

## PRODUCT LIABILITY LAW IN INDIA-A CRITIQUE

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### ABSTRACT

Consumer protection is a social and economic activity that involves the government and businesses working together to ensure that consumers are satisfied. Even before independence, the rulers of India had consumer protection as one of their obligations. With the passage of the new Consumer Protection Act of 2019, the protection level was raised to the next level. The Act, apart from modifying the concepts of the Act of 1986, has introduced several revolutionary features like the concept of “unfair contract”, mediation as method for resolution of consumer disputes, establishment of the central agency called Central Protection Agency with power of investigation and issuance of cease and desist orders, a new chapter on offences and penalties. Each of these topics will require a separate article. In the present article we will attempt to present an overview of the regime on product liability which in our opinion is going to be a game changer. The enactment of the Consumer Protection Act, 2019 has included India in the list of the few countries that have legislation on “Product Liability”.

**Keywords**—Consumer Protection, Product Liability, Manufacturer, Service Provider, Liability

### INTRODUCTION

Recently the government of India has enacted the Consumer Protection Act, repealing and replacing the Consumer Protection Act, 1986. The history of the consumer protection law in India begins with the enactment of the Consumer Protection Act in 1986<sup>1</sup>. Much water has flown through the river since the enactment of the Consumer Protection Act, 1986. The rise of information technology in all fields of human life is one such development. The nature of products sold in the market has also undergone a change. There were no specific provisions dealing with product liability under this Act. There was euphoria created by this legislation. The consumers were in a jubilant mood and

there was a reason for the same. For long the consumers in the market were at the receiving end. Shortage and adulteration of good, exploitative pricing, gross deficiencies in the services was an order of the day.

### A. HISTORY AND EVOLUTION OF THE PRODUCT LIABILITY LAW IN INDIA

#### 1) Traces of the Product Liability Concept in the US

The law of Product Liability emerged in United States through court cases<sup>2</sup>. The journey begins with the case of *Mac Pherson Buik Motor*

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<sup>1</sup>Kotler, Philip, “What consumerism means for marketers”, 50 HARV. BUS. REV. 10, 48(1972)

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<sup>2</sup> Mayer, Warner, Siedel and Lieberman, *Basics of Product Liability, Sales, and Contracts*, LARDBUCKET (access date and time), <https://2012books.lardbucket.org/pdfs/basics-of-product-liability-sales-and-contracts.pdf>.

*Co*<sup>3</sup>decided which acknowledged the concept of product liability in 1916. This was followed by the case of *Henningsen v. Bloomfield Motors Inc*<sup>4</sup> decided in 1960 and then the case of *Greenman v. Yuba Power Products, Inc*<sup>5</sup> decided in 1963, wherein the Supreme Court of California State formulated and adopted the doctrine of strict liability in tort for defective products. In *Vandermark V. Ford Motor Co*<sup>6</sup>decided in 1964 the liability was extended to all parties including the retailer of the products and in *Elmore v. American Motors Corporation*<sup>7</sup> the protective umbrella of this doctrine was extended to benefit even innocent bystanders randomly injured by the defective products. From the above-mentionedcases it can be observed that the automobile manufacturing sector in United States has contributed to the origin and development of the doctrine of product liability<sup>8</sup>.

## 2) Need and Evolution of the concept of Product Liability in India

Indian Legal system was not new to the concept of Product Liability. The Sale of Goods Act, Law of Torts, Indian Penal Code, Prevention of Food Adulteration Act, Weight and Measurements Act, Monopolies and Restrictive Trade Practices Act could be said to be some amongst several legislations in existence in India which could be summoned by a consumer who was a victim of defective and hazardous goods, over pricing, under weighing, perennial shortage due to hoarding, and adulteration of the goods; gross deficiencies in various kinds of services like banking, housing, insurance, communication, transportation and especially

the medical services<sup>9</sup>. However, these legislations utterly failed to inspire any confidence in the mind of the consumer. This frustration of the consumer was due to several reasons but the primary reasons were corruption, lack of commitment and accountability of the public servant invested with the power to regulate the market and the market operators, and gross delay in administration of justice by the traditional courts coupled with the associated cost of the justice. In this pathetic scenario a consumer who was victim of the failed, dishonest and imperfect market preferred to suffer in silence rather than vindicate his grievance resulting in the casualty of the justice.

In this situation of despair, the Consumer Protection Act of 1986 kindled hopes in the minds of consumers. They found in this legislation a weapon which could help in tilting the balance in their favor and restoring to them their lost pride in the market. The legislation promised to secure to the consumer his real position i.e. he/she is a king of the market<sup>10</sup>. The Act explicitly declared that it was enacted to offer better Protection to the interests of the consumers. This declaration was an acknowledgement of the existence of law(s), intended for protection of a consumer in the market and simultaneously, their inadequacy in protecting the interests of the consumers. For the first time the Consumer Protection Act recognized the specific rights of the consumer. However, these rights were not the enforceable but only hortatory in nature. The actual realization of the rights depended on some externalities which came in the form of other legislations like Competition Act. The beauty of thisact was the establishment of the three tired Consumer Disputes Redressal forums where the consumer is not required to pay any court fee nor is he/she required to hire the services of any lawyer. This Act of 1986 was on the statute book till 2019 i.e. for 33 years. During this

<sup>3</sup>MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)

<sup>4</sup>Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (N.J. 1960)

<sup>5</sup>Greenman v. Yuba Power Products, Inc, 59 Cal.2d 57 (1963)

<sup>6</sup>Vandermark V. Ford Motor Co, 391 P 2d. 164 (1964)

<sup>7</sup>Elmore v. American Motors Corporation, 70 Cal.2d 578 (1969)

<sup>8</sup>Harland, D, "The United Nations guidelines for consumer protection", 10 J. CONSUM. POLICY245, 266 (1987)

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<sup>9</sup>Prasad A. R, "Historical Evolution of Consumer Protection and Law in India", 11(3) JTCL132, 136 (2008).

<sup>10</sup>Rajanikanth, M, *Consumerism: A study on the Evolution of the Consumer Movement*, 41(10) Indian J. Mark. 4, 8 (2011).

period tremendous transformation has occurred in the market.

### 3) Emergence of the new Consumer Protection Act, 2019

There has been a dramatic change in the way the market operates and thanks to the emergence of information technology a new faceless market with no fixed physical boundaries has emerged. This has further widened the distance between the consumer and the trader or the service provider. New intermediaries have arrived. The altogether new products have arrived in the market challenging the abilities of the consumer to make any rational judgment regarding the utility and the effect of the product on the consumer<sup>11</sup>. The changed face of the market where the interest of the consumers are required to be protected and to address the difficulties experienced in implementation of the Consumer Protection Act and also to strengthen the Consumer Protection Act, perhaps, it was felt necessary to revamp the Act by repealing and enacting an altogether new legislation with new features and introducing new concepts and modifying some existing concepts. With this purpose the Consumer Protection Act of 2019 has come in to existence.

#### B. CRITICAL ANATOMIZATION OF THE CONCEPT OF PRODUCT LIABILITY IN THE CONSUMER PROTECTION ACT, 2019

The Consumer Protection Act of 2019 has a separate chapter on product liability. It can be said that with the enactment of this Act a new age of consumer protection has started in our country. In this section we shall see the scope of the product liability regime.

##### 1. Interpretation of the word 'Product'

In common parlance words "product" and "goods" are synonymous. Even there can be a service product for e.g. insurance policy. Therefore, in the business sense a product could be tangible or an intangible thing. It could be an item of goods or a service. It is difficult to draw

a water tight distinction between product on one hand and goods and services on the other hand. However, under the Consumer Protection Act product has been defined in a narrow sense in its Section 2(33). Interpreting the definition, it is understood that service products are beyond the reach of the product liability regime. The act separately defines the terms "product" and "goods" it can be said that the Act has made a distinction between "products" and "goods". **In view of this position it is submitted that the definition of the term "consumer", in the Act, is incomplete.**

##### 2. Analyzing Definition of Product Liability

When it comes to "product liability," it has been described as the obligation of a product maker or product seller, of any product or service, to pay for any harm caused to a customer by such faulty product created or sold, or by a deficiency in services connected thereto<sup>12</sup>. Thus the scope of the doctrine of "product liability", under the Consumer Protection Act is limited if we compare it with the doctrine laid down in the famous American case of *Elmore v. American Motors Corporation*<sup>13</sup> where the product manufacturer was held liable to the innocent bystanders randomly injured by the defective products, as the liability under the Act is confined to compensate the "consumer" which does not include the bystander. This is because the foundation of the action is the contractual relationship between the buyer of the product and the seller/manufacturer.

Another notable word in this definition of product liability is the word "harm". In order to understand the scope of product liability it will be necessary to understand the meaning of this word also. "Harm", with respect to product liability is defined under Section 2(22). This definition is not exhaustive though it covers majority of the different kinds of tangible and intangible losses which a consumer may suffer due to defective product or deficient service. The definition being inclusive one in an appropriate case the consumer forums can

<sup>11</sup> Singh Pratap, Grewal Joginder, "Consumer protection in India: some issues and trends", 2(1) IJLTET 272, 276 (2013).

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<sup>12</sup>Consumer Protection Act, 2019, § 2(34), No. 35, Acts of Parliament, 2019 (India).

<sup>13</sup>Elmore v. American Motors Corporation, 70 Cal.2d 578 (1969).

recognize any other head of loss as “harm” within the definition of the Act.

### 3. Product Liability Action

Having understood the meaning of the key words “product” and “product liability” it is imperative to now understand what “product liability action” means. The Act defines “product liability action” as a complaint brought by a person before such a District Commission, State Commission, or National Commission, as the case may be, in order to seek redress for the injury he has suffered.

Here we find one more deficiency in the drafting of the legislation. Because when the scope of product liability is confined to the harm suffered by the consumer how complaints can be filed by any other person (not being consumer) for the loss suffered by him? Although a complaint under the Act can be filed by any person on behalf of the consumer, the complaint is always for the loss suffered or borne by the consumer and not for the loss suffered by that person. As explained above the scope of the product liability action, under the Act, is confined to the harm suffered by the consumer. **Therefore, in the concluding part of the definition the words should have been “harm caused to the consumer”.** There is one more problem with the drafting of this legislation and that is regarding drafting of definition of the term “complaint”<sup>14</sup>

**It is at once clear that whereas all other clauses of this definition contain some specific allegations the part dealing with product liability action does not contain any specific allegation. It appears to be explanatory in nature only. It would have been better had an explanation been added and word “product” added after the word “goods” in the second sub-clause.**

### 4. Scope of Product Liability

It is imperative to now understand the scope of the product liability claim under the Consumer Protection Act of 2019. We have already seen that the product liability can be fastened against the manufacturer/ seller of the product and the provider of services in relation to the product.

However, **Section 83** of the Act dealing with the issue is again found to suffer from drafting deficiency. According to law, a complaint may bring a product liability action against a product seller, a product service provider, or a product manufacturer, as the matter could be, for any injury caused to him as a result of a faulty product.

In our opinion this provision is incomplete because a provider of service in relation to the product can be held responsible only for the deficiency in its services. It cannot be made responsible for the defect in goods. This position is also clear from the provisions dealing with definition of deficiency in service and also section 85 dealing with the scope of liability of the service provider in relation to the product.

**Therefore, in our submission section 83 should be amended and the words “or deficiency in product service.”**

### 5. Extent of Liability of Manufacturer of Product

The manufacturer of a product will liable to the consumer if the product has a defect and this defect causes him some harm. So, it becomes necessary to understand the meaning of the term defect in product. Generally, there are three types of defects in the product.

- i. Manufacturing defects means those defects that originate during the manufacturing process and often results from poor-quality materials or careless workmanship.
- ii. Design defect originates when the product design is intrinsically useless or dangerous irrespective of the fact that the product may have been manufactured with care.
- iii. Failure to warn defects which includes failure to provide sufficient relevant product warning or instructions to consume or operate the product.

A product manufacturer is liable under Section 84 of the Act if the product contains a defect of manufacture or there is any defect in the product design; or there is a digression from manufacturing specifications; or the product does not conform to the express warranty; or the product fails to provide clear instructions of proper usage to prevent any damage or any alerting concerning incorrect or improper usage. Thus, provisions of

<sup>14</sup>Consumer Protection Act, 2019, § 2(6), No. 35, Acts of Parliament, 2019 (India).

section 84 are wider than the types of defects mentioned above. Here we want to submit that the words product fails to contain shall be substituted by the words “he fails to give” to bring more clarity in the provision. Section 84 incorporates the principle of absolute liability as in sub-section (2) it declares that a product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product. Warranty could be either implied or express one. Section 84 is limited in its scope to the express warranty. Thus, as far as breach of implied warranty is concerned it seems to be beyond the scope of the product liability action.

#### 6. Deficiency in Product Service

The question of liability for deficiency in the product service is provided under section 85 of the Act which dictates that any service provider will be liable in the event of providing faulty, imperfect or deficient services. **In our opinion with the modifications and enlargement of the concept of “Deficiency in service” it was not necessary to enact the elaborate provision of section 85. Since the definition of complaint includes deficiency in service and also product liability action the provisions of section 85 appears to be superfluous and likely to cause the problems of interpretation and a tool in the hands of defense counsel.**

#### 7. Extent of Liability of Seller of Product

Section 86 provides that a seller of the product is liable if he has employed substantial control over the designing, testing, manufacturing, packaging or labeling of a product that caused harm; or if he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm. The seller will also be liable if he made an explicit warranty of the product, independent and additional of any explicit warranties made by a manufacturer and such product failed to conform to such warranty introduced by the seller, causing the harm. Further, seller will also be held liable if the identity of product manufacturer is unknown and even if known, the service of

notice or process or warrant cannot be produced on him or he is not subject to the law which is in force in India or if it would not be possible to enforce any order passed or to be passed against him. This provision is significant from the perspective of consumer protection. It protects the consumer against the imported products where the manufacturer resides outside the territories of India. Also, the seller will be liable where there is failure on his part to undertake reasonable care in maintaining, inspecting, or assembling the product or when he fails to pass on the product manufacturer’s warnings regarding the dangers involved with the product or instructions regarding the proper usage of the product while selling such product and such failure was the immediate cause of the harm.

#### 8. Extent of Liability of Service Provider

It has already been mentioned that the concept of product liability under the Act does not include “service product”. It covers products which are otherwise goods. However, the law of product liability governs the service in relation to the product. A consumer of any service, within the meaning of the Act, is protected mainly by the concept of “deficiency in service”. However, apart from deficiency in his service a service provider shall also be liable in a product liability action if he failed to issue adequate warnings or instructions to the consumers to prevent any harm; or the service falls short of or does not conform to the explicit warranty or the terms and conditions of the contract. Thus, the scope of liability of a service provider in relation to the product is wider than the liability of other service providers.

#### 9. Defenses in the Product Liability Action

While protecting the interests of consumers of product the Consumer Protection Act has not forgotten to protect the interests of the manufacturer/seller of the products. According to **Section 87** of the Act, a product liability claim cannot be made against the product seller if the product was altered, misused, or modified at the time of the damage. The product manufacturer shall not be liable in any product liability action on grounds of failure to give appropriate instructions or warnings, if an employer had acquired the product for use in the

workplace and the product manufacturer has issued sufficient instructions or warnings to such employer. The liability of the product manufacturer also does not arise, when the product was sold as a material or component to be used in another product, and the product maker provided the relevant warnings or instructions to the material or component purchaser, but the harm was caused to the complainant by use of the end product in which such component or material was used.

Further, there is no liability where the product was such that it was legally only meant to be used or dispensed by or under the supervision of an expert or a class of experts and the product manufacturer had exercised reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts. Liability also cannot be fixed on the manufacturer where the consumer while using such product, was under the influence of alcohol or any prescription drug without being prescribed by a medical practitioner. Similarly, a product manufacturer will not be liable if he fails to provide such instructions or warnings about a danger from the product, which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, considering the characteristics of such product.

### 10. Grant of Relief

A consumer who is a victim of defective product can file a complaint before the District Consumer Disputes Redressal Commission<sup>15</sup>, a State Consumer Disputes Redressal Commission<sup>16</sup> or the National Disputes Redressal Commission, whoever has the jurisdiction<sup>17</sup>. On the claims for compensation being proved the appropriate commission can order payment of compensation. Compensation can be awarded for any mental or physical loss or damage but not for any damage to the product

or to the premises on which the product is used. The commission's power to award compensation is, however, not confined to above heads. In an appropriate case it may award compensation for any other harm suffered by the consumer. The quantum of the compensation varies on a fact-to-fact basis for every case. Thus, the liability for the defective product is civil in nature and the remedy is by way of award of monetary compensation.

From the above discussion it is clear that the scope of the product liability action under the Consumer Protection Act of 2019 is wide enough to protect various interests of the consumers. It is indeed the part of human rights and the provisions are laudable one.

### C. JUDICIAL ACUMEN OF THE PRODUCT LIABILITY CONCEPT IN INDIA

In India, courts have dealt with product liability cases centered around the concepts of negligence and strict responsibility, but statutes have generally been quiet on the requirements for seller or manufacturer culpability for defective products and faulty services.

In *A.S. Mittal v. State of Uttar Pradesh*<sup>18</sup> in the year 1989, the Supreme Court reviewed a matter of law regarding product responsibility and concluded that the outcome will be determined by the facts and evidence provided. In the case of *Airbus Industrie v. Laura Howell Linton*<sup>19</sup> in the year 1994, an aircraft which was a scheduled passenger flight from Bombay to Bangalore, impacted earth nearly 2,300 feet before the runway began and promptly hit the boundary wall during an attempt to land at Bangalore airport. As a result, the aircraft's wings, fuselage, and other components disintegrated. This resulted in the death of 92 passengers and four crew members, while the remaining 54 people suffered injuries of different severity. In an action brought by the appellants to claim for compensation from Indian aircraft manufacturers, airlines, and airport authorities, the respondents claimed the Texas court to be a

<sup>15</sup>Consumer Protection Act, 2019, § 2(15), No. 35, Acts of Parliament, 2019 (India).

<sup>16</sup>Consumer Protection Act, 2019, § 2(44), No. 35, Acts of Parliament, 2019 (India).

<sup>17</sup>Consumer Protection Act, 2019, § 2(29), No. 35, Acts of Parliament, 2019 (India).

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<sup>18</sup>A.S. Mittal v. State of Uttar Pradesh, (1989) 3 SCC 223.

<sup>19</sup>Airbus Industrie v. Laura Howell Linton, 1994(5) Kar LJ 63.

more proper forum because India had no strict product liability law. In this case, the Karnataka High Court dismissed the respondents' claim and determined the appellants' liability based on common law concepts of causation and negligence rather than strict product liability, concluding that "the mere fact that the Indian Courts do not have the strict product liability law" was irrelevant. Such obsolete acts can be radically amended and suitably interpreted or new legislation should be brought in to save the situation, as it was done in *Charan Lal Sahu v. Union of India*<sup>20</sup>. Consumer markets for goods and services have gone through intense transformation since the enactment of the Consumer Protection Act in 1986. There existed ambiguity and uncertainty in the Indian legal environment for product liability prior to the CPA 2019 and the rules promulgated there under. The Consumer Protection Act of 1986 was amended in 1993 and 2002, but no provisions for product responsibility were included. Consumer protection bills from the years 2011, 2015, and 2018 demonstrated the government's pro-consumer stance and called for legislation to be updated to address legal ambiguity.

All of the foregoing events have eventually resulted in implementation of the new CPA 2019, which includes product responsibility rules based on tort law's strict liability concept and the courts' jurisprudence. Furthermore, the CPA 2019 e-commerce rules necessitate e-commerce firms to support the product liability framework while also forcing them to provide relevant information to customers, allowing for greater transparency and consumer protection.

#### D. SUGGESTIONS

In our opinion the legislation suffers from several drafting deficiencies. The definition of the terms like "consumer", "complaint", "product liability action" suffers from drafting defects, some of which are of serious nature. Amendments are required to be made in these definitions to make the law unambiguous. Similarly, section 83 dealing with product

liability action also is required to be amended and the words "or deficiency in the product service, as the case may be" is required to be inserted after the words "on account of a defective product" and in section 84 the words "product fails to contain" shall be substituted by the words "he fails to give" to bring more clarity in the provisions.

#### E. CONCLUSION

The product liability regime, in our opinion, is one of the laudable elements of the new Consumer Protection Act which creates a consumer-friendly mechanism for settlement of consumer disputes. This law promises to compensate a victim of defective product, as far as money can compensate, for the harm/injury suffered by him. The law tries to achieve a balance between the interests of the consumers on one hand and the interests of the manufacture/seller of the products on the other. The prompt and cost-effective remedy of the Act, if it works properly, will deliver the constitutional promise of "justice".

Whereas the intellectual property laws like patent law, Trade Design and Trade Mark protect various interests of the manufacturer like his economic interest, market reputation and good will and the competition law secures his place in the market, the Consumer Protection Act protects the interests of the consumers in the market. Therefore, it would not be wrong to say that a sort of balance between the competing interests of the manufacturer, service provider or seller, on one hand and the consumer on the other hand is sought to be created by these legislations. A market cannot exist and survive without patronage of the consumers and unless consumers have confidence in the market his patronage cannot be expected by the producers. The Consumer Protection Act by protecting the interests of the consumers through the product liability regime would serve to strengthen the market and thereby contribute to the national economy.

<sup>20</sup>Charan Lal Sahu v. Union of India, 1988 SCC (3) 255 JT.