IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 32/2002

In the matter between

ANNA ELIZABETH JACOMINA WAGENER
Appellant

and

PHARMACARE LTD
Respondent

CASE NO 7001/2000

and in the matter between:

RITA ELIZABETH CUTTINGS
Appellant

and

PHARMACARE LTD
Respondent

CORAM: **HOWIE P, MARAIS, CONRADIE, CLOETE JJA et JONES AJA**

Date Heard: 7 March 2003

Delivered: 28 March 2003

Summary: Product liability: whether manufacturer strictly liable in delict for harm caused by defective manufacture.

J U D G M E N T

HOWIE P

HOWIE P

[1] This matter concerns the extent to which a manufacturer can be strictly liable in delict for unintended harm caused by defective manufacture of a product where there is no contractual privity between the manufacturer and the injured person.

[2] The appellant in the first appeal underwent shoulder surgery at a private hospital conducted by a trust. The surgical procedure involved administration of a local anaesthetic called Regibloc Injection ('Regibloc') which was manufactured and marketed by the respondent company. As an aftermath of the surgery the appellant was left with necrosis of the tissues and nerves underlying the site of the operation, and paralysis of the right arm.

[3] In an action for damages for personal injury which the appellant instituted in the Cape Town High Court, she sued the respondent and the trustees of the trust. She alleged, among other things, that her injury and its *sequelae* were caused by Regibloc. A virtually identical suit was brought by the appellant in the second appeal, another alleged victim of Regibloc. The two actions were consolidated. For present purposes what is decided in respect of the first appeal applies to the other, and is confined to the

respective claims against the respondent. I shall simply refer, for convenience, to the parties in the first appeal. There are frequent references in the record to the respondent as manufacturer, seller and/or distributor but it is sufficient, in the judgment, to refer to manufacture because it is the respondent's role as manufacturer that is crucial.

[4] As was to be expected, one of the causes of action the appellant relied on was that the Regibloc administered to her was defective as a result of negligent manufacture by the respondent. However that was only pleaded in the alternative. Her main claim was based simply on the allegation that, contrary to the respondent's duty as manufacturer (obviously meaning legal duty in the delictual sense) the Regibloc administered was unsafe for use as a local anaesthetic because it resulted in the necrosis and paralysis referred to.

[5] The respondent excepted to the main claim as disclosing no cause of action in that it failed to allege fault in the manufacture of the Regibloc in question and purported to contend that as manufacturer the respondent was subject to strict liability for the alleged injurious consequences.

[6] The exception was argued before Fourie AJ. He upheld it but granted leave to appeal.

[7] In deciding the issues raised by the appeal it must be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent's control, that it was administered in accordance with the respondent's accompanying

instructions, that it was its defective condition which caused the alleged harm and that such harm was reasonably foreseeable. It must also be accepted, as far as the law is concerned, indeed it was not disputed, firstly, that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured Regibloc being administered to the first appellant and, secondly, that that duty was breached. In the situation pleaded there would therefore clearly have been unlawful conduct on the part of the respondent: *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*[1]. The essential enquiry is whether liability attaches even if the breach occurred without fault on the respondent's part.

[8] At the outset it is appropriate to say that the subject of product liability has over recent years been informed and illuminated in South Africa by legal textbooks as well as academic and journal writings which have all appreciably assisted in shaping and determining the debate on the present issue[2]. In this Court that debate centred on rival submissions which may briefly be summarised as follows.

[9] For the appellants it was argued that for a variety of reasons the common law remedy by which to protect and enforce the appellants'

[1] 2002 (2) SA 447 (SCA)

[2] The following list is not exhaustive. In the main, see: JC van der Walt 'Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk' (1972) 35 THRHR 244 and '*Risiko Aanspreeklikheid Uit Onregmatige Daad*' (doctoral thesis 1974); FJ de Jager '*Die Deliktuele Aanspreeklikheid van die Vervaardiger Teenoor die Verbruiker vir Skade Veroorsaak deur middel van 'n Defekte Produk'* (doctoral thesis 1977) and '*Die grondslae van produkte-aanspreeklikheid ex delicto in die Suid-Afrikaanse reg'* (1978) 41 THRHR 354; Neethling, Potgieter and Visser, '*The Law of Delict'* , 4th ed, 322-6; D McQuoid-Mason, *Consumer Law in South Africa;* S van der Merwe en FJ de Jager *'Products Liability: A Recent Unreported Case'* (1992) 109 SALJ 83; Jean Davids '*The Protection of Consumers'* (1966) 83 SALJ 87; J Neethling and JM Potgieter '*Die Hoogste Hof van Appèl laat die deur oop vir strikte vervaardigersaanspreeklikheid'*, 2002-3 TSAR 582 (a commentary on the Ciba-Geigy case).

constitutional right to bodily integrity[3], namely, the Aquilian action for damages, was inadequate to achieve those ends. In terms of the Constitution, so it was said, the Court was therefore obliged, in weighing and balancing the conflicting interests of consumers and manufacturers, to develop the common law by having recourse to the spirit, purport and objects of the Bill of Rights in order to 'fashion a remedy' that did achieve the requisite protection[4]. South African law, the argument went on, had already attached strict liability for consequential damages arising out of defective merchandise to a merchant seller who professes expert knowledge in relation to such goods (*Kroonstad Westelike Boere Ko-operatiewe Vereniging, Bpk v Botha*[5] — I shall call it the '*Kroonstad* case') and it required no more than a decision of legal policy, and a modest shift of principle, to extend such liability to a manufacturer in the circumstances of the present matter. It was pointed out, in addition, that in a more recent decision of this Court the question had been posed whether the law in this country in the field of product liability might not in any event have been 'perceived to have lagged behind'[6]. It was emphasised that there are instances of strict liability which are well known to the law of delict, for example, the pauperien action, the *actio de effusis vel dejectis* and the action based on unlawful deprivation of personal freedom. Apart from these survivors from the past there are, the submission continued, well-founded present day reasons of expediency, commercial equity and public protection which have influenced the developers of the law in comparable jurisdictions to impose strict liability on manufacturers in situations like the one in this case. In elaboration of this submission much reliance was placed on the legal position in the United States of America and in particular the provisions of section 402A of the American Law Institute's *Restatement of the Law (Second) Torts 2d*[7] and cases such as *Greenman v Yuba Power Products Inc*[8].

[10] One of the major reasons, according to the appellants' argument, why proof of fault should not be a requirement in a case such as this is that fault is most often extremely difficult to prove. A plaintiff has no knowledge of, or access to, the manufacturing process either to determine its workings generally or, more particularly, to establish negligence in relation to the making of the item or substance which has apparently caused the injury

[3] See s 12(2) of the Constitution (The Constitution of the Republic of South Africa Act 108 of 1996).

[4] See ss 8(3) and 39(2) of the Constitution.

[5] 1964 (3) SA 561 (AD)

[6] *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (AD) at 572 H-I

[7] Ch 14, 347.

[8] 59 Cal 2nd 57

complained of. And, contrary to what some writers suggest, it was urged that it is insufficient to overcome the problem that the fact of the injury, consequent upon use of the product as prescribed or directed, brings the maxim *res ipsa loquitur* into play and casts on the defendant a duty to lead evidence or risk having judgment given against it. The submission is that resort to the maxim is but a hypocritical ruse to justify (unwarranted) adherence to the fault requirement.

[11] Reverting to the *Kroonstad* case, it was contended that it was anomalous that where the injured party was the buyer, and the seller was not even the manufacturer, strict liability applied, whereas in the absence of a contractual relationship between the parties fault had to be proved. Accordingly, so the appellant's argument concluded, the time was now ripe to impose strict liability and it was the courts that were in the better position than the legislature to do so because the imposition of such liability was best implemented incrementally on a case by case basis depending on the specific circumstances of each.

[12] I should add that when asked whether extension of the principle in the *Kroonstad* case meant that the proposed new liability was to be founded on breach of some implied contractual warranty or in delict, counsel for the appellant said that such categorisation was unnecessary and obstructive ─ all that was required was a policy decision to cater for what was an obvious weakness in an injured consumer's legal armoury.

[13] For the respondent it was argued that the *Kroonstad* case was of no assistance because it concerned a warranty imposed by the law of sale. The issue here, so it was said, arose squarely and solely within the field of delictual law and imposition of the liability for which the appellant contended would bring about a fundamental change in that law which would be contrary to the principle of *stare decisis*. In addition it was submitted that it would be illogical and unworkable to impose strict liability on a case by case basis: why impose it on the manufacturer of a medical product but not on the manufacturers of all products made for public consumption? What considerations ought to prompt such imposition and, more importantly, what principles? Furthermore, was the new liability to be the subject of a new delict or an exception grafted on to Aquilian principles?

[14] As regards the problem of proving fault, counsel for the respondent pointed out that even if strict liability were imposed a plaintiff would still have to prove that the product concerned was defective when it left the manufacturer. If that were indeed established then application of *res ipsa loquitur* would suffice to place the manufacturer on its defence and, in effect, compel an exculpatory explanation, if one existed. In the

circumstances it was submitted that proving fault was really no more difficult than proving defectiveness.

[15] As regards the appellant's reliance on other instances of strict liability, it was pointed out that these have either a long history or a policy-based reason for existence, in both cases peculiar to themselves, and not free from jurisprudential controversy in any event[9]. Any analogy based on them would therefore be false.

[16] Accepting that, notionally, a case for strict liability could be made out quite apart from, and in addition to Aquilian liability, the respondent contended that it should be for the legislature, not the court, to impose it. A variety of arguments were offered in support of this thesis. I shall refer to them where necessary in what follows.

[17] In evaluating the parties' competing submissions one's starting point is that the right which the appellant seeks to protect and enforce is constitutionally entrenched. This is therefore one of the factors to be borne in mind when having regard to the injunction to shape the common law in accordance with the Constitution's spirit, purport and objects. The next consideration is that this same right has also always existed at common law. In that law its unintended infringement, where (among other consequences) bodily harm results, gives rise to a specific remedy, namely, the Aquilian action. To succeed in the action, proof of fault in the form of negligence has always been necessary. That has been stated in decisions of this Court from

[9] (f eg *Loriza Brahman en 'n Ander v Dippenaar* 2002 (2) SA 477 (SCA) at 484C-D

Cape Town Municipality v Paine[10] to *Ciba-Geigy*[11], the latter itself a case involving defective manufacture. Most of the cases pre-date the Constitution but that of *Ciba-Geigy* was decided after the Constitution came into operation. The position is, therefore, that the right concerned enjoys the same importance now as it always did and because of the operation of *stare decisis* its enforcement must, subject to the consideration to which I next come, be governed by the same principles as applied before. The binding force of precedent is as effective now as it always was[12]. Indeed, counsel for the appellant did not seek to label any of the relevant decisions on fault as wrongly decided or to question the applicability of the principle of *stare decisis.* What counsel did contend was that the remedy to enforce the right, in requiring proof of fault, operated unduly harshly in the case of defective manufacture of a medical product and so the common law development enjoined by the Constitution necessitated the suggested need for strict liability in such an instance.

[18] The first enquiry to which this submission gives rise is whether the Aquilian remedy is indeed inadequate, not in the sense of inadequacy as to the damages recoverable but as to the pre-requisite of proof of fault to

[10] 1923 AD 207 at 216-7

[11] At 471 para [68]

[12] See *Ex Parte Minister of Safety and Security and Others* : *In* re *S v Walters and Another*, 2002 (4) SA 613 (CC) paras [60-1] at 646 D-H; *Afrox Healthcare Bpk v Strydom*, 2002 (6) SA 21 (SCA) para [26] at 38 G-H.

unlock such recovery.

[19] As counsel for the respondent correctly pointed out, even if strict liability applied, a plaintiff would still have to prove not only that the product was defective when used but defective when it left the manufacturer's control. In the case of a medical product, for example, that burden would in any event probably require expert evidence involving, no doubt, some complexities of scientific analysis. It might also be difficult for a plaintiff to acquire for examination the remaining portions of the administered product or unused samples from the same consignment as that from which the administered product came. Moreover there would be the same need to prove factual and legal causation as exists when liability is fault-based. A further point that needs to be made is that even if a manufacturer were to show that a proved latent defect could not have been detected by any reasonable examination, the inference may nevertheless be justified that somebody involved in the manufacturing process must have been at fault[13].

[20] Naturally if there were strict liability it would not be open to a manufacturer to rely on proof that it had taken all reasonable care but then one must ask what real difference that is likely to make. Once there is *prima facie* proof, direct or circumstantial, that the product was defective at the various times material to the action, it is virtually inevitable that *res ipsa loquitur* will apply and require an answer from the manufacturer. True, the maxim only comes into play if the plaintiff's evidence is such that it can be

[13] Cf *Grant v Australian Knitting Mills and Others* [1936] AC 85 (PC) at 101

said that the event (in this case, for example, the necrosis) would not ordinarily occur without there having been negligent manufacture (involving, perhaps, some scientific explanation in addition to the mere fact of the injury) but it is perfectly conceivable that the courts may develop reasons for being readier in some cases of alleged defective manufacture to draw the necessary *prima facie* inference of negligence where expert evidence is extremely difficult for the plaintiff to acquire, and perhaps even more so where administration of a substance made to be applied to the human body has apparently had an effect quite contrary to the manufacturer's stated aim. If the law requires development to cater for this particular type of suit, then there would be the need for what is but an incremental shift and not a complete rejection of long standing principle. The question of that type and degree of development does not arise in this appeal, however, bearing in mind what the issue is that has been raised by the exception. It may arise if, and when, the litigation proceeds on the alternative claim.

[21] The same considerations pertain to the possibility that it might well be thought right in future for reasons of policy, practice and fairness between the parties to place the onus on the manufacturer to disprove negligence[14]. Once again that is something for another day. The point is that the applicability of *res ipsa loquitur* ─ perhaps even in an extended way ─ and the possibility of a reverse onus, are factors which militate against the conclusion that the Aquilian remedy is insufficient in the sense mentioned earlier to achieve protection of the claimant's right in this kind of litigation.

[22] It is nevertheless necessary to say that the submission advanced on the appellant's behalf that the principle in the *Kroonstad* case should be extended to encompass strict product liability, is untenable. That matter was concerned with a warranty imposed on a seller by the law of sale which can excluded by contract. Contract and delict, being quite separate branches of the law, have their own principles, remedies and defences. One cannot, because of the absence of contractual privity between the injured party and the manufacturer, simply graft warranty liability on to a situation patently governed by the law of delict.

[23] That brings me to the appellant's reliance on United States case law and the American Restatement. It is quite so that the American courts found it remarkably easy to jettison fault but the fundamental reason appears to me to be given by one of that country's leading writers on the law of torts who, so it happens, was also the Reporter for the second edition of the

[14] Cf *National Media and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1215B-1218E.

Restatement. In his Handbook of the Law of Torts[15], Prosser explains that in its inception a seller's warranty, although subsequently for some purposes regarded as a term of the contract of sale, originally gave rise to liability in tort and never lost entirely its tort character. In time the tort aspects of warranty called for a tort, rather than a contract, rule in various respects and eventually served to extend warranties to the benefit of the ultimate consumer even without privity of contract between the latter and the producer [16]. Hence cases such as *Greenman* in which one finds the emphatic statement that the manufacturer's liability is governed by the law of strict liability in tort[17]. Be that as it may, 'warranty' in South African law was an importation from English law in which a warranty was in all respects a matter of contract. In its country of adoption it remains so[18]. Reliance on the law of the United States in this connection would consequently be unjustifiable. It is significant that counsel for the appellants were unable to refer to any other country in which strict liability is imposed other than by statute as is the case in the major industrialised countries[19]. (In the United States there has been lobbying for a return to fault - based liability but this could be manufacturer - motivated and prompted by the results of jury trials and awards and not by shortcomings in the substantive law[20].)

[24] As to the fact that instances of strict liability in the law of delict do exist, this is attributable to the special policy considerations that apply to those cases[21]. Their existence does not advance the case for the appellants.

[25] For the reasons discussed I do not consider that the case for strict liability based on the suggested inadequacy of the Aquilian remedy has been demonstrated.

[26] Finally, there is the argument that, for largely commercial rather than forensic reasons, strict liability ought to be imposed. McQuoid-Mason

[15] 4th ed 634-6

[16] See, too, in this regard, Restatement, Torts 2d 355 (para m).

[17] at 63

[18] RH Christie, *The Law of Contract*, 4th ed 178 ff

[19] In the United Kingdom, the Consumer Protection Act 1987: in Europe, the European Product Liability Directive1985; in Japan, Product Liability Law 85 of 1994; in Australia, the Trade Practices Act, 1974, the relevant part of which was introduced in 1992.

[20] Alistair M Clark, *Product Liability*, 216.

[21] See *National Media and Others v Bogoshi* at 1209B-C

tabulates a substantial number of reasons in support of this point of view[22] but for present purposes it is unnecessary to examine and evaluate the factors for and against. The issue that does require consideration is whether, assuming the argument to be sound, imposition is for the courts to effect on a case by case basis or for the legislature to regulate by appropriately detailed legislation after due parliamentary process and investigation.

[27] One is sensitive to the criticism expressed by Prosser that to say that only the legislature should make changes is to echo 'the cry invariably raised against anything new whatever in the law'[23]. Nevertheless, what needs to be done is to assess what the new development entails and how best to implement it.

[28] Counsel for the respondent urged that this Court could only impose strict liability if it considered that this was what, in developing the common law, s 8(3) of the Constitution compelled; but that if the Court did so hold, the legislature would be hamstrung by such conclusion even if the democratic parliamentary process in due course delivered up the conclusion that only certain manufacturers or certain instances of manufacture should be subject to strict liability. This is illustrative of the sort of problem that could indeed arise if the courts were to alter the law in the respect proposed

[22] *Consumer Law in South Africa* at 108-9

[23] Prosser '*Assault on the Citadel* (Strict Liability to the Consumer)' (1960) 69 Yale Law Journal 1099 at 1122

by the appellants rather than to leave it to Parliament. It is difficult to understand how the courts could logically, fairly or in principle confine the imposition in this way, whether one looks at the matter from the standpoint of the claimant or that of the manufacturer. Why should only the victims of defectively made medicines have the remedy or, conversely, why should their producers be the only manufacturers strictly liable?

[29] What I find significant about all the arguments in favour of strict liability is that virtually without exception they would hold good were imposition to be by the legislature. They do not begin to get to grips with the question which forum it should be. One finds in Neethling, Potgieter and Visser[24] the statement that '(u)ltimately, products liability ought to be based on liability without fault'. The authors then, in support, quote from the article by JC van der Walt[25] who in turn provides reasons why there should be strict liability but does not say why its imposition should be judicially achieved.

[30] Mention is sometimes made of the common law as having the flexibility which allows sound incremental development as society's circumstances change. That such flexibility exists is indeed so and it is best illustrated by the judgments of this Court in recent years dealing with unlawfulness[26]. The emphasis must be on incremental development, however. Flexibility does not necessarily entail the abolition of a long-standing requirement of principle or, on the other hand, the creation of what would, in effect, be an entirely new delict. Efforts to achieve either might

[24] The work is cited in footnote 2, at 326

[25] It is in (1972) THRHR 244 at 243

[26] From *Minister van Polisie v Ewels* 1975 (3) SA 590 (A), and the many later cases which refer to it, to *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 1 (SCA)

have to be made in compliance with the Constitution were a situation to arise in respect of which there was no remedy at all in existence or a patently inadequate one, and the dictates of the Constitution led to the need for change but, for reasons already stated, that is not the situation we have before us.

[31] One of the difficulties which could arise were the courts to impose strict liability is this. A decision in favour of the appellant would not merely have prospective effect. As in the *Bogoshi* case, a finding that strict liability attaches to the respondent would in effect, declare what the law on this point has always been even if it has never before been so stated. Accordingly, a manufacturer could now, by reason of such declaration, become strictly liable for a product defectively made some years ago in respect of which, absent proof of negligence, it stood in no jeopardy of an adverse judgment. There is no procedural mechanism available by which to avoid that unjust result if the imposition of strict liability were to be by judgment. Were that imposition to be legislative, the relevant statute would not operate retrospectively on a matter of substantive law.

[32] It is not without significance that in the other parts of the world of which mention has already been made, the imposition has been by way of legislation. (The American Restatement, authoritative though it is in the United States, is not legislation, nor is it a compendium of judicial pronouncements.) No doubt it was recognised in the countries concerned that, as the respondent argued, the subject of product liability is boundless as regards the possible structures and codes that can be put in place and because the investigation and debate which is part and parcel of the democratic process are the best measures by which to canvass the opinions of all interested parties and, eventually, to produce a comprehensive set of principles, rules and procedures, all in force from one and the same date. By contrast, the result sought by the appellant would merely pertain to one type

of product and only to manufacturers of such products. The fate of manufacturers of other products or of other articles, the fate of manufacturers of ingredients (as opposed to the manufacturers of entire medicines) and of components, would have to depend on the uncertain and unpredictable frequency with which future disputes spawn cases and those cases spawn judgments.

[33] It should also be noted, as respondent's counsel pointed out, that the manufacture of medicines has, in any event, been the subject of recent extensive statutory regulation without strict liability having been imposed[27]

[34] Understandably, the appellant was not concerned to ask for a finding that all manufacture should fall within the ambit of the judgment it sought. However, the proponents of strict liability would expect, it seems, that the Court's pronouncement should indeed be as wide as that. Other manufacturers, of course, have not been heard.

[35] To illustrate the dilemma involved in the function of trying to 'legislate' judicially in this complex field (whether in this or other cases) regard may be had to some of the questions which necessarily arise and which, if that function is to be effectively and satisfactorily performed, must convincingly be answered. A few follow:

[27] See the Medicines and Related Substances Control Act 101 of 1965 which was repealed by the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998, although the latter is not yet in force.

1. What products should be included (or perhaps it is easier to specify what should be excluded) when it comes to determining the extent of the liability?
2. Is a manufacturer to include X, the maker of a component that is part of the whole article manufactured by Y; and which is liable if the component is defective?
3. Does defect mean defect in the making process only or, in the case of a designed article, also a defect of design? Should it include the failure, adequately or at all, to warn of possible harmful results?
4. Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control?
5. What relevance should the packaging have - should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examination were made?
6. Is a product defective if innocuous used on its own but which causes damage when used in combination with another's product?
7. What defences should be available? Contributory negligence easily

comes to mind, as in the case, for example, of the pauperien action. But there are defences in the statutory schemes applicable overseas which are not just taken over from common law. There is the state of the art (or development risk) defence that the defect was scientifically undiscoverable. This pertains especially to pharmaceuticals. There are also the various statutory defences provided for in the United Kingdom Act[28] which have been considered appropriate and necessary. One may ask how all these 'non-common law' defences are to be introduced and developed, especially without evidence as to their impact, practicality and fairness of operation.

8. Should the damages recoverable be exactly the same as in the case of the Aquilian claim or should they be limited, as in some jurisdictions, by excluding pure economic loss or by limiting them to personal injury?

[36] This list is by no means intended to raise all the possible questions that require answer. For a succinct and helpful discussion, with comparative references to the respective United Kingdom, United States and European positions see Clark, *Product Liability*[29].

[37] That the questions enumerated cannot be answered on the basis of

[28] See s 4

[29] Referred to in footnote 19

what has arisen and been debated in this case is due not to the fault of the parties or their representatives. It is because single instances of litigation cannot possibly provide the opportunity for the breadth and depth of investigation, analysis and determination that is necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability. The incremental approach suggested by the appellant is not incremental at all but a radical departure from accepted law, and it would immediately raise more questions than it answers.

[38] To sum up: the appellant's remedy is confined to the Aquilian action which is presently adequate to protect her right to bodily integrity, both as it is and given the opportunity for incremental development of the approach to *res ipsa loquitur* and to the incidence of the onus. If strict liability is to be imposed it is the legislature that must do it.

[39] It follows that the appeal cannot succeed. It is dismissed, with costs, including the costs of two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCURRED:

MARAIS JA

CONRADIE JA
CLOETE JA
JONES AJA