

Did we see this coming?

Was it possible to foresee that a bystander not utilising a service or a product would seek redress under the Consumer Protection Act as a consumer of that product or service and would be eligible for compensation under the Act? Until recently, the answer to this question was 'no'.

Halstead-Cleak vs Eskom

The judgement in Derek Anthony Halstead-Cleak vs Eskom Holdings in the Gauteng Division of the High Court came as a surprise. The court ruled in favor of the plaintiff, who was found to be a consumer, despite being a bystander.

The plaintiff came into contact with a low hanging, live power cable spanning the footpath where he was cycling. He sustained severe burn wounds.

The parties agreed to proceed to trial on the limited issue of whether Eskom should be strictly liable in terms of the provisions of section 61 of the Consumer Protection Act, which imposes a no-fault product liability regime on a producer.

Eskom was the producer and distributor of the electricity in the power line. It contended that had the plaintiff suffered his injuries in the course of utilising the supply of electricity at his home, the CPA might well have applied, but it did not intend to apply to circumstances such as this. In dispute was whether the plaintiff, who was not in any contractual relationship with Eskom at the time and was not a user of the electricity, was a consumer.

In finding that the plaintiff was entitled to the benefits of section 61 as a bystander, the court provided redress to the plaintiff in his capacity as a natural person protected by the CPA.

The implications of the judgment

Any public liability policy would have indemnified the insured if the claim was lodged as a pure delictual claim for damages, based on negligence. Indemnification would have followed the principle of the insurer being legally liable to pay damages up to the insured's limit of indemnity arising from an occurrence.

The application of the strict liability principle implies that judgment in favour of the plaintiff

would have triggered the 'legally liable to pay' principle in the policy, irrespective of whether the insured was negligent.

Careful consideration

From the perspective of insurers, the question that begs to be answered is whether such liability to pay is contemplated in the cover that is being provided.

With the advent of the CPA, insurers have gone to great measures to address the issue of strict liability in policy wordings. Was consideration given to the fact that strict liability can also apply in respect of a non-user of a product or as a bystander?

Is a product like electricity a product as defined under a product liability policy? A product is tangible and has to leave the custody or control of the insured. It is arguable that the product is both the current and the cable that the electricity is being distributed by.

Insurance consequences

The principle of being 'legal liability to pay' includes strict liability and insurers would therefore be required to respond to a claim of this nature, irrespective of whether the damage was suffered by a consumer or a bystander. The judgment is therefore correct in its approach, although the implications are potentially far reaching.

Similar judgements have not yet been seen, and not many courts have tested and considered the applicability of the CPA. This judgment may well cause an increase in claims of this type. This will result in an increase in insurers' liability exposure, which may well require a premium increase or a rethink of wordings in respect of such policies.

Insurers and underwriters of public liability insurance will need to consider the impact of this judgement carefully and keep an eye out for potential appeal proceedings. ●



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