



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 16561/20

Full Bench case number: A02/2026

In the matter between:

BEYERSKLOOF WINE BAR (PTY) LTD

Appellant

and

MAXINE WILLIAMS

Respondent

Coram: Van Zyl, J (Le Grange, J *et* Kusevitsky, J concurring)
Heard on: 22 July 2026
Judgment: : 12 October 2026

Summary: Civil appeal from High Court – delictual claim - appeal against finding that appellant liable on the merits for respondent's damages to be proved – *res ipsa loquitur* not applicable – no *prima facie* case of negligence established on the evidence – strict liability not applicable where common law Aquilian action adequate remedy – appeal upheld

ORDER

1. The appeal is upheld.
2. The order of the court *a quo* is set aside. and replaced by an order dismissing the plaintiff's claim.
3. The plaintiff shall pay the defendant's costs of the trial, the application for leave to appeal heard by the court *a quo*, the application for special leave to appeal decided by the Supreme Court of Appeal, and the costs of the appeal. These costs will include the costs of counsel in each instance, to be taxed on Scale C.

JUDGMENT

VAN ZYL, J (LE GRANGE, J et KUSEVITSKY, J CONCURRING):

Introduction

1. The maxim *res ipsa loquitur*¹ played a leading role in the court *a quo*. It should have stayed in the wings.
2. The respondent, as plaintiff, claimed delictual damages after she had, on 3 October 2020, swallowed “a needle type object”² while eating a hamburger at a restaurant operated by the appellant (then the defendant). I shall, for the sake of convenience, refer to the parties as plaintiff and defendant, respectively.
3. The parties having agreed on a separation of issues, the matter proceeded on the question of liability only. On 29 May 2025 the trial court found in favour of the plaintiff, and held that “... *the defendant is at fault for their failure*

¹ “The thing speaks for itself”, also referred to as “the facts speak for themselves”: see, for example, *Sardi and others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H.

² There is no precise description of the object on record. No medical evidence was furnished.

to serve the plaintiff safe food". It held that the facts spoke for themselves. It therefore granted an order that the defendant was liable for such damages as the plaintiff may in due course prove, *"arising from the needle-like foreign object that was contained in the food that was served to the plaintiff by the defendant"*.

4. The defendant brings this appeal before us, having been granted leave to do so by the Supreme Court of Appeal.
5. The pertinent facts regarding the plaintiff's experience on the day of the incident are not in dispute. The plaintiff's evidence, which sets the scene, was conveniently summarised by the trial court:

"[6] ... On the evening of 3 October 2020, the plaintiff and her husband ... visited the defendant's restaurant, their favourite in the area, and which they frequented as guests for dinner. The plaintiff testified that she ordered a bottle of wine, some water, and a hamburger with sides for each of them.

[7] The food was served, and they both continued to indulge. Halfway through her meal, she experienced a sensation of discomfort, as though something was lodged in her throat. She immediately tried to get it down but struggled profusely. The plaintiff decided to go to the restroom as she started to cough and in a state of panic. As she continued coughing, she attempted to insert her finger into her throat to dislodge the object quicker. However, upon noticing some blood in the bathroom basin, she began to cry. This all happened during the COVID 19 period, and people started looking at her in a strange manner.

[8] After some time, she returned to her husband at the table and informed him that she was unable to discharge the object from her throat. At that point, she was overwhelmed with stress and anxiety. At this juncture she was crying and had been to the bathroom on two separate occasions and failed to discharge the object from her throat. She informed her husband that they should leave immediately ... The plaintiff informed her husband that she needs to consult a doctor. Her husband settled the bill, and they proceeded to Emergency Rooms at Stellenbosch Mediclinic.

[9] The plaintiff was immediately admitted and x-rays were taken on instruction of ... the ENT specialist. The x- rays revealed that a needle-like object was stuck in her

throat. The ENT specialist attempted to remove or extract this object manually but could not succeed. She could not be operated either that evening as she ate food and drank wine. However, she was kept in hospital overnight for a constant monitoring. The plaintiff underwent an operation after 7 hours which was unsuccessful.

[10] To monitor the location of the foreign object, the plaintiff was hospitalised and the x-rays were performed twice daily i.e. morning and evening to track the location of the foreign object. Additionally, the plaintiff was administered medication to facilitate its elimination from her body. The plaintiff was hospitalised for five (5) days and released or discharged on the fifth day when the foreign object was no longer visible on the x-rays.

...

[12] She was adamant in her testimony, that there is absolutely no possibility that a foreign object came from her clothing, as she did not wear hair clips or pins and so on. She also maintained that the object did not originate from her husband. The only way the needle – like foreign object could have entered her body was through the food that was served at the restaurant.

[13] During cross-examination, the plaintiff asserted that she was unaware of the foreign object on the food prior to ingesting it. The Court should accept that it was hidden inside the food. Despite the fact that she was served a hamburger and chips on her plate, she was certain that the foreign object was on the hamburger, because that is what she consumed at that time. She was uncertain as to whether it was on the bun, patty, or garnish, or how it had been introduced to the hamburger.”

6. The question that this court, on appeal, must determine is whether the trial court was correct in its finding that, on the established legal principles applied to the evidence, the defendant is liable in delict for the plaintiff's damages. The defendant argues that the trial court erred; the plaintiff defends the judgment.

The general principles relating to delictual liability

7. These principles are not contentious:³

³ See the discussion in Neethling and Potgieter *Law of Delict* (8ed, LexisNexis) at p 4. Emphasis added.

“The mere fact that a person has caused another to suffer damage, is, of course, insufficient to constitute a delict for which he may be held liable. To found liability, further requirements must be met. These requirements, otherwise referred to as the different elements which constitute a delict, appear from the following definition: a delict is the act of a person that in a wrongful and culpable way causes harm to another. All five requirements or elements, i.e. an act, wrongfulness, fault, causation and harm must be present before the conduct complained of may be classified as a delict. If anyone (or more) of these elements is missing, there is no question of a delict and, consequently, no liability.”

8. A party claiming delictual damages bears the onus to prove all five of the elements of a delict.⁴
9. In the present matter, the plaintiff’s pleaded⁵ case is that the defendant acted negligently in various respects. Counsel are agreed that, given the evidence that the hamburger contained the foreign object, and the absence of evidence on the plaintiff’s part that the defendant or its employees had knowledge of the risk, the only pleaded grounds of negligence that could notionally have been a basis for a finding of liability are that the defendant:⁶
 - 9.1 *“Failed to keep the food and/or consumables offered to the public at the Defendant’s premises safe for public use and/or consumption”;*
and
 - 9.2 *“Failed to avoid the dangerous and unsafe consumables and/or food prepared, served and sold by the Defendant and/or their duly authorised representative being consumed by the Plaintiff”.*
10. The defendant contends that, having regard to these principles as applied to the facts, the appeal should succeed for three reasons.

⁴ *Old Mutual Unit Trust Managers Ltd v Living Hands (Pty) Ltd and others* 2024 (6) SA 85 (SCA) paras 55 and 70 regarding wrongfulness, para 84 regarding negligence, and para 91 regarding causation.

⁵ A court is called upon to decide only the pleaded issues: *Shill v Milner* 1937 AD 101 at 105.

⁶ I quote from the particulars of claim.

11. First, the particular facts of the present case do not allow for the application of the doctrine of *res ipsa loquitur*, and the trial court invoked it in error.
12. Second, whether or not *res ipsa loquitur* applies, the defendant's evidence, which could not be contested, showed that the presence of the foreign object in the plaintiff's food did not occur because of negligence on the defendant's part. The relevant grounds of negligence are pleaded in general and non-specific terms which, left the trial court in the position where it was not possible for it to make findings of fact as to how the foreign object came to be present in the food and, consequently, how it could have been foreseen or prevented by the defendant.
13. Third, and insofar as it may arise upon a reading of the trial court's judgment, the legal position regarding the sale of defective products is that the common law Aquilian action is sufficient to protect an injured person's rights. Courts therefore do not recognise strict liability as part of our law in such cases. The trial court, however, seemingly approached the dispute on the basis that the defendant should be held strictly liable for the plaintiff's damages.
14. I discuss these contentions in turn.

Res ipsa loquitur

15. I have remarked that the trial court placed heavy reliance on this maxim, which operates in a specific context:⁷

"... in seeking to establish negligence of the driver of the insured vehicle, counsel for the appellant referred to the fact that he swerved across the road. Wherefore counsel relied on the maxim res ipsa loquitur (the thing speaks for itself). He submitted that it was for the respondent to adduce sufficient evidence to overcome the prima facie effect of the [appellant's] evidence .. . The maxim has no bearing on the incidence of the onus of proof on the pleadings. It is invoked where the only

⁷ *Sardi and others v Standard and General Insurance Co Ltd supra* at 780C-H. Emphasis supplied.

known facts, relating to negligence, consist of the occurrence itself; The occurrence may be of such a nature as to warrant an inference of negligence. ... It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility; ... At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation. ..."

16. The doctrine, where applicable, gives rise to an inference rather than a presumption:⁸

*"It has been contended that res ipsa loquitur creates a presumption of negligence, but the current position is that there is no shift in onus of proof in such cases and that there is not even a prima facie case in favour of the plaintiff; The phrase is merely an argument on the probabilities that the plaintiff, who may have little evidence at his disposal, may use in order to convince the court that the defendant acted negligently ... But the defendant may still submit evidence to show that the occurrence in question bears no relation to any negligent conduct on his part."*⁹

17. The trial court in the present matter found that the doctrine applied, and held as follows: *"The defendant proffered no plausible explanation for the accident that the plaintiff encountered at its establishment. This therefore shifts the burden of providing a reasonable explanation to the defendant."*

⁸ *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 574E.

⁹ *Neethling and Potgieter op cit* at pp 191-192. Emphasis supplied.

18. The trial court's reasoning leading up to this finding appears from the following extracts from the judgment:¹⁰

"[24] ... the plaintiff asserted that the two-stage inquiry was unnecessary in establishing negligence in this instance, as the facts are self-evident. It was argued that although res ipsa loquitur is not a legal principle however, it is employed to describe the proof of fact which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against the defendant; it is a form of inferential reasoning which is invoked where the occurrence or the incident itself is the only known fact from which a conclusion of negligence can be drawn and the incident does not ordinarily occur in the absence of negligent conduct; the conclusion is self – evident from the facts, and the maxim is only invoked if the facts suggest that the defendant may have been negligent.

[25] As the plaintiff has stated, the defendant has not provided an explanation of the origins of the foreign object on the food, it merely stated that it had safety and health protocols in place to ensure food safety. Such protocols were not deconstructed to demonstrate what they entailed. The Court was unaware of the restaurant's layout and, more significantly, the kitchen's layout on the day in question, as Mr. Straaten was not present that evening and only received a briefing from his staff that the evening was bustling. Mr. Straaten could not tell in his examination who and / or how many staff members were working that evening, what health and safety protocols were put in place. What was the process undertaken by which staff member to prepare the plaintiff's hamburger. Given the fact that it was quite busy that evening, how big was the space that was utilized to create the plaintiff's hamburger; how often was it cleaned; what type of clothing was put on by the kitchen staff and waitresses? For example, did it require to be secured by pins and needles? Were the staff wearing headgears, tops and so on that were secured by pins and/or needles. Did Mr. Van Straaten interview the staff that worked that evening to ascertain if one of them did not put the needle - like object carelessly with food as it was busy? As stated above, the comment by Mr Straaten that "there must have been unforeseen circumstances for this to happen" remains speculative.

[26] In my analysis, Mr. Van Straaten is unaware of the origin of the needle-like object. In addition, he ruled out the possibility that the foreign object might have come from the suppliers. In his plea and testimony, it was stated that the defendant purchased raw products from reliable and/or reputable sources and upon delivery,

they would inspect it for quality control. Also, it was not elaborated what that process of inspection entailed.

[27] The doctrine of res ipsa loquitur allows the Court to infer negligence from the circumstances of an accident when there is no direct evidence. Similarly, there is no direct evidence regarding the manner in which the foreign object was introduced to the plaintiff's hamburger. She became aware that she had consumed a hazardous substance when the foreign object was unable to pass down her oesophagus after she had consumed a hamburger."

19. This finding conflicts with the effect of the application of the maxim as set out in the prevailing authorities. The trial court, moreover, seems to have conflated the requirements of the maxim with the test for negligence. In discussing whether the maxim was applicable, the court held that:¹¹

"The plaintiff would not have swallowed a needle like foreign object if a specified or a required set of health and safety protocols in the kitchen staff and waiters was in place. The fact that Mr. Van Straaten testified during cross-examination that food quality is checked when it is delivered and they used plastic brushes and not metal brushes to baste and clean the grill gave credence to the fact that they had a duty of care towards the plaintiff. The defendant had a duty to ensure that patties are prepared on clean surfaces, albeit using plastic brushes. Even if this Court were to employ the two – stage inquiry on negligence, it follows that they foresaw harm happening for instance in the kitchen that may result into some food contamination should they clean the grill with metal brushes but refrained from doing so. Instead, they prevented the harm from happening by using the plastic brushes. However, we do not know whether that indeed happened preceding this incident. Either way, the defendant is at fault for their failure to serve the plaintiff safe food."

20. The trial court found, in addition, that the defendant was in control of the ingredients of the hamburger eaten by the plaintiff, and that the control requirement for the maxim to apply was satisfied: *"The defendant at all times was in control of the preparations, service and sale of food. Meaning, as it sourced raw products, it was responsible for preparing (creating) the hamburger from its raw state until it was consumable. The defendant was in*

control of the appliances, instruments and/ or implements that prepared a hamburger that turned out to have a foreign object upon being swallowed.”

21. This finding, with respect, confuses control over the ingredients with control over the foreign object. This error is illustrated further by the fact that the trial court did not (and could not) find that the defendant or its employees had knowledge of the presence of the foreign object. There is, in the circumstances, no basis for a finding that the defendant was in control of a foreign object it did not know to be present in an unidentified ingredient of the hamburger.
22. The court concluded as follows as regards the application of the maxim: *“In this instance, the inference is only permissible while the cause of the incident remains unknown. The Court will therefore, infer that such an unknown event occurred if a certain party was negligent. There is therefore, an obligation from the defendant to rebut the inference by proffering an explanation for the occurrence of the incident.”*
23. In holding thus, the trial court lost sight of the fact that the onus remained on the plaintiff throughout. The trial court could not rely merely on the maxim to fill in the gaps in the plaintiff’s evidence. It still had to decide whether, on all of the evidence, together with the probabilities and such inferences as could reasonable have been drawn, the plaintiff had discharged the onus of proof on the pleadings on a balance of probability, just as in any other case concerning negligence. It could not, as it seems to have done, first draw the inference of negligence from the occurrence of the incident itself, elevating this to a *prima facie* case; and then decide whether such case has been rebutted by the defendant's explanation.
24. I agree with the submission of the defendant’s counsel that the plaintiff’s case, on a consideration of the evidence as a whole, did not meet the required standard from the outset. This matter was therefore not one in which *res ipsa loquitur* could swing the balance in the plaintiff’s favour. I discuss this in what follows.

Was the defendant negligent?

25. The focus of this appeal is (as it was in the trial court) on the element of fault in the form of negligence. I have indicated that the pleaded grounds of negligence that could notionally support a finding of liability are that the defendant failed to “*keep the food and/or consumables offered to the public at the Defendant’s premises safe for public use and/or consumption*”, and failed to “*avoid the dangerous and unsafe consumables and/or food prepared, served and sold by the Defendant and/or their duly authorised representative being consumed by the Plaintiff*”.
26. Was the defendant negligent on either or both of these bases? The test for negligence consists of two enquiries: foreseeability and preventability.¹² Fault in the form of negligence arises if a reasonable person in the defendant’s position would foresee the reasonable possibility of his conduct injuring another and causing loss; would take reasonable steps to guard against that occurrence; and the defendant failed to take those steps.
27. Foreseeability must be considered carefully: negligence is not established merely by showing that the occurrence happened, or by showing - after it happened - how it could have been prevented.¹³ The greater the possibility that damage will occur, the easier it will be for a court to find that damage was reasonably foreseeable. Conversely, the smaller the possibility of damage, the more difficult it will be for a court to find that damage was reasonably foreseeable.¹⁴
28. The mere fact that foreseeable damage occurs does not necessarily mean that steps actually taken by a defendant were unreasonable.¹⁵ The burden of eliminating the risk of harm is relevant, and the cost and difficulty of taking precautionary measures play a crucial part in the enquiry. The principle is

¹² *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

¹³ *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) para 45.

¹⁴ *McCarthy Ltd v Sunset Beach Trading* 300 CC 2012 (6) SA 551 (GNP) para 25.

¹⁵ *Shabalala v Metrorail* 2008 (3) SA 142 (SCA) para 8.

that, where the cost and difficulty of taking precautionary measures are greater than the gravity of the risk involved, a reasonable person would not take such steps to minimise or reduce the risk.¹⁶

29. The undisputed evidence of the defendant's general manager, Mr Van Straaten, was that an incident of this kind had never been experienced at the restaurant.
30. Mr Van Straaten was in charge of sourcing ingredients for the food served at the restaurant. The defendant bought all of its hamburger ingredients from third party suppliers, in other words, the defendant did not bake the bread or make the patties itself. The supplier of the patties had been in business since approximately the 1960s. Mr Van Straaten testified that he received most of the deliveries to the restaurant and, on some occasions, he collected the order from the butchery himself.
31. The defendant had health and safety protocols in place, the purpose of which was to ensure food safety. It was Mr Van Straaten's responsibility to train the defendant's staff. No metal brushes were used to scrub and clean the grills at the time when the incident took place, and a needle-like object could therefore not have found its way into the burger from there.
32. The trial court summarised the salient evidence:¹⁷

"[17] During cross-examination he confirmed that he was not on duty during the time of the incident. However, he had two managers, that is a kitchen manager who supervised food preparation and a front manager. Nevertheless, he was responsible for overseeing the operations of the business. The administration of the kitchen was his responsibility after the kitchen manager departed during the COVID-19 outbreak and did not return. He ensured that the staff was trained in health and safety protocols to guarantee food safety. The kitchen's configuration was delineated by Mr. Straaten. For instance, there were two food stations where food is prepared.

¹⁶ *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477A-C; *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 777E-I.

¹⁷ Emphasis supplied.

Working in these stations were four (4) staff members, i.e. one individual in the scullery, two individuals were employed on the grill and one person on the chips and pizza station. They provided assistance to each other at different stations based on their workload.

[18] Mr. Straaten was informed by his staff that the night of the incident was quite busy. The hamburgers were the defendant's speciality. The spicing of the patties was done by the butchery. During the preparation the patties are basted with a plastic brush on the grill. The grill can be stubborn dirty at times. However, no hazardous tool was used to clean the grill. He assisted with cleaning the kitchen if the kitchen staff are late. He could not give account on the state of the kitchen that evening because he was not present. However, he agreed that there were some appliances, implements and utensils in the kitchen. In order for these items to operate, they needed maintenance.

[19] He continued to explain that the "pass", which is where food is delivered to the waitstaff is situated above one of these stations. Above the "pass" there is a fan, the magnetic rails where the order slips are kept and the printer for printing orders. These would not have caused any hazard. To ensure food safety, Mr. Straaten's testimony was that he would get deliveries of ordered items from his suppliers and would check the stock to ensure that the correct quantity was delivered and the food was of the highest standard.

[20] On the night in question, the defendant was managed by the head waitress. The plaintiff's experience was not put to issue. Since the defendant's staff was trained in quality control, if the needle - like object was seen by any of them, they would have removed it. There is a possibility that the staff did not foresee the circumstances happening that evening. None of the staff members was called to testify during trial.

33. The plaintiff criticises the defendant's argument that, because the defendant never experienced an "incident of this kind", and because the plaintiff was unable to say whether the foreign object came from the bun, the garnish, or the patty, the defendant was unable to foresee the presence of a foreign object in the hamburger. Importantly, so the criticism goes, the defendant "vacillates" between referring to a "needle-like foreign object" and a "foreign object" in an "attempt to obfuscate". Counsel for the plaintiff argues that the law does not require foreseeability of the specific manner in which the harm occurs, the general manner is sufficient. This means that the defendant did

not specifically have to foresee the presence of a needle-like foreign object in the plaintiff's food. Foreseeability would be established, absent appropriate steps being taken to ensure food safety during the preparation, cooking and serving of the food to avoid foreign objects being introduced to the food.

34. I do not see any obfuscation on counsel's part in the description of the unidentified foreign object. In any event, neither the facts nor the relevant principles are one-man shows, and they cannot be considered independently of each other or in a piecemeal fashion. A consideration of the particular facts of this matter shows that the trial court erred on the issue of negligence. The plaintiff was not able to say from in which of the various parts of the hamburger the foreign object was lodged, and she did not know how the foreign object found its way into her food.
35. Applying the established test for negligence in the circumstances, and the principles referred to earlier in this judgment, a reasonable person in the defendant's position would not have foreseen the presence of a foreign object in an unidentified ingredient of the hamburger. This is so even taking into account the fact that a defendant need not have foreseen the exact or specific harm that occurred.¹⁸
36. Foreseeability cannot be considered without having regard to what went before, and Mr Van Straaten testified that the restaurant had never experienced an incident of this kind before. There were no historical facts or warning signs that would have placed the defendant on alert. A reasonable person in the defendant's position would therefore not have foreseen that a foreign object would find its way into one of the ingredients of the hamburger on the day in question. In the circumstances, the plaintiff did not discharge the onus of proving that the presence of a foreign object (needle-like or not) in the food was reasonably foreseeable, and consequently that harm to the plaintiff was reasonably foreseeable.

37. Even if one assumes for the sake of the argument that the risk was foreseeable, I scarcely think that a reasonable person in the defendant's position would have taken more steps than the defendant actually took to prevent the possibility of harm. What else could the defendant have done? The defendant's counsel proffered a few suggestions: the defendant should have taken x-rays of every ingredient it received from suppliers, or should have deconstructed every ingredient to ensure that there were no foreign objects hiding there; or should have scanned every dish with a metal detector to ensure that no foreign objects were hiding in the food; or should not have sold food at its restaurant. These suggestions border on the absurd, but they illustrate the point.
38. If one considers the avenues available to the defendant to prevent the presence of a foreign object in one of the ingredients of the hamburger (other than the protocols it already has in place), the only conclusion to be drawn is that a reasonable person in the defendant's position would not have taken these drastic steps.
39. If it was not possible for the trial court to make a finding of fact as to how the needle-like object found its way into the food, it would similarly not have been possible for it to make a finding on negligence or causation. It follows that, in the absence of a finding on the issue of fault, the plaintiff's claim should have been dismissed. This is the case whether or not one invokes *res ipsa loquitur*. The evidence does not lead to any conclusion other than that the defendant did not act negligently. The trial court, with respect, erred in finding otherwise.

The issue of strict liability

40. As indicated earlier, the trial court found that the defendant "*is at fault for their failure to serve the plaintiff safe food*". I agree with the submission by counsel for the plaintiff that this finding suggests that the trial court's general approach to the matter was that the sale of a defective product leaves the

seller (in this case, the defendant) strictly liable for the damages suffered by an injured person.

41. Counsel for the plaintiff argued that the issue of strict liability does not arise from the trial court's judgment, and that it is irrelevant for the purposes of this appeal. Insofar as a reading of the judgment might suggest otherwise, I deal with the issue briefly.
42. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*¹⁹ the Supreme Court of Appeal (SCA) considered whether to extend the common law relating to product liability, and to hold the manufacturer of a defective product strictly liable for the plaintiff's damages. It decided against such an extension:²⁰

"[19] ... 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. ... 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.

[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 comes into play only if the plaintiff's evidence is such that it can be said that the event ... 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

¹⁹ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) para 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."

²⁰ See *Wagener supra* paras 19-21, and see also para 25. Emphasis supplied.

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. ...

[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. 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."

43. The state of our law therefore remains that the Aquilian action remains the remedy to invoke, and is determinative of whether the defendant is liable:²¹

"[38] ... the appellants' remedy is confined to the Aquilian action which is presently adequate to protect their 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."

44. The question of strict liability therefore does not arise in the context of this matter. If the trial court effectively held the defendant strictly liable (as a reading of the judgment may suggest), it erred.

Conclusion

²¹

Wagener supra para 38.

45. For the reasons set out above, the plaintiff did not discharge the onus to prove negligence in the part of the defendant. She should therefore not have been successful in the trial court, and the appeal must succeed.

Costs

46. There is no reason why the normal rule as to costs should not be followed, namely that costs follow the event. In the exercise of my discretion, having regard to the complexity of the case and the seniority of the defendant's counsel, I am of the view that counsel's fees should be taxed on Scale C as contemplated in Rule 67A²² of the Uniform Rules of Court.

Order

47. In the premises, I suggest that the following order be granted:

1. **The appeal is upheld.**
2. **The order of the court *a quo* is set aside. and replaced by an order dismissing the plaintiff's claim.**
3. **The plaintiff shall pay the defendant's costs of the trial, the application for leave to appeal heard by the court *a quo*, the application for special leave to appeal decided by the Supreme Court of Appeal, and the costs of the appeal. These costs will include the costs of counsel in each instance, to be taxed on Scale C.**

P. S. VAN ZYL

Judge of the High Court

²² Which applies to work done after 12 April 2024.

I agree, and it is so ordered.

A. LE GRANGE
Judge of the High Court

I agree.

D. KUSEVITSKY
Judge of the High Court

Appearances:

For the appellant:

Instructed by:

Mr D. Coetsee

Cluver Markotter Attorneys

For the respondent:

Instructed by:

Ms S. van der Merwe

Hatsone Attorneys