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Ashok R. Patil

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2022

PRODUCT LIABILITY ACTION: A TOOTH TO STRENGTHEN CONSUMER PROTECTION

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PRODUCT LIABILITY ACTION: A TOOTH TO STRENGTHEN CONSUMER PROTECTION

*Prof. (Dr.) Ashok R. Patil**

As the world shifts to technological advancements, the advent of e-commerce marks its peak, particularly in India, where it has been earmarked as the fastest growing market with an annual growth rate of 51%. While these developments are an important part of globalization, a few challenges come along. Issues like unfair contracts, privacy, data protection, faulty goods, refund or return remained unaddressed as the earlier existing Consumer Protection Act, 1986 did not elucidate on the same. Given the above, the Law Commission of India had recommended that a separate law be enacted for better consumer protection. Based on the recommendations of the Law Commission of India, The Consumer Protection Bill, 2019, was introduced in Lok Sabha by the Minister of Consumer Affairs, Food and Public Distribution on July 8, 2019. The said Bill received presidential assent on August 9 2019, and came into force on July 20 2020. This Article seeks to analyse the provisions on product liability in the Consumer Protection Act 2019. To analyse the development of product liability, Part 1 of this paper deals with the historical development of product liability jurisprudence in the USA, which traces the changes in the underlying rationale behind product liability. Part 2 of this paper highlights the global best practices and gives an overview of product liability by analysing the product liability laws in numerous foreign jurisdictions. Part 3 provides an analysis of the development of product liability in India and an explanation of the provisions of product liability in the CPA 2019 by explaining the relevant terms using case laws and illustrations. Finally, this paper concludes with a summary of the paper, which is helpful for other jurisdictions considering product liability law reforms in an increasingly globalized and digital economy and draws on comparisons with regulatory regimes and issues.

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Keywords: Consumer Protection, Product Liability, Duties and Liability of Manufacturer, Service Provider, European Union and Foreign Jurisdictions.

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I. INTRODUCTION

Product Liability is a legal responsibility of the product manufacturer, product seller, or product service provider for selling a defective product. Generally, the manufacturer must comply with all specifications, warranty, and conditions and meet the consumers’ ordinary expectations. Product liability can be justified in tort law and contract law. Under tort law, product liability can arise due to negligence of the manufacturer/seller/service provider for breaching their duty of care towards the consumer.¹ Alternatively, strict liability can also be imposed as it is the responsibility of the manufacturer to ensure that the product they sell to consumers is in proper condition. Under contract law, product liability can arise due to a breach of contract or warranty by the manufacturer/seller/service provider.

In India, prior to the enactment of the Consumer Protection Act 2019 (“CPA 2019”), there was no specific product liability theory. In the absence of statutory law, the courts were guided by the constitutional and common law principles of justice, equity and good conscience. The advent of new technology with developments in e-commerce has given rise to cross-border trade, which provides consumers with more choices and cheaper products at the doorstep. However, with all these developments, consumers have witnessed several

¹ Vincent S. Walkowiak, ‘Product Liability: Litigation and the Concept of Defective Goods: Reasonableness Revisited’ (1979) 44(4) *Journal of Air Law and Commerce* 705, 707.

challenges, one being products of lower safety and quality standards. This has further created new surveillance and enforcement challenges for national authorities, making it more difficult to identify responsibilities when products are traded across borders.

Thus, to tackle the growing concerns, Chapter VI of the CPA 2019 introduces the concept of 'product liability for the first time in Indian consumer law. Product liability means that the manufacturer, seller or service provider of any product can be held liable for any harm caused to the consumer by the defective product or the deficiency of services provided. Consumers must show that they were injured because of the faulty product. Liability is determined based on who caused the fault. For example, if a person gets injured in an accident because the vehicle brakes were defective, then the injured person can hold the car's manufacturer liable. If the brakes were damaged because the seller made alterations, the seller could be held liable. The service provider could be liable if the brakes were damaged because the repairs were not done properly. The present Article shall delve in-depth into the product liability provisions under the CPA 2019.

II. DEVELOPMENT OF PRODUCT LIABILITY JURISPRUDENCE

The history of product liability jurisprudence can be clearly seen in the developments made in the United States of America. Initially, product liability claims were only based on breach of warranty per the contract's provisions between the parties. However, there are two significant issues with this justification –

- (i) There is no mandatory requirement to provide a warranty in the contract. Accordingly, an aggrieved consumer would not have any claim as there is no breach of contract. In addition, there can be circumstances where the warranty can be excluded or modified, which means that a product liability claim can be trounced.²
- (ii) Privity of contract means that only the consumer who has entered into the contract which implicates that any other party who gets injured due to the defective product cannot claim compensation for the same.³

Recognising these shortcomings, there was a move towards broadening the scope of product liability by introducing it in tort law—the case of *Mac*

² 'Products Liability' in Don Mayer (eds) *Law for Entrepreneurs* (Saylor Foundation 2012) <<https://open.umn.edu/opentextbooks/textbooks/279>> accessed February 2, 2022.

³ Richard A. Epstein, 'The Unintended Revolution in Product Liability Law' (1988) 10 *Cardozo Law Review* 2193, 2200.

*Pherson v Buick Motor Co*⁴ which reflects the abandonment of the privity doctrine. While highlighting the liability due to contractual warranty towards liability due to negligence. In this case, the plaintiff was injured in a car accident due to a car's wheels' defect. The defendant company, which had assembled the car, claimed they could not be held liable as the plaintiff had purchased the car from a dealer. Justice Cardozo removed the restriction of privity of contract as the defendant company had been negligent by breaching its duty to provide a safe vehicle to the plaintiff.

The next shift towards ensuring greater protection of consumers was to utilise a strict liability standard. This shift was based on the recognition that it was difficult for consumers to prove all elements of negligence by the product manufacturer or product seller. As opined by Justice Traynor in *Escola v Coca-Cola Bottling Co*,⁵

"A manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings".

This rationale was built further in *Greenman v Yuba Power Products Inc*⁶, wherein the Court held the manufacturer liable while observing the cause of injury arising from a defect in the design.

Additional developments were made in the cases following these decisions, such as the theory of 'implied warranty of safety, in *Henningsen v Bloomfield Motors, Inc.*⁷ The plaintiff's wife was injured due to a malfunction in the car's steering. The plaintiff sued the manufacturer and the dealer. The dealer had two defences:

- i. Plaintiff had signed the warranty consisting of a clause freeing the dealer from any liability for personal injury; and
- ii. the dealer was not responsible for an injury suffered by the plaintiff's wife. The Court rejected these arguments and held that every sale of a product includes an implied warranty of safety and that this warranty extends to all foreseeable product users.

Therefore, the jurisprudence on product liability has developed with the underlying motive to protect consumers from defective products by ensuring

⁴ (1916) 111 NE 1050, 217 NY 382.

⁵ 24 Cal 2d 453, 150 P 2d 436 (1944).

⁶ 59 Cal 2d 57, 377 P 2d 897 (1963).

⁷ 32 NJ 358, 161 A 2d 69 (1960).

that they can recover damages for any injury caused to them due to default products.

III. OVERVIEW OF PRODUCT LIABILITY LAWS IN FOREIGN JURISDICTIONS

Many jurisdictions' consumer protection laws and regulations have provisions relating to product liability. For this purpose, it is essential to discuss important jurisdictions, namely, the European Union ("EU") and the United Kingdom ("UK"), and further, compare them with other jurisdictions where the concept of product liability is being developed.

A. EUROPEAN UNION

In EU, the Product Liability Directive 85/374/EEC was adopted in 1985. It seeks to establish a strict liability regime for defective products in EU. Members of the EU have adopted the directive through national legislations.⁸ Under Article 4 of the Directive, the injured person has to show the damage they suffered and prove a causal relationship between the defective product and the damage. The standard of evidence varies in different countries.⁹ A product is defective if it does not provide the safety that a person is entitled to expect as defined under Article 6 of the Directive. In *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt-Die Gesundheitskasse*¹⁰ and *Betriebskrankenkasse RWE*,¹¹ it was held that if the consumer is at risk because the product's function is dangerous, if the user is vulnerable or if there is an abnormal potential of damage, then the safety standard is also to be increased.

Additionally, other directives seek to protect consumers and establish the liability of producers/sellers of goods. The Directive (EU) 2019/771 regulates contracts involving the sale of goods by requiring all goods to conform to specific requirements. Further, the EC periodically evaluates the product liability regime to determine its effectiveness, loopholes in the current laws, changes in the market etc. Recently, it published a report in 2020 concerning product liability and AI, robotics and the Internet of Things (IoT).¹²

⁸ Rod Freeman et al, 'Product Liability and Safety in the EU: Overview' <[https://uk.practicallaw.thomsonreuters.com/w-013-0379?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-013-0379?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 2 February 2022.

⁹ *N.W. et al v Sanofi Pasteur*, Case C-621/15.

¹⁰ *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt-Die Gesundheitskasse* Case C-503/13.

¹¹ *Betriebskrankenkasse RWE* Case C-504/13.

¹² European Commission, *Report on the Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics* (COM 2020).

B. UNITED KINGDOM

The UK passed the Consumer Protection Act 1987 to introduce product liability and consolidate amendments made to the existing Consumer Protection Act 1978. Section 2 of the Act, 1987 imposes strict liability on the manufacturer or supplier of a product, which is consistent with the strict liability given in the EU Product Liability Directive 85/374/EEC. Under this section, a claimant must show that they suffered damage due to a defect in the product. The same has been held in numerous cases –

In *Al-Iqra v DSG Retail Ltd*,¹³ the Court observed that the contention of a product never previously causing harm did not mean that the product could not be defective. As such, the facts of each case have to be determined independently. Further, *Baker v KTM Sportmotorcycle UK Ltd*¹⁴ The Court stated that it is not required for the plaintiff to prove the defect causes. In the present case, the product was regularly used, and the plaintiff carried out proper maintenance and servicing. Therefore, the galvanic corrosion must be a defect in the design or manufacture. Thus, the defendant was liable.

The Court dealt with a complaint against the manufacturers of hip replacement prostheses. While making the manufacturer strictly liable, the Court considered factors such as safety, durability, survivorship, revision surgery etc.¹⁵ In the similar line, the court in determining whether or not a product is defective, courts look at the following factors – manner of marketing the product, instructions and warnings with the product, the reasonably expected use of the product etc. In another case of *Wilkes v Depuy International Ltd*¹⁶ the Court made the following observations:

- (i) The level of safety is an objective standard based on a person's general expectation rather than a legitimate expectation of the public.
- (ii) The emphasis should be to determine if there was a defect or not and not on identifying the harmful characteristic which caused the injury.
- (iii) Relevant factors for determining defect include – cost and the risk-benefit balance of a product, ease of and extent of mitigating risk, the product's compliance with applicable standards and producer's specification.

¹³ *Al-Iqra v DSG Retail Ltd* 2019 EWHC 429 (QB).

¹⁴ *Baker v KTM Sportmotorcycle UK Ltd* 2017 EWCA Civ 378.

¹⁵ *John Hastings v Finsbury Orthopaedics Ltd, Stryker UK Ltd* 2019 CSOH 96.

¹⁶ *Wilkes v Depuy International Ltd* 2016 EWHC 3096 (QB).

In the case of *Colin Gee v Depuy International Ltd*,¹⁷ the Court made the following observations:

- (i) The concept of ‘defect’ is strictly objective and subjective to examination.
- (ii) As per Section 3, the burden falls on the claimant to prove a defect to show that the product was below the safety standards.
- (iii) If an injury can arise even if the product meets the safety standard under Section 3, then there is greater specificity about how the product is unsafe. It needs to be established that the product is unsafe due to an abnormal feature.

In *Claire Busby v Berkshire Bed Co Ltd*¹⁸ the plaintiff purchased a bed from the respondent, which led to an injury by falling off the end of the bed. She claimed that a defect caused the accident, the alleged defect was that there was a one-degree slope in the bed which had caused the plaintiff to lose their balance and get injured. The Court while dismissing the claim of breach of contract and negligence made the following observations. The Court held that the product’s level of safety would be based on the test of ‘what a person would generally be entitled to expect. Although the respondent had not manufactured the bed, they had branded the beds as their own and therefore were liable.

Section 4 lays down the defences in a product liability action, and Section 5 states the types of damage for which product liability is attracted. An important question which arises is the remoteness of damage. If given a broad interpretation, it can cause the producer/supplier to be liable to any person injured because of their product, even if there is no reasonable nexus between the producer/supplier and the injured party. In *Renfrew Golf Club v Motocaddy Ltd*¹⁹ The plaintiffs were owners of a clubhouse which had suffered property damage due to a fire. The cause was the fuse of a trolley supplied by the defendant had short-circuited. The plaintiffs claimed that the defendant was strictly liable as the product was defective; or due to negligence. The Court while rejecting the claim regarding negligence stated an exception to the imposition of strict liability in product liability claims under the Consumer Protection Act 1987 is where the damage was caused to a property which was not intended for private use.

A table listing the various product liability laws in multiple jurisdictions is given as follows:

¹⁷ *Colin Gee v Depuy International Ltd* 2018 EWHC 1208 (QB).

¹⁸ *Claire Busby v Berkshire Bed Co Ltd* 2018 EWHC 2976 (QB).

¹⁹ *Renfrew Golf Club v Motocaddy Ltd* 2016 CSIH 57.

S.No	Jurisdiction	Law governing product liability
1.	USA	There is no uniform law governing product liability. Federal and state laws apply differently. Liability is either contractual or based on negligence or strict liability. ²⁰
2.	EU	Product Liability Directive 85/374/EEC was adopted on July 25 1985. The underlying reasons for this directive were to harmonise the laws of member states of the EU about the market and to protect consumers. ²¹ Numerous member states have thus passed laws to give effect to this directive.
3.	UK	The Consumer Protection Act 1987 imposes strict liability on manufacturers. In addition, consumers are given certain statutory rights under the Consumer Rights Act 2015. ²²
4.	Germany	The Product Liability Act imposes strict liability on manufacturers. In addition, claims can be made for breach of contract or negligence. ²³
5.	France	Law No. 98-339 of 1998 imposes strict liability on manufacturers. If the subject matter of the dispute is outside the scope of the EU Product Liability Directive, then liability is also based on negligence or breach of contract. ²⁴
6.	Cyprus	The Defective Products (Civil Liability) Law of 1995 imposes strict liability on manufacturers. In addition, a product liability claim can also be based on negligence as per the Civil Wrongs Law or for breach of contract as per Sale of Goods Law 1994. ²⁵
7.	Australia	Schedule 2 to the Competition and Consumer Law 2010 contains the Australian Consumer Law, which imposes strict liability for products with a safety defects. In addition, product liability claims for negligence are also made. ²⁶
8.	Greece	The Law 2251/1994 on Consumer's Law imposes strict liability on manufacturers. In addition, liability can also be imposed for breach of contract or negligence as per the Greek Civil Code, and criminal liability as per the Greek Criminal Code may also be applied in some instances. ²⁷

²⁰ Chilton Davis Varner et Al, 'The Product Regulation and Liability Review: USA' (2022) *The Law Reviews* <<https://thelawreviews.co.uk/title/the-product-regulation-and-liability-review/usa>> accessed February 2, 2022.

²¹ Thomas V. Greer, 'Product Liability in the European Community: The Legislative History (1992) 26(1) *The Journal of Consumer Affairs* 159, 161.

²² 'Product Liability Safety', (2017) *Federal Law Gazette* <<https://practiceguides.chambers.com/practice-guides/product-liability-safety-2021/uk/trends-and-developments>> accessed February 2, 2022.

²³ 'Product Liability Act of 15 December 1989' <https://www.gesetze-im-internet.de/englisch_prodhaftg/englisch_prodhaftg.html> accessed February 2, 2022.

²⁴ 'Product Liability Safety', Chambers and Partners <<https://practiceguides.chambers.com/practice-guides/product-liability-safety-2021/france>> accessed February 2, 2022.

²⁵ 'Product Liability Laws and Regulations Cyprus 2022' (2022) <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/cyprus>> accessed February 2, 2022.

²⁶ Colin Loveday and Sheena McKie, 'The Product Regulation and Liability Review: Australia' (2022) *The Law Reviews* <<https://thelawreviews.co.uk/title/the-product-regulation-and-liability-review/australia>> accessed February 2, 2022.

²⁷ 'Product Liability Laws and Regulations Greece 2022' (2022) <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/greece>> accessed February 2, 2022.

S.No	Jurisdiction	Law governing product liability
9.	Indonesia	The Law No. 8 of 1999 on Consumer Protection imposes strict liability on manufacturers. In addition, a claim also arises for breach of contract. ²⁸
10.	Japan	The Product Liability Act 1994 imposes strict liability on manufacturers. In addition, a claim can also be brought for negligence as per the Consumer Contract Act 2000 or breach of contract as per the Civil Code of Japan. ²⁹
11.	Malaysia	The Consumer Protection Act 1999 imposes strict liability on manufacturers and sellers. In addition, product liability claims for breach of contract and for negligence can also be made. ³⁰
12.	Sweden	The Product Liability Act 1992 imposes strict liability on manufacturers. In addition, a claim can also be made for negligence as per the Tort Liability Act 1972 or breach of contract. ³¹
13.	Taiwan	The Consumer Protection Act imposes strict liability on manufacturers. In addition, a claim can also be made for breach of contract or negligence as per the Civil Code. ³²
14.	Brazil	The Consumer Protection Code imposes strict liability on manufacturers. In addition, a claim can also be made for negligence and breach of contract as per the Brazilian Civil Code. ³³
15.	Italy	The Consumer Code 2005 provides liability based on negligence or breach of contract. In addition, strict liability is imposed for 'dangerous activities as per the Italian Civil Code. ³⁴
16.	Netherlands	The Dutch Civil Code imposes strict liability on manufacturers. In addition, a claim can also be made for negligence or breach of contract. ³⁵
17.	South Korea	The Framework Act on Consumers imposes liability on manufacturers. Additional consumer safety laws include the Framework Act on Safety of Products, Framework Act on Food Safety and the Electrical Appliances and Consumer Products Safety Control Act. ³⁶

²⁸ 'Product Liability Laws and Regulation Indonesia 2022' (2022) <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/indonesia>> accessed February 2, 2022.

²⁹ 'Product Liability Safety 2021 Japan Trends and Developments' (2021) <<https://practiceguides.chambers.com/practice-guides/product-liability-safety-2021/japan/trends-and-developments>> accessed February 2, 2022.

³⁰ Muhammad Hafiz Mohd Shukri et al., 'Legal Issues about Product Liability Defences in Malaysia under the Consumer Protection Act 1999' (2020) 13(8) International Journal of Innovation, Creativity and Change 50.

³¹ Johan Nyberg, 'Sweden: Product Liability' The Legal 500 <<https://www.legal500.com/guides/chapter/sweden-product-liability/>> accessed February 2, 2022.

³² 'Product Liability Laws and Regulations Taiwan 2022' (2022) ICLG <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/taiwan>> accessed February 2, 2022.

³³ CL Marques and RAC Pfeiffer, 'Dissemination of Consumer Law and Policy in Brazil: The Impact of EU Law' (2021) *Journal of Consumer Policy* <<https://link.springer.com/content/pdf/10.1007/s10603-022-09503-w.pdf>> accessed February 2, 2022.

³⁴ 'The Product regulation and liability review Italy' <<https://thelawreviews.co.uk/title/the-product-regulation-and-liability-review/italy>> accessed February 2, 2022.

³⁵ 'Product Liability Laws and Regulations Netherlands 2022' (2022) ICLG <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/netherlands>> accessed February 2, 2022.

³⁶ 'Product Liability Safety 2021 South Korea' (2022) <<https://practiceguides.chambers.com/practice-guides/product-liability-safety-2021/south-korea>> accessed February 2, 2022.

S.No	Jurisdiction	Law governing product liability
18.	Spain	The Royal Legislative Decree 1/2007 imposes strict liability on manufacturers. ³⁷
19.	Switzerland	The Swedish Product Liability Act imposes strict liability on manufacturers. In addition, a claim for breach of contract or negligence can also be made. ³⁸
20.	Turkey	Turkey recently introduced new legislation on product liability – Law No. 7233 on the Product Safety and Technical Regulations. It annulled Law No. 4703 and came into force on March 12 2021. ³⁹

IV. PRODUCT LIABILITY IN INDIA

Introducing product liability in the CPA 2019 is a positive step toward enhancing the rights of consumers. Accordingly, discussing the various aspects associated with product liability in India is essential.

A. Development of Product Liability in India

Before CPA 2019, the Consumer Protection Act, 1986 (“CPA 1986”) prevailed as consumer protection legislation in India. While it did not use the term ‘product liability, consumers were able to seek a remedy through the twin concepts of ‘defect’ and ‘deficiency’. Where Section 2(1)(f)and 2(1) g of the CPA 1986define ‘defect’ and ‘deficiency’, respectively. Further, Section 2(1)(f)& 2(1)(g) of the CPA 1986 implicates that any violation of standards prescribed under any consumer welfare legislation or any contract amounts to the product or service is defective under the CPA 1986. Alternatively, a remedy can be sought under other special legislations as well as CPA 1986 or the new CPA 2019 as “the Act is in addition to and not in derogation with any other law for the time being in force”. Some of these special legislations are as follows:

- 1. Food Safety & Standards Act 2006 – It seeks to regulate food quality in India. Under Section 92(1), numerous standards regulate different parts of the food industry. For instance, there are standards laid down

³⁷ Alejandro Frreres Comella and Cristina Ayo Ferrándiz, ‘The Product Regulation and Liability Review: Spain’ (2022) *The Law Reviews* <<https://thelawreviews.co.uk/title/the-product-regulation-and-liability-review/spain>> accessed February 2 2022.

³⁸ ‘Product Liability Laws and Regulations Switzerland 2022’ (2022) ICLG <<https://iclg.com/practice-areas/product-liability-laws-and-regulations/switzerland>> accessed February 2, 2022.

³⁹ Elig Gurkaynak, ‘New Regulations on Product Safety Law No. 7223 on the Product Safety and Technical Regulations’ Lexology <<https://www.lexology.com/library/detail.aspx?g=00dc4f07-f320-4476-9ad0-e1df3bca1ae0>>accessed February 2, 2022.

for food additives⁴⁰, nutraceuticals⁴¹, packaging and labelling of food items⁴² etc., which must be complied with.

2. **Legal Metrology Act 2009 (“LM Act 2009”)** – It seeks to establish weights and measures and regulate the trade of all goods sold based on their weights and measures. As held in *State of U.P. v Aman Mittal*,⁴³ any offence relating to weights and measures shall be covered under the Legal Metrology Act 2009. In *State of Telangana v. Himajal Beverages*,⁴⁴ the SC held that the declarations under Section 18 of the LM Act 2009 read with Rules 6(1) and 6(2) of the Legal Metrology (Packaged Commodities) Rules 2011 are mandatory, and every manufacturer must comply with these requirements.
3. **Bureau of Indian Standards (BIS)** – The BIS is a body set up under the Bureau of Indian Standards Act 2016, which lays down standards for various technological and service sectors and certifying goods. BIS products must comply with all requirements; otherwise, a complaint can be lodged with BIS or in a consumer forum.⁴⁵ In *T. Nagaiah S/o T. Narasimha v. Jain Irrigation Systems Private Limited*,⁴⁶ the plaintiff purchased a drip installation system which the respondent manufactured. The pipes of the system developed cracks which caused the water to leak, leading to crop failure. It was found that the respondent claimed the pipes to be of BIS standards and gave warranty. However, the Commission held in favour of plaintiff as BIS standard pipes have an expected life of ten years.
4. **Automotive Research Association of India (ARAI)** – The ARAI is a cooperative research association of the automotive industry which lays down various standards for automotive vehicles and their components.⁴⁷
5. **Bureau of Energy Efficiency (BEE)** – The BEE was set up under the Energy Conservation Act 2001. Under the Standards & Labelling Scheme, electrical appliances must be marked with a star rating which refers to the product’s energy efficiency.

⁴⁰ Food Safety and Standards (Food Product Standards and Food Additives) Regulations 2011.

⁴¹ Food Safety and Standards (Food or Health Supplements, Nutraceuticals, Food for Special Dietary Purpose, Functional Food and Novel Food) Regulations 2016.

⁴² Food Safety and Standards (Packaging and Labelling) Regulations 2011.

⁴³ *State of U.P. v Aman Mittal* (2019) 19 SCC 740.

⁴⁴ *State of Telangana v Himjal Beverages (P) Ltd* 2018 SCC OnLine Hyd 509.

⁴⁵ ‘Consumer Protection’ Bureau of Indian Standards <<https://bis.gov.in/index.php/consumer-overview/consumer-overviews/consumer-protection/>> accessed February 2, 2022.

⁴⁶ *T. Nagaiah v Jain Irrigation Systems (P) Ltd* 2020 SCC OnLine NCDRC 808 : 2020 Indlaw NCDRC 676.

⁴⁷ Automotive Research Association of India <<https://www.araiindia.com/home>> accessed February 2 2022.

- 6. Central Drugs Standard Control Organisation (CDSCO)** – The CDSCO was set up under the Drugs and Cosmetics Act 2008. It seeks to lay down the standards for drugs and specific medical devices.⁴⁸

B. Judicial View of Product Liability Under CPA 1986

Before its introduction by the CPA 2019, the Indian judiciary played a very vital role in the development of the concept of product liability with re-course under the CPA 1986:

1. Anand Kumar Bansal v Premier Ltd.⁴⁹

The Consumer Commission relied on Black's Law Dictionary to define the term 'manufacturing defect' as "*a deviation from design specifications during production resulting in a product's defect, frailty or shortcoming.*"

2. Gopal Aggarwal v. Metro Motors⁵⁰

The Consumer Commission observed that if the manufacturing defects were claimed, the car must have been sent to an accredited laboratory per procedure. This procedure cannot be circumvented by saying it is a mere technicality.

3. C.N. Anantharam v. Fiat India Ltd. and Ors.⁵¹

A complaint was filed regarding noise from the engine and the gearbox wherein the Supreme Court directed that if the independent technical expert is of the opinion that there are inherent manufacturing defects in the vehicle, the petitioner will be entitled to a refund of the price of the vehicle and the life-time tax and EMI along with interest @ 12% per annum and costs.

4. Hindustan Motors Limited v. Ashok Narayan Pawar and Another⁵²

The case was regarding a defect in car in lieu of which the Court ordered that in case they had stopped manufacturing this car, in that eventuality, they would pay the current price of the car, along with 9% interest from the date of the incident, till its realization. If they choose to give him a new car, they are also liable to pay compensation in the shape of interest @ 9% p.a., from the date of the incident, till its realization.

⁴⁸ 'Introduction to CDSCO', Central Drugs Standard Control Organization, <<https://cdsco.gov.in/opencms/opencms/en/About-us/Introduction/>> accessed February 2 2022.

⁴⁹ *Anand Kumar Bansal v Premier Ltd* 2019 SCC OnLine NCDRC 1048.

⁵⁰ *Gopal Aggarwal Aggarwal Jewellers v Metro Motors* 2019 SCC OnLine NCDRC 754 : (2020) 1 CPJ 85 (NC).

⁵¹ *C.N. Anantharam v Fiat India Ltd* (2011) 1 SCC 460 : AIR 2011 SC 523.

⁵² *Hindustan Motors Ltd v Ashok Narayan Pawar* 2015 SCC OnLine NCDRC 3.

C. Product Liability Under Consumer Protection Act 2019

As stated above, the term “product liability” derives the accountability on the part of the product manufacturer/seller in case of default.⁵³ The underlying rationale behind product liability is that if a consumer is harmed by a defective product or by deficient services concerning that product, then the product manufacturer or product service provider or product seller is responsible for such harm. Chapter VI of the CPA 2019 applies to all product liability actions. It lays down the components of a product liability action when a product manufacturer, product service provider, or product seller can be held liable and the exceptions to a product liability action. But this chapter does not cover any defect in the product itself.⁵⁴ Consequently, if the consumer wants to take action for the defective product, he needs to take the same under Section 2(10) of the CPA 2019.

Section 83 of CPA 2019 provides *that an action may be brought by a complainant against a product manufacturer/product service provider/product seller, before a District Commission/ State Commission/National Commission, as the case may be, for any harm caused to him on account of a defective product.* There are three ingredients of a product liability action i.e., firstly, there must be harm caused to the complainant; secondly, the harm must be caused due to a defective product; and thirdly, the defect should have been caused by a product manufacturer or product service provider of product seller.

(a) *Liability of product manufacturer:*

Section 2(36) of CPA 2019 lays the definition of the Product manufacturer.⁵⁵ A product manufacturer shall be liable in a product liability action,⁵⁶ if

- a. the product contains a manufacturing defect; or
- b. the product is defective in design; or
- c. there is a deviation from manufacturing specifications; or
- d. the product does not conform to the express warranty; or

⁵³ Consumer Protection Act 2019, s 2(34).

⁵⁴ Consumer Protection Act 2019, s 2(22), concerning product liability action, provides that the aggrieved consumer can only claim damage to property, personal injury, illness or death or mental agony or emotional distress attendant to personal injury or illness or damage to property; or any loss of consortium or services or other loss resulting from harm but does not include any harm caused to a product itself or any damage to the property on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto.

⁵⁵ Consumer Protection Act 2019, s 2(36).

⁵⁶ Consumer Protection Act 2019, s 84.

- e. the product fails to contain adequate instructions on correct usage to prevent any harm or any warning regarding improper or incorrect use.

Further, 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.

In determining the defectiveness of a product, the Consumer Commission will take into account the merchantable quality of the product as defined under the Sales of Goods Act 1930⁵⁷ which has to satisfy four facets, i.e., genuine as per name, kind and description of the product, saleable in the market under designation fit for ordinary use and purpose of such goods or product and free from defect interfering with sale or ordinary use along with 'implied conditions and warranties as well as express undertakings of the seller or manufacturer'⁵⁸.

To construe a 'manufacturing defect,' there should be an error in the manufacturing process. Sometimes the defect may also arise when a product is designed well, but there is a flaw in the manufacturing process or sampling error, or the product does not meet the specification. If the finished product is substandard compared with identical products, the 'producer' of such product may also be held liable. Generally, the defect in design may be construed when a whole product line is more dangerous than what an ordinary consumer would expect or such design does not outweigh its risks. The manufacturer's duty extends to ensure safety even in unforeseeable ways. It shall collaborate with consumer's expectations. It is mandatory for the warning to be clear and capable of being easily understood.

(b) Liability of product service provider

The "product service provider" refers to a person who provides any service in respect of such product.⁵⁹ In the context of product liability, 'service' as per Section 2(42)⁶⁰ refers to services carried out to a product. Any person engaging in any activity that places a product for a commercial purpose is a product seller. It also includes a person involved in the sale or construction of houses. However, it does not include who sells the immovable property or who

⁵⁷ Sale of Goods Act 1930, s 16.

⁵⁸ Sale of Goods Act 1930, s 12.

⁵⁹ Consumer Protection Act 2019, s 2(38).

⁶⁰ Consumer Protection Act 2019, s 2(42) defines "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

provides professional services or someone who only acts in a financial capacity⁶¹ and is not a manufacturer, wholesaler, distributor, retailer, direct seller or electronic service provider or a person who leases a product who did not have a reasonable opportunity to discover any defects in the product under a lease arrangement.

The liability of a product service provider can arise in multiple scenarios as derived under Section 85 of CPA 2019. A product service provider can be held liable if they provide any deficient or negligent service; then they are liable, or if the product service provider performs the service in a manner which violates any provisions of any law for the time being in force; or fails to provide proper instructions or warnings to prevent harm; or if the service does not conform to the express warranty.⁶²

(c) Liability of product sellers

The term 'product seller' is broadly defined under Section 2(37) CPA 2019 as it is an inclusive definition. For instance, it includes a person who manufactures products and sells them.⁶³

A product seller can be held liable only if the product seller is not a product manufacturer. If a product seller is also a product manufacturer, then the product seller shall also be held liable u/s 84 as a product manufacturer. The liability arises in multiple scenarios, such as, if the product seller has substantial control over the designing, testing, manufacturing, packaging, labelling etc., of the product; or product seller alters or modifies a finished product and the harm is caused to the consumer because of such changes, then they are liable. If product seller independently makes an express warranty to the consumer and the product does not adhere to such express warranty, then they are liable; or in case if the product manufacturer cannot be identified or cannot be served with a notice or warrant, then the product seller is liable. If proper instructions or warnings about how to use a product is not provided then product seller shall be held liable.⁶⁴

⁶¹ Biswajit Dubey, Surabhi Khattar & Ashutosh Singh, 'Product Liability under the Consumer Protection Act, 2019: An Overview' (2022) Cyril Amarchand Mangaldas Blog, <<https://corporate.cyrilamarchandblogs.com/2022/01/product-liability-under-the-consumer-protection-act-2019-an-overview/>> accessed January 20, 2022.

⁶² Consumer Protection Act 2019, s 85.

⁶³ Consumer Protection Act 2019, s 2(37).

⁶⁴ Consumer Protection Act 2019, s 86.

(d) Exceptions to product liability action

Section 87 of the CPA 2019 provides an exception to a product liability action that can be broadly classified into two categories: Exceptions to Product Seller and Exceptions to Product Manufacturer.

Exceptions to Product Seller: A product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified.⁶⁵

If the product was misused or alterations were made before they were harmed, then no action can be brought. The rationale is that the harm would be caused by the alterations made and not due to the product being defective.

Exception to Product Manufacturer:

1. In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable if—
 - (a) The product was purchased by an employer for use at the workplace, and the product manufacturer had provided warnings to such employer;
 - (b) The product was sold as a component to be used in another product, and the product manufacturer gave necessary warnings to the purchaser of such element or material, but the harm was caused to the complainant by the use of the end product in which such component or material was used;
 - (c) The product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts, and the product manufacturer had employed reasonable means to give the warnings or instructions for the usage of such product to such expert or class of experts; or
 - (d) The complainant, while using such product, was under the influence of alcohol or any prescription drug which a medical practitioner had not prescribed.
2. A product manufacturer shall not be liable for failure to warn about a danger obvious or commonly known to the user or consumer taking into account the characteristics of such product.⁶⁶

⁶⁵ Consumer Protection Act 2019, s 87(1).

⁶⁶ Consumer Protection Act 2019, s 87(2).

Suppose an employer purchased the product for use in their workspace, and they have been given instructions by the manufacturer on how to use it. In that case, the manufacturer is not liable for any harm. The rationale is that the employer must convey those instructions to any person using that product. The manufacturer cannot be held liable if the employer fails to convey such instructions.

D. Strict Liability and Product Liability Action

The intention of the legislator is clear from the above definition that product liability actions are based on the Doctrine of Strict Liability. The concept of the strict liability in case of product liability action covers a wide range of liability but has different degrees of strictness as the standards differs from product to product as prescribed under the respective legislations. Generally, a strict liability action can be established on the grounds that the product is defective, and there is direct relation between the injury caused and defective product. It is immaterial that manufacturer or service provider or product seller has exercised sufficient care or not. Strict liability has been expressly been evoked under the Section 84(2)⁶⁷ wherein the case of all these circumstances the strict liability principle can be evolved through the definition of deficiency or defect and unfair trade practice.⁶⁸

V. CHALLENGES AND WAY FORWARD WHILE DECIDING A PRODUCT LIABILITY CLAIM

The challenges and way forward while deciding a product liability claim is as follows:

A. Onus of Proof and Burden of Proof

A party has to prove their claim and standard of proof means the extent to which the claim must be proved. Generally, the onus of proof lies on the consumer and the standard of proof is a balance of probabilities. Under CPA 2019, product liability can arise from breach of contract, negligence or strict liability; it depends on case to case basis.

In *Yum Restaurants (India) (P) Ltd v Kishan Hegde*,⁶⁹ the NCDRC dealt with the issue of onus of proof and standard of proof. The complainant had filed a

⁶⁷ Consumer Protection Act 2019, s 84(2) states 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”.

⁶⁸ Consumer Protection Act 2019, s 2(47).

⁶⁹ *Yum Restaurants (India) (P) Ltd v Kishan Hegde* 2020 SCC OnLine NCDRC 8.

consumer complaint against the restaurant for unhygienic food served to him which caused him to develop food poisoning. The NCDRC held that while the initial onus is on the consumer to prove that the food served to them is of poor quality, the standard of proof cannot be so high as to prevent an ordinary consumer from discharging it.

B. Follow principles of Natural Justice

As per Section 38(5), no proceedings shall be called in question on the grounds that PNJ has not been complied with. The judgement of the Supreme Court in *New India Assurance Co Ltd v Hilli Multipurpose Cold Storage (P) Ltd*⁷⁰ reiterates the same.

C. Assessment of loss

The Commission has to determine the harm which the consumer has suffered. For this purpose, it must determine if the loss suffered by the consumer is 'harm' as per Section 2(22) of the CPA 2019. This is important to determine the appropriate compensation payable.

Determination of types of loss suffered gives an indication of what claims can be raised by the claimant. In *Raj Kumar v Ajay Kumar*,⁷¹ the SC noted that damages may be claimed for the following – (i) Expenses relating to medicine, food etc; (ii) Loss of earnings; (iii) Medical expenses which may be incurred in the future; (iv) Loss of expectation of life; (v) Trauma caused due to the accident; and (vi) Loss of amenities. In *Govind Yadav v New India Insurance Co Ltd*,⁷² the SC held that damages can also be recovered for loss of marital prospects.

The central principle behind the amount of compensation is that it should be just. In *Reshma Kumari v Madan Mohan*,⁷³ the SC held that the amount of compensation should not lead to unjust enrichment, nor be seen as a source of profit.

D. Remedy available with Consumer

As per Section 37(1), at the first hearing of the complaint or at any later stage, the District Commission can refer the dispute for mediation under Chapter V of the CPA 2019 with parties' consent. If a settlement is reached

⁷⁰ *New India Assurance Co Ltd v Hilli Multipurpose Cold Storage (P) Ltd* (2015) 16 SCC 20.

⁷¹ *Raj Kumar v Ajay Kumar* (2011) 1 SCC 343.

⁷² *Govind Yadav v New India Insurance Co Ltd* (2011) 10 SCC 683.

⁷³ *Reshma Kumari v Madan Mohan* (2009) 13 SCC 422.

through mediation, then the mediator sends the settlement report as per Section 80(2) to the District Commission, who can then pass an order recording the dispute settlement as per Section 81(1). If a settlement cannot be reached through mediation, then the mediator submits a report as per Section 80(3) to the District Commission which then continues to hear the dispute as per Section 81(3).

While a complainant can file a case before the District Commission, as per Section 18(2), the Central Consumer Protection Authority (CCPA) can also file complaints before the District Commission or intervene in any proceedings if the matter relates to consumer rights.

The remedies which the District Commission, State Commission and National Commission can grant are given under Section 39, Section 49(1) and Section 59(1) respectively. As per Section 39(e), the District Commission can pass an order directing the product manufacturer, product service provider or product seller to pay compensation to the complainant.

As per Section 2(35), a product liability action is a civil claim for compensation for harm caused and not for the product itself. This is independent of any criminal liability which can be imposed under the CPA 2019 on a contravening party for violation of Section 90 (punishment for products containing adulterants) and Section 91 (punishment for spurious goods) where CCPA can take cognizance of the said offence before appropriate Court.

If in any cases while deciding of the product liability action if a complainant alleges that there is a defect in the goods which cannot be determined without proper testing, then a sample of the good may be obtained and sent to a laboratory for testing.⁷⁴ The complainant is required to deposit the fees of the testing before a sample is sent. The laboratory conducts test to determine if the good is defective or not and submits a report to the District Commission with 45 days. The findings of the laboratory can be challenged by either party in the form of written objections.

E. Construction of Provisions of Consumer Protection Act 2019

Considering that the CPA 2019 is a social legislation which seeks to protect consumers, the Commission should give a broad and expansive interpretation while deciding the product liability action. The same has been noted in numerous cases:

⁷⁴ Consumer Protection Act 2019, s 38(2)(c).

- (i) In *LDA v M.K. Gupta*⁷⁵, the Court noted that the legislation is a milestone in the history of socioeconomic legislation which also applies to public authorities.
- (ii) In *Thirumurugan Coop Agricultural Credit Society v M. Lalitha*,⁷⁶ the Court held that the Consumer Protection Act is in addition to and not in derogation of other laws. In the current case, as the provisions of the Tamil Nadu Co-operative Societies Act 1983 do not bar a remedy under the Consumer Protection Act, a beneficial interpretation would mean that the consumer courts should be given additional jurisdiction.
- (iii) In *Emaar MGF Land Ltd v Aftab Singh*,⁷⁷ the SC dealt with the issue of arbitrability of consumer disputes. It held that the Consumer Protection Act was a social legislation enacted to protect consumer rights unlike other dispute resolution methods which are between equal parties. As per Section 2(3) of the Arbitration Act, it does not apply to disputes which are within the purview of public law and disputes which are important for public policy. As consumer disputes fall under the scope of public law, they are not arbitrable. Accordingly, the consumer courts jurisdiction is not affected by Section 8 of the Arbitration Act.

VI. CONCLUSION

Clearly, introducing product liability in the CPA 2019 is meant to enhance the protection given to consumers. Under product liability, a claim can arise from breach of contract, negligence or imposition of strict liability. A claim for product liability means that the manufacturer/seller/service provider is liable for harm caused to a person due to a defective product or deficient services in relation to that product.

The development of product liability jurisprudence can be traced to the USA. Initially, product liability was based in contract law, but factors such as privity of contract and modifications of warranty were a major barrier for consumers to seek redressal. Later, product liability claims arose under the tort of negligence, but it was still difficult for consumers to discharge the burden on them. Finally, strict liability was imposed on manufacturers and producers. This approach has also been adopted in other international documents such as the EU Product Liability Directive 85/374/EEC, and utilised in numerous other countries such as the UK, France, Germany, Australia, Cyprus etc. In India,

⁷⁵ *LDA v M.K. Gupta* (1994) 1 SCC 243 : 1993 Indlaw SC 200.

⁷⁶ *Thirumurugan Coop Agricultural Credit Society v M. Lalitha* (2004) 1 SCC 305 : AIR 2004 SC 448.

⁷⁷ *Emaar MGF Land Ltd v Aftab Singh* (2019) 12 SCC 751.

while the term product liability was not part of any legislation prior to the CPA 2019, harm due to defective products was still covered. Under the CPA 1986, 'defect' had a very broad meaning and any violation of a law also made the product 'defective'. Accordingly, products had to adhere to the standards laid down in various legislations, and failure to comply would mean that action can be taken. The CPA 2019 is thus an expansion of the existing product liability regime in India. The provisions of the CPA 2019 must be interpreted in a consumer-friendly manner. It must be recognised that most Indian consumers are illiterate and belong to a lower economic class, which means that they require additional protection from malpractices by product manufacturers, product service providers and product sellers. For this purpose, courts should be cognisant of this reality when it is hearing any dispute under the CPA 2019 and act in the consumer's best interests.