Other industries continue to operate in spite of the higher costs that strict liability causes whether they are competitive or monopolistic, for profit or not-for-profit. At any rate, the purpose of a strict liability rule is not to minimize industry operating costs. Its purpose is to strengthen the incentives of producers to compare the costs and benefits of precautions whenever they have superior information about risk and to remove impediments to disclosing useful information to consumers. The argument that blood banks cannot survive with strict liability is tantamount to arguing that they cannot survive if consumers are fully informed about transfusion risk.”

Generally there is no clear policy justification for exempting non-for-profit organisations from liability in respect of unsafe products.<sup>79</sup> Hospitals, healthcare providers and patients depend on blood banks to

<sup>74</sup> Van Wyk *Liability for Blood Transfusion in South Africa* at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=7009>.

<sup>75</sup> Best “A Comparison of Civil Liability for Defective Products in the United Kingdom and Germany” 2002 3 *German Law Journal* no 4 par 14(b) available online at <http://www.germanlawjournal.com/article.php?id=144>. In *A v National Blood Authority* 2001 3 All ER 289, because of the unpredictable long term prognosis of hepatitis infected patients, Burton J awarded provisional damages in terms of which if a claimant satisfied certain “trigger conditions” (sclerosis, liver disease, liver cancer or psychiatric problems) at any time in his or her life, he or she could return to the court to obtain an award of further damages.

<sup>76</sup> See report by Tucker 13 Aug 1999: “Australian Schoolgirl Contracts HIV via Blood Transfusion” at <http://www.wsws.org/articles/1999/aug1999/hiv-a13.shtml>.

<sup>77</sup> See Eckert “The AIDS-Blood Transfusion Cases: A Legal and Economic Analysis of Liability” 1992 29 *San Diego Law Review* 203 287 n 339.

<sup>78</sup> 1992 29 *San Diego Law Review* 203 288 (emphasis added).

<sup>79</sup> Case C-203/99, *Henning Veedfald v Århus Amtskommune* 2003 1 CMLR 41.

provide uncontaminated blood. Providers of blood products have the best available information and technology to avoid or contain risks.<sup>80</sup> Moreover, as Eckert has also pointed out, consumers deal with doctors and hospitals and often have little idea of the blood supplier or the safety precautions it has adopted:

“Consumers in general, when facing high information costs, are not likely even to know what safety improvements — such as additional screening or testing — to bargain over. Patients rely on their hospital to choose a suitable blood bank, their physician to inform them of risks, and the blood bank to do its job prudently.”<sup>81</sup>

The arguments in favour of strict liability for blood products are therefore cogent — the risk of receiving HIV-contaminated blood in a blood transfusion should not be borne by individual patients. At the same time, the risks that strict liability entails for the SANBS should not be disregarded, and a combination of insurance and State aid for the service requires further investigation.

#### 8.4 Pharmaceuticals

The broad definition of “good” would appear, in addition, to take in defective pharmaceutical products. This is also consistent with the European Directive. Indeed the impetus for reform of product liability in Europe was partly derived from the problems which arose from the use of the thalidomide drug by pregnant women in the 1950s and 1960s and its subsequent link to the incidence of congenital defects in their babies. In the debates which preceded the adoption of the Directive, the issues surrounding pharmaceuticals attracted particular attention. However, the inclusion of pharmaceuticals brings complex policy issues into the balance. While there is understandable reluctance to allow consumers to bear the development risk for unsafe drugs, there is also a view that the liability regime should not be so strict as to discourage research into important new products.<sup>82</sup>

In addition, liability for pharmaceuticals presents particular drafting difficulties. The framework of liability must reckon with the problems of establishing causation where substances may have been ingested some time before the alleged defect comes to light, and this feature is further considered in paragraph 10 below. But it must also be accepted that drugs by their very nature are seldom completely safe, or else they could not be effective. In determining which drugs are “defective”, means must be found to distinguish between those carrying risks that the public should

<sup>80</sup> Eckert 1992 29 *San Diego Law Review* 245.

<sup>81</sup> Eckert 1992 29 *San Diego Law Review* 243.

<sup>82</sup> For a perspective from the pharmaceutical industry in Europe, see *Response to Product Liability Green Paper* by European Federation of Pharmaceutical Industries and Associations (EFPIA) (1999) at [http://www.efpia.org/4\\_pos/legal/Prodliaabilit.PDF](http://www.efpia.org/4_pos/legal/Prodliaabilit.PDF). But see also *Liability for Defective Products* (Law Com No 82, Scot Law Com No 45, 1977) par 60, in which the Law Commissions of England and Wales and of Scotland, in a joint report, concluded that market forces provide a strong incentive to develop drugs, whether or not strict liability is applied.

not in any case accept, and those in which the important health advantages outweigh the risks. Some jurisdictions have addressed such difficulties by making specific provision for the pharmaceuticals. In the United States, § 6 of the *Third Restatement* deals separately with liability for harm caused by prescription drugs<sup>83</sup> and medical devices. Within Europe, the German Medicines Act of 1976, the *Arzneimittelgesetz*, provides a separate liability regime in which, according to section 84, “pharmaceutical entrepreneurs” are liable if:

- “(a) when used in accordance with its intended purpose, the drug has harmful effects which exceed the limits considered tolerable in the light of current medical knowledge and which have their origin in the development or manufacturing process, or
- (b) the harm has occurred as a result of labelling, expert information or instructions for use which do not comply with current medical knowledge”.<sup>84</sup>

Consumers are not required to establish fault, and they are further assisted by a right of information by which they may require the producer, or supervisory authority, to disclose knowledge on effects and side-effects of the product in question (a right akin to the American pre-trial discovery rules).<sup>85</sup>

Presumably such alternatives were considered but rejected in the preparation of the draft South African legislation, and in this respect South Africa will follow most of Europe, where arguments for special treatment of pharmaceutical products have generally not prevailed. Admittedly strict quality controls apply to the manufacture, importation and distribution of prescription drugs.<sup>86</sup> These involve the monitoring of all stages of the manufacturing process and contain risks effectively in most cases. The existence of such controls in Europe is perhaps one of the factors by which the relatively low number of cases can be explained. Nevertheless, as the *Wagner* case illustrates, instances of harm will continue to occur. If the difficulties previously experienced by the plaintiff in proving fault at common law are to be eased, close consideration must be given to the appropriate balancing of factors in defining defects in pharmaceuticals, and also to the interpretation of the exclusion from liability provided by section 71(3)(c), as discussed further below.

## 8 5 Defective components

Damage is compensated when it is caused “wholly or partly by a defect as a consequence of a product failure, defect or hazard”.<sup>87</sup> It would seem

<sup>83</sup> Based upon the assumption that governmental regulatory agencies adequately review new prescription drugs and devices, keeping unreasonably dangerous designs off the market (§ 6 comment b).

<sup>84</sup> See also Best “A Comparison of Civil Liability for Defective Products in the United Kingdom and Germany” 2002 3 *German Law Journal* no 4 at <http://www.germanlawjournal.com/article.php?id=144>, discussing proposed reforms to reverse the burden of proof in relation to causation.

<sup>85</sup> See Magnus “The Reform of German Tort Law” at [http://www.indret.com/rcs\\_articulos/eng/127.pdf](http://www.indret.com/rcs_articulos/eng/127.pdf).

<sup>86</sup> See in particular Medicines & Related Substances Act 101 of 1965.

<sup>87</sup> S 71(1).

uncontentious that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components: for example, a car is defective even when only its brakes fail. At the same time, the draft makes no express mention of how the defective component is itself to be regarded, and in particular whether it is to be classed as a “good” in its own right. (This contrasts with the Directive which includes all movables “even though incorporated into another movable or into an immovable”).<sup>88</sup> This omission leaves a question mark over whether the producer/supplier of a defective component which has caused a complex product to fail may be found liable in terms of section 71, in addition to the producer/supplier of the complex product which has been rendered defective thereby. This appears to have been the draftsmen’s intention since the draft statute provides that the producer of a component *escapes* liability if it can show that the problem was caused by a defect in the finished product rather than in the component;<sup>89</sup> that the technical specifications for the component set out by the producer of the finished product were at fault;<sup>90</sup> or that the component was compromised by actions after being supplied by the producer/supplier.<sup>91</sup> However, the inclusion of components and raw materials in the definition of “good” in section 1 would assist certainty.

## 9 What kind of damage is compensated?

The concept of defectiveness as set out in section 61 extends to those features of a product which carry risk of personal injury or damage to property.<sup>92</sup> Section 71(2) imposes liability in relation to death and injury and the loss or damage of “any property” as well as the economic loss resulting therefrom.

This wording may therefore be interpreted as including damage to the defective product itself and the economic loss deriving from its replacement. To this extent the statute departs from the model of the European Directive, which in article 9 defines damage similarly as meaning “damage to, or destruction of, any item of property *other than* the defective product itself”, and also from the US *Third Restatement (Product Liability)* § 21 which covers “economic loss if caused by harm to . . . the plaintiff’s property *other than* the defective product itself”.<sup>93</sup> Loss may derive from the product itself in various ways — the costs of replacement, repair or remedying a safety hazard. The wording of the South African statute offers the owner significant additional opportunity

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<sup>88</sup> Art 2.

<sup>89</sup> S 71(3)(b)(i).

<sup>90</sup> S 71(3)(b)(ii).

<sup>91</sup> S 71(3)(b)(iii).

<sup>92</sup> S 61(4)(c)(ii).

<sup>93</sup> On the policy justification for differentiating between damage to the product itself and damage to other property, see Tettenborn “Components Product Liability: Damage to Other Property” 2000 *LMCIQ* 338 340-341.

for compensation over and above the contractual remedies already available when the product does not confirm to the contract description.

Moreover, in expressly compensating economic loss, the statute opens up an important and potentially vast area of liability; for example a small business (included as “consumer” under the statute) might suffer loss of profits or loss of business reputation when a defective product used in its undertaking has caused an accident.

## 10 Causation

The issue of causation is not dealt with expressly in the Bill. Section 71(1) states simply that producers etcetera are liable for damage “caused wholly or partly as a consequence of” a product defect etcetera. Section 2(1) of the UK Statute similarly stipulates without qualification that damage should be “caused” by a defect in a product, although the Directive sets out in more detail that the injured person is “required to prove the damage, the defect and the causal relationship between defect and damage”. Thus there is no requirement in the Bill to prove that the particular defect was the exclusive or substantial cause, or to quantify the extent of the causal connection as between different contributing factors.<sup>94</sup> Once the plaintiff has proved a material factual link between the product defect and the harm suffered, therefore, the onus will presumably pass to the defendant producer to establish either that the product defect was *not* a material cause of the harm, or that the harm was divisible and that the product defect was the cause of a quantifiable, lesser part of it. However, in the first instance, the burden rests squarely on the plaintiff to prove the causal link between defect and damage.

While in many cases it will be uncontroversial that the defect caused the accident, in others, establishing causation creates an initial obstacle, which the consumer struggles to surmount. The difficulty of proving causation where proof rests on complex technical evidence was identified in the European Commission’s *Green Paper* as one of the areas which caused most concern to consumers in the implementation of the European Directive.<sup>95</sup> (In this, there would appear to be an imbalance between the UK where, in the adversarial courtroom setting, the onus of proof is a weighty one,<sup>96</sup> and other European jurisdictions where the

<sup>94</sup> Boberg *The Law of Delict I* (1984) 404-405; *Humphrys NO v Barnes* 2004 2 SA 577 (C); *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) per Schreiner JA 222A-C.

<sup>95</sup> Commission of the European Communities *Green Paper: Liability for Defective Products* COM 99 396 par 3.2. It should also be noted that a report commissioned from the London law firm, Lovells, and published in 2003 on the operation of the Directive did not conclude that the difficulties of proving causation were resulting in injustice. The report identified the need for a product liability regime to find the correct balance between the consumer and producer, and noted a “real concern” on the part of producers and insurers that reducing the causal burden on the plaintiff might lead to an increase in the number of spurious claims: Lovells *Product Liability in the European Union: A Report for the European Union* (2003) 62 (<http://www.lovells.com/Lovells/Services/Dispute+Resolution/Product+Liability/Introduction.htm>).

<sup>96</sup> See, eg, *Foster v Biosil* 2000 59 Butterworths Medico-Legal Reports 178.

judiciary may adopt a more inquisitorial role and where means may be applied to “facilitate” the burden of proof, such as by inference of the causal link or the application of presumptions). The difficulty is an obvious one. Product liability cases are seldom fought across a level playing field. In adducing evidence to establish causation, the individual consumer may face an unequal struggle against the superior resources of a large manufacturer with readier access to the necessary information. Such problems of proof are exacerbated when the defective product has itself perished or has been ingested (as with pharmaceuticals). Further difficulties are found where the alleged defect is a defect in design, as opposed to a straightforward manufacturing defect, or where the damage is arguably caused by complex factors of which the product defect is only one. The experience of other jurisdictions suggests the following situations are worthy of comment.

### 10 1 Manufacturing defects

When a manufacturing defect in a product has apparently caused it to fail in such a way as to cause harm and the product itself has been damaged in the incident, the basic evidence required to establish factual causation may not be easy to assemble. If the likely cause of direct physical injury or property damage is a manufacturing defect, it would seem reasonable to place the onus on the manufacturer to displace the inference that this was indeed to blame. The paradigm of such cases is the example of the bottle of carbonated drink which inexplicably explodes on being handled, injuring the handler. Where the bottle was not accessible to extraneous harmful forces and was carefully handled, and obvious alternative causes can therefore be discounted, it may be inferred that the explosion was caused by a defect in the bottle, even though the plaintiff has not specifically eliminated every other possible cause.<sup>97</sup> The drawing of such an inference is consistent with practice in jurisdictions such as the Netherlands<sup>98</sup> and Belgium,<sup>99</sup> where the court would infer that the glass shattered due to a product defect, unless the producer can prove, for example, that the defect was not present prior to the marketing of the product; that the defect could not have been discovered at an earlier date; or that the product was not used in accordance with its intended use.<sup>100</sup> In a similar German case, the *Bundesgerichtshof* accepted that a bottle had shattered due to a flaw in the glass, even though it was recognised that the producer had in place the best possible equipment to detect

<sup>97</sup> The classic US case is *Escola v Coca Cola Bottling Co of Fresno* 24 Cal 2d 453, 150 P 2d 436, CA 1944.

<sup>98</sup> See Giesen & Loos “Liability for Defective Products and Services: The Netherlands” 2002 64 *Electronic Journal of Comparative Law* at <http://www.ejcl.org/64/art64-6.html>, under reference to HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona).

<sup>99</sup> *Riboux v SA Schweppes Belgium* 21.11.96, Civ Namur ch 5, 1997 *Revue de Jurisprudence de Liège, Mons et Bruxelles* 104, cited by Lovells *Product Liability in the European Union* 64.

<sup>100</sup> See Giesen & Loos 2002 64 *Electronic Journal of Comparative Law* at <http://www.ejcl.org/64/art64-6.html>; cf the English cases of *Foster v Biosil* 2000 59 *Butterworths Medico-Legal Reports* 178 and *Richardson v London Rubber Company* 2001 59 *Butterworths Medico-Legal Reports* 185.

possible blemishes in its bottles.<sup>101</sup> This is also the approach adopted in § 3 of the US *Restatement (Third) of Torts: Product Liability*. The *Restatement* allows the inference to be drawn that the defect caused the harm if the incident in question “was of a kind that ordinarily occurs as a result of product defect”.

Given the stated aim of extending consumer confidence and empowerment to groups with limited educational background, and the experience of an extensive European and American case law, it is perhaps curious that no further refinement has been made to the wording of the South African Bill in this regard. An option for consideration, following on from the models in these other jurisdictions, is whether section 71(1) might be extended to allow a dual inference to be drawn where an incident is of a kind that ordinarily occurs as a result of a manufacturing defect of this sort, such as an exploding bottle, or, for example, and electrical apparatus which explodes.<sup>102</sup> First, the existence of the defect will be inferred, and this in turn allows the inference of a causal link between the defect and the damage suffered by the plaintiff. At the same time, it is open to the producer to disprove that causal link by providing evidence of causation in relation to other factors — that the harm was solely the result of causes other than the defect in the product. The defendant producer may also escape liability by offering one of the defences provided in section 71(3) — for instance that the defect did not exist in the product at the time that it supplied it, or, where the defect has occurred in a complex product for which the defendant producer supplied a component part only, that the defect was attributable to a later product into which the producer’s product was incorporated. Such amendment might be worded as follows:

“It may be inferred that there was a defect in the product, and that defect was a material cause of the damage suffered by the plaintiff, without proof of the specific defect, when the damage suffered

- (a) was of a kind that ordinarily occurs as a result of a product defect; and
- (b) was not solely the result of causes other than the product defect.”

In effect, this statutory wording would do the work of the *res ipsa loquitur* doctrine in the Aquilian action, as previously accepted in relation to products cases.<sup>103</sup>

<sup>101</sup> BGH 129 353, NJW 1995 2162 Weir (transl) available at [http://www.ucl.ac.uk/laws/global-law/german-cases/cases\\_bundes.shtml?09may1995](http://www.ucl.ac.uk/laws/global-law/german-cases/cases_bundes.shtml?09may1995).

<sup>102</sup> The examples offered by the ALI commentators to illustrate § 3 of the *Third Restatement* include a collapsing driver’s seat in a car and a power tool from which one of the parts flies out.

<sup>103</sup> See, eg, *Bayer South Africa (Pty) Ltd v Viljoen* 1990 2 SA 647 per Milne JA 661, referring to the policy considerations discussed in *Boberg The Law of Delict I 195 et seq.*

<sup>104</sup> See, eg, *Grant v Australian Knitting Mills Ltd* 1936 AC 85 in which the plaintiff suffered dermatitis after wearing underwear made from yarn containing a chemical irritant; *TV Media Pte Ltd v De Cruz* 2004 3 *Singapore Law Reports* 543 in which the plaintiff suffered liver failure after taking a course of slimming pills.

## 10 2 Defects giving rise to non-traumatic injury

Issues of factual causation raise substantial difficulties where the alleged harm is not a direct injury but a medical condition, involving, for example, cardiovascular damage, allegedly caused by ingestion of a particular substance, typically a pharmaceutical. Where an otherwise healthy individual has been exposed to a particular substance it may be possible to exclude other factors and lead sufficient circumstantial evidence to prove causation on the balance of probabilities.<sup>104</sup> However, the plaintiff is typically required to reckon with the possible causative impact of environmental factors and the underlying medical condition, as well as that of the substance itself. Determining factual causation thus involves scrutiny of complex, highly technical evidence and a heavy evidential burden is placed upon the consumer with regard to the evaluation of epidemiological evidence. The problem even with the most extensive epidemiological investigation is that it may raise as many questions as it answers. As Stapleton<sup>105</sup> has pointed out, and as the examples above show, such data typically “cannot be sufficiently focused to eliminate related factors”. If other environmental factors create a background risk that the condition might arise in any event and this differs little from the risk attributed to the product, it may prove impossible to establish causation on the balance of probabilities.<sup>106</sup> The difficulty of reducing competing explanations for non-traumatic injury arises, no matter whether pharmaceuticals or other substances are alleged to be the cause.<sup>107</sup> A recent English case offers an illustration: in *XYZ v Schering Health Care Ltd*,<sup>108</sup> a group of claimants brought a claim under the UK Consumer Protection Act 1987 against manufacturers of oral contraceptives, alleging that the drugs were defective in that they had exposed them to an increased risk of cardiovascular injury. All of the claimants had suffered health problems, such as strokes, deep-vein thrombosis and pulmonary embolisms, a short time after being prescribed the defendants’ products. A large volume of epidemiological evidence was laid before the court by both sides, including studies by the World Health Organisation, three major transnational studies, and diverging analyses, produced by two eminent medical experts, of data

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<sup>105</sup> *Product Liability* 281.

<sup>106</sup> For a discussion, see Stapleton *Product Liability* 283-287.

<sup>107</sup> See, eg, the English case of *AB v John Wyeth and Brother Ltd No 4* 1994 PIQR P109 116-117, involving alleged injury caused by benzodiazepine drugs, in which Stuart-Smith LJ addressed “very considerable problems on causation: these involve distinguishing between the effects of the drug and the underlying condition for which it was prescribed, the problems caused by previous addiction to benzodiazepine drugs other than those prescribed by the defendants, and distinguishing between symptoms due to the drugs or, in some cases, other drugs or excess alcohol, and the fact that many plaintiffs may suffer at least some withdrawal symptoms in any event”.

<sup>108</sup> 2002 70 Butterworths Medico-Legal Reports 88. See also *Vadera v Shaw* 1999 45 Butterworths Medico-Legal Reports 162; Goldberg “The Contraceptive Pill, Negligence and Causation: Views on *Vadera v Shaw*” 2000 8 *Med L Rev* 316.

extracted from the UK General Practice Research Database.<sup>109</sup> In a highly detailed judgment extending to 345 paragraphs, Mr Justice MacKay (sitting alone in the Queen's Bench Division) praised the expertise with which the claimants' case had been presented. However, their case failed. Despite its length, his judgment contained only short passages of legal analysis, but it evaluated in extensive and meticulous detail the risk factor as indicated by the various scientific studies. On the balance of probabilities, he was not satisfied that this evidence established an increase in the risk factor of the order alleged by the claimants. The case therefore failed at the first hurdle of proving factual causation.<sup>110</sup>

The issue raised by product liability cases is therefore whether it is acceptable to place the burden of evidential uncertainty so squarely upon the plaintiff, given that the producer "may have better access to the evidence or at least better options to control the consequences of incertitude".<sup>111</sup> However, recent discussion in Europe has not pointed to a more consumer-oriented means of determining causation in such cases. A report by the London law firm of Lovells<sup>112</sup> on the working of the European Directive concluded that the balance between manufacturer and consumer would not be served by easing the evidential burden on the latter in such cases. The European Federation of Pharmaceutical Industries and Associations, unsurprisingly, also argued against concessions being made to the consumer. The EFPIA's main concern was that easing the burden of proof for causation would encourage an increase in speculative claims and lead to increased costs for the industry (given that even the defence of unsuccessful claims involves substantial costs which are not always recoverable). It concluded that such a change would "divert scarce industry resources from innovation, adversely affect competitiveness and reduce the availability of insurance cover".<sup>113</sup>

Even in those jurisdictions which have made specific provision with regard to injuries allegedly caused by pharmaceuticals, the burden of proof in causation typically remains squarely with the plaintiff. The US *Restatement Third, Torts: Products Liability* provides in § 6 that pharmaceutical manufacturers are "subject to liability for harm to persons caused by the defect" in the drug or pharmaceutical device, but no further concessions are made as to how causation may be established. Similarly, the German Pharmaceuticals statute, the *Arzneimittelgesetz*, which places strict liability on the producers of pharmaceuticals, allows liability to be found only when injury is the result of ingestion of the drug, and the effects have their origin in the development of the manufacturing

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<sup>109</sup> In the Fourth Appendix to MacKay J's judgment, 56 separate sources of epidemiological data are listed.

<sup>110</sup> For a further striking example of the difficulties of determining factual causation in relation to whether smoking was the cause of lung cancer, see *McTear v Imperial Tobacco Ltd* 2005 2 SC 1.

<sup>111</sup> Reimann 2003 51 *AmJCompL* 772.

<sup>112</sup> *Product Liability in the European Union*.

<sup>113</sup> European Federation of Pharmaceutical Industries and Associations *Position Paper: Green Paper on Liability for Defective Products* (1999) par 8.1.

process or is the result of labelling or instructions defects.<sup>114</sup> To this extent, therefore, although proof of fault is not required, it remains for the claimant to prove that the harm has been caused by the defect.

The South African Bill likewise makes no concession to the plaintiff by shifting the burden of proof in relation to pharmaceuticals. No doubt this follows on due consideration of the implications of an alternative wording for the pharmaceutical industry and their consequences in terms of the costs of existing products and the possible disincentive to research and development. This means, however, that certain groups of consumers who suffer harm due to defective pharmaceuticals are effectively excluded from the strict liability compensation by the difficulties of establishing causation.

### 10 3 Warnings issued with the product

Some products, for example power-driven chainsaws, are unavoidably dangerous, but their utility to the consumer means that they must continue to be sold. In determining whether a product is defective, section 61(3)(a) therefore takes account of the instructions or warnings issued with the product. A product escapes the definition of defective if it is accompanied by warnings proportionate to the risk it represents, and/or adequate instructions for its safe use. Thus the ultimate responsibility for accident prevention is in practice placed upon the consumer.

In order to fix liability on the producer, the draft statute requires the defect to have caused the damage. This means that in cases where the alleged basis of defectiveness is deficient or absent instructions, it must be shown that this deficiency caused the harm. In principle, therefore, the plaintiff must establish: first, that a more appropriate warning could have been provided; secondly, that such a warning would have been observed; and thirdly, that adhering to the warning would have prevented the harm.<sup>115</sup>

The second of these elements in particular is potentially problematic in that it shifts the focus away from the product itself and on to the significance of consumer action or inaction. The difficulty is of course that consumer response is infinitely variable — even literate and educated consumers can be surprisingly inattentive to warnings.<sup>116</sup> In order to assist in establishing what the consumer's hypothetical response would have been, and to strike a fair balance between expectations of producer

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<sup>114</sup> S 84.

<sup>115</sup> See Bowbeer, Lumish & Cohen "Warning! Failure to Read this Article may be Hazardous to your Failure to Warn Defense" 2000 27 *Wm Mitchell L Rev* 439 444. See also the Scots case of *McWilliams v Sir William Arrol and Co* 1962 SC (HL) 70, in which the pursuer's husband was killed in a fall. The court accepted that his employers were at fault in not providing him with a safety harness, but also accepted the inference that deceased would not have worn such a harness if provided. The case against the employers was therefore unsuccessful as the pursuer had proved the breach of duty, but not the causal connection between the breach of duty and the accident.

<sup>116</sup> For a general discussion, see Bowbeer et al 2000 27 *Wm Mitchell L Rev* 439; Latin "'Good' Warnings, Bad Products and Cognitive Limitations" 1994 41 *UCLA L Rev* 1193.

and consumer, two rebuttable inferences may legitimately be drawn from this wording.<sup>117</sup> The first<sup>118</sup> is that where warning is given, the seller may reasonably assume that it will be read and heeded. The second follows from the first: if no warning has been given, it may be similarly assumed that a warning, had it been present, would have been read and heeded.

These are rebuttable presumptions only. Courts in some US jurisdictions, for example, have accepted evidence that individual smokers would not have heeded health warnings on cigarette packets.<sup>119</sup> The presumption must be applied in such a way as to take account of likely consumers. Thus in the South African market, the presumption might be rebutted, for example, if instructions in complex technical jargon accompanied a product known to be widely marketed in rural areas where literacy rates were uneven.

### 11 Defences: the “development risk” defence

The wording of section 71(3) of the Bill in providing for defences closely follows that of section 4 of the UK Consumer Protection Act. There is no liability if the defect is the result of compliance with public regulations, or if the defect did not exist in the good at the time it was supplied (for example, when a sound component has been made defective by inept attachment to a complex product, or was made to faulty specifications). However, the Bill also includes a version of what has come to be known in Europe as “the development risks” defence, although the wording does not entirely follow either the Directive model (article 7(e)) or the UK statute (section 4(1)(e)).

There is no liability if, in terms of section 71(3)(c), it is “unreasonable” to expect the “distributor or supplier” to have discovered the defect, having regard to the “person’s role in introducing the good to the consumer market; and the state of scientific and technical knowledge at the time the good was under the control of that person”. This exemption from liability is broadly drafted. The European counterpart of this “development risk” defence is significantly narrower, exempting the producer only where it was not possible for it to have known of the defect (the state of knowledge “was not such as to enable the existence of the defect to be discovered”). Yet the latter is one of the most controversial features of the Directive, in that, as Stapleton and others have argued, it may be regarded as readmitting fault-based liability through the back door. In effect, it has been regarded as allowing the producer/supplier to escape supposedly “strict” liability by establishing that it was not at fault with regard to establishing latent risk. The inclusion of this defence in the European Directive was the result of pressure from the commercial lobby

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<sup>117</sup> See discussion in Miller & Goldberg *Product Liability* 474-475.

<sup>118</sup> Deriving from comment j to § 402A of the US *Restatement (Second) of Torts*.

<sup>119</sup> *Viguers v Philip Morris USA Inc* 837 A 2d 534 (Pa Super 2003), aff’d 2005 Pa LEXIS 2127; *Goldstein v Philip Morris Inc* 854 A 2d 585 (Pa Super 2004).

and, notably, from the UK Government led at that time by Margaret Thatcher, which feared the impact of a strict liability regime on innovative industries.<sup>120</sup> The defence has been frequently invoked by producers in subsequent litigation, although not always successfully. Section 71(3)(c) of the Bill, on the other hand, appears to allow producers even more latitude in assessing merely what was reasonable for “the distributor or supplier” to know, rather than what was possible. Its wording may reflect a policy decision to make a similar concession to South African businesses. Whatever the reason for its inclusion, it must be recognised that, as currently drafted, this provision opens up a significant gap in supposedly “strict” liability for those distributors and suppliers who can persuade the court that they have acted reasonably. In assessing this, a subjective rather than an objective standpoint is adopted, taking account of “that person’s role in introducing the good to the market”. If such a person can escape liability where it has exercised reasonable care, it is doubtful whether the liability regime can be described as strict, since liability is accurately termed as strict only when it imposes liability for foreseeable *and* unforeseeable risks.<sup>121</sup>

There is, however, an even more pressing technical problem with this subsection as currently worded. Section 71(3) provides that “[l]iability of a particular person . . . does not arise in any of the following circumstances. . .”. In other words, it offers exemption from liability to any persons identified in the section as otherwise liable (producers, distributors and suppliers). Section 71(3)(c) then provides an exemption when “it is unreasonable to expect the distributor or supplier to have discovered the product failure”, but does not mention producers. On a literal reading of this section, the combined effect is therefore to exempt producers from liability, even if it would have been reasonable for the *producer* to have discovered the defect, but where it was unreasonable for the *distributor* or *supplier* to have discovered it. It must be questioned whether this was the intended effect of the section. It is not clear whether the intention was to extend the defence to producers but only when it was unreasonable to expect *producers* to have known of the defect; or to exclude producers from the defence altogether. Either way, amendment is essential to clarify its scope.

### 11 1 Accessibility of knowledge

A further subsidiary point concerning the interpretation of section 71(3)(c) is that the precise scope of “the state of scientific and technical knowledge” is open to interpretation. When does a research hypothesis about a product’s performance convert into accepted “knowledge”: is any particular endorsement required? And how widely should knowledge

<sup>120</sup> Miller & Goldberg *Product Liability* par 13.25.

<sup>121</sup> On this point see Stapleton “*Restatement (Third) of Torts: Products Liability, and Anglo-Australian Perspective*” 2000 39 *Washburn LJ* 363 369.

be known before the distributors and suppliers are expected to discover it? Tesauro, the European Advocate General, stated in one case<sup>122</sup> that relevant factors to be considered with regard to article 7(e) of the Directive include the “place of origin [of information], the language in which it is given and the circulation of the journals in which it is published”. In particular, he noted “major differences in point of the speed in which it gets into circulation and the scale of its dissemination between a study of a researcher in a university in the United States published in an international English-language international journal and, to take an example given by the Commission, similar research carried out by an academic in Manchuria published in a local scientific journal in Chinese, which does not go outside the boundaries of the region”. “State of knowledge” should therefore encompass “all data in the information circuit of the scientific community as a whole, bearing in mind, however, on the basis of a reasonableness test the actual opportunities for the information to circulate”. This interpretation has elicited the following observation by Burton J in the leading English case of *A v National Blood Authority*:<sup>123</sup>

“It is not entirely clear what in practice is meant by the ‘Manchuria exception’. . . [I]f in fact the product in question were a product for which Manchuria was renowned, perhaps yoghurt or fabric, then Manchuria itself would be a bad example: if however it were a product of particularly high technology then it might well be wholly unlikely that Manchuria would have thought something up. It seems to me that the right approach is to look at ‘accessibility’ and to regard as *Manchuria* perhaps an unpublished document or unpublished research not available to the general public, retained within the laboratory or research department of a particular company.”

The use of “a reasonableness test”, however, opens a further point of entry for the terminology of fault. In taking into account the producer’s conduct, and removing liability for risks which were not foreseeable, the defence exculpates producers who establish that they were not negligent in this way. The defence thus brings the “strict” liability of the Directive more or less in line with Aquilian liability in which the duty to take into account the most recent knowledge available in his field is built into the formulation of the manufacturer’s general duty towards the consumer. Further qualification is therefore required as follows.

## 11 2 Time of assessment: with or without hindsight

Under the negligence standard, factors indicating an unreasonably dangerous product are evaluated at the time of manufacture — the manufacturer’s culpability is evaluated, without hindsight, on the knowledge available to it at the time of manufacture/distribution. In a similar fashion article 7(e) of the European Directive provides for an

<sup>122</sup> Case C-300/95 *Commission v UK* 1997 ECR I-2649, 1997 3 CMLR 923 pars 23-24.

<sup>123</sup> 2001 3 All ER 289 par 24.

assessment of the state of scientific and technical knowledge when the product is put into circulation.

It should be noted, however, that an alternative approach is possible. If a product liability regime evaluates “development risks” with hindsight — that is to say the risks are evaluated as known at the time of trial — it draws closer to strict (no-fault) liability. In the US, the so-called *Keeton-Wade* view adopted a form of hindsight analysis by imputing knowledge of risks to the producer at the time of manufacture or sale. Therefore in cases of design flaws or of failure to warn of a danger, factors that fell to be considered included:

“hazards that were unknown, or even unknowable, to the manufacturer when the product was marketed. That the manufacturer could not have discovered these risks in the exercise of reasonable care would be irrelevant; if a hypothetical reasonable manufacturer, aware of these risks, would not have marketed the product or would have warned of the dangers, an injured plaintiff may recover.

This exception uses hindsight to achieve a genuine strict liability in certain cases of generic risks, such as adverse reactions to drugs, dusts, and chemicals. This hindsight approach, however, has not received much policy-oriented justification either by courts or commentators.”<sup>124</sup>

This alternative approach ties in with the approach to wrongfulness and the existence of a defect as set out under paragraph 4 of this article. This envisages a comprehensive assessment of reasonableness with the perspective of hindsight, by taking account of all later-known facts pertaining to the cost, risk and utility of the product. Thus producers would not be permitted to evade liability on the ground that the defect was not reasonably foreseeable at the time of manufacture or supply, if, at the time of the trial, the risk has become known and, *with such knowledge*, it would have been reasonably possible to avoid the risk. In such a way the burden of the cost of development risks is lifted from the consumer to the producer.<sup>125</sup> However, this alternative approach would severely limit the application of the development risk defence.

A third intermediate approach is also possible. This would entail a focus, with hindsight, on the highest level of knowledge reasonably accessible, at the time the good was under the control of the distributor, supplier or producer (if the defence is regarded as extending to producers), to a distributor, supplier or producer of products of the same description, applying the best-known and economically feasible practices. This would raise the bar for application of the defence — it would not be available on the basis of possible informational or organisational constraints under which the particular defendant operated.<sup>126</sup> In view of the policy considerations underlying the introduction of strict liability for defective products it seems appropriate to set a high, but not unattainable, standard for reliance on the development risk

<sup>124</sup> Page “Generic Product Risks: The Case against Comment k and for Strict Liability” 1983 58 *NYU LRev* 853 876-877.

<sup>125</sup> On this point, see Stapleton *Product Liability* 244.

<sup>126</sup> See discussion in Miller & Goldberg *Product Liability* pars 13.89-13.90.

defence. The defendant should not be able to rely on mere absence of negligence where scientific and technical knowledge is concerned. Thus in our view the standard should be the highest level of knowledge reasonably accessible to suppliers of the kind concerned, by application of the best-known and economically feasible practices.

It is for the legislature to consider the policy implications of different approaches to the evaluation of development risks. While it is important to ensure appropriate redress for injured consumers, it is no doubt also necessary to take into account the broader implications for a developing economy of adopting a regime which disincentivises research and development, particularly in the pharmaceutical sector. The latter rather than the former consideration appears to have been foremost when section 71(3) of the Bill was drafted.

### 11 3 Undetectable defects

In principle, the development risk defence is not available where the defect stems from the product's disconformity with the manufacturer's design. It is inapplicable even where the defect has arisen because the state of scientific and technical research is such that an infallible quality control system is not attainable.<sup>127</sup> In the German Supreme Court, this argument was raised when a hairline fracture caused a re-usable mineral water bottle to explode.<sup>128</sup> Although the fracture was considered a visual flaw, it was undetectable either visually or through state of the art inspection machinery. Nevertheless, the Supreme Court decided that the development risk defence did not cover straightforward manufacturing errors which were unknown and undetectable.

A further question arises whether the defence applies to defects the presence of which is *known* in principle, but which, given scientific and technical knowledge at the time, cannot be detected in any given sample of the product. The English case of *A v National Blood Authority*<sup>129</sup> illustrates. The case involved claims by persons who had contracted hepatitis C after receiving transfusions of infected blood. At the time of transfusion the presence of the virus had been identified, but no satisfactory screen test existed to eliminate it from blood donations prior to their use. The defendants argued that the development risks defence as contained in section 4(1)(e) of the UK Consumer Protection Act 1987 could be used, even though the existence of the defect was known to the medical profession and blood producers, since the then state of knowledge was not such as to enable a producer to discover the existence of the defect in the particular blood product used. However, this was rejected on the basis that once the existence of contamination is

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<sup>127</sup> Grubb (series ed) Howells (gen ed) *Butterworths Common Law Series: The Law of Product Liability* (2000) par 4.249; Miller & Goldberg *Product Liability* par 13.91.

<sup>128</sup> 1995 NJW 2162.

<sup>129</sup> 2001 3 All ER 289 par 8.

known, even if not discoverable in any given sample, it was a known risk. A known, but unavoidable, risk was not to be regarded as falling within the development risk defence.<sup>130</sup> Burton J held that:

“If there is a known risk . . . then the producer continues to produce and supply at his own risk. It would, in my judgment, be inconsistent with the purpose of the Directive if a producer, in the case of a known risk, continues to supply products simply because, and despite the fact that, he is unable to identify in which if any of his products that defect will occur or recur, or, more relevantly in a case such as this, where the producer is obliged to supply, continues to supply without accepting the responsibility for any injuries resulting, by insurance or otherwise. . . . The *existence of the defect* is in my judgment clearly generic.”<sup>131</sup>

It would seem to follow therefore from the framework proposed in the Bill that once a defect is within the realm of scientific and technical knowledge, the section 71(3)(c) exclusion from liability disappears, and the burden of failure to introduce effective screening procedures falls upon the distributor or supplier (or producer if the defence is regarded as extending to it).

## 12 Prescription

There is no liability if claims are brought after three years have elapsed. However, section 71(3)(d) of the Bill leaves a number of question marks as to the exact starting point for that period. Three alternatives are mentioned: the “death or injury of a person”; “the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property”; or “the latest date on which a person suffered any economic loss”. But the wording does not clarify which is to prevail in the case where more than one is applicable.

A more serious problem is that this extremely loose wording quite simply does not tie in with the rest of section 71. In referring to “any person” and “any property” this subsection makes no stipulation as to what sort of “person” should have been injured or in what circumstances, or how “property” should have been lost, damaged, or occasioned economic loss.

For comparison purposes, section 22B, concerning product liability, of the Scots Prescription and Limitation (Scotland) Act 1973 may be considered:

“(2) Subject to subsection (4) below, an action to which this section applies shall not be competent unless it is commenced within the period of 3 years after the earliest date on which the person seeking to bring (or a person who could at an earlier date have brought) the action was aware, or on which, in the opinion of the court, it was reasonably practicable for him in all the circumstances to become aware, of all the facts mentioned in subsection (3) below.

- (3) The facts referred to in subsection (2) above are
- (a) that there was a defect in a product;
  - (b) that the damage was caused or partly caused by the defect;
  - (c) that the damage was sufficiently serious to justify the pursuer (or other person

<sup>130</sup> *A v National Blood Authority* 2001 3 All ER 289 par 31-32 50.

<sup>131</sup> *A v National Blood Authority* 2001 3 All ER 289 par 74.

referred to in subsection (2) above) in bringing an action to which this section applies on the assumption that the defender did not dispute liability and was able to satisfy a decree;

- (d) that the defender was a person liable for the damage under the said section 2.
- (4) In the computation of the period of 3 years mentioned in subsection (2) above, there shall be disregarded any period during which the person seeking to bring the action was under legal disability by reason of nonage or unsoundness of mind.”

### 13 Contributory negligence?

One final observation is that the Bill makes no provision for contributory negligence. This is logical in a statute providing for strict liability. It is impossible to measure the relative contribution made by negligence on the part of the plaintiff as compared with the defendant's conduct, when the latter, notionally at least, is not being assessed in such terms. However, it is arguable that there should be some recognition of the contribution made by the plaintiff to his or her loss where due care has not been observed. For example, section 61(4)(a) provides that the latent or patent nature of defect is irrelevant. Without provision for contributory negligence, this would appear to mean that even the most patent defects can be ignored by consumers with no penalty (although a plaintiff who had failed to observe perfectly obvious warnings or who had put the product to unusual and unanticipated use would be likely to find that the product did not meet the definition of defective as set out in section 61(3)). In this regard the wording of section 75AN(1) of the Australian Trade Practice Act 1974 might be considered a helpful comparator:

“If the loss in a liability action under section 75AD or 75AE was caused by both:

- (a) an act or omission of the individual who suffers the injuries concerned; and  
 (b) a defect of the action goods;

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in causing the loss.”

### 14 Conclusion

The introduction of strict products liability in the Consumer Protection Bill is to be welcomed as an indispensable element in South Africa's new consumer law. However, as currently drafted, the Bill leaves open a number of significant uncertainties for the consumer seeking redress from producers and suppliers of defective products. These relate in particular to the core definition of defectiveness; the “development risk” defence permitted where the defect was unknowable; and the burden of proving causation. It is to be hoped that attention will now be given to these problem areas, in order that the legislation in its final form will indeed establish an “accessible, consistent, harmonized, effective and efficient system of redress for consumers”.<sup>132</sup>

<sup>132</sup> S 3 of the Bill.

## OPSOMMING

Die Verbruikersbeskermingswetsontwerp 2006 maak voorsiening vir skuldlose aanspreeklikheid van vervaardigers en andere teenoor verbruikers van defekte produkte. Tot op hede is aanspreeklikheid vir skade weens defekte produkte gegrond op skuld, meestal nalatigheid. In *Wagener and Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) was die Hoogste Hof van Appèl nie bereid om af te wyk van die skuldgrondslag vir hierdie soort aanspreeklikheid nie in die uitspraak is gesê dat reëls ten opsigte van skuldlose aanspreeklikheid vir defekte produkte deur die wetgewer geskep sal moet word. Hierdie Wetsontwerp skep nou sulke reëls, soortgelyk aan reëls wat reeds in talle ander regstelsels geld. Prominente voorbeelde van sulke reëls is te vinde in die Amerikaanse *Restatement Third, Torts: Products Liability* en die Europese riglyne vir produkte-aanspreeklikheid van 1985, wat tot die aanname van ooreenstemmende wetgewing in al die Europese lidlande gelei het. Die Verbruikersbeskermingswetsontwerp volg in 'n groot mate die Europese model, in besonder die *Consumer Protection Act 1987* van die Verenigde Koninkryk.

In hierdie artikel word aangevoer dat 'n stelsel van skuldlose aanspreeklikheid vir defekte produkte in Suid-Afrika om beleidsredes geregverdig is, maar dat die Europese model nie as 'n ongekwalifiseerde sukses ervaar is nie en dat die onkritiese navolging van hierdie model sekere onduidelikhede skep; en dat die beoogde reëls in sekere opsigte nie goed aanpas by die beginsels van die Suid-Afrikaanse deliktereg nie. Besondere vrae wat vanuit hierdie perspektief bespreek word, sluit in die volgende: Ten opsigte van watter produkte in die Wetsontwerp genoem "goods" - moet skuldlose aanspreeklikheid erken word (ook vir defekte in grond en gebrekkige inligting?); wanneer moet 'n produk as "defek" beskou word (is die maatstaf van verbruikersverwagtinge "consumer expectations" 'n geskikte een en is dit versoenbaar met die onregmatigheidsvereiste vir deliktuele aanspreeklikheid?); wie moet as verweerders teenoor die verbruikers van 'n defekte produk aanspreeklik wees (vervaardigers, verspreiders en ook andere?); vir watter soort skade moet aanspreeklikheid erken word (moet buiten vergoeding vir saakskade en liggaamlike besering ook ekonomiese verlies vergoed word?); watter verwerer moet vir die vervaardiger of verspreider beskikbaar wees (ook die sogenaamde ontwikkelingsrisikoverweer "development risk defence"?); en vrae oor spesiale reëls vir kousaliteit en verjaring.