A warning defect and resultant hazard in terms of the CPA: a cautionary tale to suppliers with consideration of *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (900/2020) [2021] ZASCA 125 (unreported)

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OPSOMMING

Gebrekkige goedere veroorsaak dat ons blootgestel is aan ondraaglike risiko's van dood, besering en skade. Die vraag ontstaan dus wie aanspreeklik gehou moet word vir skade wat deur sulke gebrekkige goedere veroorsaak word, en tot welke mate. In die Suid-Afrikaanse regstelsel het 'n gespesialiseerde regsgebied ontwikkel, wat na verwys word as "produkaanspreeklikheid". Tans geld artikel 2(10) van die Wet op Verbruikersbeskerming 68 van 2008, wat bepaal dat "geen bepaling van hierdie Wet word uitgelê as sou dit ’n verbruiker verhoed om enige regte ingevolge die gemene reg beskikbaar, uit te oefen nie." Gevolglik dien hierdie artikel om die beseerde eiser 'n remedie te bied om 'n produkaanspreeklikheidseis ingevolge die gemenereg of 'n eis vir produkaanspreeklikheid ingevolge artikel 61 van die Wet op Verbruikersbeskerming in te stel. Die kommer is dat die twee remedies verskillende bewyskriteria verlang en as sodanig is hulle ongebalanseerd. Produkaanspreeklikheid ingevolge die Wet op Verbruikersbeskerming is byvoorbeeld "streng" aangesien artikel 61(1) nie vereis dat nalatigheid bewys moet word nie, hoewel dit vervang moet word met bewys van 'n "gebrek"; terwyl die gemenereg vereis dat nalatigheid bewys moet word en voorsiening gemaak word vir bydraende nalatigheid wat as verweer geopper mag word. Om die keuse vir 'n verbruiker makliker te maak, word dit gestel dat 'n produkaanspreeklikheidseis, wat ontstaan na 24 April 2010, kragtens artikel 61 van die Wet op Verbruikersbeskerming ingestel moet word. 'n Hoofpunt van hierdie bydrae is dus om die gemeenregtelikebepalings te oorweeg, in vergelyking met artikel 61 van die Wet op Verbruikersbeskerming, met die klem op subartikel 61(1)(c), 'n waarskuwingsgebrek. Daar word verwys na *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (900/2020) ZASCA 125 (ongerapporteer) - 'n saak wat voorkeur verleen om op die gemenereg staat te maak, wat daartoe lei dat die uitkoms nadelig is vir die verbruiker-eiser.

1 INTRODUCTION

In our daily lives, we are surrounded by products which facilitate the way we live. Inevitably, we are exposed to various (and in some cases unacceptable) risks of death, injury and damage caused by goods that are defective. When harm is caused, questions thereafter arise such as what law governs compensation for loss and who should be held liable for the damage? To address liability for harm caused by defective products, the South African legal regime has seen the development of a specialised area of law referred to as the common law “product liability” *ex delicto*,[2] with its evolvement into “strict product liability” per section 61 of The

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[2] Neethling-Potgieter *Law of delict* (2020) 4 (hereafter Neethling-Potgieter (2020)) state that “a delict is the act of a person that in a wrongful and culpable way causes harm to another”; and that all five elements of a delict, namely

Consumer Protection Act.[3] Both avenues of redress are on offer to an injured plaintiff. The only reason such a choice has been afforded is due to section 2(10) of the CPA, which states that "no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law." At first glance, it appears as though the consumer is well protected with both common law and statutory rights. However, upon an analysis of this subsection, the selection is not as rewarding as it appears as the two remedies display different criteria of proof, and as such they are unequal and exist on opposing legal spectrums.[4] Accordingly, the stance adopted in this contribution is that a product liability claim must be instituted under section 61 of the CPA, which requires the common law to be developed by the courts as to improve the realisation and enjoyment of consumer rights.[5]

Therefore, the discussion to follow is on:

- The governing provisions of common law product liability *ex delicto* regarding harm caused from defective goods, namely the problematic element of negligence and the defence of contributory negligence.[6]
- The contextual background to the CPA: and the strict product liability provisions in section 61 of the CPA with focus on sub-sections 61(1)(c), (2) and (3), and corresponding definitions.[7]
- The theoretical aspects of the legal regimes will be applied to *Pick 'n Pay Retailers (Pty) Ltd v Pillay*[8] – a recent unreported case held on 29 September 2021 in the Supreme Court

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an act, wrongfulness, fault, causation, and harm must be proven to hold a person delictually liable. If any element is missing, a delict cannot be said to have been committed and no liability arises. See also van Eeden and Barnard *Consumer Protection Law in South Africa* 2nd ed (2017) 31 (hereafter van Eeden and Barnard (2017)).

[3] 68 of 2008 (hereafter CPA). The extent of the discussion on the CPA is with reference to s 61 which expresses the strict product liability provisions, namely that a supplier will be held liable for harm caused from a defective product, irrespective of whether harm resulted from negligence by the defendant.

[4] For instance, a product liability claim established in terms of the common law requires negligence to be proven which may be countered by the defence of contributory negligence; whereas a strict product liability claim in terms of the CPA does *not* require negligence to be proven and thus the defence of contributory negligence will not be available to a supplier.

[5] S 4(2)*(a)* of the CPA.

[6] The discussion excludes the remaining delictual elements, as well as situations relating to insurance matters and where contractual relations exist (or privity of contract).

[7] S 61(1) lists three instances of when harm arises and strict product liability may be founded. S 61(1)(c) is one instance which applies when harm is caused due to an inadequate instruction or warning (referred to as a warning defect) relating to a hazard which may result (or arise) through the use of goods. Definitions in s 1 that are linked to s 61 include "supplier", "consumer", "harm", "hazard", "defect" and "goods". A discussion on the defences available in s 61(4), "harm" in s 61(5), and the extent of authority of a court in s 61(6)), are irrelevant to this contribution.

[8] (900/2020) [2021] ZASCA 125 (unreported) (hereafter *PnP v Pillay* or the *Pillay* case).

of Appeal ("SCA"). It reflects a preference to the common law, which is an unfortunate and prejudicial outcome for the injured consumer-plaintiff.

2 PRODUCT LIABILITY - COMMON LAW *EX DELICTO*

The South African common law of product liability *ex delicto* developed as a realm within the law of delict, with its origins in Roman law and amendments in terms of the Roman-Dutch law.[9] Generally, the law of delict "determines the circumstances in which a person is obliged to bear the damage he has caused another, i.e., when he may incur civil liability for such damage".[10] Specifically, two principles relevant for product liability *ex delicto* must be highlighted. Firstly, there must be no contractual relationship between the parties.[11] Secondly, a plaintiff who is harmed from a defective product put into circulation may institute an action against a manufacturer if the ordinary delictual requirements are satisfied.[12] This discussion, as indicated above, will only detail the negligence requirement. In this instance, reference is made to *Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd*[13] which states that "South African law has chosen…to make fault [negligence] the cornerstone of legal liability for defective products."[14] Negligence, is accordingly a fundamental element required to impose product liability on a defendant-manufacturer.

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[9] *Cape Town Municipality v Paine* 1923 AD 207 at 211, where the Roman-Dutch law principles that applied in South Africa in the context of product liability were laid down. Specifically, that a manufacturer had a legal duty to the public to avoid harmful goods from being circulated. This stance was subsequently confirmed in *Herschel v Mrupe* 1954 (3) All SA 414(A) at 431-432. For a further discussion on the development of the law of delict from Roman law to Roman-Dutch law, see Tennant *Thesis* 43.

[10] Neethling-Potgieter (2020) 3. The authors explain that because the wrongdoer has an *obligation* to make compensation for the damage suffered, the person prejudiced has a corresponding *right* to claim compensation with the result that an *obligation* between the two parties is created, and accordingly the law of delict applies. It belongs to the broader part of private law known as the *law of obligations.*

[11] Van der Merwe and De Jager "Products Liability: A recent unreported case" 1980 *SALJ* 92 (hereafter Van der Merwe and De Jager (1980) *SALJ*); and Loubser and Reid *Product Liability in South Africa* (2012) 39 (hereafter Loubser and Reid (2012)).

[12] Boberg *The law of delict* (1984) 194. Tennant *Thesis* 46 defines a "defect" (which is limited to a latent defect) as: the utility of the product was compromised and unfit for purpose, and the product was rendered "unsafe and potentially harmful" as determined by a consumer expectations test. Van Heerden and Barnard 2019 *THRHR* 446 elaborate on the criteria relied upon to establish the five delictual elements: an "act" is determined by the release of a defective product; "wrongfulness" is constituted by the infringement of a "legally protected interest" in a "legally reprehensible way"; "negligence" is established if the plaintiff's damage was reasonably foreseeable, that a reasonable man would have guarded against it, and that the defendant (manufacturer) failed to do so; "causation" (both factual and legal) is satisfied if the defective product caused harmed to the plaintiff; and "harm" is founded if there was loss or damage caused to the plaintiff.

[13] 1975 (2) SA 457 (W) at 464-465.

[14] See also Van Heerden and Barnard 2019 *THRHR* 447-448.

The *locus classicus* for the abstract or general test to establish negligence is firmly stated in *Kruger v Coetzee*[15] as follows:

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

This means that the test of negligence is two-fold, in that there must be *foreseeability* of harm and *preventability*[16] of the foreseeable harm.

Despite this time-honoured test, Kriek[17] opines that proving negligence against a manufacturer[18] presents a "weighty or insurmountable evidential burden" as it demands expert evidence to establish that the manufacturer could reasonably have foreseen and prevented the harm. She correctly suggests at the same point that consumers are unfamiliar with the technicalities of the production process and the science or technology applied, to successfully hold a manufacturer liable. On the other hand, manufacturers are in a stronger position to escape liability as they have financial knowledge and informational resources available to produce expert evidence, in defence of their production process and defective products.

Due to the problems of proving negligence against a manufacturer, the common law has offered a form of reprieve to a plaintiff in product liability cases through the application of the *res ipsa loquitur* doctrine, a doctrine derived from Anglo-American law which is directly translated as "the facts speak for themselves".[19] The basis of the doctrine is that the mere fact that harm results from a defective product may be sufficient to justify an inference of negligence on the part of the manufacturer.[20] Neethling and Potgieter describe the application of the doctrine of *res ipsa loquitur* in more detail: it allows for the inference of negligence in a given situation

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[15] 1966 (2) SA 428 (A) at 430.

[16] Italics are the author's emphasis.

[17] Kriek *The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis* (LLD thesis SU 2017) 75 (hereafter Kriek *Thesis*).

[18] Van Heerden and Barnard "Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA)" 2019 *THRHR* 449 (hereafter Van Heerden and Barnard (2019) *THRHR*) provide that the defendant in a common law product liability claim is usually the manufacturer, although both the interests and outcomes of the consumer and manufacturer need to be equally protected and balanced. It must be noted that this ideology differs to that of the CPA as a defendant is any supplier within the supply chain.

[19] See Neethling-Potgieter (2020) 385

[20] Van der Merwe and De Jager (1980) *SALJ* 91; *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (2) SA 617 (A); and Neethling-Potgieter (2020) 385-386.

and thereafter gives rise to two presumptions which the defendant is required to rebut, namely[21] that the manufacturer used an unsuitable production process, and that its employees exercised the production process negligently. The manufacturer must provide sufficient evidence that it displaced the inference of negligence and that it acted with the necessary precaution.[22]

Upon the establishment of negligence,[23] the defence of contributory negligence may be raised to counter negligence. This defence is directed at the conduct of the plaintiff which means that the defendant alleges that he/it was not the only negligent party, but that the plaintiff was also negligent with reference to the harm (or damage) suffered.[24] Contributory negligence will be alleged where a plaintiff misuses, tampers with or is inattentive to the use or purpose of a product; or disregards warnings or instructions that accompany the product.[25] The extent of damage to be attributed is decided with reference to each party's degree of negligence, as determined by expressing (as a percentage) the deviation of such negligence from the standard of a reasonable person, where these two percentages are compared and allocated in respect of the damage in question.[26] A finding of contributory negligence on the part of the plaintiff leads to a reduction of the damages awarded to him in correlation to his negligence.[27]

3 CONTEXTUAL BACKGROUND TO THE CPA

Fault-based liability has been criticised from as early as 1913, as portrayed in the case of *Union Government v Sykes*[28] where the plaintiff sought damages to his land from the local Railway due to a fire that was caused by sparks from a locomotive engine. The plaintiff had to prove fault and he lost the case as he was unable to do so. Solomon JA at the same point stated that he sympathised with the plaintiff because proving fault was an impossible task, and accordingly

[21] Neethling-Potgieter (2020) 385 fn 387.

[22] The *res ipsa loquitur* has to date not been applied to justify an inference of negligence in a product liability case under the common law *ex delicto*. Nevertheless, it is still possible that a scenario may arise where a court may decide to apply the doctrine *mero motu*.

[23] A legislative framework for apportionment of damages based on contributory negligence was introduced by means of the Apportionment of Damages Act 34 of 1956 as amended by the Apportionment of Damages Amendment Act 58 of 1971. The common law defence is general in nature as it may be raised in a wide variety of delictual claims, hence it is not product–liability specific.

[24] Neethling-Potgieter (2020) 198. At 199, the authors point out that the defence stemmed from the influence of English law.

[25] Kriek (2017) *Thesis* 89.

[26] Neethling-Potgieter (2020) 202.

[27] For an elaborate discussion, refer to Tennant *Thesis* 73-77.

[28] 1913 AD 156 at 185.

the fault-based principle resulted in unequal treatment to the consumer. He, however, concluded that this was a matter for legislation to determine and not an issue for the courts to address. Subsequently, during 2003 in the case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd,*[29] the joint appellants (namely Wagener and Cuttings) each received a local anaesthetic manufactured by the respondent, *Pharmacare*, while undergoing separate surgeries. The appellants were left paralysed, and they sued the respondent in a joint action for damages because of harm caused from the unsafe anaesthetic.[30] The appellants argued that to prove negligence against the manufacturer of the alleged harmful product was extremely difficult to do, and thus the common law remedy (including the application of the *res ipsa loquitur* doctrine) was inadequate.[31] Although the court was not opposed to the notion of strict product liability, it preferred that the matter be addressed by the legislature.[32] *In casu*, the court determined that the appellants remedy was confined to the Aquilian Action, where proof of negligence remains a requirement. The appeal was dismissed. From this judgement, it is evident that the scope of protection afforded by common law product liability *ex delicto* to persons harmed by defective goods was unsatisfactory, warranting statutory intervention.[33] At this point, it is reiterated that the main disadvantage in relying on fault-based liability is that there is unfair treatment of a consumer, because a consumer lacks the required access to and knowledge in the design and production process of the manufacturer, resulting in a plaintiff not being able to prove negligence on a balance of probability.[34] Despite this continuous outcome, it was only a few years later that the CPA[35] was assented to by the President on 24 April 2009 and promulgated on 29 April 2009.[36] Product liability was legislated in the form of strict product liability, as prescribed in section 61.

The CPA makes provision for *consumer protection*[37] in its long title, preamble, and purpose provision. An extract of the long title of the CPA indicates that it must "promote a fair,

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[29] 2003 (2) All SA 167 (SCA) at 168 and 171.
[30] *Ibid*.
[31] 2003 (2) All SA 167 (SCA) at 173.
[32] 2003 (2) All SA 167 (SCA) at 178.
[33] Kriek *Thesis* 96.
[34] Tennant *Thesis* 81.
[35] Also see *GN* 467 in *GG* 32186 regarding the early effective date (on 24 April 2010); and *GN* 917 in *GG* 33581 regarding the general effective date (on 31 March 2011). The CPA Regulations were published in *GN* R293 in *GG* 34180, which are irrelevant for the purpose of this contribution.
[36] The CPA was assented to by the President on 24 April 2009 and subsequently promulgated on 29 April 2009 - *GG* 32186. For a detailed discussion on the "road to implementing the CPA" see Tennant *Thesis* 89 and van Eeden and Barnard (2017) 23.
[37] Author's own emphasis.

accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection". An excerpt of the CPA's preamble states that such laws are demanded to "protect the interests of all consumers", failing which there will be "efficient redress for consumers who are subjected to abuse or exploitation in the marketplace". The CPA's purpose provision is detailed in section 3(1) which requires the promotion and advancement of the social and economic welfare of consumers by (amongst others) - establishing a legal framework for the consumer market, protecting consumers from unlawful practices and irregular conduct, and offering a system of redress for consumers. The CPA[38] must be interpreted in a manner that gives effect to the purpose provision in section 3(1), namely to protect a consumer.[39] Furthermore, where a provision in the CPA is interpreted with more than one meaning, the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights must be preferred.[40] Additionally, any document such as a consumer agreement which is prepared by a supplier or required per the CPA must be interpreted to the benefit of the consumer.[41] The emphasis of the CPA is evidently and repeatedly on the protection of the consumer.

4 STRICT PRODUCT LIABILTIY – CPA

[38] S 2(1).
[39] S 2(2).
[40] S 4(3).
[41] S 4(4).

The application provisions of the CPA are expressed in section 5(1).[42] Generally, the Act applies to a transaction,[43] or to the promotion[44] or supply[45] of goods or services,[46] in the ordinary course of business[47] and for consideration,[48] by a supplier[49] to a consumer.[50]

The strict product liability provisions are detailed in section 61(1)-(6), Chapter Two and Part H (sections 53 to 61) of the CPA, and which bears the title "Right to fair value, good quality and safety."

Section 61 falls under the heading "Liability for damage caused by goods". Subsection 61(1) relates only to "goods" and legislates that -

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[42] The exemptions to the CPA are covered in s 5(2). They are irrelevant to this discussion and will not be further addressed.

[43] S (5)(1)(a). S 1 defines a "transaction" to include an agreement between one person acting in the ordinary course of business and *other persons* for the supply of goods or services, or a supply of goods or the performance of services for or at the direction of a *consumer*. Read with s 5(6) which lists additional "arrangements…regarded as a transaction", which would therefore explain the use of the concept of *other persons* such as "members by a club, trade union, association, society or other collectivity".

[44] S (5)(1)(b). S 1 defines a "promotion" as an activity which broadly relates to a supplier marketing (such as to advertise, display, offer, make any representation, or induce) goods or services to a consumer.

[45] S (5)(1)(c). S 1 defines a "supply" through referring to an extensive range of acts, including to sell, rent, exchange, or hire (in relation to goods); and to sell, perform, provide, or grant access to any premises, event, activity or facility (in relation to services).

[46] S 1 non-exhaustively defines "goods" to include tangible and intangible objects, a legal interest in immovable property, and gas, water and electricity. Loubser and Reid (2012) 81 opine that component goods are included in such a definition. "Services" in s 1 includes work undertaken or performed with the outcome that it benefits someone, the provision of education, banking or financial information, transportation, accommodation, entertainment, access to electronic communication infrastructure, the use of premises, and the right to occupancy.

[47] The CPA unfortunately fails to define this concept. However, Van Heerden and Barnard 2019 *THRHR* 451 interpret it to be that insolvency law must be consulted to further unpack its meaning, as originated from *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) par 20 which requires an objective test having regard to all circumstances.

[48] S 1 defines "consideration" to mean "anything of value given and accepted in exchange for goods or services" such as money, labour, credit, or loyalty awards.

[49] S 1 defines a "supplier" as a natural person or juristic person "who markets any goods or services". S 1 defines "market" as a verb that promotes or supplies. This definition is extended to include the "supply chain" which in s1 is the "collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider". The definition of a supplier is thus broad and extensive.

[50] S 1 defines a "consumer" which is wide-ranging as it includes both natural persons (no monetary threshold applies to such consumers) as well as juristic persons (with a threshold asset value or annual turnover of less than R2 million, the amount is regulated by s 5(2)(b) and determined by *GN* 294 IN GG 34181); a person to whom goods or services are marketed; or a user of goods and beneficiaries or recipients of services, regardless of whether they entered into a transaction relating to such goods or services.

> Except to the extent contemplated in section 61(4),[51] the producer or importer or distributor or retailer[52] of any goods is liable for any harm, as described in subsection (5),[53] caused wholly or partly as a consequence of -
> (a) supplying any unsafe goods;
> (b) a product failure, defect or hazard in any goods; or
> (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
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> irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer [the defendant],[54] as the case may be.

Subsection 61(2) must be read with subsection 61(1), as it deems service providers as suppliers of goods (who are not traditionally regarded as such). It expresses that "A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purpose of this section". Such an example would include an electrician who installs a defective geyser or a surgeon who implants a defective pacemaker.[55] Section 61(3) extends the application of section 61(2) by providing that if, in a particular case, more than one person is liable in terms of section 61, their liability is joint and several.

5 THE FACTS IN *PNP v PILLAY*

The facts[56] in this decision are that *Pick 'n Pay Retailers (Pty) Ltd* ("PnP") operated and controlled an automated boom gate at its Hypermarket shopping centre in Durban North, with the intention of motor vehicles exiting a designated area.[57] The parties conceded that the boom and box holding the boom were conspicuous to the public. In December 2015, Cherylene Sarah Pillay ("Ms. Pillay") and her colleague finished shopping at PnP and walked towards the open parking area to their motor vehicle. They were deep in conversation and did not notice the

[51] This subsection sets out a closed list of defences available to the supplier and supply chain, which is omitted from this discussion.
[52] Defined in s 1 of the CPA – they are parties to the supply chain.
[53] S 61(5) describes "harm" as the death or injury to, or illness of, a natural person; loss or physical damage to movable or immovable property; and economic loss to the said listed categories of harm. "Harm" will not be discussed further.
[54] Author's emphasis.
[55] Jacobs, Stoop and Van Niekerk "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 *PELJ* 383.
[56] Paras 1-4.
[57] Para 1.

boom. The boom descended and struck both Ms. Pillay and her colleague, resulting in injuries to them. Ms. Pillay sustained more severe injuries[58] because the boom directly struck her head,[59] resulting in medical treatment being administered over an extended period. Medical professionals said that she would continue to suffer with neck spasms and headaches regularly. Her colleague never pursued a legal claim against PnP as she sustained a moderate injury to her one eye, causing mere bleeding. Ms. Pillay instituted an action in the Durban magistrate's court against PnP, alleging that her injuries were caused due to the negligence of PnP in terms of common law (also termed as product liability *ex delicto*). Her claim was dismissed as she did not prove that her injuries resulted from the negligence of PnP.[60] The matter was then taken on appeal to the high court by Ms. Pillay, where the lower court outcome was overturned, and negligence was established against PnP. However, the high court held that PnP was liable for only 60% of the damage due to the contributorily negligence of Ms. Pillay as she should have been more aware of her surroundings.[61] The matter was then taken on appeal by PnP to the Supreme Court of Appeal ("SCA"), where the court extensively considered the negligence element. It confirmed the decision of the high court and dismissed the application with costs.[62]

6 LEGAL REGIME APPLICATION

6.1 INTRODUCTION

As indicated above, section 2(10) of the CPA allows a plaintiff to select to institute a claim in terms of either common law product liability *ex delicto* or strict product liability in terms of section 61 the CPA. Ms. Pillay selected to rely on the former action. However, the discussion below is a contribution as to why she should have relied on the provisions of section 61 which, for ease of reference, the author deems as the "good", with reliance on common law product liability *ex delicto* as the "bad" (a discussion on the "bad" shall however commence). Subsequently, the author will illustrate why the selection between the two alternatives outlined in section 2(10) is the "ugly", with an unwavering stance given in favour of the application of the CPA.

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[58] Para 26.
[59] For a list of injuries to Ms. Pillay, see para 4.
[60] Para 7.
[61] Ms. Pillay contributed to the negligence (see para 9) as she was "inattentive", did not "pay proper attention to the boom" and thus "she could have avoided" the incident.
[62] Para 28. This contribution will critique the decision made by the SCA, in confirming negligence which was limited by the defence of contributory negligence. In the alternative, Ms. Pillay should have instituted a claim in terms of s 61(1)(c) of the CPA, the benefits of which are discussed below.

6.2 *THE BAD* – COMMON LAW PRODUCT LIABILITY

In the magistrate's court decision in *PnP v Pillay,* the plaintiff did not establish on a balance of probability that foreseeability of harm and its preventability were established, meaning that negligence failed to be established.[63] However, the high court overturned the lower court's decision by confirming that Ms. Pillay did indeed prove the requirements of foreseeability and preventability of harm,[64] namely because the "risk of harm presented by the boom was reasonably foreseeable" which could have been avoided by PnP as:[65]

> It was not uncommon [common] for shoppers to walk on the road right next to the boom…this was the route of choice for shoppers…they would walk under the boom when it was in a raised position, instead of safely walking past it.

The SCA[66] agreed with the decision of the HC, and accordingly set the incorrect precedent for future product liability claims.

This case, at first consideration, reflects that establishing negligence against a defendant as a stand-alone element in a delictual claim is indeed not a challenge, despite being otherwise suggested above.[67] This observation may offer relief for a potential plaintiff in a product liability common law claim. However, upon analysis and critical investigation, there is a clear hurdle to jump before negligence is firmly founded against a defendant - it is termed as the "defence of contributory negligence". Successful reliance on this defence is evident from the case *in casu* where, despite Ms. Pillay proving negligence as confirmed by the SCA, the court found that Ms. Pillay contributed 40% to the harm sustained resulting in PnP being held liable for 60% of the damage.

The defence of contributory negligence takes flight *only*[68] if there is a *prima facie* claim of negligence. That is, when negligence has been alleged and established by a plaintiff, the defendant has an opportunity to rebut it by raising the defence of contributory negligence. In

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[63] Para 6.
[64] Para 9.
[65] Para 8.
[66] Para 28.
[67] The SCA acknowledged, in paras 13 and 27, the test of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430, although in para 15 it recognised that the foreseeability and preventability of harm assessment is merely a "formula or guide that does not require strict adherence [and] courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her". This would explain why the (almost) impossible establishment of negligence became possible in this product liability claim.
[68] Author's emphasis – for a product liability claim specifically.

other words, negligence triggers contributory negligence. This stance is echoed in and supported by the statement that the said defence is only "available to a defendant who has *not* intentionally caused harm to a plaintiff".[69] Therefore, as the defence is incidental to the existence of negligence, the author aligns (which is a stance taken throughout this contribution) with the view of Van Heerden and Barnard[70] that the common law's "proof of negligence the main impediment to successfully pursuing a product liability claim".

6.3 *THE GOOD* – STRICT PRODUCT LIABILITY

Section 61(1) of the CPA provides that a supplier may be held liable for harm caused from a defect in a product "irrespective of whether the harm resulted from any negligence". This provision expressly legislates that negligence is not a requirement to found product liability. Hence "product liability" is now conceptualised as "strict product liability". The forthcoming question then is what element/s need to be proven by a plaintiff (such as Ms. Pillay) to hold a defendant (such as PnP) liable for harm if negligence is not prescribed, especially since negligence was the make-or-break element in *PnP v Ms. Pillay*? The analysis hereunder will provide an answer to this question, although it will be limited to the requirements outlined in section 61(1)(c), which refers to an *instruction or warning defect*. The rationale for this restriction is because such a defect was implied by the court in *PnP v Pillay*, albeit in terms of the common law.[71] In this regard, the SCA made the noteworthy remark in passing that "there was no warning sign in that vicinity drawing attention to the danger of the boom" especially since the route chosen by Ms. Pillay and her colleague was the preferable choice for shoppers in general.[72]

Section 61(1)(c), as a reminder, states that a supplier is "liable for any harm…caused wholly or partly as a consequence of… (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any

[69] Tennant *Thesis* 75.
[70] Van Heerden and Barnard (2019) *THRHR* 449.
[71] At common law, a defect is abstractly distinguished according to three broad categories: manufacturing defects, design defects and instruction or warning defects. See Tennant *Thesis* 18. In terms of the CPA, a "defect" is explained and defined, of which an instruction or warning defect is one of them.
[72] Para 10.

goods".[73] In order to examine this subsection, definitions are assigned to the main elements as follows:

- Inadequate – the CPA does not define this word although "adequate" means "satisfactory" with synonyms including "average", "tolerable", "competent" or suitable".[74] In contrast, "inadequate" would thus mean "unsatisfactory", "abnormal", "intolerable", "incompetent" or "unsuitable".
- Instructions or warnings – the CPA does not define this word although "instructions" ordinarily means "a direction or order" or "teaching or education;"[75] whereas "warnings" is "a statement or event that indicates a possible danger or problem", "advice against wrong or foolish actions" or "advance notice of something."[76]
- Hazard – section 53(1)(c)(i)-(ii) specifically defines that a "hazard" is a "characteristic" (which relates to the manufacture, design, quality or functionality of goods)[77] in goods or components that –
    - (i) "has been identified as, or declared to be, a hazard in terms of any other law," for instance if a danger is identified in another applicable South African law other than the CPA; or
    - (ii) "presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised". The Act does not define such a concept, although a "significant risk" is a risk that is "important", "large", "considerable" or "substantial".[78]

[73] In addition to proving an instruction or warning "defect" in s 61(1)(c), PnP must be a "supplier" and Ms. Pillay must be a "consumer". PnP is a supplier of goods due to s 61(2) – read with definition of "service" in s 1 - as it amongst others "provides access" to its shopping "premises, activity or facility" via a boom, and regardless that it "participates in, supervises or engages directly or indirectly in the service". Ms. Pillay meets the definition of "consumer" in s 1 of the Act, which is broad and includes persons who are not in privity of contract with the supplier (such as PnP) but by virtue of having entered into a "transaction" with such supplier. However, the CPA extends the definition of a "consumer" while simultaneously excluding the existence of a "transaction" *in casu* "if the context so requires or permits". This is by virtue of subparagraph (c) which states a consumer means - "a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services". As Ms. Pillay was allowed to use or benefit from the use of the boom, the definition of "transaction" thus does not need to be considered. The last element to be proven is "harm", which was established in *PnP v Pillay*. S 61(5) describes "harm" as the death or injury to, or illness of, a natural person; loss or physical damage to movable or immovable property; and economic loss to the said listed categories of harm.

[74] Livingstone (3rd ed) *Colour Oxford Dictionary and Thesaurus* (2010) 9.

[75] Loubser and Reid (2012) 76.

[76] *Ibid*.

[77] Loubser and Reid (2012) 71.

[78] *Ibid*.

Therefore, an alternative way to interpret a defect in section 61(1)(c) is by stating that:
A supplier is liable for harm caused in full or part because of unsatisfactory demands or cautions issued by a supplier to a consumer, relating to any aspect of goods that is dangerous in law or which indicates to material loss due to the use of such goods.

Attention must now be drawn to section 58(1) of the Act, which remains within Part H and is relevant for the purpose of discussion to section 61(1)(c). Section 58(1) places a stringent obligation on suppliers to comply with a duty of notice. It provides that "the supplier of any activity or facility" that is subject to a significant risk or one where a consumer "could not reasonably be expected to be aware…or contemplate" must "draw the fact, nature and potential effect" of the risk "to the attention of the consumer" in accordance with section 49(2)[79] read with section 22.[80] Accordingly, if these obligations are not adhered to, partially or totally, or are performed poorly by a supplier (such as PnP)[81] then there may exist an instruction or warning defect per section 61(1)(c), where the supplier will be exposed to liability for harm arising.[82]

6.4 *THE UGLY* – S 2(10) CONTROVERSIAL SELECTION

Naudé and Eiselen refer to this subsection as a "general savings clause", indicating that section 2(10) must be viewed against the backdrop of the presumption that the legislature did not intend to alter the common law unless clearly stated in a particular Act. Accordingly, they remark that section 2(10) confirms that the CPA does not revoke or alter the common law and must be read to be capable of co-existing with the common law.[83] However, reliance on the common law in

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[79] S 49 is headed as "Notice required for certain terms and conditions" and which demands, in brief, that a significant risk must be drawn to a consumer in plain and understandable language, in a conspicuous manner, and before a consumer "enters into the transaction or agreement, begins to engage in an activity (for the purpose of *PnP v Pillay*), or enters or gains access to the facility…" where a consumer "must be given an adequate opportunity…to receive and comprehend the provision or notice…". Furthermore, a consumer must sign, initial or act in a "manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision".

[80] S 22 sets out the right to information in plain and understandable language. This section prescribes the test and guidelines for a supplier to follow.

[81] Para 11 of *Pnp v Pillay* provides that a warning sign of "CAUTION BOOM OVERHEAD" was placed at the entrance of PnP and next to the boom *after* (author's emphasis) Ms. Pillay was injured. This indicates that PnP failed to comply with s 58(1) of the CPA at the time of harm.

[82] If PnP provided a warning instruction or notice, it could have relied on the defence in section 61(3)(a), which provides that the "hazard that results in harm is wholly attributable to compliance with any public regulation". S 1 defines a "public regulation" as any legislation which includes adhering to s 22, 49(2) and 58(1) of the CPA to avoid the possible existence of a defect in s 61(1)(c).

[83] Eiselen in Naudé and Eiselen (*eds*) *Commentary on the Consumer Protection Act* Juta (2014 *et seq*) 2-9.

PnP v Ms. Pillay portrays a different scenario. It is a modern court case that elected to follow the common law regime, a decision that was supposed to offer Ms. Pillay protection from harm and compensation for damage on par with the CPA. Instead, the outcome was not in her best interest and wellbeing as she was only awarded 60% of her loss.

Section 61 is the best possible legal regime to rely on, for three primary reasons. Firstly, this contribution shows how the establishment of negligence against a defendant (and the raising of the incidental defence of contributory negligence against a plaintiff) in *PnP v Pillay* remains a burden and which is still mostly unsuccessful. Secondly, the CPA expressly and without controversy provides for *consumer protection*[84] in its long title, preamble, and purpose provision – it is the cornerstone of the legislation. The common law does not stipulate or favour such a stance, as it opts to balance the interests of both parties by allowing for "negligence" to be established and "contributory negligence" to counter negligence. Thirdly, the CPA has recognised and acknowledged the criticism surrounding negligence and has accordingly omitted it from section 61(1), hence why it is referred to as "strict product liability". This section is a more direct (although multi-layered) approach as it lists specific criteria to be proven by a plaintiff in comparison to vague and discretionary criteria.

7 CONCLUDING REMARKS

Ms. Pillay was awarded only 60% of her claim by the SCA because of her contributory negligence. This means that she incurred 40% loss at her own misfortune and detriment. Ms. Pillay should rather have chosen to rely on section 61(1)(c) of the CPA. If she relied on this subsection, it is opined that she would have received 100% of her claim as the requirements prescribed by the Act have been met, particularly:

- Ms. Pillay is a "consumer" per the definition of section 1 subparagraph (c). This subsection furthermore provides that a "transaction" is exempt from application *in casu*.
- Ms. Pillay suffered physical "harm" per section 61(5).
- PnP is the "supplier" due to section 61(2). As a supplier, it should have complied with its obligations prescribed in sections 22, 49(2) and 58(1) of the CPA. Such sections demand that PnP should have drawn "the fact, nature and potential effect" of the danger of the boom to the attention of Ms. Pillay, in plain and understandable language and in a conspicuous

[84] *Ibid*.

manner. Before approaching the boom, she should have also had an adequate opportunity to receive and comprehend the notice and acknowledge or accept the risk of the boom descending. A notice supplied by PnP after the fact is insufficient to justify compliance to these duties. As PnP failed to comply with these obligations, section 61(1)(c) finds application.

- An instruction or a warning defect in section 61(1)(c) exists as PnP is liable for the harm caused for failing to provide the necessary caution relating to the boom it controlled and provided access to. The automatic boom thus presented a material loss due to its functionality and use.

It is therefore recommended that section 4(2)(a) of the CPA be adhered to, namely that "the court *must*[85] develop the common law as necessary to improve the realisation and enjoyment of consumer rights", in that a consumer who has suffered harm from a defective product should *only*[86] be allowed to rely on strict product liability in section 61.

[85] Author's emphasis
[86] *Ibid*.