

Product liability and safety in South Africa: overview

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A Q&A guide to product liability and safety in South Africa.

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Sources of law

1. What are the main areas of law and regulation relating to product liability?

Product liability claims can be based on the law of contract, delict or statutory provisions that set out liability for defective products.

The Consumer Protection Act No 68 of 2006 (CPA) is the legislative instrument governing liability in respect of defective or unsafe goods and general consumer protection. Section 61 of the CPA deals with liability for damages caused by goods and can be described as the product liability section.

In respect of any particular goods or services, a consumer includes:

- A person to whom those particular goods or services are marketed in the ordinary course of the supplier's business.
- A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt.
- If the context requires or permits, a user of particular goods or a recipient or beneficiary of 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.
- A franchisee (in certain circumstances).

However, the CPA does not apply to all transactions for the supply of goods or services. More specifically, where goods or services are promoted or supplied to the state, or where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister, the CPA will not apply.

2. What is required to establish liability under the most common causes of action? When is a product defective? Does strict liability apply in certain circumstances?

To establish liability, a party will have to prove that harm was caused, wholly or partly as a consequence of:

- The supply of an unsafe product.
- A product failure, defect or hazard in the product.
- Inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from, or associated with, the use of the product.

Section 53 of the Consumer Protection Act (CPA) defines "defect". In short, it means any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the services less acceptable than persons are generally reasonably entitled to expect in the circumstances, or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons are generally reasonably entitled to expect.

Section 61 of the CPA establishes strict liability and a producer, importer, distributor or retailer of any goods must comply with it and can be liable for any harm, irrespective of whether the harm resulted from negligence.

3. Who is potentially liable for a defective product? What obligations or duties do they owe and to whom?

The producer or importer, distributor or retailer of any goods are liable for defective or hazardous products. Their obligations are to supply safe products with adequate instructions and warnings to the consumer.

Defences

4. What are the defences to a product liability claim? Is there a time limit in which proceedings can be brought?

Under South African law, claims must be brought within three years.

Liability will not arise where (*section 61(4), Consumer Protection Act*):

- The unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation.
- The alleged unsafe product characteristic, failure, defect or hazard:
 - did not exist in the goods at the time it was supplied by a person to another person alleged to be liable; or
 - was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case the point above does not apply.
- It would be unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, with regard to that person's role in marketing the goods to consumers.
- The claim for damages is brought more than three years after:
 - the death or injury of a person;
 - the earliest time at which a person had knowledge of the material facts about an illness;
 - 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 last date on which a person suffered any economic loss.

Excluding/limiting liability

5. Can a supplier limit its liability for defective products and are there statutory restrictions on a supplier doing this? Do consumer protection laws apply? Are guarantees or warranties as to quality implied by law? Is there a mandatory or minimum warranty period for consumer products?

A supplier cannot require a consumer to waive its rights or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose terms as a condition of entering into a transaction. In most cases, a supplier will not be able to limit its liability for defective products (*section 48, Consumer Protection Act (CPA)*).

There is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the relevant requirements and standards.

There is an implied warranty of quality in any transaction or agreement pertaining to the supply of goods to a consumer (*section 56, CPA*). Under this section, the producer, importer, distributor and retailer each warrant that

the goods comply with the requirements and standards contemplated in section 55 of the CPA, except to the extent that those goods have been altered contrary to instructions, or after leaving the control, of the producer, importer, distributor or retailer.

Section 55 deals with consumers' rights to safe, good quality goods, and requires that goods:

- Are reasonably suitable for the purposes for which they are generally intended.
- Are of good quality, in good working order and free of any defects.
- Will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply.
- Comply with any applicable standards set under the Standards Act 1993, or any other public regulation.

There are no mandatory or minimum warranty periods for consumer products.

Product liability litigation

6. In which courts are product liability cases brought? Are product liability disputes generally decided by a judge or a panel of judges? Are juries used in certain circumstances?

There are no specific courts that hear cases on product liability disputes. Depending on the amount of damages claimed, a product liability case can be instituted in either the lower courts (Magistrates' Courts or Regional Courts) or the High Court. In South Africa, the lower courts have a monetary jurisdiction of up to ZAR400,000, while the High Courts have unlimited jurisdiction. In a lower court, the case will be presided over by a magistrate and in the High Court, by a judge.

The jury system was abolished in South Africa during the 1950s. However, a panel of judges can be appointed if the matter justifies it.

7. How are proceedings started?

Product liability proceedings start when the Sheriff serves a summons on behalf of the claimant, who allegedly suffered damages as a result of defective or hazardous goods. The defendant must file a notice to defend and a plea within 20 business days after that. The claimant can file a replication to the plea within 15 days after receiving it. Pleadings then close and the parties can apply for a trial date.

Consumers can also file a complaint with the National Consumer Commission.

8. Who has the burden of proof and to what standard?

The burden of proof is on the claimant to prove its case on a balance of probabilities. Where the Consumer Protection Act applies, the claimant will not have to prove that the defendant was negligent. However, the claimant must still satisfy a court that all the other requirements to succeed in a delictual claim have been demonstrated. Therefore, a court must:

- Assess whether any harm has been proven and adequately mitigated.
- Determine the extent and monetary value of any damages, including economic loss.
- Apportion liability among persons who are found to be jointly and severally liable.

9. How is evidence given in proceedings and are witnesses cross-examined?

In South Africa, court proceedings are adversarial in nature. Evidence is presented orally by the witnesses. An advocate (counsel) will lead a witness through their evidence-in-chief, but cannot ask leading questions. The opposing parties' advocate can cross-examine the witness and on completion of cross-examination, the first advocate can ask questions to clarify answers given by the witness during cross-examination. The advocate is not allowed at that stage to deal with new matters or evidence that the witness has not addressed during its evidence-in-chief.

10. Are parties able to rely on expert opinion evidence and are there special rules or procedures for it?

It is not within the power of the courts to appoint experts. Each party can call experts under a procedure laid down in the court rules. A party must file a notice alerting the opposing party of its intention to call an expert and the notice must name the expert witness to be called. This is then followed up by another notice, which includes a summary of the expert's evidence.

11. Is pre-trial disclosure/discovery required and which rules apply? If not, are there other ways to obtain evidence from a party or a third party?

Discovery is document-based and compulsory under the High Court Rules. Depositions, as used in the US, do not form part of the discovery process in South Africa. Rule 35 of the High Court Rules governs discovery and requests for better and/or additional discovery are allowed. Discovery is made under oath and a list of available documents is attached to the affidavit.

A party can also subpoena documents in a third party's possession.

12. Is there liability for spoliation of evidence/a remedy for destruction of or failure to preserve evidence (in particular, the product)?

Where a party has a real and well-founded apprehension that evidence may be hidden or will be destroyed, it can use an Anton Piller application to seize and preserve the evidence for use in the trial. This application can be used to safeguard specific (and specified) documents or things that constitute vital evidence in support of the applicant's cause of action.

Because of the potential for abuse, safeguards are built into the procedure and the order, for example, use of a supervising attorney.

13. What types of interim relief are available before a full trial and in what circumstances?

Interim interdicts can be obtained depending on the circumstances.

14. Can the successful party recover its costs associated with the litigation, such as legal fees and experts costs and to what extent?

As a general rule, the successful party is entitled to recover its legal fees, which also include the costs incurred to consult experts. However, not all legal costs and fees are recoverable.

The court rules contain a prescribed schedule of tariffs and a party's bill of costs are taxed subject to the discretion of the taxing master. Costs are typically taxed on a party and party scale, but special orders can be made in certain circumstances against a party. These special costs orders can include attorney and client costs or attorney and own-client costs.

15. What types of appeal are available?

Judgments are delivered in the South African civil courts based on the common law and precedents of judgments in the High Courts. From the lower courts, an appeal can be lodged to the High Court, while from the High Court, appeals are made to either three judges (a full bench) sitting as an appeal tribunal in the High Court, or a matter can be referred directly to the Supreme Court of Appeal. Typically, five judges will sit as the appeal tribunal in the Supreme Court of Appeal. The highest court in South Africa is the Constitutional Court, which has 11 judges. Appeals against decisions of the Supreme Court of Appeal (and in certain instances, decisions of the High Courts) can also be referred to the Constitutional Court.

Class actions/representative proceedings

16. Are class actions, representative proceedings or co-ordinated proceedings available? If so, what are the basic requirements? Are they commonly used?

Class action legislation does not exist in South Africa. The procedure for handling group or class-related claims is set out under the High Court Rules and the Constitution of the Republic of South Africa of 1996. The procedure is in development and it is necessary to apply for certification of a class action before it is brought. Some of the requirements identified by the courts for a class action include:

- The existence of a class identifiable by objective criteria.
- The existence of cause of action raising a triable issue.

- Issues of fact, or law, or fact and law, common to members of the class.
- The relief or damages sought flow from a cause of action and are ascertainable and capable of determination.
- An appropriate procedure to allocate damages to class members.
- The proposal of a representative suitable to conduct the action and to represent the class.
- That a class action is appropriate to determine class members' claims in light of the composition of the class and nature of the proposed action.

The Constitutional Court has ruled that the above requirements must be treated as conditions precedent or jurisdictional facts that must be present before an application for certification will succeed. The requirements must serve as factors to be considered when determining where the interests of justice lie in a particular case.

Under section 38 of the Constitution, the following persons can approach a court on behalf of others:

- Anyone acting as a member of, or in the interest of, a group or class of persons.
- Anyone acting in the public interest.

Individual groups and/or representative bodies will therefore be entitled to bring class actions. The court must approve the class representative.

It is likely that class actions will be used more often in the future where there is a large group of claimants available to institute an action.

Litigation funding

17. Is litigation funding by third parties allowed? Is it common? Are contingency fee or no win no fee arrangements allowed?

Litigation funding by third parties is allowed. Champerty has been accepted in South Africa in 2004 and has been found to be neither contrary to public policy, nor void.

Contingency fees are also allowed in South Africa. However, there are restrictions with regard to the level of the "success fee" that can be charged. The success fee cannot exceed the normal fee by more than 100%, provided that, in the case of claims grounded in money, the total of any success fee payable by a client to a legal practitioner cannot exceed 25% of the total amount awarded, or any amount obtained by the client in consequence of the relevant proceeding.

Public funding is available from institutions such as the Legal Aid Board, the Legal Resources Centre and certain legal aid clinics, although only for certain types of cases and dependent on particular criteria.

Remedies

18. What remedies are available to a successful party in a product liability claim?

Section 61 of the Consumer Protection Act provides that a producer or importer, distributor or retailer of defective goods will be liable for any harm caused. Product liability claims are usually for monetary compensation.

19. How are damages calculated and are there limitations on them? Are punitive or exemplary damages available and in what circumstances?

The only damages that can be recovered as a result of harm caused by defective or unsafe products are actual, proven damages. Where damages are awarded for pain and suffering resulting from bodily injuries, they must be proved with reference to common law judgments relating to similar injuries.

Punitive damages are not available under South African law under any circumstances.

20. Is liability joint and several/how is liability apportioned, including where a partially responsible entity is not a party to the proceedings?

Liability can be joint and several. Liability will be apportioned based on the percentage of negligence or contributory negligence found by the court. No order will be made against a person or entity not joined to the proceedings.

Product safety

21. What are the main laws and regulations for product safety?

The Consumer Protection Act (CPA) is the general legislative instrument that regulates product safety. Consumers have a right to demand a safe and good quality product. Section 55 of the CPA provides that every consumer has a right to receive goods that:

- Are reasonably suitable for the purposes for which they are generally intended.
- Are of good quality, in good working order and free of any defects.
- Will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply.
- Comply with any applicable standards set under the Standards Act 1993 or any other public regulations.

In addition, consumers also have the right to expect that the goods are reasonably suitable for a specific purpose if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier:

- Ordinarily offers to supply the goods.
- Acts in a manner consistent with being knowledgeable about the use of those goods.

Lastly, section 82 of the CPA makes provision for codes for specific industries to be agreed and prescribed by the Minister through regulations.

22. Are there general regulators of product safety issues? Are there specific regulators for particular goods or services? Briefly outline their role and powers.

The Consumer Protection Act (CPA) makes provision for a regulatory authority to be appointed. Under section 60(1) of the CPA, the National Consumer Commission must promote the development, adoption and application of industry-wide codes of practice that provide for effective and efficient systems to operate in the event of a recall. A Commissioner can appoint inspectors and investigators.

Product recall

23. Do rules or regulations specify when a product recall is required or how companies should make decisions regarding product recalls and other corrective actions? Are any criteria specified?

The Recall Guidelines, published in 2012, are the only published provisions dealing with product recall. Even though the Guidelines do not have statutory force, it is accepted practice that these guidelines must be complied with. If the guidelines are not followed, it can result in a civil claim for damages.

Under the Guidelines, consumer product safety recall can take place when a problem is identified to be a health or safety hazard. The Guidelines require:

- Notification to consumers.
- A recall strategy.
- Retrieval of the unsafe products.
- Reporting obligations.

Voluntary product recall can be initiated by a supplier when it becomes aware of safety issues relating to products supplied. In these instances, suppliers must notify the National Consumer Commission (NCC) when they undertake the recall.

The NCC can also order a compulsory recall to protect the public from any unsafe goods (*section 60(2), Consumer Protection Act*). In those instances, the NCC may issue a written notice stipulating the manner in which the recall is to occur. The NCC also monitors compliance with all notices issued by it and product recalls in general.

24. Are there mandatory advertising requirements for product recalls? Are there other rules governing how a product recall should be conducted?

It is the duty of the supplier to give notice of the recall to the consumer by whatever means necessary to reach the consumer, for example, the media, websites and, where the addresses of consumers are known, notices posted directly to them. The Recall Guidelines compel suppliers to notify consumers of the nature, causes, extent and degree of risk pertaining to goods/products sold. Therefore, a written recall notice must include:

- A product description.
- A picture of the product.
- A description of the defect.
- A statement of the hazard, which must describe the maximum potential hazard and associated risk.
- An explanation of the immediate action the consumer must take, for example, cease use immediately and return the product to the place of purchase for a full refund. It should be clear that the consumer must return the product and not dispose of it. The supplier must ensure that it minimises any inconvenience to consumers to encourage consumer compliance with the recall notice.

- Contact details for consumers to enable them to receive a refund or have the product repaired or replaced.

The recall notice must not include the words "voluntary recall".

25. Is there a mandatory obligation to report dangerous products or safety issues to the regulatory authorities?

Although the Recall Guidelines are not regulations, they can be regarded as containing mandatory obligations to report dangerous products or safety issues to the National Consumer Commission (NCC). The NCC must be notified in writing (preferably before commencing the recall process) of the recall and the reasons for it (*section 60(1), Consumer Protection Act (CPA)*).

A supplier is the entity with primary responsibility for the supply of safe consumer products in South Africa. "Suppliers" in this context includes manufacturers, importers, distributors and retailers. Where the NCC detects or becomes aware of a safety-related hazard, it will attempt to identify the supplier at the highest level in the supply chain to assist them to ensure all relevant suppliers from within the supply chain (including international recipients) are identified and advised of the safety-related hazard relating to the product.

When the supplier becomes aware of an unsafe product being sold to consumers, it must immediately consider whether a recall will be necessary.

There are no specific time frames within which a recall must take place. It will all depend on the safety of the consumers in possession of the unsafe product. There may be instances where the product may be dangerous to life when used and, in these circumstances, the supplier must act immediately.

The Recall Guidelines apply to all products sold to consumers that may be defective and unsafe. Under the CPA, an unsafe product means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

Suppliers, which will include manufacturers, importers, distributors and retailers, must report unsafe products to the NCC. The Guidelines contain a "Recall Notification Form", completion and submission of which constitutes notification to the NCC under the CPA.

Failure to act on a notice issued by the NCC and/or to notify the NCC of the initiation of a product recall is an offence.

To date, there have been no key examples of companies being prosecuted or fined for failing to report a product recall to the NCC.

26. Is there a specific requirement to provide progress reports and/or keep the authorities updated about the progress of corrective actions? In practice, do authorities expect periodic update reports?

The Recall Guidelines provide for progress reports to be submitted to the National Consumer Commission (NCC) to monitor the progress and enable ongoing assessment of the effectiveness of the recall. In practice, the NCC expects periodic progress reports and a final report before the recall is closed.

Recent trends and reform

27. Are there any recent trends in product liability and safety law? Have there been any recent significant changes or important cases? Are there any legal or procedural issues that are attracting particular interest in your jurisdiction?

It remains to be seen how the South African public will react to the Consumer Protection Act (CPA) and its requirements. Because the CPA provides for strict liability and negligence no longer needs to be proved, there will likely be a big increase in product liability matters in the future.

28. Are there any proposals for reform and when are they likely to come into force?

There are no current proposals for reform.

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Recent transactions

- Conducting commercial litigation in the Supreme Court of South Africa, Supreme Court of Appeals and Constitutional Court.
- Involved in actions in New York in both Federal and State Courts on behalf of defendant corporations, where jurisdiction and *forum non conveniens* points were successfully taken.
- Involved in the first HIV+ related case in South Africa and has been the attorney of record in various cases reported in South Africa.
- Involved in an international court case involving the sale of a 1962 Ferrari GTO, which was the most expensive car deal in the world. The car was sold for GB£8 million to a Japanese billionaire. The matter was heard in the courts of the US and in Britain.
- Acting on behalf of OUTA (Opposition to Urban Tolling Alliance) in the e-tolling matter against SANRAL and the Government.

Professional memberships. Law Society of the Northern Provinces.

Publications

- The International Comparative Legal Guide to Product Liability, Class & Group Actions 2014 (contributor).
- Getting the Deal Through: Product Liability 2013, 2014, 2017, 2018 (contributor).
- Thomson Reuters Class Action Global Guide 2016.
- The International Comparative Legal Guide to: Class & Group Actions 2016 and 2017.

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Recent transactions

- Conducting national and international FCPA (Foreign Corrupt Practices Act) and anti-corruption investigations and advised in relation to them.
- Advising major telecommunications companies on various aspects of regulatory compliance in respect of their business, agreements and licensing issues, as well as regulatory issues in certain African countries.
- Representing Vodacom in various high-profile telecommunications reviews and matters.
- Representing Sasol in a variety of its litigious matters.
- Representing Media24 in defamation actions.
- Involved in international actions launched in New York, in both Federal and State Courts on behalf of defendant corporations where jurisdiction and *forum non conveniens* points were successfully taken.

Professional memberships. Law Society of the Northern Provinces.

Publications. The International Comparative Legal Guide to: Class & Group Actions 2016 and 2017.

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