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Consumer's reliance on warranties: A comparative study of the United States of America & South Africa

Summary

This article investigates the concept of a warranty and the legal implications thereof in the United States of America and South Africa. In the USA, the introduction of the *Uniform Commercial Code* has helped to promote and protect consumer interests. However, in South Africa, no such machinery exists. The author has conducted empirical research involving manufacturers, sellers, consumers and legal experts. By virtue thereof it was concluded that where a seller does not profess to have skill and expert knowledge in respect of goods sold by him/her, he/she cannot be held responsible for implied warranties relating to these goods, especially regarding latent defects. Various solutions to the problems encountered by individuals, relating to the process of trade and the provision of services, are suggested.

Verbruikers se vertroue op waarborge: 'n Vergelykende studie van die Verenigde State van Amerika & Suid-Afrika

Hierdie artikel stel ondersoek in na die konsep van 'n waarborg en die regsimplikasies daarvan in die Verenigde State van Amerika en Suid-Afrika. In die VSA het die daarstelling van die *Uniform Commercial Code* gehelp om die belange van verbruikers te beskerm. In Suid-Afrika bestaan daar tans nie 'n soortgelyke meganisme nie. Met behulp van empiriese navorsing onder vervaardigers, handelaars, verbruikers en regsgeleerdes is bevind dat waar die handelaar nie oor kundigheid beskik of kennis dra van die artikels wat hy/sy verkoop nie, hy/sy nie verantwoordelik gehou kan word vir die stilswyende waarborge daaraan verbonde nie, veral nie ten opsigte van latente gebreke nie. Verskeie voorstelle ten opsigte van moontlike oplossings vir probleme wat individue in die koop en verkoop van produkte en dienste teëkom, word aan die hand gedoen.

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1. Introduction

1.1 The concept of warranty — Problem of definition

The concept of warranty is sometimes referred to as a statement or representation made by the seller of goods contemporaneously with, or as a part of the contract of sale, although collateral to the expressed object of it, having reference to the character, quality or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them.[1] Other people are of the view that warranty is in the nature of a covenant against failure of an article or goods for a specified purpose or for a certain specified reason.[2] This perspective or definition is not fully accepted for the fact that a "covenant" may be as difficult to define as a "warranty".

In some academic circles, a warranty has also been considered as an agreement to be responsible for all damages that arise from the falsity of a statement or assurance of fact.[3] As far as I am concerned, this is too broad, for there are limitations on the damages that may be recovered for breach of warranty. However, inherent in all these definitions is an undertaking by the seller to stand behind the quality and fitness of his product, and to be responsible for damages that occur if the product fails to measure up to the qualities that it is expressly or impliedly represented to possess.

Having analyzed briefly the concept of warranty, an attempt will be made in this article to consider consumer's reliance on the concept in both the United States of America and South Africa. In the USA we shall examine the *Uniform Commercial Code*, which has been adopted by every state except Louisiana. The differences between express warranty and implied warranty will be illustrated by showing their main characteristics.

2. Express warranties by affirmative, promise, description, sample

In the United States of America, express warranties by sellers are created as follows:

(a) Any affirmation or promise made by the seller to buyer who relates goods and become part of this basis of the bargain creates an express warranty that the goods shall conform to the affirmation and promise.

(b) Any description of the goods, which is made part of the basis of the bargain, creates an express warranty that the goods shall conform to the description.

1 Kimble and Lesher 1972:22.
2 *Barton v Davis* 1972 Mo 226-285:SW 988.
3 *Gay Oil Co. v Roach* 1910 93 Ark 454:125 SW 122.

(c) Any sample or model, which is made part of the basis of the bargain, creates an express warranty that the whole of the goods shall conform to the sample or model.[4]

An affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods, however, does not create an express warranty. Thus, the automobile or appliances salesman, the used car dealer, and the house wares huckster are left with substantial areas of operation without running afoul of the *Uniform Commercial Code*. However, puffing in the USA still remains a legitimate part of their free enterprise system, on the theory that the buyer should recognize the salesman's effort to present his product in the best possible light, so long as there are not actual misstatement of facts. Thus, the modest statement that a product was "as good as anyone else's"[5] or was "wonderful"[6] or would "last a lifetime"[7], or was "foolproof" have been held in USA courts as mere expressions of opinion, or "puffing" and not to create an express warranty.

Generally speaking, from my own personal experience, it is difficult to distinguish between a statement of opinion and a statement of fact. The test of whether a representation is a warranty or a mere opinion has been stated to be whether the seller assumes to assert a fact of which the buyer was ignorant, or merely expresses a judgement as to which both the seller and the buyer might be expected to have an opinion.[8] This too, as an abstract test, appears to be of limited value. There are those individuals, for example, endowed with a profound ignorance of mechanical matters, and to be told that a catalytic converter, a pocket computer, or a power workshop for the basement is wonderful, or will last a lifetime, or is as good as anyone else's or particularly, that it is foolproof, has a reassuring quality, in an area where we in fact have no opinion of our own.

Generally, whether a statement is an expression of opinion or a warranty is a question of fact for the judges. However, if the court determines that the statements are so clearly an expression of opinion rather than fact, or conversely, that they are clearly warranties, it may withdraw that issue from court consideration and find a warrant or an absence of warranty as a matter of law.

3. Implied warranties

In the United States of America, in the section of implied warranties, the law may imply certain warranties, depending upon the circumstances of the sale. The most common of these is the implied warranty of merchantability.[9]

4 *Uniform Commercial Code* (USA) 1970:sec 2-313.
5 *Silverman v Samuel Mallinger Co* 1954 374 Pa 422 100 A 2d 715.
6 *Jacquet v Wm Fileneís sons Co* 1958 337 Mess. 312 14g N E 2d 635.
7 *Lambert v Sistrunk* 1952 58 So.2d 434.
8 *General Supply and Equi Co v Phillips* 1973 490 Tex SW 2d 913.
9 See details in the *Uniform Commercial Code*: sec 2-314.

The *Uniform Commercial Code* shows clearly that, unless excluded or modified a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to the goods sold. A "merchant" is a person who regularly deals in goods of the kind, or by his occupation holds himself out as having knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skills.[10]

This definition excludes the occasional seller, such as the individual who sells his used car; the family that conduct a "garage sale", or the housewife who offers her cake to the church raffle. Although the *Uniform Commercial Code* speaks of a "professional status as to the particular kinds of goods"[11], this does not require any special knowledge or training, so long as the seller deals, in the course of his business, with goods of that kind, or otherwise holds himself out as possessing special skill or knowledge with respect of such goods.

The *Uniform Commercial Code* establishes the terms of such an implied warranty:

"Goods to be merchantable must be at least such

(a) as pass without objection in the trade under the contract description;

(b) in the case of fungible (interchangeable) goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the sales agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label, if any".[12]

In terms of fitness, if at the time the sale is made, the seller has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgement to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose.[13] This is the implied warranty of fitness. It differs from the implied warranty of merchantability in several respects, although the same transaction may give rise to both warranties. The implied warranty of merchantability arises out of the sale itself, it is not necessary for the buyer to show reliance on any express representations by the seller, although when the buyer has examined the goods as fully as he defines before entering into the contract of sale, or has refused to examine

10 Sec 2-104.
11 Sec 2-104.
12 Sec 2-314.
13 Sec 2-315.

the goods, there is no implied warranty with regard to defects which an examination ought to have revealed to him.

Although the implied warranty of fitness arises from sale, the buyer must show that the seller knew, or had reason to know of any particular purpose for which the goods were to be used, and must also show that he relied upon the seller's skill or judgement in selecting goods that were suitable for this particular purpose.

4. Warranty and the burden of proof in the USA

At this juncture, it might interest us to know on who the onus of proof lies first. Recovery for breach of warranty is not dependent upon a showing of negligence on the part of the seller.[14] Today, in the USA it is a strict liability but a strict warranty, not a delictual liability. Therefore, if it can be shown that the seller warranted his product, that such warranty was breached, and that damage resulted and if the plaintiff can show that he is within the class of persons to whom the warranty runs, he is entitled to recover, regardless of the fact that the seller has exercised reasonable care in the production or sale of his product, or exercised the utmost possible care. It is ordinarily immaterial in an action for breach of warranty that the seller did not know, or did not have reason to know, of the condition of the product that resulted in the breach of warranty; it is ordinarily immaterial that the condition was in fact unknowable. Accordingly, an action for breach of warranty has an obvious advantage to the plaintiff over an action for negligence, because it relieves him of the burden of proving a lack of reasonable care in the design, manufacturing or marketing process.

In the USA, a plaintiff seeking to recover under a breach of warranty is faced with certain problems of proof that are not present in a negligence action. For example in an action for breach of an express warranty, the plaintiff must show that such warranty actually existed and that it was breached. In an action for breach of an implied warranty of fitness, he must show that the seller knew, or had reason to know of the particular purpose for which the goods were required, and that the buyer relied on the seller's skill and judgement to select or furnish suitable goods. In an action for breach of an implied warranty of merchantability, the plaintiff must show that the seller was a merchant with respect of such goods.

Furthermore, the plaintiff is also required to give timely notice of the breach of warranty, and his failure to do so may preclude him from later maintaining an action.[15] What constitutes timely notice is ordinarily a question

14 In the USA today, those cases which have indicated that contributory negligence is a defense to an action for breach of warranty frequently involve fact situations in which the issue is more properly one of causation. See for example *Pepsi Cola Co v Superior Burner Services Co* 1967 427 p 2d 833.

15 See the *Uniform Commercial Code*: sec 2 - 607(3)(a): Where a tender has been accepted the buyer must within reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy.

of fact, although if there is an extraordinary long period between the time the buyer knows, or has reason to know of the breach, and the notice, the court may rule as a matter of law that the notice is untimely.[16] It is also expected of the plaintiff to show that he is either the beneficiary or a third party beneficiary of the warranty. This particular problem has been identified as one of the greatest obstacles to recovery under a warranty theory in the USA.

5. South African consumers and the issue of warranty

Unfortunately, South Africa does not have a comprehensive machinery like the American *Uniform Commercial Code* and the English *Sale of Goods Act*, both of which protect the interests of the consumers. In South Africa, the provinces have adopted consumer protection legislation and consumer protectors have been appointed. For example, in the Eastern Cape, the *Consumer Affairs Act* has been enacted.[17] The purpose of this Act is to help in the investigation, prohibition and control of unfair business practices as it affects consumers.

This Act also states clearly the functions of the consumer protectors and the procedure to be used in protecting consumers in terms of lodging complaints and the investigation process.[18]

The functions of the office of the consumer protector include among others-

(1) to receive and investigate complaints of alleged unfair business practices which have been lodged with the office in terms of the Act.

(2) perform the other functions assigned to it by or under the Act.

(3) the office shall as soon as practicable after 31st December in each year submit

(4) to the MEC a report on its functions during the year ending on that date.

In the Western Cape, similar consumer protection legislation has been enacted and consumer protectors have been appointed.[19] The reason for establishing this legislation is to protect consumers who have been exposed to unscrupulous business practices that the common law does not provide adequate protection against. The functions of the consumer protector and the procedure to be used in protecting consumers are well spelt out in the particular Act.

The problem with the consumer protection legislation in the various provinces in South Africa is that the legislation is not codified into one document and controlled by one body as it is in America and the English *Sale of Goods Act*. In view of this, consumers find it difficult to understand

16 *Truesdale v Friedman* 1965 270 Minn 109 NW 2d 854.
17 Act 5 of 1998.
18 Sec 5(1)(2).
19 *Western Cape Consumer Affairs Act* 200 2.

the limits of their protection as they move from one province to another. There is an urgent need to codify consumer protection legislation into one legal document which should be controlled by one body. However, this problem notwithstanding, we shall analyze the views of our courts and the public on the validity and reliability of the concept of warranty. In South Africa today, consumers are allowed to sue for breach of contract. A breach of an express warranty helps the injured person to cancel the contract and recover any consequential damages that ought to have been contemplated by the parties. In the case of *Marais v Commercial General Agency Ltd*,[20] the facts show clearly how our courts had interpreted the concept of warranty. In this case the appellant, a farmer, sued the respondents, who were seed and produce merchants, for *£147 145 6d* damages under the following circumstances. In May 1921, he purchased from the defendants six bags of Gluyas seed wheat, which is a well known and highly rust resistant variety of wheat. He sowed the wheat delivered believing it to be Gluyas, but after it had grown up he discovered that it was not Gluyas but another variety of wheat which was not rust resistant. The crop became infected with rust and the plaintiff only reaped 66 bags of wheat instead of 191 bags, which he would have reaped had he sown Gluyas wheat. The defendants pleaded that they sold the seed under the express warranty that they would not be responsible in any way for the crop, as they did not guarantee the description, quality or productiveness of the seed supplied. Alternatively, they pleaded that the plaintiff accepted and sowed the wheat after he knew or should have known that it was not as ordered. The magistrate found that the defendants had not supplied Gluyas wheat but that the mistake was not due to negligence as it was not an easy matter to distinguish one form of wheat from another. He held that there was a latent defect in the wheat supplied but that the defendants were not liable for the damages as claimed, in as much as it could not have been contemplated that the defendants would be liable for the failure of the plaintiff's crop owing to an honest mistake in supplying a few bags of seed. He accordingly gave absolution from the instance with cost.

The plaintiff appealed on the following grounds:

(1) that the defendants were expert seed merchants and were in the same position as artificers;

(2) that the delivery of an inferior wheat was tantamount to fraud and rendered the defendants liable in the damages as claimed; and

(3) that at the time of sale the defendants warranted the seed sold as being Gluyas wheat seed whereas, in fact, they knew, or should have known, that it was not such.

However, Mason J, after considering the decisions made in *Erasmus v Russell's Executors*,[21] *Randall and others v Roper*[22] and a host of other cases, he argued that similar cases in English law show quite clearly that the loss

20 *Marais v Commercial General Agency Ltd* 1922 TPD 440.
21 1904 TS 365:375.
22 27 LJQB 266.

in value of crops due to the different character of seeds is a proper estimate of the damage sustained from failure to supply the seeds contracted for. That is in accordance with the case of *Randall v Roper*,[23] which is cited in and supported by very many cases and really appeals to one's common sense. The ordinary law of contract is that if a man breaks his contract he must pay the damages naturally and directly resulting therefrom. Here the plaintiff bargained for Gluyes wheat. The defendants failed to supply it. The natural and direct result of that was a loss of £147 175.6d. Therefore, the decision of the magistrate in favour of the defendant is reversed and judgement entered for the plaintiff for £147 175.6d, with costs in both courts.

In the case of a manufacturer, he may expressly guarantee that a product is free from any defect that renders it unfit for the purpose for which it is sold, and any failure to meet the warranty will result in consequential damages. Where, however, purchasers buy products that they know suffer from patent or latent defects, they may not be able to recover damages arising from such defects. However, in such cases knowledge of the defects would presumably have affected the price paid, unless other representations were made or warranties given which otherwise influenced the purchaser.[24]

Generally, it has been held by South African courts that if during the process of negotiation between seller and buyer, if the seller makes a *dictum et promissum* about the quality of the thing sold and it fails to measure up to that quality, the *aedilition* remedy is available as an alternative.[25]

A buyer wishing to sue a seller for harm caused by a defective product arising from a breach of an express warranty in South Africa would have to prove:

(a) that the product was purchased from the seller;

(b) that the sale was subject to an express warranty;

(c) that the express warranty stated that the product would be fit for the purpose for which it was sold;

(d) that the nature of the defect in the product constituted a breach of the express warranty; and

(e) that as a result of the breach of the express warranty the harm caused by the defective product was within the contemplation of the parties.

6. Breach of implied warranty

There is a general belief among the public in South Africa that a breach of the implied warranty against latent defects will enable a consumer purchaser to use the *aedilitian* remedies, without proving fault, to obtain a reduction of the purchase price or cancellation of the contract and return of the purchase

23 27 LJQB 266.
24 McQuoid-Mason *et al* 1997:80.
25 *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 A:417.

price. The ability of the buyer to recover consequential damages for defective products will of course depend on the status of the seller. In two situations the purchaser may claim consequential damages for injury caused by a product with a hidden defect without proving fault on the part of the seller. This is in a situation where the seller confidently and publicly professes skill and expert knowledge and where the seller is a manufacturer. In all other cases the purchaser will have to prove fault on the part of the seller.

7. Is strict liability where seller professes skill and expert knowledge possible?

To answer this question is not a simple task because in a situation where the seller is a merchant who "publicly professes to have skill and expert knowledge in relation to the kind of goods sold", a consumer is entitled to sue under the *actio ex empto* to recover consequential damages for any injuries suffered as a result of a latent defect in the product without proving fault.[26]

In South Africa, the concept of the retailer or "merchant seller" who possesses "skill and expert knowledge" has created a number of problems in determining whether sellers will be liable for damage caused by defective products sold by them.

Unfortunately the popular *Kroonstad* case does not provide any guideline for determining who has such skill and expert knowledge: whether a seller falls within the category mentioned will be a question of fact and degree, to be decided from all the circumstances of the case. For example, in a situation where a general dealer offers a wide variety of goods for sale he or she presumably does not profess to have skill and expert knowledge of the goods. In the same vein, what happens in the case of a shopkeeper who deals in a variety of items of which he has no idea with regards to the composition of the different products he is selling. Is it possible for us to regard such shopkeeper as a person possessing skill and expert knowledge concerning the items or goods he is selling? These problems will be empirically investigated in this article.

However, before considering this empirical investigation, let us examine how South African courts in recent times have considered the liability of merchant sellers and manufacturers where goods sold are defective.

In the case of *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*,[27] it was shown that a merchant seller who professed to have attributes of skill and expert knowledge of the goods sold or delivered, can be held responsible for latent defects in these goods. In this case the appellant was a processor and cannier of fruits and vegetables that were purchased in unprocessed form from producers (growers). The appellant himself prescribed to the producers the type of fruits and vegetables to be produced,

26 *Kroonstad Westelike Boere Ko-op Vereniging v Botha* 1964 3 SA 566 A:571.
27 *1*996 2 SA 565 A.

and prescribed the type of seed to be used. The appellant supplied the seed which had to be planted with the hope that the appellant would purchase the unprocessed produce from the producers once the plants had matured. Unfortunately, the producer's (respondent) crop failed due to a latent defect in the seed supplied by the appellant. In view of this, the respondent sued the appellant for consequential damages. In an appeal the parties were *ad idem* (based on *Kroonstad* case) that the liability of the appellant for consequential loss resulting from a latent defect of which he was unaware depends on whether the appellant was a merchant seller and whether he professed to have attributes or skill and expert knowledge in relation to the goods sold. The court held that the mere fact that the appellant's trade in seed was limited to the sale of seed to producers and not to the general public, clearly did not deprive the appellant of the status of a merchant trader for the purpose of the determination of its liability for consequential damages. The court further argued that the appellant's conduct from all indications created the impression that he had the expertise and therefore the judgement of the Court *a quo* was upheld. The appeal was therefore dismissed.

Another important case is that of *Ciba Geigy v Lushof Farms*.[28] In this case Lushof Farms sued a merchant dealer (Van Staden) from whom Lushof bought some herbicide which destroyed their crops instead of destroying the weeds. Ciba Geigy was the manufacturer of the herbicide which was sold to Lushof by Van Staden. Lushof sued the seller and the manufacturer of the herbicide for the damage done to his crops. The manufacturer claimed indemnity because he never directly dealt with Lushof, the buyer, and secondly because the manufacturer had signed an agreement with the seller (Van Staden) that the seller shall have no claim whatsoever against the manufacturer (Ciba) arising out of or in connection with any information or advice given by the seller(distributor), his employees or servants to a customer contrary to the specifications of the products or the provisions of said agreement. The court held that although there is no direct relationship between the buyer and the manufacturer, the manufacturer is liable for his negligence in the production of the herbicide that destroyed the crops of the buyer in which the manufacturer professed to have expert knowledge. The seller was held liable only for breach of the contract which existed between himself and the buyer. The court argued that the seller never professed to have expert knowledge about the herbicide and because of that, the buyer could not institute a delictual action against the seller for damage caused to the crop. The manufacturer was found by the court to be responsible for the damage caused to the crop by the herbicide. Both the seller (distributor) and the manufacturer had to compensate the buyer (farmer).

The research work of Lötz and Van der Nest highlights the fact that a claim based on latent defects is often very problematic.[29] They argue that when instituting an action for damages based on a latent defect, an attempt should always be made to balance the liability in such a way that the seller and the buyer bear the responsibility to the extent in which each of the

28 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 2 SA 447 SCA.
29 Lötz and Van der Nest 2001:219-246.

parties is responsible. Lötz and Van der Nest emphasize the general rules dealing with defects by paying particular attention to the case of *Erasmus v Russell's Executors* where the court ruled that the seller is responsible for damages if he was aware of the defects of the goods sold. In the situation where a manufacturer sells his product and professes expert knowledge, he is liable for the defects.

Lötz and Van der Nest buttressed the fact that there is no uniformity in the interpretation of the common law perspective in terms of latent defects in the sale of goods in South Africa. They argue further that the common law cannot help to solve the current problems associated with defects in the sale of goods. As society advances in technology the application of common law perspectives becomes more difficult. In view of this, they suggest that there is an urgent need for legislative reform that would address the problem of latent defects in the sale of goods. Because of the difficulties experienced with the present common law-based test for liability for defects in the sale of goods, Lötz and Van der Nest recommend legislative reform to deal with present and future problems pertaining to the matter.

8. Empirical investigation

In this article, an attempt is made to investigate public opinion among manufacturers, retailers, consumers and legal experts on whether or not in an implied warranty for the sale of defective products, a retailer who does not profess skill and expert knowledge of the product should be strictly liable. To investigate this, the following research methodology was applied:

8.1 Research methodology

To investigate the above-mentioned problem and other issues on implied warranty, we interviewed sixty respondents in the following clusters; manufacturers: 15, retailers (sellers): 15, consumers: 15 and legal experts: 15.

A purposive sampling technique was used in selecting the above-mentioned respondents in the KwaZulu-Natal province of South Africa. Both open- and close-ended questionnaires were used to solicit the necessary information from the respondents. In addition to the use of the questionnaire, oral interviews were used where necessary and the information collected was carefully recorded.

8.2 Research findings:

Nature of Response			
Respondents	Yes, retailers must be strictly liable	No, retailers cannot be strictly liable	Total
Manufacturers	2	13	15
Retailers	-	15	15
Consumers	5	10	15
Legal Experts	3	12	15
Total	10	50	60

Table 1.1 Retailers and strict liability for defective products

From the above table 1.1 it can be seen that out of the sixty respondents interviewed on whether or not retailers can be strictly liable for selling defective products or goods in which they do not profess skill and expert knowledge, fifty of the respondents were of the view that retailers cannot be strictly liable. Only ten of the respondents were of the view that retailers can be strictly liable. The majority of the respondents was of the view that retailers cannot be strictly liable. This investigation agrees with what happens in the United States of America where government policy holds that retailers cannot be strictly liable for the defect in any products or goods where the retailers do not profess skill or expert knowledge of the products they are selling. These research findings agree with section 2-314 of the American *Uniform Commercial Code* which excludes the occasional seller, such as the individual who sells his used car; the family that conducts a "garage sale" or the housewife who offers her cake to the church raffle and who does not profess skill and expert knowledge of the product.[30] The Japanese consumer policy also excludes strict liability of retailers for defective products in which they do not profess skills or expert knowledge.[31]

It was also investigated whether or not strict liability of a retailer who does not profess skill and expert knowledge of the products affects his/her daily performance in terms of profit maximization.

To investigate this problem, chi-square (x2) statistical tools were used.

The hypothesis to be investigated is as follows: Strict liability of a retailer for selling defective products where he/she does not profess skill or expert knowledge affects his/her daily performance.

H0: Strict liability of a retailer for selling defective products does not affect the daily performance in terms of profit maximization.

H1: Strict liability of a retailer for selling defective products does affect the daily performance in terms of profit maximization.

30 See paragraph 3 above.

31 http://www.epa.go.jple-eldocle 1996 Ca 2 html.

Response	Respondents				
	Manufacturers	Retailers	Consumers	Legal Experts	Total
Yes, strict liability will affect retailer's daily performance	13 (11.5)	14 (3.5)	7 (11.5)	12 (3.5)	46
No, strict liability will not affect retailer's daily performance	2 (11.5)	1 (3.5)	8 (11.5)	3 (3.5)	14
Total	15	15	15	15	60

Table 1.2 The effects of strict liability on retailers for profit maximization.

Observed x2	=	66
Df	=	3
Critical value at 0.001	=	16.268
Since x2	=	66 and is greater than the critical value of 16.260 at a level of significance of 0.001, we reject the Null (H0) hypothesis and accept the alternative (H1) hypothesis.

This research therefore confirms that strict liability on the part of the retailers in terms of defective products in which they have not profess skill or knowledge will surely affect their daily performance with regards to their profits.

The legal implication of this research finding is that our magistrates and judges should not hold retailers liable for selling defective products in which they have not profess skills or expert knowledge. Any attempt to hold retailers liable for defective products for which they have not profess skill or expert knowledge is likely to eliminate large numbers of retailers in the chain distribution of goods and services. It is highly recommended to our judicial officials that all products sold by a retailer in the above circumstance should be considered as been sold *voetstoots* (as it stands).

Our submission in light of the above research findings is that any situation where a retailer does not profess skill or expert knowledge of the goods he or she is selling should be considered in the perspective of an exclusion of all implied warranties, which excludes remedies for latent defects. A case in point here is *Greyling v Fick*[32] where Fick sold Greyling a

32 1969 3 SA 579 T.

secondhand bulldozer with a ripper in terms of a written hire-purchase contract. Clause 12(ii) of the contract contained a provision wherein Greyling as purchaser acknowledged that the seller gave no warranty in respect of the condition, order or quality of the goods sold or in respect of their suitability for any purpose and that any implied warranty was expressly excluded.[33] On being sued for the purchase price by Greyling, Fick alleged that he was in law not compelled to make any payments because the goods sold suffered from serious latent defects. A magistrate ordered summary judgment against Greyling because in the express exclusion of all implied warranties in clause 12(ii), the implied warranty against latent defects was also excluded. Greyling appealed. In dismissing the appeal it was held by the then Transvaal Provincial Division that the words used by the parties, namely "any implied warranty", had excluded any remedy in connection with latent defects. Boshoff J said:

> The clause deals with warranties and is concluded in such wide terms that it envisages the exclusion of all warranties, express or implied. There is nothing in the clause that limits implied warranties to those with a factual origin. In fact it refers to any implied warranty. It is of course correct that the remedy which a purchaser has in respect of latent defects which affect the usefulness or suitability of the purchased article is a natural result of contract of sale, but for many years now it has been accepted by the courts and that it is based in essence on an implied warranty which is inserted by law.[34]

It is highly recommended that retailers who never profess skill or knowledge of what they are selling should be treated in the same way against any defect in their goods.

The other perspective in South Africa where the approach requiring proof of skill and expert knowledge give rise to several further problems include among others:

(a) where the goods are in sealed containers;

(b) where the goods are branded;

(c) where the goods carry the seller's own brand;

(d) where the final preparation is done by the seller;

(e) where consumers rely on their own skill and judgement;

(f) where the seller is a departmental store and lastly in insurance business transactions. An attempt will not be made to take a critique of the above perspectives because that is not the main focus of this article.

33 Volpe 1986:136.
34 At 580 G-H.

9. Conclusion and recommendation

Having discussed the concept of warranty as interpreted in the USA and South Africa, it can be argued that much needs to be done in South Africa to protect the interests of consumers as they are protected in the USA. In the USA, the *Uniform Commercial Code*, which is clearly understood by the jury, the manufacturers and the buyers, has helped a lot to protect the interests of the above parties. There is an urgent need in South Africa to have a Uniform Commercial Code that would also help to protect the interests of the various role players in the economy. It is also strongly recommended that South African law, apart from establishing a Uniform Commercial Code, should also follow the English *Sale of Goods Act* which allows a consumer to recover not only the purchase price or a reduction thereof, but also consequential damages from a retailer who sells defective goods.

In addition to this, it is also not fair to expect South African consumers to prove fault on the part of general dealers if they wish to recover consequential damages arising from a defective product in those cases where the seller is not a manufacturer or a merchant who professes skill and expert knowledge in respect of the goods sold. According to McQuoid-Mason, it is often difficult to prove fault on the part of a general dealer, particularly if the consumer is not aware of modern retailing practices. In view of this, McQuoid-Mason is of the opinion that it seems fair that the retailer should carry the risk because he is able to recover any damages from the manufacturer simply because he is in a better bargaining position than the consumers as regards recovery from the manufacturer. Unfortunately, I do not agree with McQuoid-Mason's suggestion, the reasons being the following:

(1) In the first place, it will not be easy for the retailers to recover such loss from the manufacturers because of the bureaucratic processes that will be involved.

(2) Secondly, the manufacturer will not be willing to pay out such money for what they have already considered as profits and paid out as dividends to the shareholders in large companies.

The shareholders will not be willing to return their dividends. In view of this problem and complexities involved, it is suggested that the South African government should establish a special fund similar to the present Road Accident Fund (RAF) from which consumers affected can claim back the cost of such defective goods. This special fund should be funded by an amount collected from value-added tax (VAT), just as the RAF is funded by the sale of petroleum to consumers. The establishment of the special fund will minimize the problems encountered by consumers, retailers and manufacturers with defective goods. Such fund can be referred to as the Consumer Protection Fund (CPF). This will make claiming easier for the affected party.

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