



DEVELOPING LEGISLATION FOR PRODUCT LIABILITY

Draft

Table of Contents

ACROYNMS	1
EXECUTIVE SUMMARY	2
BACKGROUND TO THE PROJECT	6
1.0. Introduction	6
1.1. Background	6
1.2. Statement of the problem	7
1.3. Objectives of the study	8
1.4. Justification of the study	8
1.5. Scope	9
2.0. Methodology	9
2.1. Desk Review	9
2.2. Consultation Process	9
2.3. Technical working group.....	9
2.4. Stakeholders submissions	10
2.5. Data collection	10
2.6. Study sites	10
LEGAL AND POLICY FRAMEWORK	11
3.0. Introduction	11
3.1. Criminal and administrative laws	13
3.2. Tort of negligence	17
STUDY FINDINGS AND RECOMMENDATIONS.....	21
4.0. Introduction	21
4.1. The need for legislation for product liability.....	21
4.2. Strict liability for defective products	34
4.3.2 apportioning liability for a defective product,	47
SUMMARY OF RECOMMENDATIONS AND CONCLUSION	74
BIBLIOGRAPHY	77
THE LIABILITY FOR DEFECTIVE PRODUCTS BILL, 2019	83

ACROYNMS

AU	AFRICAN UNION
CAP	CHAPTER
COMESA	COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA
EAC	EAST AFRICAN COMMUNITY
EU	EUROPEAN UNION
IGAD	INTER GOVERNMENTAL AUTHORITY ON DEVELOPMENT
NAPE	NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS
NDA	NATIONAL DRUGS AUTHORITY
NDP	NATIONAL DEVELOPMENT PLAN
OLRC	ONTARIO LAW REFORM COMMISSION
ULRC	UGANDA LAW REFORM COMMISSION
UNBS	UGANDA NATIONAL BUREAU OF STANDARDS
VOL.	VOLUME

EXECUTIVE SUMMARY

Background

The Uganda Law Reform Commission (The Commission) undertook a study to develop legislation to impose strict liability for defective or unsafe products that cause death, injury, or damage. Defective products can cause personal injuries to, or even the death of anyone using or consuming the product, damage to property, which may result in serious economic loss.¹

There are various pieces of legislation today that make provision for an injured party to seek redress for harm caused by a defective product. A party injured by a defective or unsafe product may seek redress under contract law, common law tort or seek administrative redress from the regulators. However, the current legal regime relating to product liability has its shortcomings. For example, under the present law of contract, only a buyer of a defective product can sue for breach of an implied warranty and only a seller can be sued for such breach. Accordingly, a retailer who is usually a distributor can be held strictly liable for injuries suffered by his purchaser. On the other hand, a manufacturer who is responsible for putting defective goods into the flow of the market can be held liable in tort but only if the injured party proves negligence. Moreover, this remedy may be ineffective as a practical matter if the manufacturer is unknown, insolvent or beyond jurisdiction.

The Commission is of the view that this is an aspect of the law that should be legislated for to provide the necessary interventions.

Objectives of the study

The overall objective of this study was to consider the existing law governing compensation for injury and damage caused by defective or unsafe products and to recommend such changes in the law as may be thought appropriate. Accordingly, the study seeks to propose a framework of liability which is capable of ensuring the wellbeing of victims (by ensuring they are compensated and by discouraging the marketing of defective products) and minimising the costs to industry so as to avoid excessive interference in their capacity for innovation, job creation and exporting through an equitable apportionment of the risks.

Methodology

The study was undertaken using both qualitative and quantitative methods of data collection. The study emphasized a participatory approach that enabled the research team to collect views, opinions and experiences of stakeholders on the basis of their in-depth knowledge and experience in this area. The qualitative design was adopted in this study because product strict liability is an area that is highly technical. The qualitative design is also flexible and enabled the team to generate a wealth of divergent views from the participants on the subject while at the same time building consensus on the information.

¹ European Commission Proposal for a Council Directive relating to Approximation of the laws, regulations and administrative provisions of the Member States Concerning Liability for Defective Products; COM (76) 372 – 23rd July 1976. Available at <http://aei.pitt.edu/4573/1/4573.pdf>

Literature review was conducted on the existing statutory law, international instruments, case law, comparative studies from other jurisdictions as well as local research on the subject.

Consultative workshops were held in Jinja, Kampala and Mbarara with the aim of disseminating the findings and building consensus on the proposals.

Findings and recommendations

Whether strict liability legislation for defective products is necessary?

Study findings indicate that defective products can cause injury and sometimes death and therefore need to compensate injured consumers is of essence. Findings further indicate that the Ugandan consumer is not empowered to detect defects however it is the manufacturers who control the production process and therefore should be held responsible. The Study indicates that it is the role of manufacturers and Uganda National Bureau of Standards (UNBS) to ensure that products are not defective.

Recommendation

- 1. There is need to put in place a specific piece of legislation that imposes strict liability for defective products.**
- 2. Adequate protection of the consumers from defects caused by unsafe or defective products can be achieved through the introduction of liability irrespective of fault on the part of the producer of the product which was defective and caused damage.**
- 3. Liability to the producer irrespective of fault on his or her part ensures an appropriate solution in this era where there is increase in technicality in production and the fact that the consumers have less knowledge of the production processes and highly rely on producers.**

Apportioning liability for defective products

The study indicates that apportioning strict liability for defective products is vital to ensure certainty and predictability as to who takes the blame for defects in a product that causes injury.

Recommendation

- 1. Liability should first lie with the person who created the risk, which has caused damage. That is the manufacturer or producer of a finished product or manufacturer and producer of a raw material, or component of a product.**
- 2. Liability should be imposed on those in the chain of manufacturing and distribution who are in the best position to exercise control over the quality and safety of the product. This gives a producer an incentive to improve the safety standard of the product and to reduce the risk of further accidents.**

3. **Liability should be imposed on any person who, by putting his or her name, trademark or other distinguishing feature on the product or using his or her name or any such mark or feature in relation to the product, has held him/herself out to be the producer of the product.**

Definition of a defective product

Study findings indicate that product liability is largely premised on the existence of a “defect” in a product that causes injury or damage to the user. The study sought to understand the meaning of a “defect” or what products should be considered as “defective.”

Recommendations

1. **A product should be regarded as defective if, at the time when it is put into circulation by whoever is responsible for it as its producer, it does not comply with the standard of reasonable safety that a person is entitled to expect of it;**
2. **The standard of safety should be determined objectively by having regard to all the circumstances in which the product has been put into circulation, including, in particular, any instructions or warnings that accompany the product when it is put into circulation, and the use or uses to which it would be reasonable for the product to be put in these circumstances.**

To which products should strict liability apply?

The study indicated that strict liability should be imposed on all products. This was attributed to the fact that all products if defective are prone to causing injury or damage and that whoever is responsible should be held liable.

Recommendation

1. **Strict liability should be imposed on all moveable consumer products, including electricity.**
2. **Strict product liability should not be imposed on natural and agricultural products that have not undergone industrial processing.**

Burden of proof

The study sought to establish who should bear the burden proof in claims for strict product liability.

Recommendation

The injured person should bear the burden of proving the defect, the damage and the causal relationship between defect and damage.

What defences should be available to defendants in strict product liability claims?

Study findings indicate that providing defences to claims relating to strict product liability is crucial to ensure that the law does not constrain or stifle manufacturers or producers from creating and developing new products

Recommendations

A person against whom a claim for product liability has been brought against should be in position to raise the following as defences to the claim -

- a. the defendant did not put the product in circulation or that the defect did not exist in the product when the defendant supplied the product to another;**
- b. that it is probable that the defect causing the damage came into being after the product was put into circulation by the defendant;**
- c. that the product was not manufactured for a profit-making sale;**
- d. that the product was neither manufactured nor distributed in the course of his business;**
- e. that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;**
- f. that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the defect to be discovered (“State of the Art” Defence);**
- g. in the case of a manufacturer of a component of the final product, that the defect is attributable to the design of the product or to the instructions given by the product manufacturer; or**
- h. the claimant assumed the risk or contributed to the defect.**

Who should be entitled to sue for recovery?

The study sought to establish who should be entitled to recover and whether the principle should apply to all those who suffer injury by reason of a defective product or whether some restrictions should be imposed upon a class of potential plaintiff.

Recommendation

- 1. As noted from the suggested definition and scope, any person who is injured by a defective product should have a right to sue and recover.**
- 2. Next of kin should recover on behalf of children and deceased persons.**

PART I

BACKGROUND TO THE PROJECT

1.0. Introduction

The Uganda Law Reform Commission (The Commission) undertook a study to develop legislation to impose strict liability for defective or unsafe products that cause death, injury or damage. Defective products can cause personal injuries to, or even the death of, anyone using or consuming the product, damage to property, which may result in serious economic loss.² This study was intended to provide a framework that imposes strict liability for defective products that cause injury, or damage to consumers.

1.1. Background

Product liability is a term used to describe the legal duty imposed on manufacturers or sellers of goods to compensate buyers, or users, for damages or injuries suffered as a result of defects in goods purchased.³ Accordingly, product liability is concerned with how to compensate consumers who have suffered damage or injury from defective products. This right is mainly derived from contract, tort, or strict liability law.⁴

The evolution of strict liability for defective products is mainly attributed to the limitations in the remedies provided by contract and tort law. These limitations have become more frustrating with the transformation in the system of producing and marketing of goods.⁵ Modern technology has transformed the production processes and advertising methods; the manufacturer is able to “produce the psychological effect of representation without incurring its penalties.”⁶

Uganda’s manufacturing and production industry is growing at a steady rate guided by modern science and technology. There is increase in the food processing, drinks, tobacco, textile and clothing, chemicals, print, soap, foam products and metal fabric products.⁷ As the manufacturing industry grows, the possibility of defective products finding their way on the market cannot be underestimated.

Reports indicate that there are defective and unsafe products on the market that may cause injury to consumers.⁸ For example, cosmetic products and drugs made from hazardous chemicals are reported to be causing skin colouration and bleaching, scalp corrosion and falling off of natural hair among consumers.⁹ Despite efforts by the

² European Commission Proposal for a Council Directive relating to Approximation of the laws regulations and administrative provisions of the Member States Concerning Liability for Defective Products; COM (76) 372 – 23rd July 1976. Available at <http://aei.pitt.edu/4573/1/4573.pdf>

³ See David Owen, Product Liability Law, 3rd Ed (Hornbook Series), 2014. Also see ; Owen, D,et al. Product Liability Cases and Materials. 3rd Edn. New York, NY: Foundation Press, 1996

⁴ See David Owen, Product Liability Law, 3rd Ed (Hornbook Series), 2014. Also see ; Owen, D,et al. Product Liability Cases and Materials. 3rd Edn. New York, NY: Foundation Press, 1996

⁵ Product Liability Chapter 23 http://legal.thomsonreuters.com.au/product/AU/files/720502336/chapter_23.pdf

⁶ Winterbottom v Wright (1842) 10 M & W 109; 152 ER 402.

⁷ Uganda Bureau of statistics 2014 Statistical Abstract page 62-63

⁸ Daily Monitor; NDA withdraws dangerous drugs; Friday 7th October 2016.

⁹ Ibid page 69

government to promote product safety,¹⁰ incidents of injury and damage caused by unsafe or defective products continue to exist.

Uganda's market heavily relies on imported products in both consumer goods and machinery. These products are sometimes made of hazardous chemicals which expose consumers to risk and danger; others may have manufacture or design defects that are inherently dangerous to consumers.¹¹ The Ugandan population is largely unaware of the dangers of the chemicals present in the products they use and are ignorant of their roles in the control of the use of these chemicals.¹²

1.2. Statement of the problem

Uganda does not have in place comprehensive legislation on consumer protection this has left many consumers vulnerable to defective products that can cause injury, damage and death.

Defective products do pose a danger and risk of injury or death to consumers or damage to property that may cause economic loss. The current legal principles that seek to address issues of compensation for injuries or damage caused by defective products are inadequate, restrictive and difficult to prove by the injured person. On one hand, the doctrine of privity in contract restricts those who can recover and on the other hand the tort of negligence imposes a high burden of proof on the injured party. In view of the fact that negligence is fault based, it is very difficult for the Ugandan consumers to prove fault on the part of the manufacturer, placing the consumers at a disadvantage.

The existing institutional frameworks to regulate defective products are inadequate and not efficient to offer consumers the much-needed protection. There is limited regulation of the quality and standards of the products on the Ugandan market. There is an influx of counterfeit products that may be harmful to consumers. These products have caused injury,¹³ death¹⁴ and damage to consumers. Despite these reported effects of defective products, no systems have been put in place to provide consumers with an adequate redress.

Products on the market rarely bear warnings to the consumers of the associated risks or dangers in their usage. Additionally, modern science and technology has introduced products on the market for which consumers may not understand the associated risks. This has left many consumers vulnerable to injury, damage or death.

This study sought to identify legislative and non-legislative mechanisms to address the gaps and challenges currently faced in ensuring product liability and consumer protection.

10 The Government established the Uganda National Bureau of Standards to improve safety of products (Uganda National Bureau of Standards Act,

11 <http://nape.or.ug/index.php/publications/chemical-management/17-hazardous-consumer-products-on-uganda-market/file>

12 Ibid page 69

13 Preliminary consultations revealed that some sub-standard cosmetic products have resulted in skin injuries.

14 In 2008, a consumer Alert Magazine reported that a teenager had been killed by a counterfeit extension cable which caught fire when a flat iron was connected.

1.3. Objectives of the study

The overall objective of this study was to develop legislative interventions to impose strict liability for defective products as a remedy for injury and damage caused to consumers.

The study specifically sought to:

- (a) review the existing law governing compensation for injury and damage caused by defective or unsafe products;
- (b) examine the need for legislation to impose strict product liability;
- (c) examine principles governing liability for defective products.

1.4. Justification of the study

The 1995 Constitution in Objective XI mandates the State to adopt appropriate policies and the enactment of enabling legislation to stimulate agricultural, industrial, technological and scientific development. The study seeks to develop interventions for the protection of consumers against defective products in line with these constitutional aspirations.

Legislation imposing strict product liability will increase consumer protection and ensure that manufacturers produce safe and quality goods that are competitive. Vision 2040 seeks to give impetus to the development of industries in areas of new materials industries, bio-technology, heavy industries and equipment manufacturing.¹⁵ The Second National Development Plan (NDP II) sets as one of its objectives the need to increase market access for Uganda's goods and services in regional and international markets.¹⁶ Among the interventions to achieve this objective is to enhance branding of quality and standardised products and services and effectively position Uganda's goods and services in international markets.¹⁷

Uganda's regional cooperation and market integration have widened the scope of products that may be traded on the Ugandan market. The East African Community integration through the Customs Union and the Common Market allows free movement of goods across the EAC member states. Uganda has trade links and cooperation with members of the Common Market for Eastern and Southern Africa (COMESA), African Union (AU) as well as Inter Governmental Authority on Development (IGAD). These arrangements allow many products to find their way on Uganda's market. Some of these may be defective and unsafe for consumers. It is therefore, important that Uganda puts in place legislation for strict product liability to protect consumers from defective and unsafe products.

Uganda maintains an open and liberal economy¹⁸ that has fostered both production and importation of a wide range of products that are largely unregulated. The absence of standards and poor enforcement mechanisms may lead to the sale of low-quality products that may be harmful to consumers in a bid to bridge the gap created by competition.

15 Ibid Uganda Vision 2040 Page

16 Second National Development Plan, 2015/2016 -2019/2020 Page 172- 173

17 Ibid

18 The National Trade Policy 2008

1.5. Scope

The study reviewed laws and principles governing compensation in case of injury or damage arising from defective products. In addition, the study examined the need for legislation imposing strict liability for defective products and the principles governing liability for defective products.

The study particularly targeted manufacturers, producers, consumers, consumer association bodies, business community, legal practitioners and regulatory bodies.

2.0. Methodology

The study was largely qualitative. Qualitative design was chosen to enable soliciting of view, opinions and perceptions from persons with knowledge and experience in the subject. In particular, various government ministries, departments and agencies, non-governmental organisations, scholars and researchers who have documented a wealth of literature on product liability which can be used for the study. The following methods were used to collect information during the study.

2.1. Desk Review

The Commission conducted a documentary review of the laws including the Contracts Act, 2010, the Sale of Goods and Supply of Services Act, 2018, the Food and Drugs Act, Cap. 278 and the Penal Code Act, Cap 120 among others. Government policies and programmes in particular, the National Trade Policy, 2008, NDP II 2015/2020 and Vision 2040 were reviewed. Scholarly works and court decisions were also reviewed to ascertain the need for legislation to impose strict product liability.

A review of the different regional and international principles was undertaken to ascertain the need for harmonisation and approximation of laws. Specifically, the Commission was keen on East African Community undertaking and obligations towards harmonization and approximation of laws. Court decisions relating to product liability were reviewed.

2.2. Consultation Process

Consultations were designed to provide an opportunity for stakeholders to give their views and opinions on identified issues and proposals. The input from the stakeholders into the commission's discussion paper during this process enriched the findings of the study.

2.3. Technical working group

The Commission constituted a technical working group that was constituted of persons experienced in the subject. These offered the commission with practical knowledge and shared experiences on issues relating to product liability. **Annexed is a list of members that constituted the Technical Working Group.**

2.4. Stakeholders submissions

The Commission circulated a discussion paper for comments from different stakeholders. They included; government agencies, consumers, trade and manufacturing associations, legal practitioners, and the judiciary. These submissions provided the Commission with insights into the challenges faced in the recovery of compensations for defective products, the principles governing product liability, as well as the justification for legislative interventions to impose strict liability. **Annexed is a list of institutions that submitted comments on the discussion paper.**

2.5. Data collection

During consultations workshop, key informant interviews, focus group discussions were used to collect data. Workshops were used to give feedback and build consensus on issues. Key informant interviews were used to gather views from persons with knowledge of the subject. While focus group discussions were used to gather views, proposals and recommendations from end users.

2.6. Study sites

Stakeholder consultations were undertaken in the districts of Kampala, Mbarara, Wakiso, Kasese, Gulu, Lira, Mukono and Jinja. These were selected on the basis of their location as having high volumes of product manufacturing factories and concentrated business community.

PART II

LEGAL AND POLICY FRAMEWORK

3.0. Introduction

This Part presents the legal, policy and institutional framework relating to product liability in Uganda.

Policy framework

Vision 2040

Uganda's Vision 2040 has notes that currently, the industrial base in Uganda is largely dominated of metallurgical, food processing, leather and leather products, textile, clothing and garments, building and construction, paper printing and packaging, and chemical and pharmaceutical products industry. Most of these industries use outdated technology leading to production of low-quality products that are not globally competitive.¹⁹ The Vision emphasises establishment of economic lifeline industries and putting in place a conducive legal environment for the industrial sector development.²⁰

During the Vision period, the government has committed its self to promote a deliberate policy to encourage the manufacture of alternative consumer and investment goods and participation in international value chains.²¹ This requires putting in place an enabling legal framework that will protect consumers. The Vision calls for the review of trade policies with the aim of facilitating efficient exchange and management of the quality and value of imports.²²

National Development Plan (NDP)

The National Development Plan (The Plan) has identified trade as a driver of economic growth in Uganda. According to the plan, Uganda's manufacturing sector is steadily increasing especially in the food processing, agro-processing, metal fabrication, furniture, bricks and tiles, pharmaceuticals and other chemicals, paper, plastics and cosmetics, confectioneries, electricals and electronics.²³ During the period of the Plan, key focus will be put on increasing the share of manufactured goods and services in total export and increase market access for Uganda's goods and services in regional and international markets.²⁴ Among the interventions proposed to achieve these objectives is to enhance branding of quality and standardised products and services.²⁵

However, the Plan notes that there is inadequate infrastructure for undertaking standardisation, testing and quality management including certification and

19 Vision 2040

20 ibid

21 ibid pp 35

22 ibid

23 NDP II Page 64

24 ibid

25 ibid

accreditation of the locally produced industrial goods.²⁶ Legislation imposing strict liability is likely to improve the quality and standards of products.

National Trade Policy, 2008

The National Trade Policy charges Government with the primary role to liberalise trade while taking cognisance of the possible negative effects on the country's producers and traders. Government has committed itself to continue to assist the private sector to build capacity to produce and trade in quality goods and services competitively, reliably, and on a sustainable basis.²⁷ Among the priorities of the trade policy is to boost capacities of the socially and economically disadvantaged sections of the community to trade and to enhance the competitiveness of Uganda's products and services in the domestic, regional and international markets.²⁸

The requirements for the implementation of the trade policy include reviewing and strengthening commercial and/or trade laws, as well as complementary laws and policies.

In the area of domestic trade, the government pledged to ensure that goods and services in the domestic market meet the required standards technical and those that aim at protecting plant, animal and human health or life. To achieve this policy objective, the government committed itself to formulate and implement specific sectoral policies necessary for prudent management of a liberal economy, such as competition and consumer protection policies and enacting appropriate laws and developing guidelines to ensure that growth in trade leads to and ensures, *inter alia*, food security in the country.²⁹

The National Trade Policy lays a foundation upon which consumer protection laws in trade should be based. Strict product liability plays a crucial role in promoting trade by building product confidence among the consumers and ensuring that manufacturers produce products of quality and standards. Although the trade policy highlighted the need to protect consumers in trade, no legislative measures have been undertaken to address this gap.

A study conducted by Uganda Law Reform Commission on consumer protection recommended a specific legislation on consumer protection. The justification for this recommendation was that laws on consumer protection set standards for quality, safety and reliability of products so that failure to comply with these standards can result into legal actions against the seller.³⁰

Legal framework

The Government has put in place mechanisms both legal and administrative geared towards protecting consumers against defective products. They include: the Contracts Act, No. 7 of 2010, the Food and Drugs Act, Cap. 278, the Penal Code Act, Cap. 120,

26 ibid

27 National Trade Policy 2007

28 ibid

29 ibid

30 A study on selected Trade Laws – Consumer Protection Law. LAW COM PUB No. 27 of 2004

the Uganda National Bureau of Standards Act, Cap. 327, the Public Health Act, Cap. 281, the Dairy Industry Act, Cap. 85, the Adulteration of Produce Act, Cap. 27, the National Drug Policy and Authority Act, Cap. 206 and the Sale of Goods and Supply of Services Act, No. 10 of 2018.

These laws collectively impose criminal and administrative sanctions against the manufacturers and suppliers for defective goods, however, they are silent on the recovery of compensation in case of injury or damage.

3.1. Criminal and administrative laws

Several laws as highlighted above provide for criminal sanctions against person who market and circulate injurious products. For example, section 2(3) of the Food and Drugs Act provides that:

Subject to this section, no person shall—

- (a) sell for human consumption, offer, expose or advertise for sale for human consumption, or have in his or her possession for the purpose of such sale, any food rendered injurious to health;
- (b) sell, offer, expose or advertise for sale or have in his or her possession for the purpose of sale, any drug injuriously affected in its quality, constitution or potency which is injurious to health.

Under section 2(4) any person who contravenes any of the foregone provisions of this section commits an offence and is liable on conviction to a fine not exceeding two thousand shillings or to imprisonment for a period not exceeding three months or to both such fine and imprisonment.

The Occupational Safety and Health Act, 2006³¹ also provides for the safety and health, of persons at work such as in factories, plantations and other workplaces where hazardous³² work may be found. It expands the scope of application beyond the “factory” into any “work place” where workers may be present for the purpose of work and may sustain injury and or disease in the course of their work.

The Occupational Safety and Health Act, 2006 spells out measures to be carried out before anyone operates a factory. This includes measures such as, the labelling of dangerous materials, guarding of dangerous machines, the training of persons to work at any dangerous machine, which may cause injury, disease and death, and the institution of organisational measures that are necessary to monitor and deal with safety and health at work³³. The Act spells out the duties and obligations of both employers and the employees in ensuring safety and health for all persons at workplaces³⁴. It points out the methods and measures that should be put in place to ensure safety, health and environment at work.

31 Act No. 9 of 2006.

32 Part XIII (Hazardous Materials) of the Act; Sections 83-94

33 Part XI (Machinery, Plant & Equipment) of the Act; Sections 61-82

34 Parts III; Sections 13-21; Part VI; Sections 35-39 of the Occupational Safety & Health Act

The Penal Code Act creates offences relating to adulteration of food or drink, sale of noxious food or drink and sale of adulterated drugs.³⁵ The Act however only describes the said offences as misdemeanours and does not provide for the penalties.

The remedies provided for under the different laws reviewed do not provide compensatory remedies to persons who have been injured or suffered damage as a result of a defect in the product. The laws seek to deter manufacturers and persons involved in the supply chain by providing criminal law sanctions. This disadvantages consumers who may have suffered not only injury but economic loss as a result of defective products.

Further, the implementation of the law is hindered by institutional challenges, such as lack capacity to carry out investigations; corruption and as such have not protected consumers affected by defective products.³⁶

The penalties provided for under these laws are outdated and non-deterrant. Most fines imposed by the law have been affected by inflation. A good example is the fines provided for in The Occupational Safety and Health Act³⁷ discussed above.

The study sought to examine the effectiveness of the current legal framework in providing consumers with redress in case of injury or damage caused by defective products.

Product liability is also governed by laws relating to contract. The Contracts Act³⁸, 2010 and the Sale of Goods and Supply of Services Act³⁹, 2018, provide for remedies in case of defects arising for contracts relating to sale of products.

The relevance of contract law in relation to product liability cannot be readily obvious, once parties enter into a contract, rights and obligations ensue that must be observed by either party. Contractual liability plays an important role in ensuring that the manufacturer or retailer sells products that meet the required or contractually agreed standard. The Contracts Act, 2010 allows a party to seek compensation for any loss and damages arising from breach of a contract.⁴⁰

Specifically, in relation to products' contractual obligations may lie from conditions or warranties under the Sale of Goods and Supply of Services Act, 2018. These conditions and warranties arise from promises or assertions associated with either the sale of a product or some other transfer of a product for value.

Express representations of a seller of a product impose liability on the seller as long as they are made in the course of business and the buyer relies on them. These may relate to quality, attributes or specifications of the product.

35 Section 172, 173 and 174 of the Penal Code Act, Cap 120

36 National Association of Professional Environmentalists (NAPE) Report on Hazardous Consumer Products on Ugandan Market (20...) available at www.nape.or.ug/index.php/publications.

37 Section 102 and 104 of the Occupational Safety and Health Act, No 9 of 2006

38 Act No. 7 of 2010

39 Act No. 10 of 2018

40 Section 61

The Sale of Goods and Supply of Services Act, 2018 impose implied conditions and warranties that create liability for products. These include implied terms that goods shall be reasonably fit for purpose⁴¹ and are of merchantable quality.⁴² Breach of these implied terms entitles the aggrieved party to claim for compensation and damages suffered.⁴³

The implied warranty of merchantability amounts to an assurance, imposed upon the seller by law and not arising out of any agreement between the parties. It is based upon the policy of incorporating into every sale of goods a *quid pro quo*; a product of fair quality in exchange for a fair price paid.⁴⁴ The implied warranty of merchantable quality presupposes that the goods must be suitable for the ordinary use for which goods of the kind are sold and safe for ordinary uses.⁴⁵

The implied warranty of fitness for a particular purpose is essentially an implied promise by the seller of a product that the product will meet the particular or special needs of the buyer. It presupposes that a product will safely and effectively serve the particular, as distinct from the ordinary, purposes of the buyer.⁴⁶

In order to establish the existence of the implied warranty as to fitness for the purpose, the buyer must prove that:⁴⁷ the seller knew or should have known of the buyer's particular purpose for the product; the seller knew or should have known that the buyer was relying on the seller's skill and judgment in selecting and furnishing the product; and the buyer actually relied on the seller.

3.1.1. Limitations in contract law

The general rule of contract law is that only parties who are privy to a contract can sue under it for breach of warranty. This rule of privity of contract has its origin from common law and is premised on the need for certainty and predictability in determining the scope of rights and liabilities arising from contract and who is legally affected by the contract.⁴⁸ In the case of **Scruttons Ltd v Midland Silicones Ltd**, Lord Reid stated that:

"I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended for him."⁴⁹

In **Winterbottom v. Wright**,⁵⁰ Mr. Winterbottom was seriously injured when the mail coach he was driving collapsed because of poor construction. The mail coach had been

41 Section 15(2) of Act No. 10 of 2018

42 Section 15(3) & (5) of Act No. 10 of 2018

43 Act No. 10 of 2018; See sections 12, 14, 16, 18, 47-49, 62-67. Also see *Bakeine Mabel v Yuasa Investments Ltd* HCCS No. 136 OF 2013

44 *Asbestos Prods. Inc. V. Ryan Landscape Supply Co.*, 282 Minn. 178, 180 163 N.W.2d 767 (1968)

45 J. David Prince; *Defective Products and Product Warranty Claims in Minnesota*, 31 William Mitchell Law Review 1977 (2005) Available <http://www.larsonking.com>

46 *ibid*

47 Section 15(2) Sale of Goods and Supply of Services Act, No.10 of 2018

48 [1962] AC 446

49 *ibid*

50 (1842) 10 M & W 109.

sold to the Postmaster General by its manufacturer, Mr. Wright, and the Postmaster in turn contracted with a company to supply horses to pull the coach, which then hired Mr. Winterbottom to drive the coach. Mr. Winterbottom sued Mr. Wright, court dismissed the claim based on the general rule of contract and privity of contract “that a product seller cannot be sued, even if there is negligence, by someone with whom he has not contracted with or someone who was not privy to the contract” The court premised its decision on the need to restrict actions, it noted that allowing Mr. Winterbottom to sue would be to open flood gates of actions. That it was important to confine the right to sue only to those who had contracted.

Around the turn of the twentieth century, however, courts in many jurisdictions began to create exceptions to the general rule of privity especially as a defence for product manufacturers and consumer goods.

In the US the decision of the New Jersey Supreme Court in **Henningsen v. Bloomfield Motors**⁵¹ led the way in creating exceptions to privity especially for consumer products. The court concluded that, even where the basis for the seller's liability was a contract, privity should not bar recovery because the commercial circumstances that justified privity have changed. Court states that;

“There is no doubt that under early common-law concepts of contractual liability only those persons who were parties to the bargain could sue for a breach of it. In more recent times a noticeable disposition has appeared to break through the narrow barrier of privity when dealing with sale of goods in order to give realistic recognition to a universally accepted fact. The fact is that the dealer and the ordinary buyer do not, and are not expected to, buy goods exclusively for their own consumption or use. Makers and manufacturers know this and advertise and market their products on that assumption; witness the ‘family’ car, the baby foods, etc. The limitations of privity in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality. With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of “consumer” was broader than that of “buyer.” He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured, they will be dangerous to life and limb, then society’s interests can only be protected”⁵²

Although the rule of privity was well intentioned and just, modern technology and economic circumstances have led to development of commercial contracts where the application of the doctrine may prove to be unfair. It is observed that the rule that no one except a party to a contract can enforce it may cause inconveniences where it prevents a person most interested in enforcing the contract from doing so. The many exceptions to the doctrine make it tolerable in practice, but they have provoked the

51 32 N.J. 358; 161 A.2d 69

52 32 N.J. 358; 161 A.2d 69

question whether it would not be better further to modify the doctrine or abolish it all together.⁵³

While contract law offers measures that can be exploited by an injured party to seek redress, it is nevertheless open to criticism in the following respects-⁵⁴

- (a) in the absence of proof of fault on the part of the manufacturer, only a person standing in a contractual relationship with the supplier of goods has a right and remedy. Where the injured person was not the buyer, he must bear the loss himself.
- (b) in the absence of proof of fault on the part of the manufacturer, a person standing in a contractual relationship with the supplier has rights and remedies only against him/her; usually a retailer. Thus, liability will often fall not on the manufacturer who may commonly be regarded by members of the public and others as being responsible for the quality and safety of the product but upon a retailer, who from a practical point of view is seldom nowadays regarded as being so responsible.

3.2. Tort of negligence

The tort of negligence has its origin from common law and is premised on the conduct of the manufacturer rather than the product itself. A duty of care is imposed on the manufacturer to ensure that the product is safe and does not harm the end user of a product. The duty of care imposed on manufacturers for defective products in negligence was established in the case of **Donoghue v Stevenson**.⁵⁵ In this case, Mrs. Donoghue visited a café in Paisley with a friend who purchased a bottle of ginger-beer for her. After drinking some of it when the remainder of the contents was poured into a tumbler, Mrs. Donoghue discovered the decomposed remains of a snail floating out causing her alleged shock and severe gastro-enteritis.

Mrs. Donoghue could not bring an action in contract because she was not party to the contract. She brought an action in negligence claiming that Mr. Stevenson was liable for injuring her having put the beer on the market which was likely to cause harm.

The matter went up to the House of Lords and the question was whether a manufacturer owed a duty of care to the ultimate consumer with whom he was in no contractual relationship

Lord Atkin in his judgment described the legal duty as follows;

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act

53 GH Treitel, The Law of Contract, 9th edn, (1995) page 588

54 The Law Commission and Scottish Law Reform, “Liability for defective products” (Law Com No. 82 Scot Law Com No. 45) June 1997 available at <https://www.scotlawcom.gov.uk/files>

55 (1932) 2 AC 562

that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.”⁵⁶

The decision in **Donoghue V Stevenson**⁵⁷ formally established the right of an injured consumer to sue manufacturers for defective products under the tort of negligence. A manufacturer has a duty to use due care in the design, construction, assembly and inspection of his products in order to ensure that his merchandise will not create an unreasonable risk of harm to the consuming public. Since the basis of the liability is negligence, the standard of care is that care that a reasonable man would exercise under the circumstances.⁵⁸

A party injured by a defective product can bring an action in the tort of negligence provided the following requirements are satisfied⁵⁹

- (a) the defect in the product must be one that may result in injury to the consumer's life or property;⁶⁰
- (b) the defect must have existed at the time the manufacturer parted with the possession of it;⁶¹
- (c) the defect must not be one that the manufacturer could reasonably have expected the consumer or some third party to notice or correct before it can do harm;⁶² and
- (d) the existence of the defect must be attributable to lack of reasonable care on the part of the manufacturer.⁶³

These requirements put a burden of proof on the claimant or injured party. In most cases the claimant or injured party may not have the necessary proof as to the defect because all the information regarding a particular product is in the domain of the manufacturer or producer. Further, the cost involved in adducing such proof is expensive and disadvantages to a claimant or consumer.

Following the decision on **Donoghue V Stevenson**,⁶⁴ many jurisdictions confirmed this right and extended it to other products other than food or drinks. For example, in the case of **Henningsen v. Bloomfield Motors**⁶⁵ the New Jersey Supreme Court imposed strict liability without regard to private contract to all products and to every foreseeable user of the product, because it was in society interest to protect the ultimate consumer. Court noted that “*in this way the burden of losses consequent upon the use of defective articles is borne by those who are in position to either control the danger or make equitable distribution of the losses when they do occur.*⁶⁶

56 (1932) 2 AC 562

57 (1932) 2 AC 562

58 David G. Epstein, Strict Liability in Tort: A modest Proposal. 70 W.Va.L.Rev. 1(1967)

59 Scottish Law Reform Commission

60 Per Lord Atkin in Donoghue V Stevenson (1932) AC 262 AT 599

61 Evans v Triplex Safety Glass Co. Ltd (1936) All ER 283

62 Grant V Australian Knitting Mills Ltd [1936] AC 85

63 Daniel V White (1938) 4 All ER 258

64 (1932) 2 AC 562

65 32 N.J. 358, 161 A2d 69

66 Ibid

This position later received support in the case for ***Greenman V Yuba Power products Inc.***⁶⁷ In this case the defendant raised a defence available under sale of law, that the plaintiff had failed to give notice of the breach of warranty and therefore had no cause of action in contract. The court refused the defence of lack of notice as far as the warranty action was concerned and went on to impose a more general strict liability upon the manufacturer. Court held that *a manufacturer of a product is strictly liable in tort when an article he places on the market, knowingly that it is to be used without inspection for defects, proves to have a defect that causes injury to human beings.*⁶⁸

The duty of care owed by the defendant under negligence theory varies based upon the defendant's role in the design, manufacture, marketing and distribution of the product. For example, a distributor or retailer would not have been involved in the design or manufacturing processes and therefore that defendant's duty of care would likely be limited to reasonable testing or inspection and the duty to warn.⁶⁹

The tort of negligence has shortcomings that restrict consumer recovery. A person who claims against a producer in tort or delict has to establish first that his injury was caused by a defect in the product, and second that the defect existed in the product when it left the hands of the producer. The latter burden, in particular, he may be unable to discharge.⁷⁰ Placing the burden on the consumer to prove fault on the part of the producer before recovery, disadvantages the consumer and does not offer protection.

In most cases, the consumers are not in position to prove fault especially when cases involve large companies.⁷¹ In the case of ***Escola V Coca Cola Bottling Co***, Justice Traynor noted that the difficulty of proving negligent conduct on the part of the manufacturer would constitute an impossible barrier for the injured consumer.

Institutional framework

The government has put in place agencies and authorities to ensure that products put on the market are safe and to the required standards. These institutions include; The Uganda National Bureau of Standards (UNBS) mandated among other things to enforce standards in the protection of the public against harmful ingredients, dangerous components, shoddy material and poor performance or to require certain products to comply with certain standards in manufacture, composition, treatment or performance and to prohibit substandard goods where necessary.

The National Drug Authority is mandated to control importation and exportation of and sale of pharmaceuticals, control quality of drugs, promote and control production of essential drugs.⁷²

The Occupational Safety and Health Act, 2006 imposes a duty on person who designs, manufactures, imports or supplies any article, chemical substance or mixture of chemical substances, for use at work to ensure, as far as is reasonably practicable,

67 59 Cal.2d 57 (1963)

68 Per Traynor J *Escola v Coca Cola Bottling Co* 24 C.2d 454 at (July 1944) 461

69 *Fisher V Harrods* [1966] 1 Lloyds Rep 500

70 The Law Commission and Scottish Law Reform, "Liability for Defective Products"(Law Com No. 82 Scot Law Com No. 45) June 1997 available at <https://www.scotlawcom.gov.uk/files>

71 Preliminary consultations report conducted in western Uganda December 2016 also see supra (fn1)

72 Section 6

that the article or chemical substance or mixture of chemical substances is designed or constructed or formulated to be safe and without risk to health when used properly and for the purpose for which it is meant.⁷³ The Act establishes the office of the Commissioner and inspectors who are mandated to oversee the implementation of the Act.⁷⁴

In the Building Control Act, 2013 the Minister may after consultations with the board after being satisfied that any method or materials used in a building operation is not safe by notice published in the Gazette prohibit the use of that method or material in the building operation.⁷⁵

73 Section 28 of the occupation and safety, 2006

74 Section 4

75 Section 42 Act No. 10 of 2013

PART III

STUDY FINDINGS AND RECOMMENDATIONS

4.0. Introduction

This part presents study findings and recommendations. The analysis is based on the literature review and field findings.

4.1. The need for legislation for product liability.

The study sought to establish the need for legislation to impose strict liability for defective products. Study findings revealed that there is no specific legislation that imposes strict liability for defective products. The study found that whereas, there is no specific legislation, some laws are in place upon which a claim may be brought to court by a party injured by defective products.

According to a lecturer⁷⁶ “There are many laws that cover product liability, for example the Penal Code Act and the Sale of Goods and Supply Act, 10 of 2018. She argued that consumers cannot be expected to have the same expectations and therefore the quality based on consumer expectations may not be practical”

A review of literature and study findings revealed that the need for legislation to impose strict liability is vital to ensure consumer protection and product safety. The need for specific legislation imposing strict liability for defective products is largely premised on policy considerations that include; the desire to achieve maximum protection for the injured party (consumers), promotion of public interest in discouraging the marketing of products that have defects that are a menace to the public; the desire to protect consumer expectation⁷⁷ and the inefficiencies of the current legal framework in offering consumers enough.

The study explored perceptions towards imposing strict liability for defective products. Majority of the respondents were not conversant with the concept of product liability especially consumers. The findings revealed that there are not many legal actions filed in courts of law relating to product liability in Uganda. This was attributed to a number of reasons that include-

- (a) the general lack of awareness about the law and ignorance among consumers in Uganda.⁷⁸
- (b) the lack of claims being brought to courts of law is attributed to the fact that the average citizen would find the complexity of the existing law and the costs involved being prohibitive.⁷⁹

⁷⁶ A participant at a workshop held at Royal Suits Hotel in Bugolobi, Kampala, 20 June, 2018, the participant is a lecturer at Makerere University faculty of Law

⁷⁷ Gaumer V Rossville Truck 257 P.3d 292

⁷⁸ Key Informant Interview with Executive Director of Uganda Consumers Association March 2017; Focus Group Discussion with selected Legal Practitioners in Mbarara December, 2016

⁷⁹ Key informant interview with a legal practitioner in Kampala, March, 2017

- (c) it is also attributed to the culture among Ugandans that instead of making a claim, people merely stop using the product. If the injury or damage is suspected to have been caused by misuse, then the user would refrain from making any claim.⁸⁰ This is however changing as people continue to be enlightened about their rights.⁸¹
- (d) the fact that the majority of the injuries or damage are minor, and often settled expeditiously by the parties involved without legal action. Many manufacturers opined that they would rather have the matter settled amicably without going to courts of law.⁸²
- (e) the Ugandan market is fragile and survives on second-hand goods. This gives consumers no confidence to make claims.⁸³
- (f) consumers lack confidence to assert their rights, they tend to believe that they have no bargaining power with manufacturers or suppliers.⁸⁴

During consultations there was general consensus among the people consulted that imposing strict liability is necessary to offer consumers protections against defective products. It was observed that most products on the Ugandan market lack standards and as such they can be harmful to consumers, resulting into injury or even death. The strict liability regime is therefore necessary to hold those responsible liable. A lawyer in Mbarara observed as follows;

“There are manufactures mushrooming everywhere who are not well regulated, especially those manufacturing beverages, some of these are harmful to consumers strict liability will check them”⁸⁵

Respondents identified the following as the reasons why strict liability should be imposed for defective products:

- (a) defective products can cause injury and sometimes death and therefore need to compensate injured consumers;
- (b) the Ugandan consumer is not empowered to detect defects;
- (c) Manufacturers control the production process and therefore should be held responsible.
- (d) the need to protect consumers who have genuinely spent their money;
- (e) consumer ignorance about the products;
- (f) it is the role of manufacturers and UNBS to ensure that products are not defective;

80 Focus Group discussion with lawyers in Mbarara, December, 2016

81 ibid

82 Meeting with legal Counsel, Uganda Breweries Limited April, 2017

83 Focus group discussion with Businesses men and consumers in Kampala, April 2017

84 Stakeholder meeting with Consumers held in Kampala March, 2017

85 Key Informant Interview with Ms. Lydia Ahimbisibwe, of Ahimbisibwe & Co Advocates, Mbarara December, 2016

- (g) Ugandan consumers are still illiterate as majority of the population cannot read;
- (h) court processes are expensive for majority of the Ugandans consumers;
- (i) the influx of counterfeit (*fake*) products on the market.

4.1.1. Public policy considerations

Strict product liability is based on the public policy which holds that the law should protect consumers from unsafe products that are hazards to life and limb, and generally to public health. During consultations there was consensus that imposing strict liability for defective products is necessary to offer consumers the much-needed protections. This was mainly attributed to the fact that consumers often are ignorant about the products they purchase and that the manufacturers have the financial muscle to remedy any defect.⁸⁶ A respondent stated that⁸⁷-

“most of our consumers in Uganda are ignorant, they don’t know how to read and as such they heavily rely on the manufacturers and suppliers, who at times mislead them, accordingly such legislation is necessary to ensure that the average consumer is protected”

Accordingly, the purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.⁸⁸ In the Californian Supreme Court in the United States of America in **Escola V Coca Cola Bottling Co.** Justice Traynor noted that *“even if there is no negligence public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market”*⁸⁹ the Judge concluded that it is in public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.⁹⁰

Further this policy consideration was echoed by court in the case of **Williams v. Coca-Cola Bottling Co Ltd.**⁹¹ Court stated that -

“Considerations of public policy, modern methods of manufacturing, packaging and merchandising and the protection of the health of the consuming public require that an obligation be placed upon the manufacturer of Coca-Cola to see to it, at his peril, that the product he offers the general public is fit for the purpose for which it is intended, namely, human consumption. The “demands of social justice” require that his liability should be made absolute. Only the manufacturer or bottler can know of the contents of the bottle.”⁹²

⁸⁶ Stakeholder Workshop held in Mbarara on 8th February 2018 at Lake View Hotel.

⁸⁷ Meeting with legal practitioners in Mbarara in December 2016

⁸⁸ Greenman v Yuba Power Products (Supreme court of California) 59 Cal .2d 57 (1963)

⁸⁹ Escola V Coca Cola Bottling Co Ltd

⁹⁰ Ibid

⁹¹ 285 S.W.2d 53 (1955)

⁹² Ibid

Clearly, strict liability is justified because the cost of injuries flowing from typical risk inherent in products can fairly be put upon the enterprise marketing the product as cost of their doing business, thus assuming that these enterprises will fully pay their way in the society from which they drive their profit⁹³

4.1.2. Manufacturers ability to control risk of defects arising at the time of manufacturing

Product accidents in many cases can be attributed to negligent acts or omissions of the manufacturer or producer during some stages of the manufacturing or marketing process, and not on product abuse. This, in many cases, may prove difficult for the consumer to discover, and often practically impossible to prove.⁹⁴

During the process of manufacturing products, a manufacturer or producer can control and detect risks that are associated with a product and be able to eliminate such risks. Accordingly, manufacturers or producers are often in a better position than consumers to identify the potential product risks, to determine the acceptable levels of such risks, and to confine the risks within those levels. **In Jacob E. Decker & Sons V Scapps**,⁹⁵ court observed that the ultimate consumer was normally unable to analyse or scrutinise the product for safety and implicitly took it on trust that it would not be dangerous to life and limb. For example, a consumer will not analyse food products because they are pre-packed. Product liability is therefore premised on the hallmark that the manufacturer or producer is best placed to control the product and insure the risk involved.⁹⁶

4.1.3. Strict liability will lead manufacturers to be careful and take precaution during the various stages of production

Study findings indicated that one of the reasons strict liability for defective goods is necessary is to ensure that manufacturers take necessary precautions and due diligence during the production process.

Majority of the persons consulted were of the view that legislation imposing strict liability would promote product quality and standards because manufacturers will be very careful to avoid law suits and losses. A respondent during an interview observed as follows “.... such a law would be good for Ugandan market, many of these manufacturers would be deterred from manufacturing fake products that cause injury”

A legal practitioner opined that “... a law imposing strict liability will obviously act as a deterrent for manufacturers and make them to be more careful if they know that in case of injury they will be sued and have to pay damages”

Considering that a manufacturer or producer is the best person capable of detecting and preventing damage from occurring in a product, strict product liability might persuade them to take more precaution and whatever is necessary to avoid defective

93 David Owen. Product Liability law, 3rd ed (Hornbook series) 2014

94 Mcpherson V Buick Motors (Justice Benjamin Cardozo)

95 164 SW 2d 828, 829 (1942)

96 Geraint Howells, Stephen Weatherill; Consumer protection, 2nd Edition Ashgate (2005)

products from getting on the market. Justice Roger Troney in **Greenman V Yuba Power Products** noted that -

"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being"

When manufacturers or producers take precaution in the manufacturing or production cycle to avoid defective products, they increase consumer confidence in the products. Courts and commentators generally agree that strict liability creates incentives for manufacturers to ensure greater product safety.⁹⁷ In **Larsen v. Pacesetter Systems, Inc.**⁹⁸ court observed that;

.... imposing liability on Pacesetter will promote product safety by encouraging manufacturers to anticipate and test for foreseeable defects likely to cause severe injury."

A study conducted in Japan after the introduction of the product liability law in 1995 revealed that manufacturers and importers had begun to take measures to limit product liability exposure.⁹⁹ Some had begun to more forthrightly advise consumers as to risks associated with the use of their products. Others have redesigned their products, or even gone so far as to discontinue production of high -liability risk items. In general, manufacturers appear to have begun to look more closely at the safety of their products.¹⁰⁰ One large manufacturing concern, for example, has instituted a policy to "double check and triple check" product safety as a result of the new law.¹⁰¹ Its short term effects have primarily been manifested not in a rise in the number of lawsuits filed, but rather in pre-emptive measures by manufacturers and an increase in the number of consumer inquiries to the manufacturers.¹⁰²

4.1.4. The need to protect consumers from defective products

Study findings revealed that the need to impose strict liability for defective products is premised on the need to protect consumers from defective products. Respondents observed that when consumers purchase products, they have an expectation that the product purchased is safe and not defective. That imposing strict product liability for defective products goes a long way to protect this expectation. During an interview with a lawyer in Kampala, he observed that: "*You see strict liability for manufacturers will generally offer protection to consumers since it lessens the burden of proof and provides them with remedies to fulfil their expectation.*"¹⁰³

In the case of **Caterpillar Tractor Co. v. Beck**,¹⁰⁴ the Supreme Court stated that;

97 David Owen, Product Liability Law, 3rd ed, Hornbook Series (2014)

98 837 P.2d. 1273 at 1287

99 James D. Pagliaro *Brady L. Gree: Japan's 1995 Product Liability Law: Will the Adoption of Strict Liability Alter the Future of Litigation in Japan?* Published in 9 International Quarterly 304 -19 (April 1997); Legal Mind 81-104 (January 1997)

100 ibid

101 ibid

102 ibid

103 Key Informant interview with a legal practitioner in Kampala November, 2017

104 593 P.2d 871, 878 n.15 (Alaska 1979)

“the purpose of imposing such strict liability on the manufacturer and retailer is to ensure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves”

Further, the need to impose strict liability in order to protect consumers lies in the inequality of bargaining power between the manufacturers and the consumer. The manufacturer has a higher bargaining power in the market compared to consumers, for example through the use of standard contracts that put consumers in a take or leave situation. In **Henningsen v. Bloomfield Motors, Inc.** the New Jersey Supreme Court, justified allowing injured plaintiffs to sue manufacturers under this new theory by describing a manufacturer-plaintiff setting as one defined by gross inequality of bargaining power and by standard form contracts used by all, or nearly all, manufacturers in an industry. That *“The demands of social justice,”* did not permit such a sharp bargain.

Generally, consumers do not have the ability to investigate the soundness of the product.¹⁰⁵ In the case of **Brandenburger v. Toyota Motor Sales, U. S. A., Inc.**¹⁰⁶ Court observed that *“Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number of complexity of products which must be consumed in order to function”*

There was consensus among all the persons consulted that there is need to protect consumers from defective or injurious goods. This was mainly attributed to the fact that consumers always spend on products and their expectations are high. That manufacturer always has the higher bargaining power over consumers and as such consumers must be protected.¹⁰⁷ a respondent during interview stated that

“.... the government has not done much to protect consumers, it has allowed Chinese products that are dangerous and consumers are not protected. Such a law is very necessary to punish those that sale fake products that cause injury and protect buyers”¹⁰⁸

In the case of **Helene Curtis**,¹⁰⁹ court observed that strict product liability doctrine centres on a desire to lessen the social problems that are created when victims of unpredictable and often inevitable product-related injuries go uncompensated.

4.1.5. Consumers are relying on manufactures/sellers' advertisements

The other justification underlying introduction of strict product liability is premised on the notion that in modern times, consumers heavily rely on manufacturers' and sellers' advertisement. The study revealed that in most cases manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.¹¹⁰ Respondents noted that in

105 Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)

106 513 P.2d 268, 273 (Mont. 1973)

107 Stakeholders Workshop held at Sunset Hotel Jinja on the 15th February 2018

108 Interview with an executive member of KACITA, 7th March 2017

109 385 F.2d at 848

110 David Owen, Product Liability Law, 3rd Edn, (Hornbook Series) 2014

Uganda some of the advertising or marketing strategies are deceptive or fraudulent, or artificially restricted, this affects the consumers' ability to make appropriate purchase decisions.¹¹¹

In **Escola V Coca Cola Bottling Co.**¹¹² Justice Traynor noted that in this present age of mass production and nationwide advertising techniques, consumers no longer have the opportunity to examine products warily but, instead, are forced to rely upon the manufacturer's own representations with respect to the quality and safety of his goods.

Further, new products that come on the market are so complex and sophisticated that consumers may have limited knowledge about these products and as such need protection.

In **Greenman V Yuba Power Productions**¹¹³ Justice Traynor emphasised the need to extend strict liability to manufacturers as based on the need "*to ensure that the cost of injuries resulting from defective products are borne by the manufacturers who put such products on the market rather than by the injured persons who are powerless to protect themselves.*"

Clearly, the power of advertisements in product choice by consumers cannot be underestimated. Majority of the persons consulted were in agreement that advertisement highly influences consumers in choosing products. That most consumers rely on the presentations by suppliers and manufacturers and as such if this trust is breached compensation must be paid.¹¹⁴ A respondent during an interview stated

“.... look at our Ugandan consumers, they know nothing about products and most times rely on sellers and what they hear or see in adverts”¹¹⁵

4.1.6. Modern products and technological advancement

Study findings revealed that modern technology has not only created supplicated products but has also changed product advertising and marketing strategies that attract consumers. Respondents noted that advertising and marketing improves the efficient functioning of a market economy by providing useful information to consumers and encouraging competition among providers of goods and services.

The study found that with liberalisation of the economy there are fiercely competitive and unethical business owners who will cut corners without regard to the health or safety of the consumers. As a result of competition some manufacturers may be tempted to use low-quality material in making certain products, causing them to be defective¹¹⁶ therefore it is vital to protect consumers.

According to Lowe and Woodroffe, the fundamental need for review of product liability legislation arises from new business methods and changing social attitudes.¹¹⁷ Not

111 Stakeholders Workshop held at Sunset Hotel Jinja on the 15th February 2018

112 150 P.2d 436

113 59 Cal.2d 57; 377 P.2d 897

114 Stakeholder Workshop held in Mbarara on 8th February 2018 at Lake View Hotel.

115 Key Informant Interview with Lubega Johnson, businessman in Kampala March 2018

116 Stakeholder Workshop held in Mbarara on 8th February 2018 at Lake View Hotel.

117 R Lowe & G Woodroffe, Consumer Law and Practice, 4th edition 1995 at page 2.

only have products become more complex, methods of distribution have also changed substantially. Modernisation and technological advancement have seen the invention of new products to which the consumer has no knowledge about or expectation, it is therefore necessary that consumers are protected for such products.

The inability of consumers to understand complex products brought about by developments in technology was ably stated by Justice Jackson in his dissenting opinion in **Dalehite v. United States**.¹¹⁸ Where he stated that;

“... This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exert greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and wellbeing. Purchasers cannot try our drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.”¹¹⁹

The complexity of goods produced as a result of technology advancement leads to weak consumers being unable to assess the quality of the goods while the traders on the other hand in a better position because they have access to the information on the goods produced. This is a good example of market failure.¹²⁰ Thus, the market failure needs to be regulated by imposing liability on those who have access to information on a particular product.

In **Barker V. Lull Engineering Co**,¹²¹ court observed that the technological revolution has created a society that contains dangers to the individual never before contemplated. The individual faces the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. The radical change from a comparatively safe, largely agricultural society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of a tortfeasor but now are more concerned with the safety of the individual who suffers the loss.

The Australia Royal Commission on Civil Liability and Compensation for Personal Injury expressed its views in its 1978 report that -

118 346 US No. 308 15 (1953)

119 346 US 15, 52-52 (1953)

120 Zeti Zuryani Mohd Zakuan and Sakina Shaik Ahmed Yusoff, Liability of manufacturers for Goods under the Consumer Protection Act, 1999: a Paradigm Shift. Journal of Law, Policy and Globalization ISSN 2224 – 3240 (Paper) Vol. 11, 2013

121 20 Cal.3d 435

“Until a fairly late stage in the industrial revolution most goods were manufactured by small business, often selling directly to the user. Now the situation is transformed by the scale of production, the complexity of technology, the number of processes, producers and distributors involved with any one item, and the sheer quantity of goods produced and consumed. The consumer is dependent on producers he does not know and processes he does not understand”¹²²

4.1.7. Inefficiencies of Tort and Contract law

In its broadest terms, the evolution toward strict liability had as its impetus the restrictive nature of the then-available actions for recovery of damages occasioned by use of a defective product.¹²³ It is argued that the tort-contract dichotomy so evident in the early cases was an unnecessary burden on the injured party.¹²⁴ For example, under tort the burden upon the plaintiff to show where the manufacturer had been negligent was clearly a heavy one; and there could be no recovery where the manufacturer could not have discovered the defect by reasonable inspection. The requirements of privity under contract law also permit contractual limitations of warranty, which can defeat an otherwise valid claim.¹²⁵ In the case of **S. Sharks V the Upjohn Company**,¹²⁶ the Supreme Court stated that;

“one of the major goals of strict product liability is to relieve the plaintiff of the burdensome evidentiary requirements of the negligence cause of action ...”

Commentators have argued that strict liability provides a simple solution to the tort-contract dichotomy by joining aspects of negligence and warranty law together in one action, thereby expanding allowable recovery under warranty aspects and reducing the formidable burden of proof in negligence.¹²⁷

Globally, countries that have imposed strict liability legislation have sought to protect consumers from defective goods. Reports from other jurisdictions indicate that the increasing impact of product liability has caused many manufacturers to devote more attention, money to product safety and as a result products are generally safer today.¹²⁸ For example, The European Union has noted the need for liability without fault on the part of the producer as the sole means of adequately solving the problem, peculiar to our age of increasing technicality, or a fair apportionment of the risks inherent in modern technological production and a means of consumer protections.¹²⁹ Similarly, in a bid to hold producers liable for defective and reasonably dangerous products the American Law Institute (ALI) adopted the *Reinstatement of Torts (Second)* section 402A that imposes strict liability to sellers of defective or dangerous products.¹³⁰

122 Report of the Australia Royal Commission on Civil Liability and Compensation for Personal Injury expressed 1978 at Para 1203

123 Bivins, William P. Jr. (1978) "The Products Liability Crisis: Modest Proposals For Legislative Reform," *Akron Law Review*: Vol. 11 : Iss. 4 , Article 2.

124 ibid

125 ibid

126 835 P 2d 1189

127 ibid

128 See Final Report, Interagency Taskforce on Product Liability VI-47 (1977)

129 Council Directive 85/374/EEC of 1985

130 *Reinstatement (Second) of Torts* Section 402A 1964

The UK Law Commission and Scottish Law Reform Commission has noted that product liability must be premised on the following considerations of policy -

- (a) Where a person suffers personal injury because of the defective state of a product, the loss should be borne by the person or persons who created the risk by putting the defective product into circulation for commercial purposes, rather than by the person injured.
- (b) It is desirable to impose liability on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product.
- (c) It is desirable that the risk of injury by defective products should be borne by those who can most conveniently insure against it.
- (d) Public expectations, which are sometimes raised by advertising and promotional material, should be taken into account in determining where the loss should lie.
- (e) It is desirable to remove difficulties of a procedural or evidentiary character which impede rather than assist the course of justice.
- (f) The policy of the law should be to discourage unnecessary litigation.
- (g) The number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons
- (h) As a matter of general importance, the laws of the United Kingdom should not put such heavy additional liabilities on British producers as:
 - i. to place them at an undue competitive disadvantage in the international market;
 - ii. to inhibit technical innovation or research; or
 - iii. to cause reputable manufacturers to cease production in the United Kingdom altogether.

Majority of the people consulted share the view that the burden of proof put on the injured party is unnecessary, that manufacturers and those in the chain of distribution should be the ones to bear the burden of proof, that manufacturers are often big companies that can afford to discharge the burden of proof and that most consumers rely on the skill of sellers.

4.1.8. Arguments against imposing strict liability

During the study a section of respondents especially manufacturers and some business people urged against imposing strict liability for defective products. Some respondents observed that the law of contract and sale of goods are sufficient and a specific law on product liability was not necessary. A respondent observed as follows “*consumer*

protection laws are not necessary, that is why even at university we have removed it from the syllabus, contract and sale of goods laws are sufficient”¹³¹

Other respondents noted that before a specific law for strict liability is introduced consideration should be heard to the nature of Uganda’s economy. That Uganda is a young industrial economy and strict liability law may inhibit innovation¹³² because strict product liability could scare away manufacturers.¹³³ A respondent stated as follows;

“the Ugandan market heavily relies on imported products; strict liability may scare away even the few manufacturers we have or the upcoming ones because of liability.”¹³⁴

Another respondent opined that “the law should be trade facilitating and the informal nature of Uganda market be considered so as not to inhibit investors”¹³⁵

Globally, some of the arguments advanced against imposing strict liability for defective products state that while individual consumers who suffered injury from defective products might benefit from the introduction of strict liability, consumers as a whole would be adversely affected by such a change.¹³⁶ Product liability may raise the cost of products to cover increased insurance premiums required by the need to insure against strict liability.¹³⁷ The variety of goods available would decrease, limiting consumer choice of goods. Companies would protect themselves by sticking to well-known and well-tried products and not take risks with minor variations. Finally, and most cogently, it was contended that research and technological innovation would be seriously impeded.¹³⁸

Whereas, this sounds economically viable for producers, there are new developments that suggest that consumers have expectations when they purchase products that must be fulfilled. When consumers purchase products, they have a reasonable expectation that the products will be safe and work to their expectations. It has been pointed out that when a product causes injury or damage it is the consumer’s expectation that the producer will offer adequate compensation for the injury or damage caused by the product.¹³⁹

The Australian Law Reform Commission justifying the introduction of legislation for of product liability noted that

“... if the law gave free rein to manufacturers and distributors, and did not give any compensation rights to persons injured by unsafe or defective products, there might not be enough incentive to market goods which were safe and free from defects. There would be increased costs to the community as a whole, because it would lead to increased use of health and rehabilitation services.”

131 Comment received at a stakeholder workshop held at Royal Suits Bugolobi, June 2018.

132 Focus Group discussions with Legal Practitioners in Mbarara District, December 2016

133 Interview with businessmen in Mbarara Dec 2016

134 Focus group discussion with Association of Small-Scale Industries held at their headquarters at Lugogo UMA show Grounds, 2017

135 Officer from Ministry of Trade, Industry and Cooperatives

136 Law Reform Commission of Hongkong, Report on Civil Liability for Unsafe Products, 1998

137 M Brazier, Street on Torts, 8th Edition at Page 302

138 ibid

139 Meeting with the Executive Director Uganda Consumers Association, 2017

The Commission notes the inadequacy of the current legal regime available to consumers to seek redress in case of defective or dangerous products that may cause death, injury or damage to property. For example, the available compensation remedy available to consumers is to seek legal redress in contract for breach of warranties or tort of negligence are criticised for being expensive to consumers, bogged down with delays in courts, lack of consumer awareness and pose a heavy burden of proof on the consumer. The continuous reports of injuries and damages caused by defective or dangerous products shows that these remedies and interventions are not effective.

Findings indicated that even the institutions established to protect consumers from defective products are not effective. It was proposed that the law imposes liability on regulators to ensure that they are effective. For example, it was noted that Uganda National Bureau of Standards which certifies certain products should be held liable. A respondent observed as follows;

'UNBS and URA should be held liable in circumstances where they clear goods that are not labelled and these goods cause harm.' The respondent gave an example of school children who ate unlabelled sweets and consequently became very ill and were hospitalised yet there is evidence that UNBS has been clearing the entry of these sweets into the country.¹⁴⁰

Another respondent noted the need for manufacturers to provide consumer indemnity in case of defective products. That such indemnity should be required by regulators to ensure that when a product causes injury or damage, the regulator can indemnify the injured party.¹⁴¹

Further, industrialisation has led to growth of enterprises especially in the commercial sector, purchasers are buying products made by manufacturers in distant places from their locality (most goods are imported) the consumers have no proximity with the manufacturers. Producers and manufacturers are selling their products through distributors, agents and wholesalers who sell the products to retailers who in turn sell them to consumers. Clearly, privity of contractual relations is no longer likely to influence obligations. Finally, the development of radio and television marketing has become a mass media affair. This combined with disparity of bargaining power has made the traditional concept of *caveat emptor* (buyer be aware) a one-sided legal doctrine. Moreover, the types of products manufactured in modern times are more dangerous to human life for which it is necessary that consumers are protected.

Consultations revealed that the available compensation remedy available to consumers is to seek legal redress in contract for breach of warranties or tort of negligence.¹⁴² These are criticised for being expensive to consumers, bogged down with delays in courts and majority of the consumers are not aware of their rights to take action. Some of the producers noted that they have adopted consumer education to lessen injuries or damage that may arise.¹⁴³ The continuous reports of injuries and damages caused by defective products shows that these remedies and interventions are not effective.

140 Preliminary consultative meeting with members of Kampala City Traders Association, 25th April 2017.

141 Preliminary consultative meeting with members of Kampala City Traders Association, 25th April 2017

142 Meeting with lawyers in Mbarara December, 2016

143 Meeting with Kaziare Herbal Products in Mbarara December, 2016

The public policy rationale and considerations for imposing strict liability highlighted above have greatly influenced and persuaded countries across the world to introduce specific strict liability legislation.¹⁴⁴ For example, United States of America, European countries, Canada, Japan, South Africa, and Australia have all developed legislation for strict liability premised on these public policy rationales.

The policy considerations and rational behind legislation for product liability cannot be over emphasized. The commission supports the rationale behind product liability legislation mainly because:

- (a) the manufacturer is in the best position to avoid the risks of injury by taking preventive measures;
- (b) considering that the manufacturer is responsible for products placed on the market, they should bear the loss;
- (c) it is always difficult for an injured consumer to establish negligence against the manufacturer;
- (d) manufacturers have control over the production process and as such can avert any risks associated with the product;
- (e) some existing laws already endorse a strict liability rule in the case of food products;
- (f) consumers place greater reliance on manufacturers because they lack the means and skills to fully investigate every product and their vigilance is lulled by advertising and market devices and
- (g) such legislation will provide consumers with the much-needed protection against unsafe products.

Recommendation

1. **There is need to put in place a specific piece of legislation that imposes strict liability for defective products.**
2. **The specific law should aim at providing consumers protection from defective products.**
3. **Adequate protection of consumers from defects caused by unsafe or defective products can be achieved through the introduction of liability irrespective of fault on the part of the producer of the product which was defective and caused damage.**
4. **Liability to the producer irrespective of fault in his or her part ensures an appropriate solution in this era where there is increase in technicality in production and the fact that the consumers have less knowledge of the production processes and highly rely on producers.**

¹⁴⁴ Peter Nash S wisher, Proposed Legislation: A (Second) Modest Proposal to Protect Virginia Consumers against Defective Products, 43 *U.Rich. L. Rev.* 19 (2008)

4.2. Strict liability for defective products

The study sought to examine principles governing liability for defective products for purposes of codification. The principles include; definition of a defective product, apportioning liability for a defective product, determining who has a right to bring an action in case of injury, available defences and limitations to actions.

4.2.1 Definition of a defective product,

Defining “defective product”

Consultations revealed that, the common understanding of the term product “defect” related to a situation where the product is not manufactured to the standards and causes injury or harm.¹⁴⁵ Most consumers felt that goods that did not meet the standards or those that caused injury should be regarded as being defective.¹⁴⁶

A section of respondents related defect in a product to the implied terms in sale of goods, it was noted that goods are generally defective if they are not fit for purpose or merchantable quality.¹⁴⁷

There was no consensus among the persons consulted during the study as to the definition of a defective product. Several responses were recorded as to what constitutes a defective product. These include products that are dangerous to use e.g. medicine, drugs, expired products, products that are spoilt, those that do not operate or work as expected by the consumer, substandard goods, counterfeit (fake) products, products that cause diseases, and Chinese products among others.¹⁴⁸ A respondent observed as follows;

“if goods do not meet the purpose for which they are bought for, or if they are harmful, then they should be regarded as defective”¹⁴⁹

Another respondent gave examples of defective products “..... gold plated watches that irritate the skin, alcohol made from methanol, counterfeit phones, carved lenses, contaminated food and drinks”¹⁵⁰

A respondent observed as follows “In construction cement is an area of concern, buildings collapse every day. Sometimes the bars used in high rise buildings are not robust.”¹⁵¹

Some of the defective products identified by a respondent from the National Chamber of Commerce include beef products, fish, chicken, drugs, milk and herbal medicines. “Abattoirs are using chemicals intended for the preservation of dead bodies to preserve

145 WORKSHOPS

146 Focus Group meeting with consumers in Kampala April 2018 also see stakeholder4 workshop held in Mbarara and Jinja *supra*

147 Stakeholder workshop held at Royal Suits Hotel Bugolobi, Kampala 20th June 2018; also see FGD meeting with Legal Practitioners in Mbarara December 2016.

148 WORKSHOPS MBARARA, JINJA, KAMPALA

149 Interview with a lawyer in Mbarara January 2018

150 Preliminary consultations report central region 2017

151 Preliminary consultations central region, 2017

meat and vegetables. Fish mongers are using poisonous substances to catch fish. Also, some of the drugs available on the market are expired. Some milk supplied on the market is contaminated with medication. Herbal medicines are being manufactured locally without checks and balances.

There is no general definition of the term “defect” in product liability;¹⁵² in most cases it is dependent on particular facts relating to the damage or loss sought to compensate.¹⁵³ It is argued that providing a definite definition of “defect” is the most difficult part in product liability law, that the preferred definition should be dependent on the type of damage or loss which is sought to be compensated.¹⁵⁴

Generally, the common forms of defect in a product include a miscarriage in the production process, foreign object or impurities in food or drinks, the use of weak materials or incorrectly assembling a product.¹⁵⁵ In these circumstances, the essence of the complaint is that the product was not produced as intended and usually this will be because of inadequate systems of screening, inspection or testing at the time of production. Other defects in a product may relate to the design, that the product was designed in an unsafe way that it becomes dangerous, or the manner in which the product was marketed¹⁵⁶

The European Union Directive on Liability for Defective Products (The Directive)¹⁵⁷ in Article 6 provides that a product is defective when it does not provide the safety which a person is entitled to expect, taking into account all the circumstances, including the product's presentation, the use to which it could reasonably be expected to be put and the time when the product was put into circulation. Defectiveness under the Directive is based on a consumer expectations standard, which therefore serves as the applicable test for defectiveness within all EU jurisdictions. Several other countries in, Latin America, the Pacific Rim and most recently, South Africa, have modelled their product liability provisions on the EU Directive's formulation of this core element.¹⁵⁸

The American Law Institute has produced the *Reinstatement (Third) of Torts: Product Liability*, which articulates clear answers regarding whether a product is defective by formulating three distinct categories of product defect and the legal standards appropriate to each: manufacturing defects, design defects, and inadequate instructions or warnings defects.

The UK and European experience of defectiveness can be contrasted with the experience in the US. Whereas, the UK and the European Directive do not distinguish between manufacturing defect, design defect and warning defect, the *Reinstatement (Third) of Torts: Product Liability* establishes distinct functional definitions for the various types of defects.¹⁵⁹

152 CJ Miller and RS Goldberg, *Product Liability*, 2nd Edition, Oxford Press 2010: Para 10:13 Page 351

153 *ibid*

154 *ibid* Para 10.3 Page 351

155 *ibid* Para 10.02 at Page 346

156 *ibid*

157 EU Directive 85

158 Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) 51 *American Journal of Comparative Law* AT 761.

159 CJ Miller and RS Goldberg, *Product Liability*, 2nd Edition, Oxford Press 2010: Para 10:15 Page 352

Miller and Goldberg observe that since the cornerstone of defective in UK and Europe is premised on the consumer expectation test, the definition of a defect is based on product safety. That therefore, the defectiveness of the product will not be determined not by its fitness for use, nor in case of a medicine, by its efficiency, but by the level of safety that is reasonably expected of it.¹⁶⁰

Accordingly, an inferior product is not considered “defective” unless it actually introduces a risk of injury.¹⁶¹ The authors conclude that in strict product liability the concept of defective product requires a weighing of the product’s dangers against its overall advantages unlike in implied contractual terms theory which requires an inquiry only into whether the production in question was fit for purpose for the ordinary purpose for which such goods are used.

From the field findings, it can be deduced that a defective product is one which does not meet the user/consumer expectation or one which causes injury or damage. When consumers purchase products, they have a reasonable expectation that the products will work according to the purpose, be of expected standards and not be injurious or cause injury. In order to determine a defect in a product, several factors are considered. These factors may relate to a manufacturing, design and warning defect.

(a) Manufacturing defect

A manufacturing defect is a flaw or irregularity in a product arising from errors in the production process. In **Wheeler v. Ho Sports Inc.**¹⁶² court stated that "A product is defective in manufacture if it deviates in some material way from its design or performance standards."

Study findings indicate that there are reports of products that have manufacturing defects. For example, reports of foods and beverage products which are contaminated with foreign products were reported.¹⁶³ In October 2018, a one Martin Kayiwa, a businessman dragged Century Bottling Company Limited to the High Court Civil Division seeking compensation of Shs 51,780,000 million after allegedly consuming a contaminated soda.¹⁶⁴ In **Kalemara Godfrey and 3 Others V Uniliver (U) Limited and Another**¹⁶⁵ the Plaintiff sought to recover damages resulting from consumption of contaminated margarine.

During consultations, it was observed that many products that have a manufacturing defect exist but are rarely reported. This was mainly attributed to consumer ignorance, illiteracy, lack of consumer empowerment and consumers often have no direct relationship with the manufacturer. A respondent during an interview stated; ***many products on the Ugandan market come with manufacturing defects but ‘most times consumers do not know where to report.’***¹⁶⁶ A representative of a

160 ibid Para 10:16 Page 353

161 ibid Para 10:16 Page 353

162 232 F.3d 754, 757 (10th Cir. 2000)

163 Daily Monitor News Paper reports “UNBS warns the public against contaminated soft drinks” 22 June 2012

164 PMdailiy online News

165 HCT-00-CV-CS-1181-1997

166 Interview with an executive member of Kampala City Traders Association, March 2018

manufacturer stated as follows; ***it is true sometimes we get these complaints coming from our consumers but we often solve them internally***¹⁶⁷

Another respondent¹⁶⁸ listed a number of products on the market that are potentially dangerous. He stated that they include: faulty measuring scales; toxic drinks; t-shirts; lotions; tyres; baby feeders; fake chains; adulterated petroleum; adulterated cement; curry powder; hair products; drugs and blood.

According to Miller and Goldberg, persons generally are clearly entitled to expect that a product conform with standards of safety common to the items of the same line of products marketed by a particular manufacturer: an individual product which fails to comply with such standard because it was not produced or marketed as intended will no doubt be considered defective.¹⁶⁹

Manufacturing defects often result from improper assembly, missing parts, loose parts, warped parts or the use of substandard or otherwise defective materials. For example, the failure to prevent foreign matter from entering food or drink may cause its contamination,¹⁷⁰ a snail in a bottle of ginger beer, a carbolic acid in a bottle of lemonade,¹⁷¹ infected blood.¹⁷²

Scholars and Commentators contend that manufacturing defects may manifest in different ways. According to Boivin,¹⁷³ a manufacturing defect may manifest itself in various ways. For instance, the defect may be the absence of a required component part, the presence of some foreign element, or the lower than intended quality of some important feature in the unit.¹⁷⁴ Moreover, there may be various reasons why the manufacturing defect occurred. For example, the defect may be due to the actions or omissions of an individual employee failing to perform his or her duties, or to the inadequacy of the systems of construction, inspection, and testing used by the manufacturer.¹⁷⁵

Manufacturing defects are often few and limited because of the manufacturing controls and regulatory oversight at production facilities and those that are defective can be easily replaced.¹⁷⁶ Products that are dangerous due to a manufacturing defect tend to be the ones that slipped through the cracks.

On the contrary, the study found that many of the products on the Ugandan market possess or are likely to suffer a manufacturing defect. This was mainly attributed to the fact that some manufacturers often are negligent or ignore the required standards.¹⁷⁷ As such categorising a defective product as one which presents a manufacturing defect fits properly in Uganda's circumstances, so as to ensure that manufacturers

167 Interview with a representative of a manufacturer conducted in Kampala, April 2018

168 Meeting with a member of Uganda National Chamber of Commerce.

169 CJ Miller and RS Goldberg , Product Liability, 2nd Edition, Oxford Press 2010: Para 11:01 Page 395

170 Brayman v. 99 West, Inc., 116 F. Supp. 2d 225, 228 (D. Mass. 2000) (involving a piece of glass in mashed potatoes)

171 Daniels AND Daniels v R White and Sons Limited [1938] 4 All ER 258

172 A V National Blood Authority [2001] 3 All ER 289

173 Boivin, Denis W.. "Strict Products Liability Revisited." *Osgoode Hall Law Journal* 33.3 (1995): 487-547. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss3/3>

174 ibid

175 ibid

176 J.A. Henderson & A.D. Twerski, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992) 77 Cornell L. Rev. 1512 at 1520 and 1532-34.

177 Preliminary consultations

take more precautions during the manufacturing process. This will offer consumers and users the protection against negligent acts of manufacturers and producers.

Recommendation

- 1. In order to provide the necessary protection, there is need for legislation that stipulates what amounts to a manufacturing defect.**
- 2. A product should be regarded to have a manufacturing defect where it 'deviates in some material way from its design or performance standards even though all possible care was exercised in the preparation and marketing of the product.**

Design Defects

Study findings revealed a general lack of knowledge relating to design defects. some respondents observed that in Uganda where the manufacturing industries are still at the take-off stage, design issues are likely to manifest. Some respondents observed that design defects may arise where some manufacturers copy products on the market without investing in research and trial.¹⁷⁸ Some respondents also expressed doubt as to whether consumers have the capacity to determine design defects. This was attributed to the lack of consumer awareness in some cases. A respondent observed that "All products are taken to be well designed because consumers have no options to compare with."¹⁷⁹

A section of respondents in the manufacturing sector opined that design defect relates to the manner in which a product is made which does not allow it to serve the intended purpose.

While some respondent from the regulatory sector were of the view that a design defect occurs where safety standards are not met. An officer from National Bureau of Standards observed that; "The manufacturer must design the product to meet safety standards in all the ways in which it is intended to be used. If a product fails to meet this standard, the product has a design defect."¹⁸⁰

According to some scholars, a design defect occurs when there is an inherent flaw or error in a product's design that renders it unreasonably dangerous or unsafe for their intended or contemplated purpose.¹⁸¹ For example, a power saw that has no guard to protect the user's hands from the blade may have a design defect. Even if each of the power saws is built perfectly out of quality materials, anyone who uses one runs a significant risk of being injured by the fast-moving blade. However, it should be noted that an obvious, known risk inherent in the use of a product, such as a knife, does not constitute a design defect. The existence of dangers and risks that are generally or specifically known to consumers and thus accepted does not make the product flawed.¹⁸² For example, equipment for extreme sports and stimulants such as

178 Stakeholder workshop held at Sunset Hotel Jinja 15th February 2018

179 ibid

180 Interview with official from National Bureau of Standards at the head offices April 2018.

181 CJ Miller and RS Goldberg , Product Liability, 2nd Edition, Oxford Press 2010: Para 11:10 Page 400

182 Baker v Lull Engineering Co 20 Cal.3d 435

alcohol and cigarettes are not defective. Likewise, dangers resulting from misuse or unforeseeable uses do not constitute a design defect.

In determining whether a product has a design defect, the risk-utility or cost-benefit analysis test is usually adopted by courts. The test presupposes that a product is defective if its inherent danger outweighs its utility/benefit. Often, the risk utility test is viewed as a complement to the consumer expectation test.¹⁸³ For example, Miller and Goldberg contend that it is entirely possible for such a risk-utility or risk-benefit approach to be accommodated under the EU directive and the Consumer Protection Act of the UK. The authors state that;

“Indeed, in the case of an alleged defect in a design it seems almost inevitable that the standard of safety which the person is entitled to will depend in part on weighing of the risk and the benefit associated with the product”

In the United States, the risk-utility test is widely used to determine design defect. The test draws from Professor John Wade who refined and applied a risk benefit analysis to product liability based on the following factors¹⁸⁴

- (a) the usefulness and desirability of the product-its utility to the user and to the public as a whole;
- (b) the safety aspects of the product-the likelihood that it will cause injury and probable seriousness of the injury;
- (c) the availability of a substitute product which would meet the same need and not be as unsafe;
- (d) the manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- (e) the user’s ability to avoid danger by the exercise of care in the use of the product;
- (f) the users anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
- (g) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Recommendation

1. **In order to provide the necessary protection, there is need for legislation that stipulates what amounts to a design defect.**
2. **A product should be regarded as possessing a design defect when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe.**

183 CJ Miller and RS Goldberg , Product Liability, 2nd Edition, Oxford Press 2010: Para 11:10 Page 400

184 JW Wade, ‘On the Nature of Strict Liability of Products” 44 Miss LJ 825, 837 -8 (1973)

Warning defects

The principles governing product liability presuppose that a manufacturer or seller can be liable for a product defect if there are inadequate warnings or instructions supplied to the consumer in which if proper warnings were made available, the foreseeable risks of harm posed by the product could have been reduced or avoided. The study sought to establish the effect of warnings or instructions on a product and whether a manufacturer or seller should be held liable for failure to provide warnings.

Study findings revealed that product warnings are vital to product safety. There was consensus during consultations that product warnings play the following functions: they promote safe use and protection of consumers; adequate warnings reduce the risk of harm posed by the product; protects the ability of the consumer to make informed choices as to whether to counter certain risks; act as a risk warning to consumers; that warnings is one way of exercising the duty of care which the manufacturers owe to the consumers.¹⁸⁵

Miller and Goldberg contend that providing warnings about a product's potential dangers serves two primary functions: they may reduce the risk of a product-related injury by allowing consumers to behave more carefully than if they were ignorant of the risks related to product use.¹⁸⁶ Secondary, warnings may provide the consumer with information to make an informed choice.

In many jurisdictions, courts have held that manufacturers or producers are required to exercise ordinary care to warn purchasers and other contemplated users of a product's known or reasonably ought to be known dangerous characteristics and of those circumstances and/or uses likely to make the product dangerous to use. In **Proctor & Gamble Co. v. Superior Court of Marin County**¹⁸⁷ Court stated;

*"It is settled that if a manufacturer knows or should know that an article sold by him is dangerous he must give appropriate warning to the user of a danger which he ordinarily would not discover."*¹⁸⁸

A warning generally must be clear and specific. It should also be conspicuous and placed in a location that the user can easily find. During consultations it was found that many consumers are familiar with these warning stickers and there was consensus that warnings and instructions on products are necessary for consumer safety, especially for dangerous products like medicine, flammable products, drugs, food among others.

However, a section of respondents noted warnings may not serve a purpose in Ugandan circumstances mainly because, there is a probability that people will not read them or even pay attention to such product warning and as such this may not lead to prevent danger; illiteracy and ignorance among Ugandan consumers greatly affects the effect of warnings; some consumers do not understand the English language or other

¹⁸⁵ Focus Group Discussion with legal practitioners in Mbarara December 2016

¹⁸⁶ Miller and Goldberg, "Product Liability" Para 12.06 Page 432. 2nd Edition, Oxford University Press (2010)

¹⁸⁷ 124 Cal. App.2d 157 at 162

¹⁸⁸ Ibid Page 162

languages in which these warnings are prescribed.¹⁸⁹ Mukasa Jamil a businessman stated as follows;

“Ugandans do not care about warnings; all they care about is whether the product is cheap and whether it will work”

Comparative analysis of other jurisdictions that have legislated on product liability reveal that the duty to warn normally does not extend to obvious and generally known risks. It is argued that the inclusion of warnings about risks that are knowable through common sense would seldom result in a higher level of product safety, and could even cause consumers to start disregarding warnings, the obvious danger being that they could contain information on non-obvious risks as well. However, in products that have known unavoidable risks, such as cigarette, whiskey, drugs the manufacturer is under a duty to warn of any hidden dangers that may occur with use.¹⁹⁰ This premised on the notion that sellers of generically dangerous products may trust that users, properly informed of the hidden dangers, will read and heed any adequate warnings and take responsibility for such inherent risks.¹⁹¹ Indeed Comment J on the Reinstatement (Third) of Torts, Product Liability concludes that:

“Where adequate warning of any hidden dangers is given, the seller [of inherently dangerous products like food, drugs, alcoholic beverages, and cigarettes may reasonably assume that the warning will be read and heeded because there is nothing else the seller can do to avoid the danger; and such a product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous.”

In **Jennings v. BIC Corp.**¹⁹², the Court of Appeals held as a matter of law that a lighter was not defective for failing to contain childproof features. The warning “keep out of reach of children” was held sufficient to render the product not defective. The court concluded that it “is not reasonable to require BIC to take all possible measures to ensure that its products could not be misused by anyone who might, even foreseeably, come into possession of them.

However, commentators have noted that this must be interpreted in the narrow sense that it only applies only to the narrow category of inherently dangerous products with unavoidable dangers like food, drugs, alcoholic beverages, and tobacco.¹⁹³ That interpreting too broadly to apply to other products would be an absurdity; any broad interpretation should mean that manufacturer may fulfil its informational obligations to consumers by providing adequate warnings and instructions.¹⁹⁴

¹⁸⁹ Stakeholder workshop held at Sunset Hotel Jinja 15th February 2018; also see Stakeholder meeting held in Lake View hotel, Mbarara February 2018.

¹⁹⁰ David G. Owen, The Puzzel of Comment j, 55 Hastings L.J 1377 (2004)

¹⁹¹ ibid

¹⁹² 181 F.3d 1250 (11th Cir 1999)

¹⁹³ supra n202

¹⁹⁴ Moulton v Rival Co., 116 F.3d 22, 28 (1st Cir. 1997)

During consultations there was agreement that a product should contain a warning defect where both the:

- (a) foreseeable risks of the product could have been reduced or avoided by providing reasonable warnings or instructions; and
- (b) due to the absence of such information, the product is unreasonably dangerous.

In general, the Commission is in agreement that a producer or supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use. A manufacturer's duty to warn must extend to all reasonably foreseeable users. The duty to warn should be construed as consisting of two duties -

- (a) the duty to give adequate instructions for safe use; and
- (b) the duty to warn of dangers inherent in improper usage.

Clearly, a product that provides warnings of inherent dangers, warnings of any known defect, directions for safe use, and guidelines to deal with emergency situations is presumptively safer. Information enables consumers to personally manage the risks they are bound to encounter while using a product; reduce the social costs of accidents associated with a product;¹⁹⁵ make informed choices in the marketplace by offering them means to decide; protects the consumers right to personal autonomy and integrity in decision making by, enabling consumers to decide whether, and in what measure, they will use products.¹⁹⁶

Recommendation

Protection should be rendered by classifying products which do not provide instructions or warnings about foreseeable risks or harm or inherent dangers as defective where the omission of the instructions or warnings renders the product unsafe.

Factors to consider in determining defective product.

In Uganda, there hasn't been much litigation on matters relating to product liability and as such the principles to be adopted in such cases are low. This is mainly attributed to the fact that few cases relating to products are reported or litigated on. However, it was noted that as Uganda's manufacturing industry grows these cases are bound to increase.

Uganda's market is currently experiencing trade in defective products. This is evidenced by a number of newspaper reports in the recent past. In 2008, it was reported that a defective or substandard electricity plug had killed a teenager in Ntinda.¹⁹⁷ Recently,

¹⁹⁵ Boivin, Denis W.. "Strict Products Liability Revisited." *Osgoode Hall Law Journal* 33.3 (1995): 487-547. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss3/3>

¹⁹⁶ ibid

¹⁹⁷ Consumer Alert Magazine 2008, reported that a teenager in Ntinda had died of electric shock resulting from a substandard extension cable

it was reported in a newspaper publication that the National Drug Authority had withdrawn dangerous drugs off the market.¹⁹⁸

In many other jurisdictions they use legislation and courts to determine defectiveness of a product. Courts have adopted the use of the consumer expectation test or the utility test or both tests. Generally applying either test, is often dependant on the nature of the defect.

In determining whether a product has a manufacturing defect, courts, both in Europe and in the United States of America, apply the consumer expectation test. The consumer expectation test presupposes that a product is deemed defectively designed if the claimant is able to demonstrate that the product did not perform as safely as an ordinary consumer would expect when the product is used in the intended or reasonably foreseeable manner.¹⁹⁹

Commentators argue that the consumer protection test appears as a sustainable test for manufacturing defects because it focuses on the condition of the product, as opposed to a manufacturers' conduct and recognises the evolution of strict tort liability.²⁰⁰ Further, that the Consumer expectation test has the effect of encouraging precaution by manufacturers; the manufacturer who knows that he is held to a standard of perfection has a greater incentive to eliminate hazards from his products than a manufacturer who is merely required to use reasonable care.²⁰¹

According to Fischer, the usefulness of the consumer expectations test in achieving the goals underlying strict liability is obviously limited.²⁰² In some cases it works well, and in other cases it works poorly. This is because the rule does not take into account the different fact patterns which require that cases be dealt with differently.²⁰³ As a result, the consumer expectation test has been criticized as not capable of working well when applied to design defects especially high tech or new products that a consumer has no expectations,²⁰⁴ that it exculpates or shields manufacturers from liability if they have provided warnings no matter the damage.²⁰⁵ The test does not protect consumers from generally known to be dangerous products no matter the injury especially in cases involving patent products.²⁰⁶ The consumer expectation test suffers from ambiguity and uncertainty of interpretation and practical implications.

Finally, that the consumer expectation test fails to appreciate that there is usually information imbalance between the manufacturer and the consumer/user and therefore their expectations as to safety may not always be in line with reality. As J. Wade has pointed out, the expectations of the ordinary consumer cannot be viewed as the

198 Daily Monitor; NDA withdraws dangerous drugs; Friday 7th October 2016.

199 CJ Miller and RS Goldberg , Product Liability, 2nd Edition, Oxford Press 2010: Para 11:01 Page 395

200 *ibid*

201 O'Connell, An Alternative to Abandoning Tort Liability: Elective No fault Insurance for Many Kinds of Injuries, 60 MINN. L. REV. 501, 550 (1976).

202 David A. Fischer, Products Liability- Functionally Imposed Strict Liability, 32 Okla. L. Rev. 93 (1979).

203 *ibid*

204 Professor Wade Strict tort liability for manufactures 19 SW. LJ 5 15 (1996)

205 **Worsley v Tambrands Ltd.**" The plaintiff suffered from toxic shock syndrome ("TSS") after using the defendant's tampons. In accepting the defendant's submission that there was no case to answer under the UK Consumer Protection Act 1987, the court held that the warning of the association between TSS and tampon use on the outer packaging of the product and some detail of the risk in the leaflet inside the packaging were adequate.

206 Sam Bogel Vs. McDonald it was held that consumers are expected to know that coffee served at Macdonald restaurant is hot and spills could cause injury.

exclusive yardstick for evaluating design defectiveness because "in many situations ... the consumer would not know what to expect, because he would have no idea how safe the product could be made."²⁰⁷

Prosser and Keeton²⁰⁸ disapprove of consumer expectations as an independent test on the grounds of its ambiguity and vagueness, stating that it provides little guidance to courts in determining design defectiveness:

*"What does the reasonable purchaser contemplate? In one sense he does not 'expect' to be adversely affected by a risk or hazard unknown to him. In another sense, he does contemplate the 'possibility' of unknown 'side effects.' In a sense, the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilised to explain almost any result that a court or jury chooses to reach."*²⁰⁹

Risk-utility test

Risk-utility or cost-benefit analysis test presupposes that a product is defective if its inherent danger outweighs its utility/benefit. The application of the test in strict product liability cases focuses on the condition of the product rather than the conduct of the person who caused the defect. Under the risk-utility test, a product is considered to be unsafe if *the risk of the product or an allegedly dangerous characteristic of the product is greater than its utility.*

The test is premised on the notion that virtually all products have both risk and benefit and that there is no way to go about evaluating design defect (hazard) intelligently without weighing the danger against utility/benefit. The test is particularly relevant in a case involving a high-risk product such as drugs.²¹⁰ Many drugs are generally known to carry side-effects. In such cases, the court will have to consider the overall social costs created by the product balanced against the social benefits conferred by the use of the product.²¹¹

John Wade has suggested several factors in weighing the risk against utility, several factors will be taken into consideration such as; product cost, the foreseeability of the danger, its utility to the user, the availability of a substitute product and other relevant factors; usefulness of a product, users ability to avoid the danger, manufactures ability to eliminate danger and the user's knowledge of the danger and the feasibility of risk spreading. They include:

- (a) the usefulness and desirability of the product-its utility to the user and the public as a whole
- (b) the safety aspects of the product – the likelihood that it will cause injury and the probable seriousness of the injury;

207 J. Wade Nature of Strict Tort Liability for Products 44 Miss L.J. 825 at 837- 38 (1973)

208 Prosser and Keeton on Torts , 5th Edition, Hornbook (1984)

209 ibid pp 699

210 supra

211 ibid

- (c) the availability of substitute product which would meet the need and not be as unsafe;
- (d) the manufacturer's ability to eliminate the safe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- (e) the user's ability to avoid danger by exercise of care in the use of the product;
- (f) the user's anticipated awareness of the dangers inherent in the product and their availability, because of the general public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions;
- (g) the feasibility, on the part of the manufacturers of spreading the loss by setting the price of the product or carrying liability insurance.²¹²

According to Kip,²¹³ Wade's list of factors leaves us with many unanswered questions. For instance, how is the performance of a product with respect to the seven factors to be measured and, once measured, how are these values to be aggregated to assess whether the product passes the test? There are no formal procedures of this type. In almost all cases, competing effects involving the various factors will be involved. Under what circumstances are opposing effects off setting? Do all factors receive equal weight? On how many dimensions must a product fail before it is found to be defective? The risk-utility test, as it is currently articulated, cannot generally form the basis for determining whether a producer should be liable for a product-related injury²¹⁴

The risk-utility test provides a more systematic and structured approach to the analysis of product liability claims, for design defects. In the US, the test is mostly applied in complex design cases.²¹⁵

The risk-utility test, has been criticised because it may accept even gross and hidden dangers simply because they keep a product cheap or otherwise useful, and it may impair consumer autonomy if courts dictate safety devices neither desired by the market nor endorsed by the political process.²¹⁶ Other authors have opined that the risk utility test presents itself with vagueness and unpredictability for which it was intended to cure.²¹⁷ According to critics the risk-utility test lacks sound articulation of procedures to be followed by courts in applying the test and it's the appropriateness and use in considering whether a product is too risky to be marketed at all.²¹⁸

In view of the shortcomings of the consumer expectation test, a twin or two-pronged test has been adopted by courts in the United States in which both the consumer expectation and risk-utility test are used to determine defectiveness of a product. This is seen as a practical solution to rectify the flaw in the consumer expectation test in design defects cases.

212 Wade, *The Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973).

213 W. Kip Viscusi, *Wading Through the Middle of the Risk Utility Analysis*. The American University Law Review Volume 39: 573 [1990] Available at <https://pdfs.semanticscholar.org/0195/b666c447dcdbd12a164e83e3d47698c0a42d.pdf>

214 *ibid*

215 Gary Myers, *Dean John Wade and the Law of Torts*, 65 Miss. L.J. 29 (1995)

216 Larsen, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REv. 2045, 2046 (1984)

217 Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REv. 681, 696(1980).

218 *supra* note 224

In *Ray Barker v Lull Engineering Co*,²¹⁹ the plaintiff Barker sustained serious injuries as a result of an accident which occurred while he was operating a Lull High-Lift Loader at a construction site. The Supreme Court of California in adopting a combination of consumer expectation and risk-utility tests held that a finding of design defect may result from a demonstration either that the product failed to perform as safely as an ordinary consumer would expect under normal operating circumstances, or the plaintiff demonstrates that the product design proximately caused his injury and the defendant fails to prove that the risk inherent in the product's design outweigh the benefits of that design. The Supreme Court stated that;

we believe that the test for defective design set out above is appropriate in light of the rationale and limits of the strict liability doctrine, for it subjects a manufacturer to liability whenever there is something "wrong" with a product's design -- either because the product fails to meet ordinary consumer expectations as to safety or because, on balance, the design is not as safe as it should be -- while stopping short of making the manufacturer an insurer for all injuries which may result from the use of its product.²²⁰

The court noted that "this dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be."²²¹

In utilising this test, the court has discretion to choose whether the two tests should be considered alternatively or together on equal footing. Accordingly, the two-pronged test has logical appeals because it protects the essential interests furthered by each test, contract laws protection of the buyer's expectations and the sellers in their private bargains and tort law protection of the public welfare by requiring sellers to accord due respect to the safety interest of persons foreseeably endangered by their defective products

It is argued that in most American cases the consumer expectations test has been treated as a primary and independent theory that sometimes needs to be supplemented by risk-utility considerations. " *In other words, a risk-utility analysis only plays a subsidiary role for the purpose of determining the expectations of consumers in cases where the latter test provides inadequate basis for assessing liability such as cases involving bystanders, children, obvious dangers and complex products.*

Study findings indicate that adopting both the consumer expectation test and risk utility test in determining whether a product is defective is ideal. Majority of the legal practitioners consulted were of the view that the question of whether or not a product is defective should be a question of fact left for the courts to determine. That the courts should have the discretion to choose which test to apply depending on the facts presented.

The Commission acknowledges the importance of using the consumer expectation test and the risk-utility test in determining whether a product is defective. Notwithstanding

²¹⁹ 20 Cal. 3d 413

²²⁰ 20 Cal. 3d 413 at 417

²²¹ *ibid*

the short comings of the consumer expectation test it remains primary and fundamental in determining defectiveness of a product.

Recommendations

1. **In order to establish a regime imposing strict liability for defective products it is necessary to define what amounts to “a defective product.” It is proposed that a defective product be defined to mean a product which at the time it is put in circulation by whoever is responsible for it as its producer, does not comply with the standard of reasonable safety that a person is entitled to expect of it.**
2. **In order to determine whether a product is defective, the courts should apply a standard of safety which should be determined objectively having regard to all the circumstances under which the product was put into circulation, including;**
 - (a) **any instructions or warnings that accompany the product when it is put into circulation; and**
 - (b) **the use or uses to which the product would be reasonably expected to be put in the circumstances;**
 - (c) **the presentation of a product when put into circulation;**
 - (d) **manner in which, and the purpose for which, the product has been marketed.**
3. **A product:**
 - (a) **contains a manufacturing defect when the product from its intended design even though all possible care was exercised in the preparation and marketing of the product;**
 - (b) **is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;**
 - (c) **is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.**

4.3.2 apportioning liability for a defective product,

The study sought to explore how liability for defective products/goods should be apportioned in case a product causes injury, death or damage to a consumer.

Apportioning strict liability for defective products is vital to ensure certainty and predictability as to who takes the blame for defects in a product that cause injury. The processes of production and marketing involve many actors to whom the consumer looks up to ensure safety. For example, in most cases consumers rely on the skill

and expertise of the persons involved in the manufacture or those in the chain of production and distribution.

The existing law ensures that manufacturers and sellers or suppliers of products bear the risk of loss caused by the products. For example, manufacturers may be held liable under the tort of negligence and suppliers or sellers may be held liable under contract law or sale of goods law for breach of a warranty.²²²

Generally, there is consensus among consumers consulted that those involved in the manufacturing or production process should be held liable for any product that causes injury, loss or damage. During consultations, respondents observed that manufacturers or producers should be held liable for any injury or damage caused by a product because they;

- (a) are in full control of the processes and the technical know-how;²²³
- (b) have all the information relating to the product for which the consumer is not privy,²²⁴
- (c) have resources to bear the loss and compensate the injured consumer.²²⁵
- (d) influence consumers to buy their products and derive profit from them.
- (e) are the ones that put the products on the market and such they should bear any loss or injury caused by the product.²²⁶

Scholars and commentators have noted the need to hold manufacturers and producers liable for injury or damage caused by a defective product. William Prosser in his Handbook of the Law of Torts Treatise reviewed the case for the imposition of strict liability upon the manufacturers of defective products. Prosser noted that:

"in recent years there has been an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance. Added to this is the difficulty of proving negligence with the aid of *res ipsa loquitur*, together with the wastefulness and uncertainty of a series of warranty actions carrying liability back through retailer and jobber to the original maker, the practice of reputable manufacturers to stand behind their goods as good business policy, and a recognition that the intermediate seller is usually a mere conduit to market the product. There is an obvious argument that the consumer is entitled to the maximum of protection at the hands of someone [sic] , and that the producer, practically and morally, is the one to provide it."²²⁷

Regarding the question as to who is "a manufacturer or producer" for purposes of strict liability, majority of the persons consulted opined that a manufacturer should be regarded as the one who produce or manufacture by process mass production of goods and circulates or markets them on the Ugandan market. Particularly, producers and manufacturer that use supplicated and technological processes were identified. However, some of the respondents observed the need to consider occasional

²²² see Contract Act, No. 7 /2010; Sale Goods & Supply of Services Act, 2018

²²³ Stakeholder meeting with Consumers held in Kampala March 2017; Focus Group discussions with Legal Practitioners in Mbarara District, December 2016

²²⁴ Focus Group discussions with Legal Practitioners in Mbarara District, December 2016

²²⁵ *ibid*

²²⁶ Stakeholder meeting with Consumers held in Kampala March 2017

²²⁷ William Prosser, Handbook of the Law of Torts Treatise (1941) 1st Edition West Publishing Company 1941. page 14

manufacturers particularly because there are many mushrooming manufacturers in Uganda and consumers often have high expectations in them.

A comparatively analysis of jurisdictions that have in place legislation for product liability indicate that individual manufactures have been considered for liability. The Law Commission and Wales together with the Scottish Law Commission have noted that “*where articles are individually made the public expectation of safety is, if anything, higher than in relation to mass-produced ones. These ought, as a general rule, to be included*”²²⁸ Miller and Goldberg have observed that it is obvious to assume responsibility on the manufacturer or producer because they will usually have actively created the defect or at least have failed to eliminate it.²²⁹

According to Wertheimer, strict products liability represents a commitment to the idea that the manufacturer of a product should pay for the injuries caused by the product even if the manufacturer was not negligent in the design or marketing of the product.²³⁰ It is contended that this may be attributed to the fact that the manufacturer has made the decisions about designing, labelling, and marketing the product, and has made the product.²³¹ Strict liability was designed to compel the manufacturer to stand behind its product, a justification that has nothing whatsoever to do with negligence.²³²

Strict product liability doctrine represents a societal judgment that, as between a nonnegligent manufacturer and a non-negligent plaintiff, the loss should fall on the party responsible for the presence of the product on the market. Professor Cowan has pointed out why manufacturers should be held liable, that;

“..Now the question arises, why should the manufacturer be allowed to pass the so-called consumer's risk on to the consumer at all? Especially the risk of property loss or serious bodily injury arising from a defective product? The answer of the manufacturer that he must pass some risk on to the consumer is now met with the reply: then pay for the damages. This is not absolute liability. It has nothing to do with insurance. It has nothing to do with subjective fault. It has to do with compensation for a loss resulting from a deliberately assigned risk-assigned, that is, to the other fellow”²³³

The California Supreme Court in **Escola v. Coca-Cola Bottling Co.**²³⁴ Justice Traynor stated that;

“Those who suffer injury from defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business.....However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant and general one. Against

²²⁸ The Law Commission Working Paper 64 and Scottish Law Reform Commission Memorandum 20 Liability for defective Products (1975)

²²⁹ CJ Miller and RS Goldberg, Product liability Para 8.01 at page 237

²³⁰ Ellen Wertheimer, Unavoidably Unsafe Products: A Modest Proposal, 72 Chi.-Kent L. Rev. 189 (1996). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss1/7>.

²³¹ ibid

²³² ibid

²³³ Thomas A. Cowan, Some Policy Bases of Products Liability, 17 STAN. L. REV. 1077, 1088-89 (1965). at 1091-92

²³⁴ Cal. 2d 453, 150 P.2d 436 (1944).

such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection”²³⁵

Liability for Retailers, distributors, franchises holder, trademark holders, importers and wholesalers.

When products are manufactured or produced, they undergo a chain in sale and distribution to reach the last consumer. This chain includes; retailers, distributors, wholesalers, importers, franchise and trademark holders among others. The study sought to explore the extent to which these should be strictly held liable for defective products.

Overall study findings indicate that most consumers rely more on the manufacturer and those in the chain of distribution as to the safety and standards of the products. It was however noted that in most cases those involved in the chain of distribution often lack knowledge and expertise in the products they put on the market.²³⁶ It was therefore suggested that to ensure quality controls and product safety, these should be held liable for the products they circulate and market.²³⁷ The reasons advanced for imposing liability to retailers, distributors, importers and wholesalers were that:

- (a) proximity of retailers, distributors, importers and wholesalers to the consumer which will allow them to recover quickly. it was noted that the consumer is a small person who may not follow up to the manufacturer;²³⁸
- (b) reliance on the expertise and skill; in most cases consumers rely on the skill, expertise and knowledge of the retailer, distributors of the product at the purchasing time;²³⁹
- (c) need to promote and eliminate substandard and fake products on the market;²⁴⁰
- (d) punish unprofessionalism and shrewd businessmen who import and sale substandard goods;²⁴¹
- (e) profitability from a defective product. The retailers, distributors, importers and wholesalers' profit from the sale of the defective product and as such should be made to pay compensation;²⁴²
- (f) capacity to claim indemnity from the manufacturer. Retailers, distributors, importers and wholesalers are better placed to claim indemnity from the manufacturer since they are in a close business relationship compared to the consumer.²⁴³

Further, related to proximity of the distributors and suppliers to the consumer some respondent noted that sometimes, these intermediaries holdout themselves through advertisements and branding of goods which in effect makes them liable, because through these activities they hold themselves to have the knowledge and skill of the

235 ibid at page 441

236 Stakeholders Workshop held at Sunset Hotel Jinja on the 15th February 2018

237 ibid

238 Stakeholder workshop held on 8th February 2017 at Lake View Hotel, Mbarara

239 ibid

240 Meeting with KACITA executive members held in the Commission Board room on 8th Floor Workers House, March 2017

241 ibid

242 Meeting with Consumers in Kampala April 2018; also see meeting with Uganda National Bureau of Standards at their Head offices

243 Focus Group Discussions with legal practitioners in Mbarara December 2016

products. It was also noted that due to the globalization and change in movement of goods, the consumer might only know the supplier of the goods and has no means of discovering the manufacturer and as such they should be held liable.

Comparative analysis with other jurisdictions shows that product liability is extended to the players involved in the chain of production. For example, in the United States the Restatement (Third) of Law of Torts: Product liability imposes liability upon a broad range of defendants, including commercial sellers and distributors. Section 1, provides that one who is engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect. This would therefore include manufacturers and commercial sellers/retailers, distributors/wholesalers and importers of defective goods into the United States. In **Lartigue v. R. J. Reynolds Tobacco Co.**²⁴⁴ court observed that:

"Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce and market the products... The consumer of such products is entitled to a maximum of protection"

Similarly, in Europe, suppliers, franchise, trademark holders, distributors and importers of products are held liable for defective products.²⁴⁵ According to Miller and Goldberg the rationale behind Article 3 of the EU Directive is that injured persons are provided with a readily identifiable defendant in the form of an own-brander or own-labeller. Further, that it encourages such persons to provide information as to the identity of the real producer if only to join it as a co-defendant.²⁴⁶ It is also argued that organisations which hold a product out as their own by means of a brand name, trademark or other identifying feature should carry the same responsibility for the accident as if they were the producers.²⁴⁷

Professor Owen asserts that in the trademark context, the application of consumer expectation rationale seems particularly appropriate since the licensor intends full well to induce consumer reliance on its goodwill through the express communication of the idea that the product is that of the trademark licensor.²⁴⁸ In **Connelly v. Uniroyal, Inc.**²⁴⁹ the Supreme Court observed that;

"A licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce . . . presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors.

Among the reasons cited by for extending liability to all actors in the distribution chain is the belief that wholesalers and retailers are in a better position than individual consumers and users, to absorb the risks of defective products, and that they will,

244 317 F.2d 19, 36 (5th Cir. 1963)

245 Article 3 EU Directive on Product Liability

246 CJ Miller and RS Goldberg, *Product Liability*, 2nd Ed Oxford University Press 2010 . Para 8:17 page 244

247 Law Commission of England and Wales; Law Com Rep No. 82 Liability for Defective Products, Para 99

248 David G. Owen, *Rethinking the Policies of Strict Products Liability* 33 V and. L. Rev. 681 (1980)

249 75 111. 2d 393, 389 N.E.2d 155 (1979),

in turn, be able to recover liability costs from the manufacturer.²⁵⁰ Moreover, due to the sometimes extended nature of modern supply chains, plaintiffs regularly face procedural challenges in joining manufacturers in product claims.²⁵¹

A further argument in favour of this inclusive category of defendants is that, by holding wholesalers and retailers strictly liable, the interests of users and consumers will be better protected, in the sense that the former will be encouraged to deal only with trustworthy and financially responsible manufacturers and distributors capable of indemnifying them from liability.²⁵²

The liability of those involved in the distribution chain was considered in the case of **Kalemara Godfrey and 3 Others V Unilever (U) Limited and Another**²⁵³ Justice Bamwine stated that;

“..... In all these circumstances, court is satisfied that the second defendant is liable to the plaintiffs for the loss and damage caused to them, in its capacity as the manufacturer of the product, and the first defendant as its distributor. By dealing in products manufactured by the second defendant and marketing them in Uganda, the first defendant gave an implied warranty as to the safety of the second defendant’s product. It is therefore immaterial that the retailer, Daddy Frank, had not been sued. The plaintiffs were at liberty to sue him jointly with the defendants or not to sue him at all. It is trite that the plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody.”

The other justifications advanced for imposing liability on retailers, importers and distributor is that retailers, like manufacturers, are engaged in the business of distributing goods to the public. Retailers are in the chain of product distribution; they are an integral part of the overall production and marketing enterprise.²⁵⁴ Often, the manufacturer of a defective product is unavailable and the retailer is the only party in the chain of product distribution from which the injured party can reasonably expect to obtain recovery.²⁵⁵

The justification for imposing liability to retailers expounded by the Californian Supreme court in **Vandermark v, Ford Motor Company**.²⁵⁶ Where Justice Traynor observed that -

“...Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases, the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer

²⁵⁰ Carla Skiek, “The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis” Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University. March 2017. available at. <https://scholar.sun.ac.za>

²⁵¹ ibid

²⁵² ibid

²⁵³ HCT-OO-CV-CS-1181-1997

²⁵⁴ Vandermark v, Form Motor Company (1964) 61 Cal.2d 256

²⁵⁵ ibid

²⁵⁶ (1964) 61 Cal.2d 256

to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship. Accordingly, as a retailer engaged in the business of distributing goods to the public, Maywood Bell is strictly liable in tort for personal injuries caused by defects in cars sold by it.²⁵⁷

Regarding the question of liability for importers, respondents observed that the Ugandans market is flooded with imported goods especially from Asian markets especially China. That in many cases these products are of a substandard nature and are defective. Products like cosmetics, electronics, clothes, household items were identified as some of the products imported that pose a threat and danger to consumers. Majority of the respondents were in consensus that there is need to regulate and hold importers of these products for any damage, injury or death caused as a result.

The need to impose liability on importers was premised on the fact that in most cases, it is the importer who is in the know of the manufacturer; has knowledge of the product; and generally responsible for the circulations of the product on the Ugandan market. A respondent observed as follows;

“most Ugandan businessmen import substandard goods that may turn out to be defective in order to maximise profits, often they import low graded goods that turn out to be defective, if the importers are held liable they will desist from importing such products into Uganda”

Generally, there is consensus among jurisdictions that have imposed strict product liability that it should be extended to suppliers. The Law Commission of England and Wales justified extending liability to suppliers as follows: First, the injured person is assisted in tracing the anonymous producer where such assistance is required, secondly, it encourages retailers and other suppliers to keep records from which it may be possible to establish the identity of the supplier (or producer) of the product in issue. Thirdly, by making it harder for the producer to remain anonymous, it encourages him to reveal his identity by labelling his products where practicable.²⁵⁸

Philips citing sections 2 of the Reinstatement (Third) of Tort: Product Liability has observed that;

“An often-cited rationale for holding wholesalers and retailers strictly liable for harm caused by manufacturing defects is that, as between them and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses. In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer. When joining the manufacturer in the tort action presents the plaintiff with procedural difficulties, local retailers can pay

²⁵⁷ Citing Greenberg v. Lorenz, 9 N.Y.2d 195, 200 [213 N.Y.S.2d 39, 173 N.E.2d 773]; McBurnette v. Playground Equipment Corp. (Fla.) 137 So.2d 563, 566-567; Graham v. Butterfield's Inc., 176 Kan. 68 [269 P.2d 413, 418]; Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 406 [161 A.2d 69, 75 A.L.R.2d 1]; State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289 [110 N.W.2d 449, 455-456]; Rest.2d Torts (Tent. Draft No. 7) § 402A, com. f.)

²⁵⁸ Law Commission of England and Wales; Law Com Rep No. 82 Liability for Defective Products,

damages to the victims and then seek indemnity from manufacturers. Finally, holding retailers and wholesalers strictly liable creates incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers.²⁵⁹

The Commission agrees that the first person on whom strict liability should be imposed on is the manufacturer or producer of a defective product since they are the persons able to regulate the quality of the product. This is in line with the overall duty of care owed by the manufacturer to the consumers. The duty of care that the product put into circulation is safe and not dangerous to cause injury, death or damage. This duty gives the consumers an expectation that the products they purchase will be safe for use.

It is important to note that American law imposes strict liability on all commercial sellers of a product: manufacturers, intermediaries and retailers.²⁶⁰ This stems from its origin in sellers warranties and is defended on the ground that the consumer should be free to select from whom to claim, leaving the ultimate allocation of the loss to the potential defendants. In the UK, product liability law, confines liability to the producer, anyone who has held itself out as such, like “own-brand” suppliers, and any importer.²⁶¹ Other suppliers are exempt, unless they fail to identify on request anyone of the previously mentioned class.²⁶²

The commission supports the idea of extending strict product liability to suppliers, wholesalers, intermediaries, trademark owners, distributor and importers. Extending liability to such persons in the chain of distribution will provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, reduce transaction costs, relieve the burden imposed on interstate commerce by the present litigation system. The legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than it is under current law.

Recommendation

- 1. Manufacturers and producers are well placed to remedy injuries caused by defective products. This is mainly because, they take profit, they can take out product insurance and are better placed to absorb the loss rather than the consumer.**
- 2. Strict product liability should first lie on the person who created the risk, which has caused damage. That is the manufacturer or producer of a finished product or manufacturer and producer of a raw material, or component of a product.**
- 3. Strict product liability should be imposed on those in the chain of manufacturing, marketing and distribution who are in the best position to**

²⁵⁹ Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 Chi.-Kent L. Rev. 129 (1996). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss1/5> Page 135

²⁶⁰ Reinstatement of Torts 2nd 402A

²⁶¹ Section 2(2) Consumer Protection Act 1986

²⁶² Section 2(3) Consumer Protection Act 1986

exercise control over the quality and safety of the product. This will give a producer or manufacturer an incentive to improve the safety standard of the product and to reduce the risk of further accidents.

4. **Strict product liability should be imposed on any person who, by putting his name, trademark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product.**
5. **Strict product liability should be imposed on a person who has imported the product into Uganda, in the course of any business of his, to supply it to another or to the supplier, wholesaler, distributor of the product where the manufacturer of the product cannot be identified**

Products subject to strict liability

Defining the scope of products that should be subjected to strict product liability is vital to ensure certainty and predictability in apportioning liability. The study sought to establish the scope and nature of products that should be subjected to strict product liability. During the study, the question whether strict product liability should apply to all products, moveable or immoveable was investigated.

During consultations varying views and responses were given regarding the nature of products that should be subjected to strict product liability. On one hand some respondents were of the view that strict product liability should apply to all products as long as they are used by consumers. On the other hand, some respondents were of the view that strict product liability should be restricted to products that are manufactured or those that undergo a process of manufacturing. For example, some respondents were of the view that agricultural and nature products should not be subjected to strict liability.²⁶³

Generally, there was consensus among persons consulted that strict product liability should apply to all moveable or consumer products with no exemptions²⁶⁴ This was mainly attributed to the fact that all products if defective are prone to causing injury or damage and that whoever is responsible should be held liable.²⁶⁵ According to UNCITRAL, strict product liability should be imposed on industrial goods produced in large series; this is because imposing liability would act as a control measure to maintain standards and quality controls.²⁶⁶

This view was largely supported by consumers, who felt that where any product has caused injury compensation from the person who is responsible for it should follow. They argued that exempting certain products would create ambiguity, particularly it was contended that exempting agricultural products would have a greater impact on liability because modern methods of farming such the use of fertilisers, pesticides,

263 Interview with manufacture in Mbarara December 2017

264 Majority of the respondents in the legal fraternity were of the view that strict liability should apply to all products.

265 Stakeholder meeting held in Lake View hotel, Mbarara February 2018.

266 A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111

steroids, artificial insemination, use of genetically modified seeds may cause damage for which the producers will not be held responsible.²⁶⁷

Natural products

According to UNCITRAL, primary natural products, particularly those of agriculture, farming and fisheries present special problems which require careful consideration. Study findings revealed that manufacturers, producers and a section of the business community were opposed to imposing liability on all products, particularly agricultural products. They felt that in case of natural products the suppliers have no control over the product.²⁶⁸ They argued that sometimes these products may be subject to natural and environmental effects for which the producer may have no control.²⁶⁹

This view is supported by the authors Miller and Goldberg who argue that exclusion of primary agriculture products from strict liability is premised on the justification that primary agriculture products are particularly prone to hidden defects caused by environmental factors beyond the control of the producer.²⁷⁰ According to Geraint the arguments are centred on the fact that agriculture products are already regulated by other laws, and that there is practical problems with attaching warnings to items of agriculture or fishery produce, particularly where they are delivered to the distributor in the natural state.²⁷¹

Further the tendency of mixed large quantities of bulk food supplies at trade markets would generate difficulties in determining the source of defective products and it could be very difficult to ascertain at what stage in the production or distribution process the defect in a primary agriculture product arose.²⁷² In addition it is suggested that if a defect was found in primary food stuff claimants had the right against the suppliers under contract law and rights against the producer under the existing law of negligence.²⁷³

UNCITRAL has noted with regard to natural products that these are increasingly bearing a mark of human intervention and as such liability should be imposed. This is because they are sometimes processed or somehow treated for example, with chemicals, fertilisers, insecticides and preservatives; their intervention is therefore justified on the basis that such human intervention could bring about harm to consumers.²⁷⁴ During a stakeholder meeting, a participant observed as follows:

“Agricultural products should not be wholly exempted; because farmers are using chemicals that may be dangerous to humans in a bid to maximise profit. For example, we have seen reports of farmers feeding pigs with HIV ARVs. Who knows the effect of this to the ultimate consumer of such meat at the end of the day?”²⁷⁵

267 Meeting with Consumers and Business Community in Kampala, April 2019

268 Meeting with Small scale industries at UMA Show Grounds Kampala, 2018; Stakeholder meeting held in Lake View hotel, Mbarara February 2018.

269 Stakeholder meeting held in Lake View hotel, Mbarara February 2018.

270 CJ Miller and RS Goldberg, Product Liability 2nd Edition 2010

271 Howells Geraint, Comparative Product Liability Page 33

272 CJ Miller and RS Goldberg, Product Liability 2nd Edition 2010 page 288

273 Ibid

274 A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111

275 Stakeholder meeting held at Royal Suits Hotel, Bugolobi, Kampala 2018

Study findings indicate that strict liability should be imposed on all moveable products that have undergone some form of processing.²⁷⁶ That liability should only apply to consumer products upon satisfaction that the product had an unreasonably dangerous defect that injured the consumer. This is attributed to the fact that protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product or component part or any raw material supplied by them was defective.²⁷⁷

Comparative analyses of other jurisdictions that have enacted strict liability legislation reveal a varying trend. For example, The English Law Commission and the Scottish Law Commission while considering the issue of which products should be subjected to strict product liability reached deferring conclusions.²⁷⁸ The English Law Commission favoured the imposition of strict product liability for natural agriculture products in strict product liability. The Law Commission justified the inclusion majorly on the following reasons;²⁷⁹

- (a) that the line between natural and industrial products could not be drawn with precision, and different treatment was not warranted;
- (b) In the case of foodstuffs, most food would have been subjected to some kind of process before it reached the consumer. Some items of food, however, would be put on the consumer market seemingly in their natural state. An example would be fresh vegetables, which at first sight seem natural unprocessed products. But the vegetables might have been sprayed by chemicals, or treated by artificial fertilisers. It would then become arguable whether fresh vegetables should be regarded as natural products;
- (c) even if a foodstuff or product was not subjected to any process whatsoever, a consumer who suffered illness or damage should be entitled to look to the person who put the product into the stream of commerce for compensation.

However, the Scottish Law Commission, did not favour imposition of strict liability for natural products, the reasons advanced by the Scottish Law Commission were;²⁸⁰

- (a) a principal argument for strict liability was that the loss should be borne by the person who created the risk and was in the best position to exercise control over its quality and safety. In agricultural or fishery production, the risk might have been laid by a polluter or nature itself.
- (b) premised on the argument that a person who created a product, and therefore the risks incidental to the use of it, should be strictly liable for injuries caused by the use of the product, was the assumption that the manufacturer of goods in bulk would be better able to bear those risks. It was contended that a high proportion of farms in the United Kingdom were manned only by the farmer himself earning only a small net revenue.
- (c) it might be difficult for the producers of agricultural products to insure against claims. One of the reasons for the difficulty was that the products would be mostly perishable and the producer might find it difficult to raise the defence that the defect did not exist in the product when it left the producer.

²⁷⁶ Stakeholder meeting held in Lake View hotel, Mbarara February 2018; stakeholder meeting held at Royal Suits Hotel, Bugolobi, Kampala 2018 and Stakeholders Meeting held at Sunset Hotel Jinja District

²⁷⁷ Stakeholder meeting held at Royal Suits Bugolobi, Kampala 2018

²⁷⁸ *Liability for Defective Product* (1977 : Cmnd. 6831) at paragraphs 83-88.

²⁷⁹ *Liability for Defective Product* (1977 : Cmnd. 6831) at paragraphs 83-88.

²⁸⁰ *Ibid* at paragraphs 89-96.

- (d) it was further contended that public expectation would be that the party responsible for the preparation of the food, instead of the original producer, should be primarily liable for food poisoning.

The Hong Kong Law Reform Commission has agreed with imposing strict liability on unprocessed agricultural produce and game, this is premised on the following reasons;

- (a) unprocessed foodstuffs are consumed by almost every member of the public. An area of general public concern should not be left unregulated under the proposed legislation.
- (b) Hong Kong and neighbouring countries have recurrent problems of contaminated vegetables and seafood, and the inclusion of such products in the proposed legislation would encourage producers and importers to take extra effort to ensure that their products are safe. Retailers will also be encouraged to ascertain and keep records of their source of supply.
- (c) given the serious threat to health that unsafe natural foodstuff may cause, any increase in product price that may be brought about will still be justifiable.
- (d) if unprocessed natural products are excluded, it will lead to anomalies. For instance, if one consignment of infected live cattle is imported and half of it is sold as fresh meat whereas the other half of it is sold as frozen meat, people who suffer illness from the frozen meat can be compensated whereas people who suffer illness from the fresh meat cannot.
- (e) excluding unprocessed natural products will necessitate a definition of industrial process, which is likely to prove difficult. Any distinction is likely to be fine and artificial, and may lead to uncertainty. For example, the mincing of meat if done in factories using automated machinery will be regarded as having undergone an industrial process, whereas it may not be so regarded if done in small meat stalls using manually operated mincers. It may be uncertain whether mincing constitutes industrial process.²⁸¹

The Commission notes that Uganda as a country highly relies on agriculture for its development, imposing strict liability on natural and agricultural products would stifle agriculture produce. However, if natural and agricultural products undergo any form of processing, then the producer of the processed product should be held liable. This is because the producer of a processed product is expected to conduct the appropriate tests to ensure that hidden defects, how so ever caused, are detected and eliminated.

Recommendation

1. **Strict liability should be imposed on all moveable consumer products, including electricity.**
2. **Strict product liability should not be imposed on natural and agricultural products that have not undergone industrial processing.**

²⁸¹ Hong Kong Law Reform Commission Report Product Liability

Burden of proof

Claims arising from strict product liability present proof issues. The study sought to establish who bear the burden of proof in cases involving product liability and what should be the standard of proof.

Generally, there was consensus among the persons consulted that the burden of proof must always rest on the plaintiff or claimant who claims that the product was defective and caused injury. That it is vital for the plaintiff/claimant to show that the product was defective and that it causes injury. A respondent observed as follows:

“It is settled in Uganda and most common law jurisdictions that the burden of proof squarely lies on he who alleges; so, the person who alleges a defect in a product which has caused injury should bear the burden of proving it”

In the case of **Suvada v White Motor Co.**²⁸² The plaintiff must prove that his injury and damage proximately resulted from a condition of the product, that the condition made the product unreasonably dangerous, and that the condition existed at the time the product left the defendant's control.²⁸³

According to Keeton, there are two main points to emphasize. First, when plaintiff seeks to recover for harm resulting from an alleged defective product on a theory of strict liability, rather than negligence, he is not relieved from the burden of showing a defect in the product which was likely present when the maker surrendered possession and control. Second, when negligence is the basis for recovery, proof of the same two requirements will normally serve as circumstantial evidence sufficient for a finding on the part of the jury that the defect was the result of the maker's negligence. Therefore, while strict liability obviates the necessity for convincing the jury as to the existence of negligence, it does not alter in any substantial way the plaintiff's proof problems, and the satisfaction of plaintiff's proof requirements for strict liability will generally result also in a finding of negligence.²⁸⁴

The European Union Commission in assessing the effectiveness of the EU Directive on product liability has noted that a large majority of public authorities and civil society representatives the proof of defect and of the link between it and the damage is burdensome to consumers.²⁸⁵ Almost all consumer associations see this burden as the most frequent obstacle to obtaining compensation, especially with regard to new technological developments and increasing product complexity.²⁸⁶ However, the report found that most businesses were of the view that removing this burden would be disadvantageous. The report concluded that indeed, the burden of proof upon the injured person is essential as a basis for the claim; removing it would make the Directive unfair.²⁸⁷

²⁸² Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965)

²⁸³ Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965)

²⁸⁴ Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 563 (1969).

²⁸⁵ Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. COM(2018)246final} -{SWD(2018)158final. page 67 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0157&from=EN>

²⁸⁶ ibid

²⁸⁷ ibid

Some respondents²⁸⁸ noted that although the claimant should bear the burden of proof, the standard should not be of a high standard because the victim may not have what it takes to prove. That the claimant should only be required to prove defect and injury at which point the burden should shift to the defendant.

Recommendation

- 1. The claimant should bear the burden of proving the defect, the damage and the causal relationship between defect and damage.**
- 2. The Claimant should not be required to prove fault on the part of the manufacturer or producer (Defendant).**

Defences available in strict product liability claims.

The study sought to explore the possible defences that should be available to a defendant in a claim based on strict product liability. Generally, there was consensus during the study that liability for defective products should not be absolute. That defences should be availed to defendants in certain cases.

The study found that defences against claims relating to strict product liability are crucial to ensure that the law does not constrain or stifle manufacturers or producers from developing new products.²⁸⁹ Consultations revealed that both consumers and manufacturers, producers were in agreement that there is need to provide defences against claims for product liability.²⁹⁰ Some of the defences highlighted to be pleaded by a defendant in a claim of product liability include:

- (a) the defendant did not manufacture the alleged defective product;
- (b) the product was not defective, or that the product defect was not the proximate cause of the plaintiff's injuries;
- (c) that the person caused his/her own injury by using the product in a manifestly unreasonable or unexpected manner;
- (d) the defendant did not put the product in circulation;
- (e) the defect did not exist in the product when the defendant supplied or put it into circulation; and
- (f) the claimant misused the product.

Manufacturers are not insurers of their products. Misuse of a product of a substantial and unforeseeable nature may be a defence against claims of negligence, warranty, and strict liability.

In general, misuse is defined as the use of a product for a purpose neither intended nor reasonably foreseeable by the manufacturer. It occurs when the product user does not act in a manner that would be expected of an ordinarily, reasonably prudent person likely to use the product under the same or similar circumstances. Traditionally, it covered two types of conduct, that is, use of the product for an improper purpose and use of the product in an improper manner. The misuse of a product by the plaintiff or

²⁸⁸

289 Stakeholder meeting held at Royal Suits Hotel, Bugolobi, Kampala 2018

290 See Preliminary consultations report carried out in Mbarara District December, 2016

other party may result in a reduction or apportionment of damages to the extent that such misuse was the proximate cause of the plaintiff's harm.

The study found that in jurisdictions where specific product liability legislation has been enacted, specific statutory defences have been provided for against claims. For example, in the United Kingdom, the Consumer Protection Act, 1987 provides for specific defences against product liability claims in section 4. The defences include;

- (a) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation;
- (b) that the person proceeded against did not at any time supply the product to another;
- (c) that the defect did not exist in the product at the relevant time; or
- (d) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.

The South Africa Consumer Protection Act²⁹¹, provides for defences in section 61 provides that it is a defence 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:
 - i. death or injury of a natural person;
 - ii. the earliest time at which a person had knowledge of the material facts an illness of a natural person;
 - 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 any property, respective of where it is movable or immovable; or
 - iv. the latest date on which a person suffered any economic loss due to death, injury or illness to a natural person, or loss or physical damage to property.

²⁹¹

In Australia, the statutory defences available against claims for product liability include: that the safety defect did not exist at the time of supply by the manufacturer; the product was a component of a finished product and the safety defect is only attributable to; the safety defect could not have been discovered at the time the manufacturer supplied the goods because there was insufficient scientific or technical knowledge at that time; the safety defect only existed because a mandatory standard was complied with.²⁹²

The defect did not exist in the product when the defendant supplied the product to another.

Manufacturers and those in the chain of distribution should have as a defence if the product was not defective at the time of supply or when it was put in circulation. It has been argued that the defence is expected to come into play where it is claimed that the danger stems from lack of repair or servicing or from subsequent authorised modification to or tempering with the product.²⁹³ Study findings indicate that sometimes the defect or product danger may arise out of storage by the retailer, wholesaler or distributor and as such that the manufacturer should not be held liable. For example, it is argued that many products including food are perishable and an impurity may develop solely as a result of unsuitable storage by the intermediate wholesaler or retailer.²⁹⁴

Majority of the respondents noted that sometimes consumers themselves may be accountable for defects that may occur to products notwithstanding that at the time of supply or when they were put in circulation they were not defective, this was attributed to poor storage, tempering with the product.

Product was not defective at the time of supply

The study found that in jurisdictions where strict liability for defective products has been introduced, it is a defence available to the defendant that at the time the product was supplied or put in circulation it was not defective and that the defect occurred afterwards. For example, in the United Kingdom under section 4(1) of the Consumer Protection Act²⁹⁵, it is a defence to show that the product was not defective at the time of supply. The EU Directive²⁹⁶ in Article 7(6) also makes it a defence if at the defect didn't exist at the time the product was put in circulation.

According to Goldberg there is no sensible basis on which liability could be attributed to manufacturers or producers where the defect came into existence at the later stage. That this defence may come into play where danger stems from lack of repairs or servicing or from subsequent unauthorised modification to or tempering with the product.²⁹⁷

292 <https://www.productsafety.gov.au/product-safety-laws/legislation/product-liability>

293 Para 13.18 at Page 486

294 *ibid* page 487

295

296

297 CJ Miller and RS Goldberg, *Product Liability* 2nd Edition 2010, Para 13:16 at page 486

Defect not reasonably discoverable

The study found that in many jurisdictions, manufacturers may be allowed to present evidence that their product was “state of the art” at the time that it was designed or manufactured. The circumstances where this defence could be raised may include so-called ‘development risks,’ being risks that are only discovered as the goods are being used by consumers and which were not known or detectable at the time of supply.

“State of the art” in general, means the technical, mechanical, and scientific knowledge used for manufacturing, designing, or labeling the same or similar products was of the level that was in existence and reasonably feasible at the time the product was available.²⁹⁸ In determining whether the knowledge is available, courts have found that “a manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances.”²⁹⁹

In presenting state of the art evidence, the manufacturer essentially argues that they should not be responsible for a particular product risk, because at the time of manufacture, that risk was generally unknown or the means for avoiding it was unknown or unavailable. State of the art is distinguishable from mere compliance with industry custom or standard because industry custom refers to what is currently being done in the industry; while state of the art refers to what feasibly could have been done.

In the United Kingdom, section 61(4)(c) of the Consumer Protection Act³⁰⁰, provides that the liability of a “particular person” does not arise if it was “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.”

The EU Directive 1246 similarly provides an express defence to producers where “*the state of scientific and technical knowledge at the time the producer put the product into circulation*” did not allow the defect to be discovered.

This defence has been subject to criticism from different scholars. For example, Stapleton³⁰¹ doubts the supposed ‘strictness’ of liability when it is supported by a ‘development risk’ type defence: she points out that by allowing the producer or supplier to escape liability on the ground that it acted reasonably, in effect amounts to re-admittance of negligence or fault-based liability. However, industry pressure and policy reasons such as the rise in insurance costs of businesses and inhibition of innovation have been central to the inclusion of this defence in foreign jurisdictions.³⁰²

The Court of Justice of the European Union (CJEU) in *European Commission v United Kingdom*³⁰³ has held that the reference to “scientific and technical knowledge”

298 Carla Kriek, The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis. Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University March 2017 at Page 399

299 A V National Blood Authority [2001] 3 ALL ER 289

300

301 ‘Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective’ (2000) 39 Washburn LJ 369.

302 *ibid*

303 [1997] All E.R. (EC) 481 at [20]; [26].

in article 7(e) of the EU Directive does not refer to the state of knowledge in the industrial sector within which the producer of the product operates, but rather “*the state of scientific and technical knowledge, including the most advanced level of such knowledge*” in general.

Kriek has argued that this defence provides a true form of strict liability for manufacturers and importers but a ‘modified’ strict liability for distributors and retailers who can avail themselves of the defence by showing it was unreasonable in the circumstances to expect them to have discovered the unsafe product characteristic, failure, defect or hazard” having regard to their role in marketing the goods to consumers.³⁰⁴ *she observed that “It was perhaps the legislature’s intention to provide this defence to retailers since they often do not have the opportunity to inspect products prior to on-sale, such as sealed products that would become unmarketable once opened, nor do they necessarily possess the knowledge or skill to detect defects.”*³⁰⁵ The omission of “importers” from this defence presumably serves to prevent a situation where a plaintiff has no recourse against the retailer and distributor based on this defence and the producer is overseas.³⁰⁶

Miller and Goldberg argue that the state of art defence continue to receive considerable support from manufacturing and consumer organizations who regard it as an important element of the strict liability.³⁰⁷ However, the authors note that whereas the defence is capable of benefiting all industrial sectors, it is likely that its greatest impact will be in the context of medical products and in the aerospace, biotechnological and other industries operating at the forefront of scientific and technological knowledge.³⁰⁸

Recommendations

A person against whom a claim for product liability has been brought against should be in position to raise the following as defences to the claim

- a. the defendant did not put the product in circulation or that the defect happened when the product was no-longer in possession of the defendant;**
- b. that it is probable that the defect causing the damage came into being after the product was put into circulation by the defendant;**
- c. that the product was not manufactured for a profit-making sale;**
- d. that the product was neither manufactured nor distributed in the course of his or her business;**
- e. that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;**

³⁰⁴ Carla Kriek, The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis . Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University March 2017 at Page 399

³⁰⁵ Ibid

³⁰⁶ Ibid

³⁰⁷ Miller and Goldberg Product Liability 2nd Edition Par 13:30 page 492

³⁰⁸ Ibid

- f. **that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the defect to be discovered (“State of the Art” Defence); or**
- g. **in the case of a manufacturer of a component of the final product, that the defect is attributable to the design of the product or to the instructions given by the product manufacturer.**
- h. **the claimant assumed the risk or contributed to the defect.**

Who should be entitled to sue for recovery?

The study sought to establish who should be entitled to recover and whether the principle should apply to all those who suffer injury by reason of a defective product or whether some restrictions should be imposed upon a class of potential plaintiff.

Study findings indicate that ascertaining who is entitled to recover in product liability is important to create certainty and predictability of the law. It was noted that currently, the law of contract and negligence to which an injured party may rely on to claim compensation for injuries is uncertain and unpredictable. For example, a legal practitioner in Mbarara observed:

*“The law locks out many people who can recover in case of injury, because of the archaic rules of privity of contract and tort.”*³⁰⁹

According to UNCITRAL, in many jurisdictions recovery under product liability is not generally limited to certain categories of plaintiff; it is merely restricted by legal requirements concerning the connection between negligent act and injury or damage suffered, for example that there be proximate, direct or adequate causation.³¹⁰ That in strict product liability, there is need to refine this approach because liability irrespective of fault to all potential victims could be regarded as too extensive.³¹¹

During the study, there was consensus among persons consulted that the ultimate buyer should have the right to sue for damages where he or she suffers damage while using or consuming the product purchased. This was attributed to the general law of contract which presupposes that the buyer will have provided consideration for the product. A respondent observed as follows: *“of course the last buyer must have the right to sue because he or she has spent money on the product that has caused damage”*³¹²

UNCITRAL has noted that the right of a buyer to claim for compensation in case of injury or damage in product liability is not only premised on contract but on the policy

³⁰⁹ Key informant interview with Lydia Ahimbisibwe, legal practitioner with Ahimbisibwe & Co Advocates held in December 2016.

³¹⁰ A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111

³¹¹ A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111. Page 251

³¹² Interview with a consumer in Kasese District January 2017

consideration that in fact the buyer in most cases chooses the product in reliance on its safety and above all, contributes via purchase price to the buyers mutual benefit.³¹³

The other categories of persons entitled to recover or bring claims in product liability who received wide support during the study were consumers or users. Majority of the persons consulted were of the view that consumers and end users of the product should have a right to sue and recover damages suffered as a result of using a defective product. This was attributed to the fact that consumers and users deserve protection because they often rely on the safety of a product and consumer ignorance. A respondent justifying why consumers and end users should have a right to recover stated as follows:

*“Consumers and users are the ultimate persons likely to suffer the damage and as such, it is important that the law protects them, irrespective of whether they bought the product or not, for example children”*³¹⁴

UNCITRAL has noted that consumers and users deserve protection because they rely on the safety of a product which itself is intended for the very purpose of consumption or use, and because they are, besides being the targets of production and distribution, the beneficiaries of the policy of risk control and harm prevention. Further, that consumers and users are often in some kind of family, social or business relationship with the buyer who thus, can be assumed to pay his contribution for their benefit as well.³¹⁵ Finally, UNCITRAL has proposed that the definition of consumer or user should be broadly construed in a very broad sense so that consumer for example would include the person who does not consume the product but prepares it for consumption for someone else and user would also cover anyone who passively enjoys the benefit of a product for example a car passenger.

The study also established that protection of bystander's product liability legislations in some jurisdictions has extended protection to non-users or bystanders. Extending protection to non-users or bystanders is premised on the policy consideration of deterrence, the desire to minimise the risk of personal injury which is valid for all potential victims regardless of status.³¹⁶ Critics against extending liability to non-users or bystanders argued that these are neither buyers nor users of the product. According to Prosser, “a bystander has relied upon nothing, he is not the kind of person the defendant has been seeking to reach, no representation has been made to him expressly or impliedly, he has done nothing except to be there when the accident happened”³¹⁷ According to UNCITRAL, such reasoning seems to focus entirely on the consumer reliance rationale, ignoring the theories of enterprise liability and risk

³¹³ A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133). Year Book of United Nations Commission on International Trade Law, 1977 Volume 111. Page 251

³¹⁴ Focus group discussion with members of the Kampala City Traders Association (KACITA) held at KACITA Head offices 2017.

³¹⁵ A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111, paragraph 48,49,50, page 252, <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p235-269-e.pdf>

³¹⁶ ibid

³¹⁷ ibid

distribution under both of which no valid distinction seems possible between the bystander and the user.³¹⁸

During consultations, majority of the persons consulted were of the view that remedies should not be extended to bystanders mainly because they have not provided consideration for the product and the producer or manufacturer may not have foreseen, them coming into contact with the product. That extending such liability in Uganda would be to open a flood gate of actions because most Ugandans are opportunists who will exploit every circumstance for their benefit. A respondent observed “*in Uganda such rule to protect bystanders would be unfair, people will exploit this to sue manufacturers and thus affect the infant manufacturing industry*”

Comparative analysis with other jurisdictions that have put in place legislation for product liability reveal that some have imposed restrictions on who can recover. For example, in the United States, section 402A of the Restatement (Second) of Torts restricts recovery to a user or consumer. However, this approach has been criticized as being inhibitive and in practice it has been abandoned in many American States.³¹⁹ In **Elmore v American Motors Corporation**,³²⁰ the Californian Supreme Court was of the view that public policy which protects the driver and a passenger of the car should protect a bystander. Court stated that

“If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous...”

In the United States in order to address contentious issues posed by the Reinstatement of Torts (Second), the American Law Institute has produced the Reinstatement of Law (Third) section 1 refers to harm to ‘persons or property’. In section 3, reference is made to harm sustained by the “plaintiff”. In other words, any person who suffers harm due to a defective product is arguably entitled to bring a claim against the commercial seller or distributor. It is also urged that section 21 which defines “harm to persons or property” in the context of recovery of economic loss to include any economic loss caused by “harm to the plaintiff’s person” or “the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law.” would mean that the section confirms that plaintiffs may also be dependants of a person who is physically harmed by a defective product.³²¹

In Europe, the class of persons who can recover as a result of injury sustained as a result of a defective product is unrestricted. Although the preamble to the EU Directive

318 A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111. P, 252. Available at: <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p235-269-e.pdf>

319 Ontario Law Reform Commission, Report on Products Liability

320 451 P 2d 84 at 89 (Cal 1969)

321 Carla Skiek, “*The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis*” Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University. March 2017. Available at: <https://scholar.sun.ac.za>

in its recitals refer to the protection of consumers, the provisions of Articles 3, 4, 8, 9, 11, of the Directive refer to “the injured person”. For example, Article 3 provides that the “injured person” is required to prove the damage caused by the defective product and the causal relationship between the defect and the damage.³²² Accordingly, some authors have argued that the EU directive appears to be open to any person harmed by a defective product, whether that person is the purchaser of the product, a bystander or a defendant who suffers loss as a result of harm caused by a defective product to another person.³²³

The Ontario Law Reform Commission has noted that the principle should be extended to cover not only by users and consumers, but any person within the principle of proximity and causation injured by the defective product as is the case in tort.³²⁴

Clearly, worldwide jurisdictions have refrained from expressing a view as to whether the doctrine of strict liability of the manufacturer and retailer for defects is applicable to third parties who are bystanders and who are not purchasers or users of the defective product. However, in practice courts have extended the application of the principles to third parties who are bystanders and who are not purchasers or users of the defective product.³²⁵ The commission notes that the question whether liability should be extended to bystanders remains a question of fact and should be left for courts to decide.

Recommendation

- 1. As noted from the suggested definition and scope, any person who is injured by a defective product should have a right to sue and recover. These should include buyers, users and consumers of a defective product.**
- 2. Next of kin should recover on behalf of children and deceased persons**

Should claims for product liability be subject to Limitation periods?

The study sought to explore whether claims in product liability should be subjected to limitations like actions based on tort and contract. Generally, there was consensus among the persons consulted that claims arising from product liability should be subjected to limitations as is the case in tort and contract law. This was attributed to the need to provide manufacturers or producers with certainty as to when their liability with regard to products will end and to the fact that products may be made for a specific period of time. A respondent observed as follows: *“Just like contract and tort actions have a limitation under the Limitations Act, so should be product liability, liability for defective products should not be forever”*³²⁶

UNCITRAL has noted that it would seem appropriate to set time limits for bringing compensation claim in product liability in order to give defendants (and their insurers)

322 ibid

323 ibid

324 Ontario Law Reform Commission, Report on Products Liability Page 94

325 Elmore v American Motors Corporation

326 Key informant interview with a legal practitioner in Kampala, 2017

more certainty about liability exposure and to exclude litigation after a long period of time has expired and relevant evidence has become hard to come by.³²⁷

A Proposal presented by the European Union Commission for a council directive observed that if the liability of the producer is no longer made to depend upon fault on his part and is thus deprived of the limiting factor of personal contribution for the damage, as a condition of his liability, another limiting factor must be provided for.³²⁸ Liability irrespective of fault without any kind of limitation would place an incalculable burden of risk on the producer. This would involve the danger that producers would be afraid to take business risks in developing new products. This would in turn impair or jeopardise economic and technical progress, which is not in the general interest, particularly of consumers.³²⁹

The EU Commission concluded that in the best interest of the industry and consumers considering that products age in the course of time, higher safety standards are required to ensure that the state of science and technology progress, it would be unreasonable to make the producer liable for an unlimited period of time for the defectiveness of his products.³³⁰ It is therefore important that liability should be limited to a reasonable length of time so as to balance the need to protect consumers and the burden imposed upon the industry.³³¹

A limit to the period of liability is necessary above all to provide a well-balanced solution to the problem of 'development risks'.³³² The producer can be liable in respect of defects which are discovered within a certain period of time as a result of progress in science and technology. An unlimited period of liability, however, would mean that the producer would have to bear an inordinately high risk particularly in this field.³³³

Prohibition of exclusion or restriction of liability

Generally, it is a general rule of contract law that a party can limit its liability arising from defective products by including contractual terms that limit or exclude that liability. This is premised on the overriding notion of freedom of contract. However, this general rule is subject to exceptions, such as statutory exceptions embodied in different laws.

The study sought to explore whether, a party should be allowed to incorporate exemptions as to strict product liability.

The study found that there was general consensus among the persons consulted that exclusion or restriction of liability by manufacturers and producers must be prohibited if the law was to meet its expectation of protecting consumers. This was mainly attributed to the fact that in most cases consumers have a weaker bargaining power and that

327 A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111Page 254-255.

328 Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. COM (76) 371 23rd July 1976. Presented by the Europe Union Commission September 1976. Published in Bulletin of European Communities supplement 11/76. available at <http://aei.pitt.edu/4573/1/4573.pdf>.

329 ibid

330 ibid

331 ibid

332 ibid

333 ibid

the use of exclusion or restriction clauses would defeat the whole purpose of product liability. During a consultative workshop a participant observed as follows: “*consumers have a weaker bargaining powers when it comes to products, this is mainly because of cost and availability of products on the market, therefore exclusion clauses can greatly affect the whole purpose of product liability*”³³⁴

UNCITRAL has noted that allowing the use of exclusion clauses, disclaimer clauses or limited liability such as contracting out would adversely affect the goal of unification, particularly those of certainty and equal consumer protection.³³⁵

Commentators have argued that prohibition of exclusion clauses in product liability is premised on the following reasons: the average buyer is unable to discover hidden defects; lack of bargaining power; lack of information necessary for knowledgeable contractual waiver of product liability rights, because the consumer who waives his or her rights is susceptible to more accidents and higher costs; if permitted manufacturers will always disclaim liability and thus defeat the purpose; the existence of external cost which must be factored by manufacturers such as injuries to third parties and the overriding policy consideration to protect consumers who might expose themselves to injury.³³⁶

In many jurisdictions where product liability legislation has been introduced, clauses prohibiting the use of exclusion clauses by manufacturers or [producers have been specifically provided for. for example, In the UK section 7 of the Consumer Protection Act, a party is prohibited from limiting or excluding liability for damages arising from a defective product, whether through contractual means, a notice or any other provision. Similarly, in the United States, the Reinstatement of (Second) of Torts 402A prohibited waiver of product liability rights in most consumer sales. The Restatement (Third) of Torts: Products Liability section18 (1998) states that disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

Commentators Choir and Spier³³⁷ argue that one of the important objectives of the products liability law is to create incentives for manufacturers to make cost justified investments in product safety. The law attempts to achieve this objective by allowing harmed consumers to fully recover from the manufacturers and by prohibiting them from contractually waiving products liability.³³⁸

The Commission is in agreement that allowing manufactures to use exclusion clauses, waivers or disclaimers defeats the whole purpose of imposing strict liability for defective products. Majority of consumers in Uganda lack information and in most cases are at

334 Stakeholder meeting held at Royal Suits Hotel, Bugolobi, Kampala 2018

335 A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN.9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111Page Page 256

336 P.M.K and W.J.S **“Enforcing Waivers in Product Liability”** Virginia Law Review Vol. 69 No. 6 of 1983 pp 1111- 1152. JSTOR, www.jstor.org/stable/1072739.

337 Albert Choi, Kathryn Spier, “*Should Consumers be permitted to waive Products Liability? Product Safety, Private Contracts, and Adverse*” September 2010. https://law.utexas.edu/wp-content/uploads/sites/25/spier_should_consumers_be_permitted.pdf.

338 *ibid*

a weaker bargaining power and uninformed. As opined during consultations: “*Ugandan consumers lack bargaining power in consumer contracts. In most cases they look at the supplier or manufacturer as doing them a favour*”. It is proposed that producers are prohibited from using exclusion clauses to shield themselves from liability. This is because if this is allowed it will not offer the much needed protection to consumers.

Recommendation

- 1. The liability of a manufacturer or producer to an injured person should not be limited or excluded by any term of contract, by any notice or by any other provision.**
- 2. Imposing criminal liability for defective products/product safety**

The study sought to explore whether liability for the manufacture or sale of defective products should be criminal or civil in nature.

Generally, there was consensus among the persons consulted that product safety is key to ensuring consumer protection. Product safety was viewed as ensuring that a product on the market does not cause injury or damage. Just like product liability, product safety is viewed as the ultimate fulfilment of the consumer expectation.

The study found that whereas, several laws have been put in place to ensure product safety in a bid to protect consumers, these are faced with challenges of implementation and enforcement. For example, the study found that whereas the Food and Drugs Act is in place, its scope is limited to adulterated foods and drugs and does not cover unsafe products which are not adulterated. Further, the study found that some of the enabling laws are outdated and not deterrent enough to protect consumers, the Penal Code Act was identified as one of the laws whose provisions are outdated and provisions relating to prohibition of unsafe products not deterrent enough.

The area of food, cosmetics and drugs was identified as the key area that requires product safety regulations. This was mainly attributed to the deadly consequences that may follow of having unsafe products on the market. There was consensus among the persons consulted that there is need to update the law and provide for more commercial oriented remedies like notification to consumers of the unsafe products and product recalls where a manufacturer detects a defect.

The study revealed that the different institutions mandated to enforce safety standards have not done much to execute their mandate and functions. For example, it was observed that UNBS and NDA have failed to ensure that unsafe products and drugs don't reach the market. This has mainly been attributed to understaffing and corruption. A respondent stated as follows: “*Uganda National Bureau of Standards has failed in its mandate, that's why we have all these fake and unsafe products on the market*”³³⁹. Another respondent questioned as follows: “*how do all these fake and unsafe products find their way on the market?, the answer is simple, UNBS and other enforcement agencies are compromised through bribes*”

³³⁹ Preliminary consultations meeting with KACITA executive members held in the Commission Board room on 8th Floor Workers House, March 2017

In many jurisdictions product safety regulations are viewed as effective in ensuring a high level of consumer protection, by contributing to protecting the health and safety of consumers. For example, under the European Union Community, the European Communities (General Product Safety) Regulations 2004, as amended, ("the 2004 Regulations") which implemented EC Directive 2001/95. These Regulations make it an offence to place unsafe products on the market and specify the duties of producers and distributors in this regard

The United Nations has issued guidelines for consumer protection among member states. The guidelines provide among others that:³⁴⁰

- (a) member states should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.
- (b) appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities and, as appropriate, the public without delay.
- (c) member states should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial and severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it. If it is not possible to do this within a reasonable period of time, the consumer should be adequately compensated

According to United Nations Conference on Trade and Development, product safety laws are necessary because:³⁴¹

- (a) consumers need to be protected against unreasonable, unnecessary and preventable risks of injury from the foreseeable use of consumer products;
- (b) consumer products in the marketplace are increasing in complexity and sophistication;
- (c) consumers are often unable to foresee risks and protect themselves. This is particularly true with new products of which consumers had no previous experience, or products that contain components such as chemicals, which may not be apparent;
- (d) to establish minimum and harmonized safety standards for products being sold to ensure that developing countries do not become dumping grounds for sub-standard products that would not meet the standards in the country of origin, or other potential importing countries;

³⁴⁰ United Nations Guidelines for Consumer Protection, 2015

³⁴¹ United Nations Conference on Trade and Development; "Manual on Consumer Protection" 2016 Edition UNCTAD/WEB/DITC/CLP/2016/1. Available at <https://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf>.

- (e) It is beneficial to have products that comply with international standards, as this will improve access to international markets, thus allowing greater consumer choice and raising the baseline for safety on a global basis.

The Commission is in agrees with the proposition that product safety is vital to ensure product quality and consumer protection. As Uganda's economy continues to grow there need to put in place consumer protection laws and strong institutions to ensure that products put on the market are safe for use by the consumers.

Manufacturers or producers must be duty bound to adopt measures commensurate with the characteristics of the products, enabling them to be informed of the risks that these products may present, to supply consumers with information enabling them to assess and prevent risks, to warn consumers of the risks posed by dangerous products already supplied to them, to withdraw those products from the market and, as a last resort, to recall them when necessary.

Recommendations

1. **Producers should be obliged to place only safe products on the market**
2. **Producers should be under a duty to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use.**
3. **Criminal offences and penalties be prescribed for producers who place unsafe products on the market.**

SUMMARY OF RECOMMENDATIONS AND CONCLUSION

The Commission makes the following recommendations:

1. **The current legal framework for product liability is inadequate and does not offer consumers protection. A law imposing strict liability for defective products be enacted in Uganda.**
2. **The existing rights and remedies available to a consumer in contract and tort should be preserved.**
3. **As a general rule, producer or manufacture should be strictly held liable where injury or damage is caused as a result of a defective product irrespective of fault. This strict liability should only apply to producers who put their products into circulation in the course of business.**
4. **In addition to producers or manufactures strict liability for defective products should be imposed on certain persons who play a part in the chain of distribution without necessarily being producers such as:—**
 - (a) **a person who puts his or her name, trade-mark or other distinguishing feature on a defective product so as to present it as his or her own should be strictly liable for it;**
 - (b) **a person who in the course of a business supplies a defective product which does not carry any indication as to the identity of the producer should be strictly liable for it unless he discloses the identity either of the producer or of the person who supplied him with the product;**
 - (c) **the first distributor of a defective product within Uganda as an importer.**
5. **A product should be regarded as defective if, at the time when it is put into circulation by whoever is responsible for it as its producer, it does not comply with the standard of reasonable safety that a person is entitled to expect of it.**
6. **A product should be regarded as defective where it has any of the following**
 - (a) **manufacturing defect**
 - (b) **design defect**
 - (c) **warning defect**
7. **The standard of safety should be determined objectively having regard to all the circumstances in which the product has been put into circulation, including, in particular, any instructions or warnings that accompany the**

product when it is put into circulation, and the use or uses to which it would be reasonable for the product to be put in these circumstances.

8. The principle of strict liability for defective products should cover personal injury and damage to property together with economic loss consequent therein.
9. The class of persons entitled to recover under the proposed principle of strict liability should not be restricted in anyway other than by the general tort limitations of proximity and causation. In particular, the principle should apply to user, consumers, and bystanders whether they were privy to the contract with the defendant or not.
10. In order to establish strict product liability, the injured person should prove:—
 - (a) that he or she was injured by the product;
 - (b) that the injury was attributable to a defect in or defectiveness of a product;
 - (c) that the defendant had produced the product or dealt with it in circumstances rendering him or her liable to the same extent as if he were the producer.
11. Strict product liability should not extend to damage to property suffered in the course of carrying out business.
12. Strict product liability should not extend to pure economic loss.
13. Compensation for injury or damage caused by a defective product should not be subject to monetary limit as to either the amount recoverable by the injured party or compensation to be paid by the defendant.
14. Strict product liability should apply to all moveable products.
15. Strict liability should not apply to natural or primary agricultural product.
16. The defence of assumption of risk and contributory negligence should be available to a defendant in a strict liability claim.
17. An oral or written agreement, notice, statement or provision of any kind purporting to exclude strict liability for defective products should be void.
18. A supplier, retailer, distributor or importer who is held liable in strict liability for defective products should be entitled to indemnity from the producer, manufacture or prior supplier of the product.

19. **The liability of a manufacturer or producer to an injured person should not be limited or excluded by any term of contract, by any notice or by any other provision.**
20. **An action arising from injury or damage caused by a defective product should be commenced with seven years from the time the cause of action arouse. After seven years a claimant should be barred from instituting an action.**
21. **Producers should be obliged to place only safe products on the market.**
22. **Producers should be under a duty to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use.**
23. **Criminal offences and penalties be prescribed for producers who place unsafe products on the market.**

BIBLIOGRAPHY

Domestic Legislation

1. The Constitution of the Republic of Uganda 1995. (as amended)
2. Adulteration of Produce Act, Cap 27.
3. Dairy Industry Act, Cap. 85.
4. Contract Act, No 7 of 2010.
5. National Bureau of Standards Act, Cap 327.
6. Penal Code Act, Cap. 120.
7. Public Health Act, Cap. 281.
8. Foods and Drugs Act, Cap. 278.
9. Public Health Act, Cap 281.
10. National Drug, Policy and Authority Act, Cap. 206.
11. Sale of Goods and Supply of Services Act, 2018.

International and Regional Instruments

1. The African Charter on Human and Peoples' Rights 1981(ACHPR)
2. The Universal Declaration of Human Rights 1948 United Nation (UNDHR)

Textbooks

1. David Owen, Product Liability Law, 3rd Ed (Hornbook Series), 2014.
2. Owen, D,et al. Product Liability Cases and Materials. 3rd Edn. New York, NY: Foundation Press, 1996.
3. GH Treitel, The Law of Contract, 9th edn, (1995) page 588
4. Geraint Howells, Stephen Weatherill; Consumer protection, 2nd edition Ashgate (2005)
5. CJ Miller and RS Goldberg , Product Liability, 2nd Edition, Oxford Press 2010

Journals, Reports and Articles

1. Zeti Zuryani Mohd Zakuan and Sakina Shaik Ahmed Yusoff, Liability of manufacturers for Goods under the Consumer Protection Act, 1999: a Paradigm Shift. Journal of Law, Policy and Globalization ISSN 2224 – 3240 (Paper) Vol. 11, 2013.
2. J. David Prince; Defective Products and Product Warranty Claims in Minnesota, 31 William Mitchell Law Review 1977 (2005) Available <http://www.larsonking.com>
3. The Law Commission and Scottish Law Reform, “Liability for defective products”(Law Com No. 82 Scot Law Com No. 45) June 1997 available at <https://www.scotlawcom.gov.uk/files>
4. David G. Epstein, Strict Liability in Tort: A modest Proposal. 70 W.Va.L.Rev. 1(1967)

5. Bivins, William P. Jr. (1978) "The Products Liability Crisis: Modest Proposals For Legislative Reform," Akron Law Review: Vol. 11 : Iss. 4 , Article 2.
6. James D. Pagliaro Brady L. Gree: Japan's 1995 Product Liability Law: Will the Adoption of Strict Liability Alter the Future of Litigation in Japan? Published in 9 International Quarterly 304 -19 (April 1997); Legal Mind 81-104 (January 1997)
7. Carla Skiek, " The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis" Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University. March 2017. available at <https://scholar.sun.ac.za>
8. Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) 51 *American Journal of Comparative Law*
9. O'Connell, An Alternative to Abandoning Tort Liability: Elective No fault Insurance for Many Kinds of Injuries, 60 MINN. L. REV. 501, 550 (1976).
10. David A. Fischer, Products Liability- Functionally Imposed Strict Liability, 32 Okla. L. Rev. 93 (1979).
11. Professor Wade Strict tort liability for manufactures 19 SW. LJ 5 15 (1996)
12. J. Wade Nature of Strict Tort Liability for Products 44 Miss L.J. 825
13. R Lowe & G Woodroffe, Consumer Law and Practice, 4th edition 1995.
14. Report of the Australia Royal Commission on Civil Liability and Compensation for Personal Injury expressed 1978 at Para 1203
15. Final Report, Interagency Taskforce on Product Liability VI-47 (1977)
16. Law Reform Commission of Hongkong, Report on Civil Liability for Unsafe Products, 1998
17. Peter Nash S wisher, Proposed Legislation: A (Second) Modest Proposal to Protect Virginia Consumers against Defective Products, 43 U.Rich. L. Rev. 19 (2008)
18. William Prosser, Handbook of the Law of Torts Treatise (1941) 1ST Edition West Publishing Company 1941.
19. The Law Commission Working Paper 64 and Scottish Law Reform Commission Memorandum 20 Liability for defective Products (1975).
20. David G. Owen, The Puzzel of Comment , 55 Hastings L.J 1377 (2004)
21. Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559,(1969).

22. Ellen Wertheimer, Unavoidably Unsafe Products: A Modest Proposal, 72 Chi.-Kent L. Rev. 189 (1996)
23. Thomas A. Cowan, Some Policy Bases of Products Liability, 17 STAN. L. REV. 1077, 1088-89 (1965).
24. CJ Miller and RS Goldberg, Product Liability, 2nd Ed Oxford University Press 2010
25. David G. Owen, Rethinking the Policies of Strict Products Liability 33 V and. L. Rev. 681 (1980)
26. Carla Skiek, " The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis" Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University. March 2017
27. Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 Chi.-Kent L. Rev. 129 (1996).
28. Law Commission of England and Wales; Law Com Rep No. 82 Liability for Defective Products.
29. Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) 51 American *Journal of Comparative Law* at 761
30. J.A. Henderson & A.D. Twerski, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992) 77 Cornell L. Rev.
31. J W Wade, 'On the Nature of Strict Liability of Products" 44 Miss LJ 825, 837 -8 (1973)
32. David G. Owen, The Puzzel of Comment j, 55 Hastings L.J 1377 (2004)
33. Boivin, Denis W. "Strict Products Liability Revisited." *Osgoode Hall Law Journal* 33.3 (1995):
34. O'Connell, An Alternative to Abandoning Tort Liability: Elective No fault Insurance for Many Kinds of Injuries, 60 MINN. L. REV. 501, 550
35. David A. Fischer, Products Liability- Functionally Imposed Strict Liability, 32 Okla. L. Rev. 93 (1979).
36. Professor Wade Strict tort liability for manufactures 19 SW. LJ 5 15 (1996)
37. J. Wade Nature of Strict Tort Liability for Products 44 Miss L.J. 825 at 837- 38 (1973)

38. Prosser and Keeton on Torts , 5th Edition, Hornbook (1984)
39. W. Kip Viscusi, Wading Through the Middle of the Risk Utility Analysis. The American University Law Review Volume 39: 573 [1990]
40. Gary Myers, Dean John Wade and the Law of Torts, 65 Miss. L.J. 29 (1995)
41. Larsen, Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis, 84 COLUM. L. REv. 2045, 2046 (1984)
42. Owen, Rethinking the Policies of Strict Products Liability, 33 VAND. L. REv. 681, 696(1980).
43. A report of the Secretary General: Liability for damage caused by products intended for or involved in International Trade. (A/CN:9/133) Year Book of United Nations Commission on International Trade Law, 1977 Volume 111
44. Howells Geraint, Comparative Product Liability, Dartmouth Publishing Company 1993
45. Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 563 (1969).
46. William L. Prosser, "Product Liability in Perspective" Gonzaga Law Review, Vol 5 (1970).
47. Ontario Law Reform Commission, Report on Products Liability
48. Carla Kriek, The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis . Dissertation presented for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University March 2017
49. P.M.K and W.J.S "Enforcing Waivers in Product Liability" Virginia Law Review Vol. 69 No. 6 of 1983
50. Albert Choi, Kathryn Spier, "Should Consumers be permitted to waive Products Liability? Product Safety, Private Contracts, and Adverse" September 2010.
51. United Nations Conference on Trade and Development; Manual on Consumer Protection" 2016 Edition

Internet resource

1. <http://nape.or.ug/index.php/publications/chemical-management/17-hazardous-consumer-products-on-uganda-market/file>

2. National Association of Professional Environmentalists (NAPE) Report on Hazardous Consumer Products on Ugandan Market available at www.nape.or.ug/index.php/publications
3. Background Paper 79 – 5 available at <https://www.leg.state.nv.us/Division/Research/Publications/>
4. <http://www.larsonking.com/files/Defective%20Products%20and%20Product%20Warranty%20Claims%20in%20Minnesota.pdf>
5. <http://aei.pitt.edu/4573/1/4573.pdf>

Newspaper Articles

Daily Monitor; NDA withdraws dangerous drugs; Friday 7th October 2016

LIABILITY FOR DEFECTIVE PRODUCTS BILL, 2019

Arrangement of Sections

Section

PART I—PRELIMINARY

1. Interpretation
2. Application

PART II—LIABILITY FOR DEFECTIVE PRODUCTS

3. Liability for defective products.
4. Persons liable for defective products
5. Liability for suppliers
6. Liability may be joint or severally
7. Meaning of “defect”
8. Proof of damage and defect
9. Limitation of actions
10. Defences to claims
11. Warning concerning fact and nature of risks
12. Prohibition on exclusion from liability

PART III—PROHIBITION OF FALSE TRADE DESCRIPTION

13. Prohibition of false trade description
14. False trade description
15. Applying a trade description to goods
16. False or misleading statement in advertisement
17. Presumption of liability on advertisers, etc.

THE LIABILITY FOR DEFECTIVE PRODUCTS BILL, 2019

A Bill for an Act ENTITLED LIABILITY FOR DEFECTIVE PRODUCTS BILL, 2019

An Act to impose strict liability for defective products, provide right of action for consumers who are injured by defective products, provide producers with defences to claims, offer protection to consumers and other matters incidental thereto or connected therewith.

BE IT ENACTED by Parliament as follows:

PART I—PRELIMINARY

1. Interpretation

In this Act, unless the context otherwise requires—

“**advertisement**” means every form of advertising whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication by the display of notices or by means of catalogues, price lists, circulars, labels, cards or other documents or materials or by the exhibition of films or of pictures or photographs, or by means of radio or television, or in any other way including through electronic means;

“**agricultural produce**” means any produce of the soil, of stock farming or of fisheries;

“**damage**” means death or personal injury, or any loss of or damage to any property, including land, as the case may require;

“**dependant**” has the same meaning as in the Civil Procedure Act

“**goods**” includes ship, aircrafts, vehicles, animals, plants and crops and all kinds of movable property;

“**injured person**” means a person who has suffered damage caused wholly or partly by a defect in a product or, if he has died, his personal representative or dependants.

“**personal injury**” includes any disease and any impairment of a person’s physical or mental condition;

“**manufacturer**” in relation to a product, means—

- (a) the manufacturer or producer of a finished product; or
- (b) a person who manufactured, processed, or imported the product in the course of trade;
- (c) the manufacturer or producer of any raw material or the manufacturer or producer of a component part of a product; or
- (d) in the case of the products of the soil, of stock-farming and of fisheries and game, which have undergone initial processing, the person who carried out such processing; or

- (e) any person who, by putting his name, trademark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product; or
- (f) any person who has imported the product into the country, in the course of any business of his or her, to supply it to another;

“product” means moveable product manufactured or processed and includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise.

“unsafe” 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.

2. Application

(1) This Act shall apply to all moveable products except primary agricultural products which have not undergone initial processing, and includes—

- (a) movables even though incorporated into another product or into an immovable, whether by virtue of being a component part or raw material or otherwise;
- (b) electricity where damage is caused as a result of a failure in the process of generation of electricity.

(2) For the purposes of this Act, a person who supplies any product in which other products are comprised therein, whether by virtue of being a component part, raw material or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised therein.

PART II—LIABILITY FOR DEFECTIVE PRODUCTS

3. Liability for defective products

A producer, importer, distributor or retailer of any products is liable for any harm, caused wholly or partly as a consequence of—

- (a) supplying any unsafe product;
- (b) a product failure, defect or hazard in any product; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods;
- (d) irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

4. Personas liable for defective products

Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage caused:

- (a) the producer of the product;

- (b) the person who, by putting his name on the product or using a trademark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; and
- (c) the person who has, in the course of his or her business, imported the product into Uganda in order to supply it to another person.

5. Liability for suppliers

(1) Notwithstanding section 3 where damage is caused wholly or partly by a defect in a product, the person who suffered the damage may within a reasonable period after the damage occurs request the supplier to identify any or all of the persons referred to in section 3 whether or not he or she is or they are still in existence.

(2) Where the supplier fails to comply with a request under subsection (1) within a reasonable time having regard to all the circumstances, the supplier shall be held liable for the loss or damage.

(3) For the purpose of subsection (1), it is immaterial whether the supplier supplied the defective product to —

- (a) the person who suffered the damage;
- (b) the producer of a product in which the defective product is comprised therein; or
- (c) any other person.

(4) This section shall not apply to a person in respect of any defect in agricultural produce if the only supply of the agricultural produce by the person to another person was at a time when the agricultural produce has not undergone any industrial process.

6. Liability may be joint or severally

Where two or more persons are liable under this Act for the same damage, their liability shall be joint and several.

7. Meaning of “defect”

- (1) A defect means—
 - (a) any material imperfection in the manufacture of the product or components, or in performance of a product, that renders the product less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
 - (b) any characteristic of the product or components that renders the product or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

(2) In determining what a person is generally entitled to expect in relation to a product, all relevant circumstances shall be taken into account including the—

- (a) manner in which, and the purposes for which, the product has been marketed;
- (b) presentation of the product;

- (c) use for which the product is reasonably expected to be put;
- (d) use of any mark in relation to the product;
- (e) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product;
- (f) time when the product was supplied or put into circulation by its producer to another person.

(3) Nothing in this section shall require a defect to be inferred from the mere fact that the safety of a product which is subsequently supplied is greater than the safety of the product in question.

(4) For the purposes of this section, "safety", in relation to a product, shall include—

- (a) safety with respect to products comprised therein;
- (b) safety in the context of risk of damage to property; and
- (c) safety in the context of risk of death or personal injury.

8. Proof of damage and defect

The onus shall be on the injured person concerned to prove the damage, the defect and the causal relationship between the defect and damage.

9. Limitation of actions

(1) An action for the recovery of damages under this Act shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

(2) A right of action under this Act shall be extinguished upon the expiration of the period of ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured person has in the meantime instituted proceedings against the producer.

10. Defences to claims

A manufacturer shall not be liable under this Act if he or she proves—

- (a) that he or she did not put the product into circulation; or
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that that defect came into being afterwards; or
- (c) that the product was neither manufactured by him or her for sale or any form of distribution for an economic purpose nor manufactured or distributed by him in the course of his business; or
- (d) that the defect concerned is due to compliance by the product with any requirement imposed by or under any enactment or any requirement of the law of the European Communities; or

- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of the manufacturer of a component or the producer of a raw material, that the defect is attributable entirely to the design of the product in which the component has been fitted or the raw material has been incorporated or to the instructions given by the manufacturer of the product;
- (g) 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.

11. Warning concerning fact and nature of risks

- (1) A manufacturer of any product that is subject to any—
 - (a) risk of an unusual character or nature;
 - (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
 - (c) risk that could result in serious injury or death;
 - (d) must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a reasonable manner.

(2) A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that provides the consumer with adequate instructions for the safe handling and use of those goods.

(3) Subsection (2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation.

12. Prohibition on exclusion from liability

The liability of a person under this Act to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant of such a person, shall not be limited or excluded by any contract term, notice or other provision.

PART III—PROHIBITION OF FALSE TRADE DESCRIPTION

13. Prohibition of false trade description

- (1) A person who—
 - (a) applies a false trade description to any goods;
 - (b) supplies or offers to supply any goods to which a false trade description is applied; or
 - (c) exposes for supply or has in his possession, custody or control for supply any goods to which a false trade description is applied,

commits an offence and shall, on conviction, be liable to a fine not exceeding or to imprisonment for a term ofyears or both.

(2) For purposes of this section, a trade description is an indication, whether direct or indirect and by any means given, of any of the following matters with respect to any goods or parts of goods—

- (a) nature or designation;
- (b) quantity, length, width, height, area, volume, capacity, weight, size or gauge;
- (c) method of manufacture, production, processing or reconditioning;
- (d) composition;
- (e) fitness for purpose, strength, performance, behaviour or accuracy;
- (f) the standard of fineness of articles made of precious metal;
- (g) any physical or technological characteristics not included in the preceding paragraphs;
- (h) date of expiration of the goods;
- (i) testing by any person and results thereof;
- (j) quality otherwise than as specified in the preceding paragraphs;
- (k) approval by any person or conformity with a type approved by any person;
- (l) place or date of manufacture, production, processing or reconditioning;
- (m) person who manufactured, produced, processed or reconditioned the goods.

14. False trade description

(1) A false trade description is a trade description which is false to a material degree.

(2) A trade description which, though not false, is misleading, that is to say, is likely to be taken for an indication of any of the matters specified in section 6 as would be false to a material degree, is deemed to be a false trade description.

(3) Anything which, though not a trade description, that is to say, is likely to be taken for an indication of any of the matters specified in section 13 (2) as would be false to a material degree, is deemed to be a false trade description.

(4) A false indication or anything likely to be taken as an indication which would be false, that any goods comply with a standard specified or recognised by any person or implied by the approval of any person is deemed to be a false trade description, if there is no such person or no standard so specified, recognised or implied.

15. Applying a trade description to goods.

(1) A person applies a trade description to goods if he or any person authorised by him—

- (a) affixes or annexes it to or in any manner marks it on or incorporates it with—
 - (i) the goods themselves; or
 - (ii) anything in, on or with which the goods are supplied;
- (b) places the goods in, on or with anything which the trade description has been affixed or annexed to, marked on or incorporated with, or places any such thing with the goods; or

- (c) uses the trade description in any manner likely to be taken as referring to the goods.

16. False or misleading statement in advertisement

(1) A person shall make any false or misleading statement in any advertisement in relation to any goods.

(2) A person who makes a false or misleading statement in any advertisement in relation to any goods commits an offence and shall on conviction be liable to

17. Presumption of liability on advertisers, etc.

The following persons shall, unless the contrary is proved, be deemed to have given a false or misleading statement in any advertisement:

- (a) the person who directly or indirectly offers to supply the goods or services;
- (b) the person on whose behalf the advertisement is made.