

## **ADVISORY NOTE 8:**

### **EMOTIONAL DISTRESS SUFFERED FROM CONTAMINATED FOOD**

**This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act (CPA).**

#### **Summary**

The CGSO receives claims arising from alleged emotional distress or shock caused by adulterated or contaminated foodstuffs. Emotional distress or shock may be defined as as: “shock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event...”

The contamination or tainting of the foodstuff may be in various forms: physical, chemical, biological and psychological.

The so called no fault/ strict liability provision of the CPA, section 61, which deals with damages arising from defective goods, is sufficiently wide to cover claims relating to allegedly contaminated food. The section does not, however, expressly mention damages associated with emotional distress. This does not preclude a claim for emotional distress that led to physical illness: damages are claimable in respect of death, injury or illness in terms of CPA section 61(5).

Where the emotional distress does not result in psychological/ physical illness, a claimant would need to resort the common law in order to bring their claim: their right to rely on their common law remedy is reserved by the CPA section 2(10). In order to succeed in such a claim, the consumer would usually have to prove negligence on the part of the supplier or manufacturer and that the emotional distress was consequential (not trivial) and long lasting.

The supplier of tainted foodstuffs would also face the possibility of liability being imposed for contravening the CPA or other food/ health/ labelling legislation, in addition to suffering immense reputational damage.

Although none on the CPA dispute resolution and enforcement structures may make an order for the payment of damages ( CPA section 115(2)), this does not prevent an ombudsman from assisting the parties in reaching a resolution in respect of such claims (CPA section 70(4)).

Suppliers of food and food outlets should, in order to protect themselves, ensure compliance with the law and maintain good customer relationships, have protocols in place to:

- prevent foodstuff from being or becoming contaminated;
- deal with complaints in a way that ensures their effective investigation;
- take remedial action to deal with any problems detected and
- fairly and appropriately redress consumer concerns.

Consumers who believe that food supplied to them is contaminated should:

- Escalate the complaint to management
- Keep/ freeze all the evidence.
- Get medical care if necessary.
- Document the proof of purchase with an invoice, receipt or credit card record.
- Take photos of the object, all the packaging, the receipt and all other physical evidence and any injuries.
- If the food came from a restaurant, bakery or catering company file a complaint with the local health department ASAP.<sup>1</sup>

There are various civil and criminal protections available to suppliers to guard them against bogus or fraudulent claims. Further, CGSO is entitled in terms of the Code to reject frivolous or vexatious claims and those that have no prospect of succeeding.

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<sup>1</sup> A list of South African health departments is available at: <http://www.cgso.org.za/Page/27848/Documents>.

## Introduction

The CGSO has received various claims arising from alleged emotional distress or shock caused by contaminated foodstuffs. These include a claim for compensation for a miscarriage and the loss of a house following an illness allegedly caused by eating stale crisps and a claim which received media attention, involving a consumer who alleged he had suffered damages of R 6 million as he has to travel to India to atone for having bitten into a beef samoosa that was supplied to him instead of the potato samoosa he had ordered.

Such claims are not unique to South Africa. In one study, the U.S. Food & Drug Administration found that approximately one-quarter of all food-related complaints it received one year involved the presence of a visible foreign contaminant. This same study indicated that nearly 15% of the complainants had reportedly suffered an injury or illness which they attributed to the foreign material.<sup>2</sup>

This note considers whether the CPA makes provision for a claim for emotional distress, with reference to the common law of South Africa and other common law countries.<sup>3</sup>

## Definitions

### Emotional Shock/ distress

Emotional shock is defined as shock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close emotional relationship.<sup>4</sup>

A more appropriate example for the present purposes is the emotional distress or shock one would experience in discovering, for example, a snail in one's ginger beer bottle, as happened to the plaintiff in the famous British case of *Donoghue v Stevenson*,<sup>5</sup> decided upon in 1932 in by the House of Lords. That case, however, related to a claim for the physical illness caused.

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<sup>2</sup> <http://www.raglandjones.com/lawyer-attorney-1802466.html>).

<sup>3</sup> Common law is a system of law whose source is the decisions in cases by judges, as opposed to Civil law, which has as its central source codifications in a constitution or statute passed by legislature: [http://en.wikipedia.org/wiki/List\\_of\\_national\\_legal\\_systems](http://en.wikipedia.org/wiki/List_of_national_legal_systems).

<sup>4</sup> As was the case in *Swartbooi v Road Accident Fund* (20352/2008) [2012] ZAWCHC 29; [2012] 3 All SA 670 (WCC); 2013 (1) SA 30 (WCC) (17 April 2012) Western Cape High Court [definition at para 17]. Judges who have expressed disapproval for the term nervous shock prefer to refer to *psychiatric damage*: Julio Alberto Diaz: *Non- Physical Damage: A Comparative Perspective* PhD Thesis at 2 (hereafter "Diaz).

<sup>5</sup> [1932] UKHL 100.

## Contamination

The contamination or tainting of the foodstuff may be in various forms:<sup>6</sup>

Physical	Chemical	Biological
wood	cleaning chemicals	micro organisms
metal	maintenance chemicals	insects
glass	pest control chemicals	rodents
paint chips		birds
hair		

For present purposes, to these may be added a fourth category, psychological contaminants, which includes a broad range of items that render a product undesirable, offensive or repulsive to some or all consumers. Included in this category are products which may not be consumed for reasons of religion, personal health and taste (items that may not *per se* be harmful, or undesirable to all groups), such as pork (religion), alcohol (health (children and alcoholics) and religion) and rabbit/ horse/ worms (taste). The latter may be nutritious, and entirely acceptable to many people.

## Consideration of the Law

This consideration of the law with regard to claims for emotional distress provides no more than a backdrop to the consideration of the provisions of the CPA and is by no means a comprehensive treatment of a “very complex area of the law without apparent coherent background principles”.<sup>7</sup>

## International

In the common law countries, the rules relating to the negligent infliction of non-physical harm did not develop alongside the principles governing the negligent infliction of physical damage. The significant consequence of this peculiarity is that the nature of the injury suffered becomes a very important factor in determining the protective scope of the duty of care.<sup>8</sup>

The common law has historically demonstrated a reluctance to consider emotional tranquility and psychic equilibrium as an interest worthy of extensive legal recognition and protection. Arguments of lack of precedent, difficulty of proof, fears of fraudulent and

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<sup>6</sup> <https://sites.google.com/site/safefoodhandling/food-contamination>. Items falling within these groups may also be allergens or irritants or substances that particular consumers wish to avoid for health reasons.

<sup>7</sup> Dias (op cit) at iv.

<sup>8</sup> Ibid.

proliferation of claims, immeasurability of mental damages and potentially unlimited liability were some of the ways used by common law courts to express that reluctance to provide a remedy for emotional injury.<sup>9</sup>

### England & Scotland

There was a traditional reluctance to permit redress is not associated with physical injuries. In its report *Liability for psychiatric illness*, the English Law Commission put forward six 'policy arguments' as being grounds for limitations of liability:

- the possibility of a flood of claims;
- the potential for frauds;
- the potential for conflicting medical opinions; the notion that psychiatric illness is not worthy of compensation;
- the notion that the plaintiff is only a *secondary* victim;
- the potential for litigation to affect prognosis.<sup>10</sup>

Liability for emotional distress was first recognized when inflicted intentionally.<sup>11</sup>

In the case of *Bourhill v. Young*,<sup>12</sup> the House of Lords for the first time held that the law should recognise not only of physical injury resulting from actual impact but that an action was available for injury by shock sustained through the medium of the eye or the ear without direct contact.

The case involved an eight month pregnant fishwife, who heard a loud noise of a collision as a motorcyclist went into a car. She later saw blood on the road at the site of the accident. She claimed that as a result she suffered a severe shock to her nervous system and one month later gave birth to a stillborn child.

*Dias*<sup>13</sup> considers at length how various requirements have been imposed by the English courts to keep such claims manageable and to avoid the door from being opened too wide, such as that the plaintiff's mental distress had to be accompanied by a physical manifestation (such as miscarriage) and that the plaintiff needed to establish that his or her shock resulted from fear for his or her own safety.<sup>14</sup>

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<sup>9</sup> John G. Fleming, 'Distant shock in Germany (and elsewhere).' (1972) 20 *American Journal of Comparative Law* 485.

<sup>10</sup> Law Commission n° 249 para 6.6 in *Dias*(op cit) at 10 fn 10.

<sup>11</sup> S.K. Parmanand, 'Intentional infliction of emotional distress – A neglected delict' (1984) 101 *South African Law Journal* 171,173.

<sup>12</sup> [1943] AC 92.

<sup>13</sup> Op cit generally.

<sup>14</sup> The general principles are illustrated through case law in: 'A brief review of the delictual principles on nervous shock': <http://dynalex.wordpress.com/2012/10/24/a-brief-review-of-the-delictual-principles-on-nervous-shock/>

The Scottish Law Commission favoured the approach used by the courts in England and Wales that a "recognisable psychiatric illness" must be something more than mere mental distress. The Commission felt the law ought to differentiate between initial transient mental distress arising out of an incident which nearly all people will suffer and the more long-lasting and debilitating psychiatric injury which develops in a minority of cases. Physical and mental injuries cannot be fully equated with each other. Most people go through their daily lives without being physically injured by the actions of others. But people do not live on the same emotional plane all the time. They inevitably experience mental highs and lows in the course of interacting with their surroundings and other people. Removing the existing requirement of a psychiatric illness so making all mental distress compensatable would enlarge liability to an unacceptable extent.<sup>15</sup>

It should be noted that there are many situations in which compensation payable for psychiatric injury is regulated by statute, such as the Criminal Injuries Compensation Scheme 2001 (made under the Criminal Injuries Compensation Act 1995),<sup>4</sup> the Carriage by Air Act 1961 and the Carriage by Air (Supplementary Provisions) Act 1962, the Consumer Protection Act 1987 and the Nuclear Installations Act 1965.

It is often not clear whether the provisions exclude claims for psychiatric injury by those involved in the accident or whether claims by those whose psychiatric injury arises from the death or personal injury of the immediate victim are within the scope of the provisions. For example, s 45(1) of the Consumer Protection Act 1987 defines personal injury to include impairment of a person's mental condition, but it is thought secondary victims are not covered. It has recently been decided by the House of Lords that a pure psychiatric illness is not "bodily injury" for the purposes of a claim under the Carriage by Air Act 1961, *King v Bristow Helicopters Ltd*<sup>16 17</sup>.

## USA

Complete emotional tranquility is seldom attainable in the world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it.

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<sup>15</sup> Scottish Law Commission: Discussion Paper on Damages for Psychiatric Injury  
Scottish Law Commission: August 2002, The Stationery Office Edinburgh at 7.

<sup>16</sup> 2002 SLT 378

<sup>17</sup> Scottish Law Commission (op cit) at 1.

The intensity and duration of the distress are factors to be considered in determining its severity. It appears therefore, that in this context, severe emotional distress means, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.<sup>18</sup>

In the recent American case of *Bylsma v. Burger King Corp*<sup>19</sup>, the Washington Supreme Court in 2013 held that the state’s strict liability statute, the Washington Product Liability Act, “permits relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product, if the emotional distress is a reasonable response and manifest by objective symptomatology.”

The plaintiff, a sheriff’s deputy, sued Burger King Corporation over allegations that its employees spat on his food. While on his lunch break, he drove his marked police car through the drive-thru of the restaurant and ordered a hamburger. After having an “uneasy feeling” that “was so strong that he felt he should check his burger,” he examined his food and found what appeared to be saliva. Later DNA testing confirmed that the saliva belonged to one of the employees who served the plaintiff his food. The plaintiff claims that he now suffers ongoing emotional trauma from the incident, including vomiting, nausea, food anxiety, and sleeplessness. He also claims that he has sought treatment by a mental health professional due to the incident.

In reaching its holding, the Washington Supreme Court explained that “Washington courts have balanced the right to compensation for emotional distress against competing interests in preventing fraudulent claims and ensuring that tortfeasors are held responsible only insofar as is commensurate with their degree of culpability.” (*Id.* at \*5-6). The court reasoned that in this situation, “[c]ommon sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil. Thus, when a food manufacturer serves a contaminated food product, it is well within the scope of foreseeable harmful consequences that the individual served will suffer emotional distress.” (*Id.* at \*7).<sup>20</sup>

## **Australia**

In the leading case of *Mount Isa Mines Ltd. v. Pusey*<sup>21</sup>, two employees of the defendant who were testing a switchboard were severely burnt by an intense electric arc. The short circuit

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<sup>18</sup> Restatement (Second) of Torts, §46, comment j (2003).

<sup>19</sup> 293 P.3d 1168, 2013 WL 363519 (Wash. Jan. 31, 2013).

<sup>20</sup> [http://www.jvra.com/verdict\\_trak/professional.aspx?search=379](http://www.jvra.com/verdict_trak/professional.aspx?search=379) Click here to read the full opinion of the court.

<sup>21</sup> (1970) 125 CLR 383

caused a loud explosion. The plaintiff, who had not witnessed the accident because he was working on the floor below, ran to the scene and found one of the victims “just burn up” before his eyes. The victim’s clothes were burnt off, his skin was peeling and he was grievously hurt. The plaintiff assisted in carrying him to an ambulance. Mr. Pusey subsequently developed a serious mental disorder, involving an acute schizophrenic episode and depression. The Australian High Court held that the defendant was liable for the plaintiff’s psychiatric injuries.

In his judgment, Windeyer J stated: “An illness of the mind set off by shock is not the less an injury because it is functional, not organic, and its progress is psychogenic.”<sup>22</sup>

Elsewhere, the learned judge was at pains to make it clear that “[a] plaintiff in an action of negligence cannot recover damages for a ‘shock’ however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening.”<sup>23</sup>.

## Canada

The Canadian approach is similar to that of Australia with regard to confining claims to significant psychological harm. In the Canadian case of *Rhodes v Canadian National Railway*<sup>24</sup> Wallace JA made the point that “grief, sorrow or reactive depression are not compensable”.

## South Africa

Prior to the Appellate Division decision of *Bester v Commercial Union Versekeringsmaatskappy*<sup>25</sup>, claims for damages for mental illness arising from a nervous shock negligently caused were not allowed, on the grounds that mental illness was not an injury to a physical organism.<sup>26</sup> This “artificial distinction” was cast aside by Botha JA in the Bester case, when he held that “[d]ie senu- en breinstelsel is, in iedere geval, net so ‘n deel van die fisiese ligan as wat ‘n arm of ‘n been is.”

In that case, a negligently-driven motorcar struck and killed one of two young brothers who were crossing a road. The surviving brother, who was physically uninjured, suffered severe emotional shock leading to an anxiety neurosis that required medical treatment. The boy's father succeeded in his claim against the third party insurer of the car on behalf of his son for the cost of medical treatment as well as for damages.<sup>27</sup>

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<sup>22</sup> (1971) 45 ALJR 88 at 92.

<sup>23</sup> (1970) 125 CLR 383 at 394

<sup>24</sup> (1991) 75 DLR (4<sup>th</sup>) 248 at 264.

<sup>25</sup> 1973(1) SA 769 (AD)

<sup>26</sup> Louse Tager ‘Nervous Shock and Mental Illness’ (1973) 90 SALJ 123.

<sup>27</sup> <http://www.legalcity.net/Index.cfm?fuseaction=RIGHTS.article&ArticleID=9817610>

This case showed the ability of Roman-Dutch law, through its flexibility, to keep abreast with developments in the law of other jurisdictions.<sup>28</sup> Further, it rid South African law of the artificial constraints inherited from English law. Prior to *Bester*, the South African law of delict lacked clear principles in the field of psychiatric injuries. Since Roman-Dutch authority was scant, the courts consistently sought guidance from English law as far as the negligent infliction of emotional shock was concerned.<sup>29</sup>

Over the years various limitations to claims of this sort were imposed here and abroad.<sup>30</sup>

The case of *Road Accident Fund v Sauls*<sup>31</sup> summarises the requirements for recovering damages based on emotional shock as being:

1. reasonably foreseeable and of a sufficiently serious nature so as to affect the general health of the claimant and require treatment;
2. if a reasonable man in the position of the wrongdoer would foresee the detrimental consequences of the emotional shock.

To these, the court added a further existing limitation: proof of the actual harm suffered and its *sequelae*, the burden of which rests on the claimant. Of particular significance to the present enquiry is the court's comment, "It is in this frequently neglected field that extravagant claims will be exposed." In other words, those making fraudulent claims will find it impossible to prove their claims of emotional shock.

In *Sauls*' case, his fiancé witnessed him being involved in an accident. She feared he had been killed or seriously injured and was in a state of shock and turmoil. On the night of the accident she slept badly and experienced nightmares, reliving the whole trauma. She was subsequently diagnosed with a post-traumatic stress disorder which had become chronic and was unlikely to improve. It was alleged that she would never be able to take up gainful employment again, would need extensive psychiatric treatment and medication, and had lost most of her previous enjoyments of life - she was withdrawn, did not want to see anyone, was deeply depressed, suffered a pattern of sleep disturbance with intrusive, distressing and morbid dreams. It was also alleged that she had lost all interest in social, household and sexual activities and that her whole personality had changed for the worse. In short, her case was that as a consequence of her witnessing the injury to *Sauls*, she

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<sup>28</sup> Louse Tager 'Nervous Shock and Mental Illness' (1973) 90 *SALJ* 123.

<sup>29</sup> Johann Neethling, 'Delictual liability for psychological lesions in South African law' in Ulrich Magnus and Jaap Spier (Eds) *European Tort Law* (2000) 211.

<sup>30</sup> *Road Accident Fund v Sauls* (423/2000) [2001] ZASCA 135 (28 November 2001) at para 17.

<sup>31</sup> (423/2000) [2001] ZASCA 135 (28 November 2001) at para 18.

suffered severe emotional shock and trauma, which gave rise to a recognised and detectable psychiatric injury, viz post-traumatic stress disorder.

In *Swartbooi v Road Accident Fund*<sup>32</sup>, the Western Cape High Court held that where a Plaintiff suffers a resulting detectable psychiatric injury where a person close to him or her dies as a result of an accident, the relationship between the primary and secondary victim was not necessarily the prime consideration.

“In determining such limitations, the court will take into consideration such relationship, but it remains a question of **legal policy, reasonableness, fairness and justice, and that reasonable foreseeability should also be a guide.**” (Bolding added).

Although the above cases have taken forward the common law, they relate to claims in terms of a fund set up by statute the Road Accident Fund Act 56 of 1996. Subsequent to the amendment of the Act in 2006, section 21 now provides for an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person other than a third party. The emotional shock must have arisen when the claimant witnessed, or observed or was informed of the bodily injury to or death of another person as a result of a motor collision.

There are South African cases dealing with claims that have arisen other than as a result of motor accidents. The court in the *Swartbooi* case (supra) referred to an inadvertent baby swapping case, *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal*.<sup>33</sup> The case involved the parents of two babies who were born on the same day. The nursing staff swapped babies around, and the parents were informed of the mistake some two years later. A claim was brought against the hospital authorities and the court held in favour of the parents. The defendant owed the parents a duty of care, that this duty was breached and that the harm or injury suffered, in the form of emotional shock, was reasonably foreseeable.

In the case of *Muzik v Canzone-del-Mare*<sup>34</sup>, heard by the Cape Provincial Division, a patron of the Canzone-del-Mare restaurant ordered sea food and after eating the meal experienced symptoms of food poisoning which led to his hospitalization and further medical treatment. Muzik sued the restaurant for damages which included:

- his hospital and medical expenses;
- damages for
  - (a) The anxiety he suffered (he believed he was going to die),

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<sup>32</sup> (20352/2008) [2012] ZAWCHC 29; [2012] 3 All SA 670 (WCC); 2013 (1) SA 30 (WCC) (17 April 2012).

<sup>33</sup> 1996 (2) SA 37 (W).

<sup>34</sup> 1980 (3) SA 470 (CPD).

- (b) The fact the experience put him off eating seafood, which he used to enjoy, and
- (c) The loss of enjoyment of life, including (perhaps surprisingly) not being able to work, and not being able to read, play the piano or go for walks.

The court found that claim (a) failed as there was no proof of mental impairment or that his bodily wellbeing was affected; there was no claim permissible in respect of (b), but for claim (c), Muzik was entitled to compensation in the amount of R 400 for the temporary loss of enjoyment of life.

All the above cases dealt with delictual claims. There is some academic debate as to whether a claim for emotional distress is part of the *Lex Aquilia*, the Roman law action that enables claims for patrimonial loss (loss to one's estate) arising from negligence, or a separate legal claim<sup>35</sup> but a consideration of that question is beyond the scope of this note. The question of whether a claim for emotional distress can be brought as a contractual claim was answered in the negative in *Administrator of Natal v Edouard*<sup>36</sup>, in which the Appellate Division indicated its reluctance to extend the ambit of claims for emotional distress any further:

“It may be that for reasons of convenience it is desirable that in some cases some form of intangible loss may be recovered in contract. That, however, is an extension of the law which has to be effected by the legislature and not by a court of law.”<sup>37</sup>

The case included a claim for emotional distress suffered by a woman when the tubular ligation of her fallopian tubes was unsuccessful and she gave birth to a child.

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<sup>35</sup> See Tager (op cit) at 123, c.f. F du Bois et al (eds) *Wille's Principles of South African Law* (9ed) (2007)Juta at 1116, especially fn 2.

<sup>36</sup> (5/89) [1990] ZASCA 60; 1990 (3) SA 581 (AD); [1990] 2 All SA 374 (A) (30 May 1990)

<sup>37</sup> On <http://www.saflii.org.za/za/cases/ZASCA/1990/60.html> at 48

## Nature and extent of psychological harm

From the above research it emerges that not every form of emotional distress may give rise to a legal claim. Muzik's case (supra) is an example of a case where a claim for emotional distress failed. This is in line with the view expressed by Markesinis and Deakin<sup>38</sup>:

"[A]ll courts try to restrict recovery to serious emotional distress and payment of claims for transient or slight distress is actively discouraged. Moreover, the precipitating event must have been one that would produce serious emotional distress...in a reasonably strong-minded person".

In the South African context, according to McQuoid-Mason and Dada<sup>39</sup>, it is necessary to prove that the shock caused a physical reaction such as

- (a) a stroke leading to death;
- (b) a miscarriage;
- (c) high blood pressure, trembling and collapse; or
- (d) a detectable or recognisable psychiatric injury or lesion that is not passing or trivial, such as anxiety neurosis, acute depression, mixed anxiety depressive disorder, post-traumatic stress disorder<sup>40</sup>, impaired sleep or emotional trauma.

## CPA

The Consumer Protection Act brought about sweeping changes to the existing law in so far as it related to consumer transactions.<sup>41</sup> The so called no fault/ strict liability provision of the CPA, section 61, which deals with damages arising from defective goods, is sufficiently wide to cover claims relating to allegedly contaminated food<sup>42</sup>:

61. (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—

- (a) supplying any unsafe goods;
- (b) a product failure, defect or hazard in any goods; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether

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<sup>38</sup> B S Markesinis and S F Deakin, *Tort Law* (4 ed) (1999) Clarendon Press Place at 216.

<sup>39</sup> David Jan McQuoid-Mason & Mahomed A. Dada: *A-Z of Medical Law* (2009) Juta at 125.

<sup>40</sup> Some of the symptoms of this disorder are listed in Saul's case (supra).

<sup>41</sup> Ampofo-Anti, O 'Significant changes on the way: consumer law' *Without prejudice*, Vol 7, Issue 5, June 2007, at 34-35 and articles listed on <http://www.sabinetlaw.co.za/economic-affairs/legislation/consumer-protection>.

<sup>42</sup> Janusz Luterek 'Civil and criminal liability in the food industry' on: <http://www.foodstuffsa.co.za/component/content/article/237-civil-and-criminal-liability-in-the-food-industry>

the harm resulted from any negligence on the part of then producer, importer, distributor or retailer, as the case may be.

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61. (5) Harm for which a person may be held liable in terms of this section includes—

(a) the death of, or injury to, any natural person;

(b) an illness of any natural person;

(c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and

(d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).

The section does not, however, expressly mention damages associated with emotional distress. This does not, however, preclude a claim for emotional distress that led to physical illness: damages are claimable in respect of death, injury or illness in terms of section 61(5).

In Saul's case,<sup>43</sup> the court reaffirmed the principle set out in *Bester v Commercial Union Versekeringsmaatskappy* (op cit) that that psychological or psychiatric injury is 'bodily injury' for the purposes of the road traffic legislation. There is no reason that a similar approach should not be adopted with regard to "injury" in the CPA.

Where the emotional distress does not result in psychological/ physical illness, a claimant would need to resort the common law in order to bring their claim: their right to rely on their common law remedy is reserved by the CPA section 2(10). In order to succeed in such a claim, the consumer would usually have to prove negligence on the part of the supplier or manufacturer and that the emotional distress was consequential (**not trivial**) and long lasting. Section 61(6) permits a court to require proof of the harm claimed and that steps were taken to mitigate (lessen) it. The intricacies of proving such a claim medically are explained by Melton and others in their book on the subject.<sup>44</sup>

There is no scope to apply section 4(2), which permits the Tribunal or a court develop the common law as necessary to improve the realisation and enjoyment of consumer rights and make any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the Act. This section relates to giving effect to the CPA, not extending existing rights or creating new rights. Further, our law does not generally provide for punitive (punishing) damages, although there is a punitive element

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<sup>43</sup> Supra at para 5.

<sup>44</sup> Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin: *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (3rd Edition) (2007) Guilford Press.

in section 62(2)(b)(ii) of the CPA, which provided a consumer must be repaid double what they paid the supplier.

Although none of the CPA dispute resolution and enforcement structures may make an order for the payment of damages (CPA sections 69(d) and 115(2)), or are indeed equipped in the same way as a court to enquire into the technical evidence required to prove psychological injuries or consider the weighty policy issues that are associated with the question of permitting and controlling claims for emotional distress, this does not prevent an ombudsman from assisting the parties in reaching a resolution in respect of such claims (CPA section 70(4)).

Claims settled in this manner are unlikely to escalate into the public domain. The process also serves to educate the parties of their rights and responsibilities, with a view to reasonable settlements being reached and avoiding unnecessary claims against insurers and court cases.

It should be noted, however, that should a consumer wish to test the limits of the CPA by bringing an action for damages for transient emotional distress, they must first have gone through the CPA dispute resolution processes (referred the complaint to the Commission and then approached the Tribunal for a certificate (section 115(2)(b)).

## **Advice to Suppliers**

The supplier of tainted foodstuffs would also face the possibility of liability being imposed for contravening the CPA or other food/ health/ labelling legislation<sup>45</sup>, in addition to suffering immense reputational damage. In an online article, it is suggested that a supplier offers coupons, free products, a discount or a complimentary meal.<sup>46</sup> Whether such measures would be sufficient to placate an enraged diner who found a fingernail clipping in a pizza is debatable. They would possibly prefer an undertaking from management that the matter would be investigated and appropriate action taken to avoid a reoccurrence. In a case like *Bylsma* referred to above (involving the saliva in the hamburger) it would be possible to charge the perpetrator with criminal assault. This would be grounds for the dismissal of the employee.

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<sup>45</sup> In *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of the City of Durban* (675/92) [1994] ZASCA 2; 1994 (3) SA 170 (AD); [1994] 2 All SA 222 (A) (22 February 1994), the Appellate division confirmed the conviction of a soft drinks manufacturer under a municipal by-law in respect of supplying a soft drink that contained a bee in the bottle. The conviction was based on strict liability. In terms of Section 2 of the Food, Cosmetics and Disinfectants Act, it is a criminal offence to sell or distribute food which is unfit for consumption or which has a foreign object in the packaging. This criminal conduct can be attributed to any party in the supply chain from importer, manufacturer, distributor, retailer, to food outlet regardless of actual knowledge of the foreign object in the food or the state of the foodstuff. <http://www.foodstuffsa.co.za/component/content/article/237-civil-and-criminal-liability-in-the-food-industry>

<sup>46</sup> <http://www.americanownews.com/story/21854583/what-to-do-if-a-foreign-object-shows-up-in-your-food?clienttype=mobile>

The potential for negative reputational fallout in such cases is massive, so any remedy should be aimed at pre-empting that. Suppliers of food and food outlets should, in order to protect themselves, ensure compliance with the law and maintain good customer relationships, have protocols in place to:

- prevent foodstuff from being or becoming contaminated;
- deal with complaints in a way that ensures their effective and thorough investigation;
- take remedial action to deal with any problems detected and
- fairly and appropriately redress consumer claims and concerns.

The practical advice offered by one supplier is “the most crucial element in managing a situation is the *speed end reaction time*. Most customers expect **immediate acknowledgement** of the gravity of the situation and accept that an investigatory process is essential.”<sup>47</sup> In an attempt to give a guideline as to how to arrive at an appropriate remedy in such cases, reference is made to an online article in which it is suggested that a supplier offers coupons, free products, a discount or a complimentary meal.<sup>48</sup>

### Advice to Consumers

The following protocol has been suggested as advice to consumers<sup>49</sup>:

- First, immediately alert your server. Do not remove the object, but keep all the evidence. Request the object be shown to a manager and that written reports be prepared. Keep all the evidence.
- Get medical care if you swallowed an object, sustain injury or contract food poisoning. With food poisoning, request that a stool sample be taken and tested to identify the pathogen.
- Document the proof of purchase with an invoice, receipt or credit card record.
- Secure the evidence including the foreign material not ingested and all packaging materials which contained the food. Freeze or refrigerate what is perishable.
- Take photos of the object, all the packaging, the receipt and all other physical evidence as soon as possible. Photograph any injuries as well.
- As soon as possible, notify the company or restaurant about the incident and be ready with complete information about the food, location and date of purchase and injuries suffered.
- If the food came from a restaurant, bakery or catering company file a complaint with the local health department ASAP.<sup>50</sup>

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<sup>47</sup> Phil Tozer, Astral Foods, email dated 15 January 2014

<sup>48</sup> <http://www.americanownews.com/story/21854583/what-to-do-if-a-foreign-object-shows-up-in-your-food?clienttype=mobile>

<sup>49</sup> <http://www.raglandjones.com/lawyer-attorney-1802466.html>.

Anyone tempted to make a false, totally unrealistic and possibly opportunistic claim should heed this warning given to U.S. customers, which would apply equally here:

“Making a false claim about something in your food can lead to a lawsuit. Damages include lost sales, customers and reputation.”<sup>51</sup>

## **Avoidance of Bogus Claims.**

There are various civil and criminal protections available to suppliers to guard them against bogus or fraudulent claims. It must be born in mind also that the person claiming mental distress would need to prove it. A further safeguard is that set out in the legal maxim *de minimus non curat lex* (the law does not concern itself with trifles).<sup>52</sup>

Further, CGSO is entitled in terms of the Code to reject frivolous or vexatious claims and those that have no prospect of succeeding.

## **Conclusion**

The world over, common law system courts have been slow to permit claims for psychological shock and have, for cogent policy reasons, put in place various, sometimes convoluted, barriers to ensure that the floodgates are not opened. The courts clearly expect claimants to “suffer the slings and arrows of outrageous fortune” (to paraphrase Shakespeare) as far as insignificant or short term emotional distress are concerned. There is no jurisdiction which permits claims for damages for initial transient mental distress unaccompanied by physical symptomology (all of the subjective indicators of an illness).

This is one area in which the sea-change brought about by the radical Consumer Protection Act did not reach. Damages for emotional shock are only claimable under the CPA if they amount to an injury capable of proof. Complainants wishing to test the limits of the CPA by bringing an action for damages for transient emotional distress in court must first have gone through the CPA dispute resolution processes. Such claims and those for unrealistically large amounts of compensation should be referred to the NCC to investigate.

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<sup>50</sup> A list of South African health departments is available at: <http://www.cgso.org.za/Page/27848/Documents>.

<sup>51</sup> See: <http://product-liability.lawyers.com/Product-Liability/You-Found-a-What-in-Your-Food.html>)

<sup>52</sup> A principle of law, that even if a technical violation of a law appears to exist according to the letter of the law, if the effect is too small to be of consequence, the violation of the law will not be considered as a sufficient cause of action, whether in civil or criminal proceedings.  
<http://www.thefreedictionary.com/de+minimis+non+curat+lex>

This does not mean to say that suppliers should not attempt to mollify consumers with appropriate, nominal offers of non-monetary recompense in deserving cases, in the interest of maintaining good customer relations and reputation, even if it is on a no-liability basis. They are within their rights to take appropriate action when bogus claims are unearthed after an investigation.

**Adv NJ Melville**

**Ombudsman**

**29 January 2014**