
MANUFACTURERS AND STRICT LIABILITY FOR DEFECTIVE PRODUCTS

**Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd
2003 4 SA 285 (SCA)**

1 Introduction

For years academics and consumer activists have been calling for manufacturers to be held strictly liable for defective products, irrespective of whether or not they are contractually linked to consumers (see McQuoid-Mason *Consumer Law in South Africa* (1996) 107-111; and Neethling, Potgieter and Visser *Law of Delict* 4ed (2001) 326). In the United States of America, for example, these calls go back as far as the 1940s (Cantu “Twenty-five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A” 1993-4 25 *St Marys Law Journal* 327 329). The present position in our law is that, unless the action arises out of a contractual relationship, the general principles of delict apply and negligence or intentional misconduct on the part of the manufacturer must be proven by the injured consumer. The problem for consumers is that it is often very difficult for them to do this. This is particularly true in South Africa where we have a highly sophisticated manufacturing industry serving a largely unsophisticated consumer market. Following *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* (2002 2 SA 447 (SCA)), some suggested that the Supreme Court of Appeal had left the door open for the courts to recognise strict liability in delict for unintended harm caused by defective products. Neethling and Potgieter in their article “Die Hoogste Hof van Appel laat die Deur Oop vir Strikte Vervaardigersaanspreeklikheid” (2002 *TSAR* 582) concluded as follows:

“Aangesien die appelhofuitspraak in *Ciba* klaarblyklik nie afwysend staan teenoor die erkenning van strikte risiko-aanspreeklikheid op die gebied van defekte produkte nie, vertrou ons dat die hof in verdienstelike gevalle hieraan gevolg sal gee” (586).

However, in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* (2003 4 SA 285 (SCA)) the Supreme Court of Appeal closed the door, holding instead that introducing strict liability for manufacturers is the prerogative of the legislature and not the courts.

2 Facts

The matter involved two similar appeals from the Cape Provincial Division which were consolidated for purposes of the appeal. The first appellant, Wagener, underwent shoulder surgery at a private hospital which was owned by a trust. During the operation she received a local anaesthetic called the Regibloc Injection (Regibloc). This anaesthetic was manufactured and marketed by Pharmacare Ltd. After the operation, Wagener was left with a paralysed right arm. She brought an action for damages for personal injuries against Pharmacare and the trustees of the trust in the Cape Town High Court, alleging that her injuries were caused by Regibloc. The judgment states that the second appellant, Cuttings, brought a virtually identical suit although the report does not stipulate the injuries suffered. The main claim against Pharmacare was based on the allegation that, contrary to its duty as manufacturer, the Regibloc administered was unsafe for use as a local anaesthetic because it had resulted in necrosis and paralysis. In the alternative, it was argued that Pharmacare had acted negligently. Pharmacare excepted to the main claim on the basis that it did not disclose a cause of action in that it failed to allege fault on the part of Pharmacare and purported to contend that Pharmacare was strictly liable for the injuries suffered. Fourie AJ upheld the exception but granted leave to appeal to the Supreme Court of Appeal. In the appeal, the essential inquiry was whether liability attached to Pharmacare even where there was no fault on its part, in other words was it strictly liable?

3 The Appellants' argument

A study of the appeal judgment suggests that the appellants resorted to all the arguments that have, over time, been advocated by the various and numerous academics in South Africa and elsewhere who have called for strict liability. The appellants took this a step further by relying on the Constitution (Act 108 of 1996) arguing that their common-law remedy, namely the Aquilian action for damages, was inadequate to protect their constitutional right to bodily integrity (292B-C). They contended that in terms of the Constitution, the court was obliged to develop the common law and to “fashion a remedy” that did achieve the requisite protection. They referred to *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* (1964 3 SA 561 (A)) where the court had extended strict liability for consequential damages arising out of defective merchandise to a merchant seller who professed expert knowledge in relation to the faulty goods, and argued that “it required no more than a decision of legal policy, and a modest shift of principle, to extend such liability to a manufacturer” (292C-D). The appellants pointed out that it is rather anomalous that sellers who are not responsible for manufacturing the product can be held strictly liable but when it comes to the manufacturer who was responsible for producing the defective product, fault must be proven (293D-E). The appellants also

referred the court to the more recent Appellate Division decision of *Langenberg Voedsel Bpk v Sarculum Boerdery Bpk* (1996 2 SA 565 (A)) where the question was posed whether the law in South Africa had lagged behind other jurisdictions where strict liability has been imposed (for example in the United States, Japan and the United Kingdom).

The appellants emphasised that there are instances of strict liability which are well-known in the law of delict and that there are well-founded present day reasons such as expediency, commercial equity and public protection which have influenced other jurisdictions to impose strict liability in cases such as this one (292E-F). One of the major reasons why the appellants argued for strict liability was because proving fault for an ordinary consumer is extremely difficult. Consumers have no knowledge of, or access to, the manufacturing process and therefore are not in a position to determine whether the manufacturer has acted negligently or not. They also argued that relying on the maxim *res ipsa loquitur* does not solve the problem because injured parties still have a duty to lead evidence and run the risk that judgment will be given against them. The appellants submitted that resorting “to the maxim was simply a hypothetical ruse to justify adherence to the fault requirement” (293 D).

Counsel for the appellants was asked by the court whether the proposed new liability was to be founded on a breach of some implied contractual warranty, or in delict. The reply was that “such categorisation was unnecessary and obstructive”. The appellants were simply asking the court to make a policy decision in order to “cater for what was an obvious weakness in an injured consumer’s legal armoury” (293G).

4 The decision

The court emphatically dismissed the appellants’ arguments and refused to extend the principle in the *Kroonstad* case to manufacturers. It was pointed out that the *Kroonstad* matter was concerned with a warranty imposed on a seller by the law of sale and that contract and delict are quite separate branches of law with their own principles, remedies and defences (296D). The court refused to “simply graft warranty liability onto a situation patently governed by the law of delict”. Reference to US law in this situation was dismissed because the history of this remedy in the USA is very different to the history in South Africa and so the court maintained that it would be unjustifiable for it to rely on US law in this instance (296E-297A). In all other industrialised nations where there is strict liability, this has been imposed by statute. The court found it significant that whilst many commentators are calling for strict liability, they do not necessarily state which forum should be responsible for this development in the law. The court concluded by stating that “if strict liability is to be imposed, then it is the legislature that must do it” (300G).

The court dismissed the arguments relating to the Constitution on the basis that the existing Aquilian remedy is not inadequate. It was contended that the maxim *res ipsa loquitur* could be developed further to provide protection for claimants in this kind of litigation and that this would involve an incremental shift rather than the creation of a whole new delict (295G-296B).

5 Comment

5.1 *The distinction between contract and delict*

Counsel's reply to the court's question regarding whether the proposed new liability was founded on the law of contract or delict suggests that counsel foresaw a blurring of the traditional boundaries between these two branches of the law. Such a blurring has been suggested by other commentators. Olivier in "The Tortification of Contract" (2000 *Acta Juridica* 283) expresses the opinion that with the rise of new political and social ideas and the development of a consumer society, the rigid approach to the law of contract of the nineteenth century has changed dramatically (286). No longer are judges there simply to act as umpires whose function it is merely to decide what the parties themselves had agreed to when they entered the contract. They are increasingly being called upon to judge matters relating to contractual fairness, reasonableness and justice. He also points to substantial developments that have taken place in the law of delict which include the recognition that there can be faultless liability (287). He argues that by the mid-twentieth century it was obvious that the traditional division of contract and delict was under strain. Olivier quotes the Dutch professor Smits who proposes the notion that contract and delict are "in a process of merging with one another" (290) and refers to Gilmore (*The Death of Contract* (1974)) who has gone as far as suggesting that at first-year level the distinction between contract and torts should be scrapped and students should be taught a subject called contorts.

As a traditional contract academic I find it difficult to accept the notion that contract may be just "an enclave within the general domain of tort" (Gilmore quoted by Olivier 292) but as a consumer rights advocate I welcome the infusion of principles such as public policy, reasonableness and fairness into the law of contract – principles far more at home in the law of delict than they are in the law of contract, that can be used to soften the rigid effect of contractual concepts such as *caveat subscriptor*. (I say this despite recent Supreme Court of Appeal decisions such as *Brisley v Drotzky* 2002 4 SA 1 (SCA); and *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA)). The idea that the law of contract is being eroded is obviously a very radical approach and is deserving of far more attention than a case note allows. For the purposes of this note it is sufficient to suggest that the distinction between contract and delict is not as cut and dried as the court suggests and this was an opportunity for the court to examine possible developments in the law

which would have aided consumers who find themselves in the unfortunate position of the appellants.

5.2 *Policy reasons for imposing strict liability*

The highly sophisticated modern commercial world of today is a far cry from the days when most consumers purchased their products from the person who made them. Purchasing goods from an artisan or craftsman meant that consumers not only knew who was responsible for manufacturing them, they also knew who to blame when things went awry. The industrial revolution changed all this and today it is very difficult for consumers to judge whether goods have been manufactured properly or even to perform a perfunctory inspection before purchasing. Requiring consumers to prove negligence when injured by defective products places them in an extremely difficult position. Manufacturing processes often involve highly technical and complicated methods that are beyond the knowledge of the average consumer (McQuoid-Mason 96; and *Hackett v G & G Radio and Refrigeration Corp* 1949 3 SA 664 (A) 693).

The policy reasons for imposing strict liability as expressed by Traynor J 60 years ago in the American decision of *Escola v Coca-Cola Bottling Co of Fresno* (24 Cal 2d 453, 150 P 2d 436 (Cal 1944)) are particularly apposite in this case. McQuoid-Mason summarises them as follows (108):

- “(a) The manufacturer is in the best position to reduce the risk.
- (b) Losses suffered by individual consumers may be overwhelming to them, but can be insured against by the manufacturer and distributed amongst the public as a cost of doing business.
- (c) The manufacturer is responsible for placing the product on the market.
- (d) Strict liability against the seller means that the latter must in turn sue the manufacturer, which leads to needless circuitry and litigation; the consumer should be able to sue the manufacturer directly in strict liability without privity.
- (e) Consumers lack the means and the skill to investigate the soundness of the product for themselves.
- (f) Advertising and marketing devices used by manufacturers, such as trade marks, lull consumers into a false sense of security concerning the quality of the goods.”

Apart from (f) this is a textbook case where these policies are applicable. The court referred to them but maintained that the legislature was the best forum to evaluate and implement them (297). The court stated that one of the difficulties that could arise if the court were to impose strict liability was that this would have a retrospective effect. In other words, the court would in fact be pronouncing that this is the law and always has been the law so a manufacturer who produced goods a number of years ago could now be held strictly liable for something which was produced in circumstances where it stood “in no jeopardy of an adverse judgment” (298F-G). However, the plaintiff still has to establish that the injuries were caused by a defective product. Once this is established, it is submitted that on policy grounds, it is

the manufacturer who should be responsible for the injuries regardless of when the goods were manufactured. To allow manufacturers to escape liability for defective products on the basis that they were not aware that they would be held liable for the injuries caused seems to be very unfair from the consumer point of view and something that most consumers would find difficult to understand.

5.3 *An alternative to strict liability – res ipsa loquitur*

Whilst the court declined to create what, in its opinion, would have amounted to a new delict, there is a ray of hope. Stressing that developments in the law should take place on an incremental basis, the court suggested that if the matter proceeded on the alternative count (where negligence was alleged) the courts may develop reasons for being readier in some cases of alleged defective manufacture to draw the necessary *prima facie* inference of negligence. This would mean that the maxim *res ipsa loquitur* will apply and the manufacturer will be obliged to give an explanation. The court stated that in circumstances where a substance was administered to the human body and had an effect quite contrary to the manufacturer's stated aim this was perhaps the approach to adopt and involved an incremental shift rather than the complete rejection of a long-standing principle (295F-I). The court also suggested that the question of who bears the onus of proof could be reconsidered and that for reasons of policy, practice and fairness it might be preferable to place the onus on the manufacturer to disprove negligence (296). This was the approach suggested by Van der Walt in "Die Deliktuele Aanspreeklikheid van die Vervaardiger vir Skade Berokken deur Middel van sy Defekte Produk" (1972 *THRHR* 224) and De Jager in "Die Grondslae van Produkte-aanspreeklikheid *Ex Delicto* in die Suid-Afrikaanse Reg" (1978 *THRHR* 347). De Jager is of the view that *res ipsa loquitur* can be applied in such a way as to introduce strict liability. This can be done by increasing the requirements for rebutting the inference of negligence to such an extent that it is impossible for manufacturers to satisfy them (364; and see also Van der Merwe and De Jager "Products Liability: A Recent Unreported Case" 1980 *SALJ* 83). As this was not the issue before the court, the court declined to pronounce on these matters and it is hoped that in the interests of consumers the Supreme Court of Appeal will at least extend the existing law to give unfortunate victims of defectively manufactured goods some hope that they will be compensated for their injuries without having to surmount impossible legal burdens.

6 Conclusion

There can be no doubt that this decision is a blow for consumers. One can imagine the confusion and frustration that the appellants must have felt when their main claim against the manufacturers was dismissed on what must seem to them to be a technicality. What is particularly frustrating is that

there seems to be very little development of consumer protection measures either through the courts or via the legislature. South African law is lagging behind other jurisdictions and recent decisions of the Supreme Court of Appeal suggest that consumers cannot rely on the courts to come to their aid (see in particular *Brisley v Drotsky supra* and *Afrox Healthcare Bpk v Strydom supra*).

The state of our law reflects South Africa's extremely weak consumer culture. This lack of commitment to consumer matters can be attributed to a number of factors, including the fact that consumers are just not aware of their rights. In addition, there is a lack of a vibrant non-governmental consumer organisation sector in South Africa and the government does not, at this stage, have a coherent consumer protection policy. There are however, indications that government is becoming more alive to the problem (see generally Tsele-Maseloanyane "Better Business: Building a Culture of Consumer Protection" Issue 4 March 2002 *Sisebenza Sonke* 14 published by the Department of Trade and Industry) and as this decision sends a clear message that consumer protection measures are the responsibility of government, it is hoped that the legislature will heed the call.

The final point that needs to be made is that with the opening up of global markets and the drive to export South African products, South African manufacturers and their foreign agents will be held strictly liable in many other jurisdictions. It is time that South African consumers were afforded the same level of protection as their overseas counterparts.

Tanya Woker
University of KwaZulu-Natal, Durban