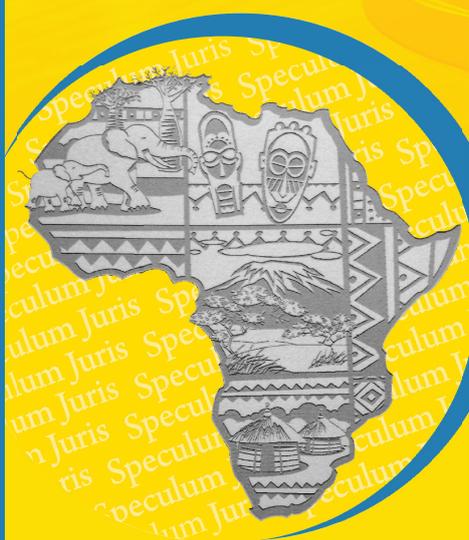


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## Food Product Liability and its Implications for Consumer Protection in South Africa: An Exposition of the Listeriosis Crisis

Bronwyn Le-Ann Batchelor\*  
Nasholan Chetty\*\*

### Abstract

*Food manufacturers' liability for harm caused to consumers has gained prominence in South Africa since the outbreak of listeriosis. This crisis was ascribed to the negligence of manufacturers in taking preventive measures to curb the spread of food-borne intestinal diseases and ensuring that their products were safe. This article explores the legal recourse available to the victims of listeriosis by presenting the background and history of the outbreak and proceeds to discuss product liability under common law and the remedies for affected consumers under the South African Consumer Protection (CPA) Act 68 of 2000, compared to other jurisdictions. It is argued that the victims of listeriosis can base their claims for compensation on the delictual principles of product liability and consumer rights under CPA and common law. However, supplementary remedies, emanating from breach of legal duty and other constitutional damages, which may be available to the victims, are beyond the scope of this article.*

**Keywords:** Product liability, listeriosis, Consumer Protection Act 68 of 2000, consumer rights

\* (BComm (Law); LLB; LLM).

\*\* (LLB; LLM)

## 1 INTRODUCTION

The human right to safe food is universally acknowledged as a *sine qua non* for the realisation of various international human rights.<sup>1</sup> Indeed, the full enjoyment of the human right to health and the right to life is predicated on consuming safe food.<sup>2</sup> With every bite of food taken humans are potentially exposed to illness emanating from either microbiological or chemical contamination.<sup>3</sup> Globally, billions of people are at risk of either contracting food-borne enteric diseases and millions become sick or die because of consuming unsafe food.<sup>4</sup> According to the World Health Organisation (WHO)<sup>5</sup>, concerns about food safety have intensified both in developed and developing countries in recent years.<sup>6</sup> However, the real tragedy of food-borne diseases largely occurs in developing countries where contaminated water is used for the cleaning of food, poor food-production processes and handling, inadequate or absent food

- 1 Foluke *Access to Safe Food in South Africa as a Human Rights Imperative* (LLM thesis, University of Western Cape, 2015)1; Loubser and Reid *Product Liability in South Africa* (2012) 2; Basson "The South African Law on Products Liability – Quo Vadis?" 2001 *SAIIE* 85; Davis "Products Liability in South African Law" 1979 *CILSA* 206; Stoop and Van Niekerk "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: a critical overview and analysis" 2010 *PER* 302; Naudé "The Consumer's right to Safe, Good Quality Goods and the implied Warranty of Quality under s 55 and 56 of the Consumer Protection Act 68 of 2008" 2011 *South African Mercantile Law* 336; Strydom *A Critical Analysis of Strict Product Liability in South Africa* (LLM-dissertation, University of Pretoria, 2013) 3; Ally *A critical examination of Section 61 of the Consumer Protection Act 68 of 2008 and its implications for those in the Supply Chain* (Masters in Business Law, University of KwaZulu Natal, 2017)1; Havinga "The Influence of Liability Law on Food Safety On Preventive Effects of Liability Claims and Liability Insurance" <http://www/file:///Downloads/NSOLWP201002-HavingaLiabilityLawpdf-AdobeAcrobatPro.pdf> (accessed 14-03-2020).
- 2 Notably, the right to safe food is enshrined in the human right to life, human dignity and food. In accordance with the United Nations Universal Declaration of Human Rights (UDHR), adopted on December 10, 1948 "Everyone has the right to life, liberty and security of his person" and "Everyone has the right to a standard of living that provides health and well-being for his and his family, including food, clothing, housing, medical care and necessary social benefits, as well as the right to insurance against unemployment, sickness, incapacity for work, widowhood, old age or the loss of livelihoods in an otherwise independent way." The provisions of the Declaration perceive food as an important element in ensuring the right to appropriate living standards. See Damayanti and Wahyati "Food Safety in the Protection of the Right to Health" <https://iopscience.iop.org/article/10.1088/1755-1315/292/1/012047/pdf> (accessed 14-03-2020); Ayala and Meier "A human rights approach to the health implications of food and nutrition insecurity" 2017 *Public Health Review* 38; Lizakowski and Krampichowsk "Legal regulations and administration of food safety" 2019 *World Scientific News* 133.
- 3 Cawthorn et al "A high incidence of species substitution and mislabeling detected in meat products sold in South Africa" 2013 *Food Control* 440; Van Der Linde *Product Liability: The Common Law And The Consumer Protection Act 68 Of 2008* (LLM-dissertation, 2018) 1; Barnard "The influence of the Consumer Protection Act 68 of 2008 in the warranty against latent defects, voetstoots clauses and liability for damages" 2012 *De Jure* 455; Botha and Joubert "Does the Consumer Protection Act 68 of 2008 provide for strict product liability?-A Comparative analysis" 2011 *THRHR* 305. WHO "Food safety" <https://www.who.int/news-room/fact-sheets/detail/food-safety> (accessed 15-03-2020); African Centre for Biosafety "Below the belt, below the headline South Africa's inequitable and GM contaminated bread industry" <http://www.acbio.org.za/index.php/media/64-media-releases/458-below-the-belt-below-the-headline-south-africas-inequitable-and-gm-contaminated-bread-industr> (accessed 16-03-2020).
- 4 Ansell and Vogel (eds) "The Contested Governance of European Food Safety Regulation" in Ansell and Vogel *What's the beef? The contested governance of European Food Safety* (2006) 3.
- 5 The World Health Organisation ("WHO") established on 7 April 1948 is a specialized agency of the United Nations responsible for international public health. The WHO Constitution, which establishes the agency's governing structure and principles, states its main objective as "the attainment by all peoples of the highest possible level of health." See WHO "WHO governance" <https://apps.who.int/gb/gov/> (accessed 16-03-2020).
- 6 Microbiologists, clinicians and epidemiologist maintain that food-borne diseases are preventable through building strong and resilient national food safety systems and providing consumers with tools to make safe food choices. According to WHO, efforts to fight food-borne diseases are receiving relatively little political attention, especially in developing countries with the absence of reliable data on the actual national burden of food-borne diseases necessary to draw public attention and mobilize political will and resources to combat such diseases. WHO in 2019, estimated that unsafe food caused 600 million cases of food-borne diseases and 420 000 deaths. About 30% of food-borne deaths occurred among children under 5 years of age. Further, unsafe food containing harmful bacteria, viruses, parasites or chemical substances, causes more than 200 diseases ranging from diarrhea to cancers. More than US\$110 billion is lost each year in productivity and medical expenses resulting from unsafe food in developing countries. Unsafe food creates a vicious cycle of disease and malnutrition, particularly affecting infants, young children, elderly and the sick. In addition, food-borne diseases impede socioeconomic development by straining health care systems, and harming national economies, tourism and trade. See WHO "Estimating the burden of food-borne diseases" <https://www.who.int/activities/estimating-the-burden-of-foodborne-diseases> (accessed 16-03-2020); Shrivastava et al "World Health Organization calls for food safety and prevention of food-borne illnesses" [file:///Downloads/World\\_Health\\_Organization\\_calls\\_for\\_food\\_safety\\_an.pdf](file:///Downloads/World_Health_Organization_calls_for_food_safety_an.pdf) (accessed 16-03-2020).

storage facilities and poorly enforced regulatory standards for food safety.<sup>7</sup>

In South Africa, food safety issues became relevant after the listeriotic outbreak lasting from 2017 to 2019.<sup>8</sup> Listeriosis is defined as a disease that is caused by eating food contaminated with the *bacterium listeria monocytogenes*.<sup>9</sup> It attracted the attention of state regulators, consumer rights organisations and human rights activists. While scientists and microbiologists agree that listeria is commonly present in nature, ready-to-eat processed meat products are particularly susceptible to contamination.<sup>10</sup> Consequently, manufacturers and other participants in food chains have a duty of care under common law and other legislation to ensure that their products are free from listeriosis contamination.<sup>11</sup> This article explores the nature of the obligations imposed on manufacturers in terms of product liability to ensure food safety, and the recourse available to victims when such legal duty was neglected.<sup>12</sup> Product liability under common law and consumer protection rights under the South African Consumer Protection (CPA) Act 68 of 2008 in light of other comparative jurisdictions are explored.<sup>13</sup> It is argued that listeriosis victims can claim compensation based on the delictual principles of product liability and concomitant consumer protection embodied under common law and CPA respectively.<sup>14</sup> However, supplementary remedies, arising from breach of legal duty and constitutional damages, do not fall within the scope of this article.<sup>15</sup>

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- 7 Conceptually, food safety depends on an interrelated, interlinked chain of connected participants in the food market namely food producers, manufacturer of agricultural raw materials, processors, distributors, legislature, as well as state bodies responsible for enforcing and control law enforcement and other parties who constitute the final linkage in the chain of consumers. Fuchs *et al* "Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation" <http://www.springerlink.com/content/m237228605223463/full-text.pdf> (accessed 16-03-2020).
- 8 Grobler "Listeriosis outbreak: How it started, how it was traced, and how it was finally stopped" <https://www.news24.com/SouthAfrica/News/listeriosis-outbreak-how-it-started-how-it-was-traced-and-how-it-was-finally-stopped-20180903> (accessed 24-01-2019).
- 9 Farber and Peterkin "Listeria monocytogenes, a Food-Borne Pathogen" 1991 *Microbiology Review* 476.
- 10 Roe "Optimal sharing of foodborne illness prevention between consumers and industry: the effect of regulation and liability" 2004 *American Journal of Agricultural Economy* 359; Goulet *et al* "Incidence of listeriosis and related mortality among groups at risk of acquiring listeriosis" 2012 *Clinical Infectious Diseases* 652; Schjørring *et al* "Cross-border outbreak of listeriosis caused by cold-smoked salmon, revealed by integrated surveillance and whole genome sequencing" 2017 *European Surveillance* 17.
- 11 Breach "Victims file suite in listeria outbreak, more illnesses expected" <https://www.foodsafetynews.com/2018/03/victims-file-suit-in-listeria-outbreak-more-illnesses-expected/> (accessed 07-03-2019).
- 12 Rothstein "Escaping the Regulatory Net: Why Regulatory Reform Can Fail Consumers" 2005 *Law and Policy* 520; Van Waarden "Taste, Tradition, Transactions, and Trust: The public and private regulation of food" in Ansell and Vogel (eds) *What's the beef? The contested governance of European Food Safety* (2006) 35.
- 13 Jacobs *et al* "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis" 2010 *PER* 508-515; Ferrari *Risk Perception, Culture, and Legal Change. A Comparative Study on Food Safety in the Wake of the Mad Cow Crisis* (2009) 89; Stapleton "Restatement Third of Torts: Products Liability, an Anglo-Australian Perspective" 2000 *Washburn Law Journal* 369; Reimann "Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?" 2003 *American Journal of Comparative Law* 761.
- 14 Masterson "Product liability under the Consumer Protection Act" <https://www.pinsentmasons.com/out-law/guides/product-liability-under-the-consumer-protection-act> (accessed 07-03-2019).
- 15 Henson and Caswell "Food safety regulation: An overview of contemporary issues" 1999 *Food Policy* 589. Constitutional Damages were discussed in the case of *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA) wherein the unreasonable delay in considering Kate's application for social assistance deprived her during that period of her constitutional right to receive a social grant, and for that deprivation it was argued that she ought to be recompensed by an order for damages (para 17). It was considered contentious whether an award of monetary damages is an appropriate remedy for the admitted constitutional breach. *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) recognized that in principle monetary damages are capable of being awarded for a constitutional breach (para 23). Monetary damages for a constitutional breach have since been awarded by the Supreme Court of Appeal and endorsed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 43 and 2005 5 SA 3 CC paras 65 and 66. The Court in *Kate* indicated that whether relief in the form of constitutional damages is appropriate in a particular case must "be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned" (para 25). The aforementioned being the test for the awarding of constitutional damages. It was confirmed further in *Kate* at paragraph 27 that the relief permitted by s 38 of the Constitution is not a remedy of last resort, only to be looked to when there is no alternative. Therefore, although beyond the scope of this article, there definitely is an argument to be made for constitutional damages to be considered in the listeriotic outbreak case as it is argued that the following constitutional rights of the Applicants were breached: s10, s11, s12 (2), s24, s27, and in certain instances s28 (1)(b) and s28 (1)(c) of the Constitution.

## 2 (RE)-AND (DE)-CONSTRUCTING THE SOUTH AFRICAN LISTERIOSIS CRISIS

The South African listeriosis outbreak, which is recognised as a serious food-borne disease, lasted from 2017 to 2019.<sup>16</sup> During this period, 978 laboratory-confirmed listeriotic cases were reported by the South African National Institute for Communicable Diseases (NICD) from all the provinces. Statistically, the bulk of the cases came from three provinces namely: Gauteng (59%); Western Cape (12%); and KwaZulu-Natal (7%). The remaining 22 % of the cases came from other provinces in South Africa.<sup>17</sup> According to the NICD, of the 674 patients diagnosed 183 died. This was comparable to the fatality rate of internationally recorded outbreaks.<sup>18</sup> The majority of deaths were ascribed to compromised immune systems and other underlying medical conditions, or higher risk individuals like neonates, pregnant women, the elderly and cancer patients.<sup>19</sup> About 42% of the cases consisted of neonates who were infected during pregnancy or delivery.<sup>20</sup> *Listeria* can be fatal, with a mortality rate of between 20% and 30%<sup>21</sup> and symptoms can include meningitis, gastro-enteritis and fever.<sup>22</sup>

The South African Department of Health launched a formal comprehensive investigation into the origin and source of the disease and after a few months, the strain known as ST6 was traced to the a company facility in Polokwane, Limpopo. The plant was shut down and the products were recalled from South Africa and 15 other African countries.<sup>23</sup> The main product affected by the strain was ready-to-eat processed meat, particularly polony, a cheap type of sausage popular with lower income consumers, among them the vulnerable.<sup>24</sup> The same strain was also found in the manufacturer's processing environment. The company and three of the retailers affiliated with them, had exported their food products to 15 countries in Sub-Saharan Africa. As a result, the South African Department of Health and the countries to which these products were exported, issued recalls for the contaminated products. Environmental samples from other food production companies in South Africa also tested positive for listeriosis.

16 South African Department of Health "Report on Listeriosis, 2018" file:///C:/Users/-DOMAIN.003/Downloads/listeriosis%20outbreak%20situation%20report%2027%20april%202018.pdf> (accessed 16-03-2020).

17 *Ibid.*

18 *Ibid.*

19 Thomas "Outbreak of Listeriosis in South Africa Associated with Processed Meat" 2020 *The New England Journal of Medicine* 633.

20 Adeoye et al "Overview of listeriosis in the Southern African Hemisphere—Review" 2019 *Food Safety* 21.

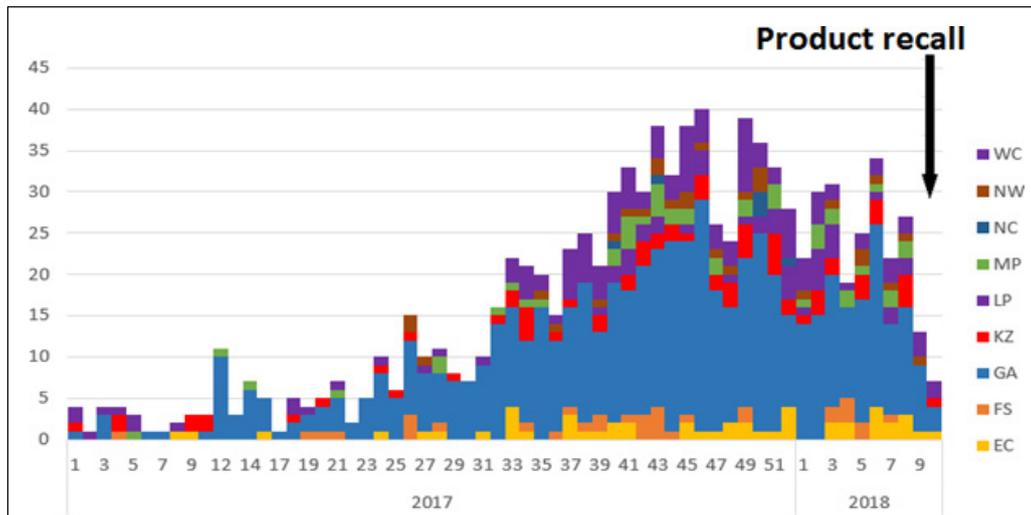
21 South African Department of Health "Report on Listeriosis, 2018" <http://www/file:///C:/Users/-DOMAIN.003/Downloads/listeriosis%20outbreak%20situation%20report%2027%20april%202018.pdf>> (accessed 16-03-2020).

22 Arslan and Baytur "Prevalence and antimicrobial resistance of *Listeria* species and subtyping and virulence factors of *Listeria mono-cytogenes* from retail meat" 2019 *Journal of Food Safety* 2.

23 Grobler "Listeriosis outbreak: How it started, how it was traced, and how it was finally stopped" <https://www.news24.com/SouthAfrica/News/listeriosis-outbreak-how-it-started-how-it-was-traced-and-how-it-was-finally-stopped-20180903> (accessed 24-01-2019).

24 *Ibid.*

Number of Laboratory-Confirmed Cases of Listeriosis by Week of Sample Collection and Province, South Africa, from 01 January 2017 to 12 March 2018 (n=978): Source, Department of Health



### 3 LITIGATING AGAINST FOOD MANUFACTURERS

The South African death toll from the listeriosis disease exceeded two hundred, which triggered legal challenges by family members and dependents of those affected.<sup>25</sup> In May 2018 ten plaintiffs lodged a class action against Tiger Brands in the Gauteng High Court on the ground that its products had been infected with listeriosis. The plaintiffs included:

- (a) Individuals who contracted, but did not die as a consequence of an invasive infection of listeria monocytogenes ingestion of food products originating from or having passed through the Company's meat processing facility at Polokwane over the period from 23 October 2016 to 4 March 2018 (known as the first class);<sup>26</sup>
- (b) Individuals who contracted, but did not die as a consequence of, an invasive infection of listeria monocytogenes as a result of their mothers ingesting food products originating from or having passed through the Company's meat processing facility at Polokwane over the period from 23 October 2016 to 4 March 2018, whilst carrying the individual *in utero* (known as the second class);<sup>27</sup>
- (c) Individuals who were dependent upon persons who died as a consequence of contracting an invasive infection of listeria monocytogenes as a result of the ingestion of food products originating from or having passed through the Company's meat processing facility at Polokwane over the period from 23 October 2016 to 4 March 2018 (known as the third class);<sup>28</sup> and
- (d) Individuals who are and / or were liable for the maintenance of, or were in fact maintaining other individuals who contracted an invasive infection of listeria monocytogenes as a result of the ingestion of food products originating from or having passed through the Company's meat processing facility at Polokwane over the period from 23 October 2016 to 4 March 2018; or their mothers so ingesting the food products referred to whilst carrying the individual *in utero*; whether they died as a consequence of the infection or not (known as the fourth class).<sup>29</sup>

The Founding papers<sup>30</sup> show that plaintiffs' council sought to pursue the class action in two stages,<sup>31</sup> namely declaratory relief in respect of the Defendants' liability to the classes and

<sup>25</sup> *Ibid.*

<sup>26</sup> Case number 12835/2018 page 10 (Annexure A).

<sup>27</sup> *Supra.*

<sup>28</sup> *Supra.*

<sup>29</sup> *Supra.*

<sup>30</sup> Case number 12835/2018 para 17-19.

<sup>31</sup> Case number 12835/2018 para 17-19.

second, a claim for damages.<sup>32</sup>

A critical analysis of paragraph 7 of the Founding Affidavit demonstrates that the plaintiff argued that manufacturers and other players in the food chain who profit from the preparation and distribution of food products have a duty to take reasonable measures against contamination by pathogens. The production of food in general and ready-to-eat foods in particular involves immense public trust and the plaintiff argued that a breach of this trust and the legal consequences of it was at the heart of the case.<sup>33</sup> In December 2018 the South Gauteng High Court granted a certification order for a class-action lawsuit against the Company for approximately 1 000 claimants seeking to prove liability of the Respondents as formulated in s 61 of the CPA.<sup>34</sup>

#### 4 PRODUCT LIABILITY UNDER COMMON LAW

In order to determine whether the arguments raised by the plaintiff hold water in law, it is necessary to delve into the common law position regarding product liability. This is because the duty bestowed on manufacturers and other participants in the food chain to take reasonable measures to prevent their foodstuffs from being contaminated with harmful substances is primarily anchored on the common law concept of product liability. In terms of the common law, the general position regarding product liability is that whoever suffers loss must bear the consequences, "the loss lies where it falls."<sup>35</sup> The common law concept of product liability prescribes that consumers seeking to recover losses caused by defective products must prove fault and wrongfulness on the part of the supplier.<sup>36</sup> Prior to the CPA, the courts generally viewed product liability as falling within the *Aquilian* action, which meant that the elements of delict would have to be present and proven in order for the supplier to be held liable for any loss suffered. Neethling posits that despite the CPA's strict liability for damage by a defective product, the common law position remains in force.<sup>37</sup> The authors support this view.

The element of the delict that is difficult to prove remains "fault", especially on the part of the manufacturer.<sup>38</sup> In 2003, prior to the CPA, the Supreme Court of Appeal dealt with the case of *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*,<sup>39</sup> an appeal from the Cape

32 Case number 12835/2018 para 18.

33 Case number 12835/2018 para 7.

34 Section 61 of the CPA states as follows: Liability for damage caused by goods. (1) Except to the extent contemplated in subsec (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsec (5), 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, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. (2) 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 purposes of this section. (3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several. (4) Liability of a particular person in terms of this section does not arise if— (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation; (b) the alleged unsafe product characteristic, failure, defect or hazard— (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply; (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or (d) the claim for damages is brought more than three years after the— (i) death or injury of a person contemplated in subsec (5)(a); (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsec (5)(b); or (iii) 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 contemplated in subsec (5)(c); or (iv) the latest date on which a person suffered any economic loss contemplated in subsec (5)(d). (5) Harm for which a person may be held liable in terms of this section includes— (a) the death of, or injury to, any natural person; (b) an illness of any natural person; (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c). (6) Nothing in this section limits the authority of a court to— (a) assess whether any harm has been proven and adequately mitigated; (b) determine the extent and monetary value of any damages, including economic loss; or (c) apportion liability among persons who are found to be jointly and severally liable.

35 Melville *The Consumer Protection Act Made Easy* (2011) 24.

36 *Ibid.*

37 Neethling and Potgieter *Law of Delict 7<sup>th</sup> Edition* (2014) 172.

38 *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA).

39 2003 2 All SA 167 (SCA).

Town High Court. It concerned the extent to which a manufacturer can be held strictly liable in delict for unintended harm caused by the defective manufacture of a product where there is no contractual obligation between the manufacturer and the injured person.<sup>40</sup> The appellants argued that fault should not be a requirement in this matter as the plaintiff had no knowledge of, or access to, the manufacturing process, either to determine its workings generally, or to establish negligence in relation to the making of the item or substance, which was the cause of the injury. The court found that the appellants' remedy was confined to the *Aquilian* action, where proof of fault is a requirement and that if strict liability were to be imposed it should be by the legislature. The appeal was thus dismissed.

Civil liability for food-related cases is about one party damaging another's interests. In a case of product liability, the plaintiff must be able to prove negligence on the part of the defendant, who might attempt to respond by blaming the accuser to exercise due diligence at the time of purchase.<sup>41</sup> A case concerning food poisoning, and subsequent claims came before the Cape High Court in 1980. In *Muzak v Canzone-del-Mare*<sup>42</sup> a patron of the restaurant Canzone-del-Mare experienced symptoms of food poisoning, which led to his hospitalization and further medical treatment. Muzak subsequently sued the restaurant for damages that included his medical expenses and loss of income during his illness.<sup>43</sup> In addition, he sued for special damages claiming that he had been deprived of the future enjoyment of seafood owing to a fear of repeated poisoning. The court held in favour of Muzak and awarded his actual losses as well as an amount for the loss of enjoyment of life.<sup>44</sup> The special damages exceeded the actual medical expenses and loss of earnings. Canzone-del-Mare was ordered to pay Muzak's legal costs.<sup>45</sup> This is a landmark ruling<sup>46</sup> and serves as a caveat for all manufacturers, retailers, and food outlets in that the consumer can sue for damages, special damages and legal costs.

## 5 EXPLORING PROTECTION UNDER THE CONSUMER PROTECTION ACT

In the South African listeriosis case, the Company was sued in class action for two reasons. Firstly, the applicants' primary claim was based upon s 61 of the CPA as the Company is a producer, and distributor.<sup>47</sup> Accordingly, it was alleged that they were liable for damages by providing unsafe products and secondly, the Company exercises control and influence over its operations and subsidiary.<sup>48</sup>

A respondent's liability could be established as follows: The respondents are strictly liable for any damages resulting from producing, manufacturing and distributing contaminated processed meat products. This liability arises from s 60(1)<sup>49</sup> of the CPA; the Respondents are liable for harm occasioned by the negligent and wrongful breach of a duty of care to be vindicated through the *Aquilian* action referred to above; or the respondents' actions violated

40 In this case, the Appellants underwent surgery, which required the administration of a Regibloc injection, a local anaesthetic that was manufactured and marketed by the Respondent. As a result of the surgery, the Appellants' right arms became paralysed. It was alleged that the Regibloc administered was defective as a result of negligent manufacture by the Respondent.

41 *Muzak v Canzone-del-Mare* 1980 3 SA 470 (C).

42 1980 3 SA 470 (C).

43 *Supra*.

44 *Supra*.

45 *Supra*.

46 1980 3 SA 470 (C).

47 Section 1 of the CPA states as follows: "distributor, in relation to any particular goods, means a person who, in the ordinary course of business—(a) is supplied with those goods by a producer, importer or other distributor; and (b) in turn, supplies those goods to either another distributor or to a retailer."

48 Case number 12835/2018 para 43.2.

49 Section 60(1) of the CPA: "The Commission must promote, within the framework of s 82, the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to—  
(a) receive notice of—

(i) consumer complaints or reports of product failures, defects or hazards; (ii) the return of any goods because of a failure, defect or hazard; (iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard; and (iv) other indication of failure, defect or hazard, in any particular goods or in any component of them, or injury or damage resulting from the use of those goods;  
(b) monitor the sources of information contemplated in paragraph (a), and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;  
(c) conduct investigations into the nature, causes, extent and degree of the risk to the public;  
(d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and  
(e) if the goods are unsafe, recall those goods for repair, replacement or refund."

several constitutionally enshrined rights (outside of the scope of this article).<sup>50</sup>

The applicants did not intend to show that the respondents were responsible for every single case of listeriosis during the epidemic as this case was narrower because the respondents were only responsible for listeriosis that occurred from January 2017 to the filing of the documents.<sup>51</sup>

The CPA's preamble seeks to protect consumer wellbeing and develop effective means of redress. Chapter 2 of the CPA provides for the fundamental rights of consumers, among these, the right to fair value, good quality, and safety.<sup>52</sup> Section 61 of the CPA is worded in such a manner that the consumer need not prove negligence but only a causal link, allowing extensive damages to be claimed under the CPA. In terms of section 61(1) of the CPA there is strict liability for respondents who produce, distribute or market hazardous or defective products for human consumption to consumers. Section 61(5) of the CPA defines the harm for which the respondents may be held liable, to include death of or injury to any natural person; an illness of any natural person; any loss of, or physical damage to, any property; and any economic loss resulting from this harm.

The attorneys in the class action contend that all four classes have a *prima facie* case under s 61(1) of the CPA due to the fact that the "the respondents produced, manufactured and distributed ready-to-eat processed meat products. These products were marketed as being safe for human consumption, although they were not. The respondents' products were contaminated with *Listeria*, rendering them unsafe, defective or hazardous. Class Action members suffered damages as a result of the consumption (by them or another) of the respondents' contaminated products. These damages manifested in death, illness and economic loss respectively."<sup>53</sup>

Under common law, delictual action in the form of the *Aquilian* action remains available to consumers who suffer damages as a result of negligence by the manufacturer or supplier. Alternatively, the consumer can seek redress and compensation under the CPA as discussed above.<sup>54</sup>

The respondents were required by legislation to develop and maintain a regime to prevent contamination by various pathogens.<sup>55</sup> By necessary inference, one of three scenarios occurred. "The first possible scenario is that the respondents did not have a policy regime at all. The second is that the respondents had an ineffective policy regime. The third is that they had an effective regime but failed to implement it".<sup>56</sup>

This action arose in the context of the failure to prevent outbreaks of food-borne disease in widely-consumed, ready-to-eat foodstuffs. These violations disproportionately affected more vulnerable members of society, namely children, pregnant mothers, the elderly, and those with compromised immune systems.<sup>57</sup> Moreover, despite numerous warning signs the respondents, who account for a third of the market in these products, were nonchalant in dealing with the outbreak.<sup>58</sup>

Product liability and food safety claims are routinely pursued by class actions in other

50 The applicants contend that the respondents have infringed the following constitutional rights: the right to human dignity (s10); the right to life (s11); the right to bodily integrity (s12 (2)); the right to an environment that is conducive to the applicants' health or wellbeing (s24); and the right of access to food (s27), which implies the right to safe food. In addition, in respect of children, the Respondents have infringed the following constitutional rights: the right to family or parental care, in s28 (1)(b); and the right to basic nutrition in s28 (1) (c).

51 Case number 12835/2018 para 12. The National Institute for Communicable Diseases (NICD) first declared listeriosis a reportable disease in December 2017.

52 Sections 53 to 61 of the CPA.

53 Case number 12835/2018 para 134.

54 The consumer further has available to them a third alternative, namely breach of legal duty. The Respondents owe a legal duty to the public not to distribute food products contaminated with dangerous levels of bacteria. In this regard, food safety is heavily regulated by a myriad of legislation, enforced by several agencies, such as the South African Food Security and Development Agency ("SAFSDA") and The South African Bureau of Standards ("SABS"). Act 85 of 1983. In addition to the remedies of the common law *Aquilian* action, protection under the CPA, and breach of legal duty, consumers can further rely on their constitutional rights in pursuing recourse against negligent suppliers or manufacturers. On the face of it, at least the following Acts apply, along with their regulations: The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; the Meat Safety Act 40 of 2000; and the Occupational Health and Safety Act 85 of 1993.

55 Section 12 of the Meat Safety Act 40 of 2000.

56 Case number 12835/2018 para 136.7.

57 Case number 12835/2018 para 142.

58 *Supra* at para 143-144. The attorneys for the applicants cite the recent Life Esidemi Arbitration Award 2018, which is similar to the case at hand in that negligence played a significant factor in the death of many mentally

jurisdictions. Examples of this, apart from *Maple Leaf*<sup>59</sup> in Canada, include *Costco*<sup>60</sup> and *New Hawaii*,<sup>61</sup> in the United States. In Canadian law, the question of whether agents for Federal and Provincial Governments could be held liable to consumers for negligence has traditionally been resolved in the negative. Canada experienced a listeriosis outbreak in 2008 wherein 57 (Fifty-Seven) Canadians contracted the disease and 22 (Twenty-Two) ultimately died from processed meat supplied by a Canadian food supplier. Maple Leaf Foods compensated victims and reached a settlement agreement with the principal counsel groups that launched a class action following the listeriosis outbreak. This compensation agreement sought to move beyond crisis by rehabilitating the organization's reputation.

The *Costco*<sup>62</sup> lawsuit was a consumer class action claiming injury due to the risk of exposure to the hepatitis A virus after consuming Townsend Farm's Organic Anti-Oxidant Blend, a frozen berry and pomegranate aril mix ("berry mix") purchased from Costco.<sup>63</sup> During summary judgment, the Court ruled in favour of strict liability. Strict liability law is essential because consumers cannot investigate every link in a supply chain before they purchase a product and are not typically qualified to assess for themselves whether a product is defective.<sup>64</sup> Strict liability law shifts the burden to corporations to ensure that the products they provide to consumers are safe.<sup>65</sup>

The CPA recognizes class action suits in s 4, which provides that a person acting as a member of, or in the interest of a group or class of affected persons may approach a court alleging that a consumer right in terms of this Act has been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring.<sup>66</sup> A discussion on the procedure of the class action lawsuits is outside of the scope of this article.

To address the difficulties that consumers / plaintiffs can have in terms of proof, Directive 85/374 of the European Union has made producers strictly liable for defective products that they have placed on the market, even in the absence of fault. This is an initiative to reduce litigation and enhance consumers' rights that could well be considered outside the European Union.<sup>67</sup>

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ill patients. Retired Deputy Chief Justice Moseneke aptly described such negligence as "... a pervasive and reeking violation of our Constitution..." that justifies imposing constitutional damages. It is true that no amount of money can bring back a lost child or loved one. This is not the purpose of constitutional damages. The purpose is to provide an appropriate remedy to vindicate rights that cannot be appropriately vindicated under the common law. It is also to gain a sense of justice that common law damages cannot begin to provide (Life Esidimeni Arbitration Award para 218).

59 Merchant Law Group "Maple Leaf Foods Class Action Settlement" <https://www.cbc.ca/canada/story/2008/12/18/listeriosis-settlement.html> (accessed 07-03-2019).

60 *Jacob Petersen et al v Costco Wholesale Go Inc.*, United States District Court Central District of California Southern District SA CV 13-1292-Doc.

61 *Teshida Williams and others similarly situated v Williamsbridge Restaurant /ne dlbla New Hawaii Sea Restaurant*, Supreme Court of the State of New York Bronx County 24232-13E.

62 *Jacob Petersen et al v Costco Wholesale Go Inc.*, United States District Court Central District of California Southern District SA CV 13-1292-Doc.

63 *Ibid.*

64 See *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63 (1963) (noting consumers are "powerless to protect themselves").

65 *Jacob Petersen et al v Costco Wholesale Go Inc.*, United States District Court Central District of California Southern District SA CV 13-1292-Doc.

66 Section 4 of the CPA states as follows: "(1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- (a) A person acting on his or her own behalf;
- (b) an authorized person acting on behalf of another person who cannot act in his or her own name;
- (c) a person acting as a member of, or in the interest of, a group or class of affected persons;
- (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- (e) an association acting in the interest of its members."

67 *Riva v. Pepsico, Inc.* 82 F. Supp. 3d 1045 (N.D. Cal. 2015). The court in this case dismissed the Plaintiffs' negligence and strict liability claims for lack of standing. The Plaintiffs proposed a class action seeking medical monitoring for lung cancer based on the Defendant's use of an additive in its soft drinks that is listed as a "known carcinogen" under California's Proposition 65. In order to satisfy the standing requirement, Plaintiffs must establish a "credible threat of harm sufficient to constitute actual injury" (at 4). That is, an increased risk of injury can be enough to establish injury-in-fact if "the increased risk of injury is credible and not conjectural" (at 4). The court found that these requirements were not met in this case. Exposure alone was not enough to show that the alleged risk of cancer was "both credible and substantial" (at 4). Moreover, while the plaintiffs alleged that mice experienced increased levels of cancer at very high exposures to the additive used in the Defendant's products, the plaintiffs failed to establish that humans experience the same increased risk, especially at the

## 6 CONCLUDING REMARKS

From the discussion of these cases, it can be concluded that the applicants raise some salient points concerning the CPA and the authors do not see the respondents offering a worthy defence, with the company merely denying any wrongdoing.<sup>68</sup> There are potential pitfalls in relation to the action, with the sheer size of the case being one. Owing to adverts having been circulated around the country, more than 1000 individuals became involved with the lawsuit, which means that the case could continue for a number of years. Further to this, the Respondents may choose to act in bad faith by prolonging the matter unnecessarily and / or even offering out-of-court settlements. This is an unprecedented case in South African legal history and international case law does not provide insight, as many cases were settled out of court. Therefore, should the matter proceed to trial, the outcome would set a precedent with regard to strict liability and the vulnerable individual's right to food security.

The trust that consumers place in products and their suppliers and manufacturers should not be undermined. Compensation of affected consumers would ensure that the pain and suffering sustained is at least partially eased in terms of not having to carry the financial burden of costs incurred. Should the company be found liable, legal experts believe that it could be expected to pay anything between R100 000 and R2 000 000 to the families of the more than 200 people who died from listeriosis in South Africa.<sup>69</sup> The authors agree that the plaintiffs represent a marginalized group of persons that would most likely require some form of relief immediately. Therefore, the best interests of the clients would be an out of court settlement in compensation.

The authors are of the opinion that the CPA is a fundamental piece of legislation in this case, as it holds the key for the affected consumers as it diminishes the need for the fault requirement previously relied upon under common law. The CPA is progressive legislation, and if properly applied will provide the necessary relief for victims and ensure food security.

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alleged levels. According to the court, the studies cited by the Plaintiffs failed to support an inference that the Plaintiffs experienced significant exposure to the additive. Moreover, the mere fact that the additive was listed as a "known carcinogen" (at 4) was not sufficient to support the Plaintiffs' claims because a claim for medical monitoring must be supported by a higher level of proof than is required for a substance to be listed under Proposition 65. Finally, the causation analysis was complicated by the fact that there are many dietary sources of the additive. It would be "implausible" to conclude that any alleged increase in cancer was more likely than not caused by the Defendant's soda products. Therefore, for a variety of reasons, the court dismissed the case with prejudice. Friend "Office of Inspector General: Sara Lee Corporation pays \$4.4 million in adulterated meat case" <https://www.usda.gov/oig/webdocs/oig67.html> (accessed 07-03-2019).

68 Defendants Plea. Case 12835/2018. Filed 8<sup>th</sup> August 2019.

69 De Villiers "This is how much South Africa's listeriosis victims may get, lawyers say" <https://www.businessinsider.co.za/south-africas-listeriosis-victims-can-more-than-r3-million-each-from-class-action-lawyers-say-2018-12> (accessed 15-12-2018). "The lawyer, however, said pregnant mothers who lost babies can expect payments of roughly R1.5 million. The loss of a child is an aggravating factor for possible lawsuits. At an average of R100,000 each, Tiger Brands would pay a total of R100 million if all 1,000 claimants were successful."