



# Product Liability

in 31 jurisdictions worldwide

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# India

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## Civil litigation system

### 1 The court system

What is the structure of the civil court system?

India has a unified three-tier judicial structure with 28 states, six union territories and one national territory, further subdivided into 671 administrative districts. Each district has a district court complex with several courts exercising original civil and criminal jurisdiction with limited appellate jurisdiction. There are 24 High Courts at the state and union territory levels (some states have more than one bench and each High Court has multiple courtrooms) exercising appellate jurisdiction over the district courts. Most High Courts have original civil jurisdiction (allowing claims to be filed or to originate there) for matters over a specified threshold value. The Supreme Court of India exercises appellate jurisdiction over the High Courts and original jurisdiction only in certain cases such as disputes involving state governments or fundamental rights.

The Consumer Protection Act, 1986 (CPA) was enacted to create a special system of consumer courts (called district forums and state commissions). India now has 629 district forums, 35 state commissions and the National Consumer Disputes Redressal Commission (NCDRC). Large cities have more than one district forum and each state (and some union territories) has a state commission for appeals and original jurisdiction above a pecuniary limit. The NCDRC has its seat at New Delhi and is vested with supervisory powers over the state commissions and district forums. The NCDRC also has original jurisdiction above a threshold value of claim. The consumer courts have a fairly wide jurisdiction in relation to defective goods, product liability and deficiency in service. Each district forum is headed by a person who is or has been, or is eligible to be, appointed as a district judge and each state commission is similarly headed by a person who is or has been a judge of the state's high court. Apart from the above-mentioned district court structure, there are a number of judicial tribunals that have been set up under different special laws. These include the Company Law Tribunal, Competition Commission of India, Customs, Excise and Service Tax Appellate Tribunals, Telecom Regulatory Authority of India, etc. These tribunals function subject to the supervisory jurisdiction of their respective appellate tribunals (such as the Competition Appellate Tribunal) and in some cases the relevant High Court or the Supreme Court.

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### 2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

The role of judges in a civil proceeding is purely to adjudicate between adversaries. The system does not admit inquisitorial proceedings. All matters, even those involving the state, are adversarial. India has no currently functioning jury system for trials and the last jury trial took place in 1959 in the case of *K M Nanavati v State of Maharashtra*, AIR 1962 SC 605, pursuant to which the government

abolished jury trials in 1960 since they were susceptible to media and public influence.

Although the role of the judges and presiding officers in the consumer forums follows the format of a civil proceeding under the Civil Procedure Code, 1908 (the Code), it is not strictly governed by the provisions of the Code (see *Indian Airlines Ltd v CERS*, 1991, NCDRC).

Consumer forums occasionally insist upon cross-examination but evidence is generally recorded by way of affidavits and a summary procedure is followed. The consumer courts are somewhat inclined to be lenient with procedure (particularly in relation to individual complainants) and once the deficiency or defect has been demonstrated, the awards are also fairly reasonable rather than curative or penal. Some Supreme Court judgments have discouraged penalties or penal damages, but some awards include mental agony and inconvenience damages, others lately have included minor penalties (the CPA was amended in 2002 to allow for 'punitive damages').

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### 3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Most product liability actions begin with a consumer complaint. India still does not have an excessively developed product liability system involving statutory standards that can be enforced through either civil proceedings or consumer court actions initiated by the state. There are, however, specialist bodies that oversee product safety and compliance for particular industries like cosmetics, pharmaceuticals and drugs, foods, motor vehicles and many other industries. These may be regulated through general standards of the Bureau of Indian Standards (BIS) and in the case of a defective product certified to be BIS compliant, the complaint may be addressed to the consumer affairs and public grievances department of the BIS. It is also possible to file a complaint with the relevant specialist regulator such as the Food Standards and Safety Authority of India (FSSAI) created in September 2008.

An ordinary complainant or plaintiff has the option to proceed by initiating a consumer complaint or a civil suit for recovery. In both instances, it is possible to claim money along with other reliefs like mandatory injunctions for products to be fixed or replaced and even for defective goods to be withdrawn from the market. Injunctions may be granted to restrain the sale of a defective product or hazardous goods.

A civil suit is initiated by filing a plaint in a court of original jurisdiction such as the district court or a High Court having territorial jurisdiction over the defendants. A similar procedure is prescribed for consumer complaints, but in consumer cases the procedure is simpler and quicker without ad valorem court fees. A consumer complaint can be initiated without much attention to prescribed formats even in the form of an ordinary letter addressed to the consumer court.

Once a plaint is filed in a civil court, a response (written statement) has to be filed within 30 days from the date of service, with admissions and denials in response to each of the allegations contained in the plaint. The plaintiff is usually allowed to file a rejoinder or replication in response to the written statement; especially if the defendant counterclaims. Such formal requirements do not exist under the CPA but it is common for parties to approximate the consumer court procedure in a similar but simpler manner without pre-set formats. There is no provision for a counterclaim or claims in a consumer case. Once pleadings are complete, it is common for evidentiary affidavits to be filed on behalf of the plaintiff. At this stage, the civil proceedings differ significantly from those before a consumer forum since civil proceedings require the plaintiff's and the defendant's evidence to be recorded followed by cross-examination of their witnesses, whereas in a consumer case, the complainant and the opposite parties are given an opportunity to file their evidentiary affidavits and the matter is usually decided without cross-examination, allowing the parties to file written submissions and to address brief arguments.

#### 4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal lawsuit may be commenced by the product liability claimant?

The CPA does not contain pre-filing requirements, but it is common for parties to issue a legal notice that may or may not result in a dispute being settled before the complainant approaches a consumer forum. Legal notices are often relied upon by the claimant but they do not have special evidentiary value.

In the civil court system, there is presently no requirement for mandatory mediation or conciliation, but most civil courts do suggest mediation or conciliation at the initial stages of a fresh lawsuit. The conciliation process has recently been streamlined by newly established mediation centres; these are established in some of the High Courts and some are being set up outside the court system by chambers of commerce. The relevant mediation centre is often the subject of a reference in the interim orders of the court and increasingly consumer cases are being referred to the people's courts (see question 5).

#### 5 Summary dispositions

Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Under the provisions of order XII, rule 6 of the Code, courts may, at any stage of the suit, pass a judgment in terms of such facts as are admitted in the 'pleading or otherwise' and similarly, under order VII, rule 11 a court may reject a plaint that does not disclose a cause of action or is barred by any law in force. A partial or full decree in favour of a plaintiff may result if the defendant admits the case of the plaintiff resulting in a summary judgment to that extent. In certain matters such as money claims under order XXXVII, rule 3 of the Code (providing for summary trials), the plaintiff may claim a liquidated sum that appears to be due from the defendant and if there is no apparent excuse for non-payment, the court may direct immediate deposit or payment of the undisputed amount. However, a defendant may apply for liberty to defend a summary suit through an affidavit explaining his or her defence and then the same suit would be converted to an ordinary suit, if leave to defend is granted. Apart from the summary procedures built into the Code, section 89 provides for a situation 'where it appears to the court that there exist elements of a settlement which may be acceptable to the parties' so that the court is then required to formulate the proposed terms of a settlement before referring the parties to arbitration, conciliation or mediation (some mediation or 'judicial settlement' is handled by the people's courts). Order XXIII, rule 3 of the Code also lays down that in the event the parties arrive at a settlement, a court 'shall' pronounce judgment in

terms of the settlement, leaving no scope for adjudication. It is now a common practice in most civil proceedings for the courts to compel the parties to appear before a mediator (especially where there is a mediation centre available) and some of the learned judges also try to reduce long-pending disputes by meeting the parties in chambers to resolve the matter.

The people's court set up under the Legal Services Authorities Act, 1987 is a conciliatory body and many courts refer disputes to the people's courts. It is permissible for a people's court to return a report to the court or forum to the effect that the parties were unable to settle their differences. The people's courts aim to urge settlements that result in the closure of a case without the possibility of an appeal. Some of these new practices have resulted in quicker closure of disputes, which used to take years, especially due to the subsequent appellate proceedings.

#### 6 Trials

What is the basic trial structure?

The basic trial structure for a civil case involves hearings on a periodic basis whereby trial dates have one or more witnesses examined and the remaining witnesses presented for another trial date. Several hearings with witness examination, sometimes spread over a long period, culminate in conclusion of the trial before a case is treated as ripe for final arguments. The length of an adjournment depends upon court availability determined by a court diary. Witnesses are supposed to be examined and cross-examined on the same day, but it is not uncommon for a key witness to be examined over several trial hearing dates. Live testimony is commonly recorded when the witness is being cross-examined, but an examination-in-chief is now furnished by affidavit. Court proceedings are open under section 153B of the Code; however, a proviso appended to the same section empowers the presiding officer of the court to restrict the access of the general public to the court premises in cases where he or she deems fit.

Consumer cases do not involve regular trials and ordinarily the consumer courts only allow exchange of affidavits to prove facts contained in the complaint or in the reply of the opposite party or parties. Some consumer courts still insist upon a trial procedure involving cross-examination or impose it for a special case. The process of affidavit exchange (and thus recording of evidence) can take up to six months.

#### 7 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

Class or group actions are recognised under the CPA under section 2(b)(ii) which recognises 'any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force' as a complainant to initiate a complaint on behalf of affected consumers. Section 2(b)(iv) provides for a complainant to include 'one or more consumers, where there are numerous consumers having the same interest'. However, these are different from the class action law suits common in jurisdictions such as the United States. The Civil Procedure Code also allows any number of plaintiffs (under order 1, rule 1) to file a suit against the same defendant (or defendants) if the relief claimed arises out of the same act or series of acts. In such cases the award may be apportioned among the plaintiffs in such manner as the court deems fit. There remains an express prohibition to prevent Indian lawyers charging contingent fees or for that matter any success-related remuneration. Lawyers and law firms cannot advertise product liability claims and seek out victims. While it is possible for an individual consumer to advertise for similarly affected parties to join him or her, this has also not been commonly pursued. As a result, it is still uncommon for a group action to be ini-

tiated through an ordinary tort claim. Apart from the few occasions in which such actions have been initiated by non-government organisations, societies and consumer protection associations set up for this express purpose, very few concerted actions are taken in cases where consumers are similarly affected against a particular tortfeasor.

## 8 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

There are three different possible proceedings that could be initiated for product liability actions and these proceedings can be initiated in any of several hundred possible courts around the country. The time taken for the case to run through a trial process and up to the final judgment depends upon whether it is a consumer complaint or a civil suit, and in some rare cases, it could also involve either an action against the regulator (by a writ proceeding) or an action by a regulator. There is also a complaints procedure with statutory ombudsmen for certain industries. In the case of food, the regulator is the Food Safety and Standards Authority of India (FSSAI) whose powers include the power of entry and inspection, search and seizure and power to take samples and destroy defective food items. Similarly, the prescribed authorities for drugs and cosmetics include the drugs inspector, drugs controller, etc, whose powers include the power of entry and inspection, power to collect samples, search and seizure, power to order production of a book, record, evidence, etc. Where public complaint and grievance redressal procedures are prescribed by statute, the authority may also be required to decide a complaint within a set time frame and then the outcome can be challenged by way of appeals provided for within these laws. Taking an ordinary civil suit as the most common form of litigation, for product liability claims (such claims could easily cover anything from tents to tunnel-boring machines), the jurisdiction depends upon the cause-of-action and whether the defendant has a branch office within the territorial limits of the court where the case is being filed.

A typical trial takes upwards of two to three years depending on the court where the case is initiated. Some fast-track courts decide a civil dispute pending in that forum or commission within six to 12 months while others can take several years due to the backlog that remains high as a national average. The CPA provides that each district forum shall ordinarily endeavour to finally decide a consumer dispute within three months from the date of receipt of notice by the opposite party and within five months where the complaint requires testing or analysis of commodities, but in practice these disputes can take much longer in certain parts of the country. With over 629 district forums and 35 state commissions, the handling of these disputes across India is varied and much depends upon court resources, support staff and the number of disputes pending in that forum or commission.

Since class actions are uncommon, there is little material available with regard to the extent of time taken for product liability issues involving a large number of plaintiffs or complainants, but such cases generally take much longer especially with successive rounds of appellate litigation.

The process of dealing with the original complaint, subsequent appeals to the state commission and then an appeal to the national commission, depends on the district and state where the case is filed and the outcome of each appeal, so that it can take more than two to four years.

## Evidentiary issues and damages

### 9 Pretrial discovery and disclosure

What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

The documentation required for a consumer case is significantly less than that which may be required to discharge the onus of proof in

a civil suit. In both cases, there are sufficient provisions for pretrial discovery, but in practice these are not pursued actively and most parties simply rely upon their own documentation. For consumer cases, the district forum is empowered to summon and enforce the attendance of any defendant or witness, to order discovery and production of any document or other material object able to be produced as evidence and to requisition reports for analysis or testing from an appropriate laboratory or other relevant sources. These powers are exercised occasionally and on an application of the concerned parties seeking discovery. Discovery is also sometimes sought in relation to government bodies through the relatively recent Right to Information Act, 2005 that can also be used to obtain product standards and norms specified by the authorities, as well as the conditions prescribed by a government regulator or other information that is available with a government instrumentality. Although there are also powers of discovery set out in the Code for an ordinary civil suit, lawyers and parties do not use these extensively. The relevant provisions in the Code are set out under order XI, which allows for discovery and inspection by means of interrogatories and otherwise.

### 10 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

There is no existing system for recording evidence through technical apparatus in Indian courts even though there are a few e-courts with documentation uploaded on a computer to enable the court to avoid paper files. Evidence is recorded by the presiding officer, supported by the court's staff, on a computer that usually has two screens so that the deponent is able to see the deposition as it is taken down. In consumer courts, it is common to submit evidentiary affidavits and most consumer courts avoid a trial involving cross-examination. Cross-examination is carried out in a civil trial by the counsel for the opposing party. An affidavit is filed, exhibited along with oral testimony and then documents are marked with a short examination-in-chief that is often followed by a (usually exhaustive and exhausting) cross-examination process. The latter can take up multiple court dates. The opposing party's counsel is permitted to ask questions on the documents that have been exhibited by the witness as well as other documents placed on record.

### 11 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Civil courts are empowered to appoint experts but the procedure is treated as an independent process involving a commissioner that will report to the court. Order XXVI provides for the appointment of commissions to inquire into questions involving scientific investigation, adjustment of accounts, taking evidence, etc. Ordinarily, the report of the commission is treated as evidence except in circumstances where the court deems fit to order further inquiry. Experts may also be appointed by a district consumer forum or state commission and section 13(4) of the CPA grants them the power to requisition a report or test result from an 'appropriate laboratory' or 'other relevant source' similar to provisions in the Code of Civil Procedure, so that expert evidence is usually sought through a court-requisitioned report rather than oral testimony and cross-examination. Parties are always free to adduce expert evidence. Un-rebutted expert evidence may be accepted especially if the respondent company fails to examine the defective product or the resulting damage. In the case of *National Seed Corporation Ltd v M Madhusudhan Reddy and Another* (AIR 2012 SC 1160), involving a consumer complaint about defective seeds, the Supreme Court did not display much sympathy for the appealing company when it failed to examine the resulting crop, let alone produce expert evidence to refute the evidence of

the complainants' experts and the company's appeal was dismissed. In contrast, in *Royal Enfield Motor Ltd v Kulwant Singh Chauhan* (II, 2011, CPJ, 489) the NCDRC accepted the evidence on affidavit of the company's two witnesses and dismissed the complaint refusing to find a 'manufacturing defect', stating that the complainant had failed to prove the defect. The NCDRC relied on the Supreme Court of India's oft-cited judgment in *Maruti Udyog Ltd v Susheel Kumar Gabgotra & Another* (2006) CPJ 3 (SC). In a case where the vehicle had to be taken to the workshop 36 times during its warranty period the National Commission relied upon the doctrine of *res ipsa loquitur* and upheld the State Commission's award against the manufacturer, see *Tata Engineering & Locomotive Co Ltd (TELCO) v Subhash Ahuja and Another* (FAO531/08, decided 13 April 2013).

### 12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

The consumer protection law provides for punitive damages (see the proviso to section 14(d) of the CPA), but punitive damages are rarely awarded; instead there is commonly an award made for 'mental agony and suffering' (see *Jose Philip Mampillil v Premier Automobiles Ltd*, AIR 2004 SC 1529), which may cover non-compensatory damages that derive from inconvenience caused to the complainant. Such damages may be said to cover psychological injury, but are usually quite conservative (from the point of view of the tortfeasor) and can even be seen as 'reasonable' in most cases. Most of the consumer courts thus award quick relief without excessive trial procedures while maintaining a relatively low scale of damages, which covers actual loss or damage and a reasonable amount towards mental agony and suffering. Although the Act does not allow for punitive damages, the question of whether punitive damages can be awarded by a civil court through a lawsuit (that claims a large amount to discourage similar conduct in the future) has not yet been decided. This probably derives from the fact that most courts require payment of court fees based on the amount of the claim, but, in addition, it is also uncommon for courts to tax negligence or impose penalties that would also be regarded as a windfall to the claimant. Some courts have imposed fines, especially in cases involving death, serious injury or 'total failure to take reasonable care'. The compensation is usually not restricted to simple reimbursement of expenses and the cost incurred consequent to the tortfeasor's negligence, but extends to a reasonable figure for the harassment caused (see *C Venuprasad General Manager (Operations) Premier Vinyl Flooring Ltd. and others v M/s Narangs International Hotel Pvt Ltd and OTIS Elevator Co (India) Ltd* where the hotel operator was held liable and Otis was exonerated for having warned the hotel about preventative maintenance on numerous occasions).

The law with regard to product liability follows general principles set out for consumer cases in judgments of the NCDRC or the Supreme Court. The NCDRC has held that the award of compensation has to be made on well-recognised principles governing the quantification of loss or injury suffered to assess compensation and not arbitrarily; compensation is granted only for the monetary loss actually suffered and not for any imaginary or indirect loss (see the case of *Punjab Tourism Development Corporation Ltd, Chandigarh v Kirit P Doshi*, 1997 (5) CTJ 186 NCDRC).

The law of tort in India still follows English precedent and, as such, the reasonable foresight principle continues to limit damages (see *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388; and the Indian cases following this case such as *Leena Mathew and Others v The Kerala Shipping Corporation Ltd* 1988 (1) KLT 212, *Rajkot Municipal Corporation v Manjulaben Jayantilal Nakum and Others* 1992 ACJ 792, etc). Some recent cases speak of exemplary or penal damages and this interesting trend (and its impact on insurance) is worthy of careful observation.

In *Maruti Udyog* (see question 11), the Supreme Court held that

a warranty condition referred only to replacement of the defective part and not the car, or its price through a refund). In an old case of 1993, the NCDRC held that replacement of the whole machine is not necessary and 'would be prejudicial to the interest of the manufacturer' without sufficient cause. Claims for refund of the price of the car are usually unsuccessful where the defective part can be replaced, but some compensation for mental agony and inconvenience is awarded (see *Honda Siel Cars India Ltd v Indra Pati Singh and Others* (I (2011) CPJ 382).

### 13 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Punitive, mental agony and other non-compensatory damages have been discussed in response to question 12, but it may also be mentioned that the concept of moral damages is not generally applied in India.

### Litigation funding, fees and costs

#### 14 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Legal aid is available in India and the criteria for receiving it is specified in section 12 of the Legal Services Authorities Act, 1987. This makes it possible for poor and indigent litigants to initiate and continue legal proceedings at different levels of the legal system. Each of the High Courts has a legal aid cell and it is common for courts to award costs that are payable to the relevant High Court legal aid cell. We should, however, point out that a manufacturer of a product as a potential defendant would usually be beyond the criteria for legal aid and they are thus left to defend a product liability claim without legal aid.

#### 15 Third-party litigation funding

Is third-party litigation funding permissible?

Although there is no express bar to third-party funding of litigation, this is relatively uncommon in India. To the extent that a third party may participate in a property-related dispute, there are occasions where third party funding may be resorted to so that the owner of a disputed property can pursue his or her title with outside assistance, but this is practically unknown for tort or product liability claims. The difficulty in relation to third-party funding probably derives from the rule prohibiting lawyers from accepting contingency fees so that a third party would not necessarily invest funds after arriving at an agreement with the complainant or plaintiff with a similar arrangement arrived at with the concerned lawyers. India also does not presently have a mass tort litigious society and as such insurance costs, payments, awards and even court-assisted settlements result in low-level payments making it uneconomic for a third party to fund litigation.

#### 16 Contingency fees

Are contingency or conditional fee arrangements permissible?

The Bar Council of India rules, which apply to the entire union of India provide that: 'An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof' (rule 20) and thus prohibit an advocate from accepting a contingency or conditional fee arrangement.

**17 'Loser pays' rule**

Can the successful party recover its legal fees and expenses from the unsuccessful party?

In a case decided by a civil court, the court can order payment of costs incident to the suit (costs follows the event). The Code expressly provides: 'Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing'. However, despite this provision, it is rare for the courts to actually impose even the actual costs incurred by a successful defendant, let alone compensatory costs in respect of false or vexatious claims or defences. Express provision is made in the Code for compensatory costs on account of a false or vexatious claim and similarly the Code also provides for costs to be imposed for causing delay. It would thus be apparent that although provisions exist for the loser to pay and for costs to follow the event, most judgments of the superior courts in India end with the words 'no costs' or similar expressions that impose the cost of litigation on the respective parties. An example of costs quantified on a rough and ready basis by the Supreme Court of India can be found in the case of *Jose Philip Mampillil v Premier Automobiles Ltd* (AIR 2004 SC 1529) where the Court rejected the winning appellant's claim for costs (for lack of proof) but awarded a percentage of the claim. The conservative award of costs is explained as a policy measure that avoids discouraging the poor litigant from approaching the courts.

**Sources of law****18 Product liability statutes**

Is there a statute that governs product liability litigation?

Unlike the EU's Product Liability Directive 85/374/EEC, India does not have a general product liability statute, but there are several general laws that protect consumers from defective products. The Consumer Protection Act, 1986 has provisions for a complaint to be filed in relation to goods that are hazardous to life and safety (in contravention of any standards imposed by law) or otherwise defective. The Act also defines 'defect' to mean 'any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods'. There are other specific statutes that contain provisions relating to product safety, standards and regulations such as:

- the Food Safety and Standards Act, 2006;
- the Drugs and Cosmetics Act, 1940;
- the Agricultural Produce (Grading and Marketing) Act, 1937;
- the Bureau of Indian Standards Act, 1986; and
- the Insecticides Act, 1968.

A general duty is also imposed under the Sale of Goods Act, 1930 whereby the sale is subject to implied conditions as to quality or fitness, merchantable quality and conformity with the sellers' description. In some cases of goods being sold without warranty or other standard conditions in favour of the purchaser, the courts may occasionally resort to custom or trade practice to determine the normal antecedents of a sale in the relevant product. The Competition Act, 2002 came into force after some amendments in May 2009. The Act amended the Consumer Protection Act, 1986 to insert references to the unfair trade practices (deriving from the thereby repealed Monopolies & Restrictive Trade Practices Act, 1969) which are defined in section 2(r) of the CPA, covering any form of false or misleading representation, statement or advertisement, these are actionable through the usual consumer complaint process.

**19 Traditional theories of liability**

What other theories of liability are available to product liability claimants?

Tort law is the foundation for non-contractual claims, but the law of tort in India has been overlaid with a rich variety of case law arising from consumer complaints, appellate decisions in the field of consumer law and recently some involvement of the Competition Commission of India in relation to conditions affecting the sale of certain products. Product liability claimants thus have recourse to their contractual rights where there is a written contract or a printed warranty supplied with the product, in addition to consumer and tort remedies. It is also possible in some instances for an affected party to file criminal complaints against the supplier of a defective product if it has caused death or serious bodily harm, such complaints accelerate settlements.

**20 Consumer legislation**

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

There is the Consumer Protection Act, 1986 that has been described above. The Act does not contain provisions that impose new statutory duties, but is formulated to allow for complaints against defective goods or goods that will be hazardous to life and safety when used or offered for sale to the public. The general provisions of this law, as explained above, cover faults, imperfections, shortcomings in the quality, quantity, potency, purity or standards that ought to be maintained under any law for the time being in force or under any contract, express or implied. Depending on the claimed amount, the district forums, state commissions and the national commission are adequately empowered under the Act to provide any of the following reliefs in the case of defective goods or products:

- to remove the defect;
- to replace the goods with new goods of a similar description, which shall be free from any defect;
- to return the price or consideration to the complainant;
- to pay such amount as may be awarded as compensation to the consumer for the loss or injury suffered by the consumer due to the negligence of the other party and in a fit case to award punitive damages;
- to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- to cease and desist manufacture of hazardous goods;
- not to offer hazardous goods for sale; and
- to withdraw hazardous goods from being offered for sale.

**21 Criminal law**

Can criminal sanctions be imposed for the sale or distribution of defective products?

Some of the relevant laws impose criminal sanctions in the form of punishments for a violation of standards, adulteration or for the sale of unsafe or hazardous or spurious products. Certain statutes such as the Bureau of Indian Standards Act, 1986 impose monetary penalties without regarding the relevant violation as an offence, but the same act also imposes criminal sanctions (imprisonment) for improper use of the ISI standard mark or any colourable imitation thereof without a valid licence (granted by the bureau).

There have been instances of the ordinary criminal law being applied for product safety cases; if a product was made negligently in such a manner as to cause death or endanger the personal safety of others, or if a product caused death due to a negligent act of another (operator, manufacturer or repairman), criminal proceedings could be commenced by the state. In some instances, provisions relating to cheating have been used with regard to the sale of spurious or defective products. The criminal law (Indian Penal Code) contains

provisions for fraudulent use of weights and measures and also in relation to adulteration of food and drink, drugs, etc, so that punishment (imprisonment or a fine, or both) can be imposed in such cases. The Food Safety and Standards Act, 2006 provides for imprisonment for life and a heavy fine to discourage manufacture, storage, sale, distribution or import of any article of food for human consumption that is unsafe and for similar wrongful conduct. Some other interesting statutes can occasionally cause unexpected consequences such as the Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954 which provides for imprisonment consequent to an advertisement for a product claiming to cure any of the ailments specified in the Act (such as appendicitis, arteriosclerosis, cancer, blindness etc.)

## 22 Novel theories

Are any novel theories available or emerging for product liability claimants?

In the absence of a special product liability statute or other law imposing liability for defective products, it is difficult to find any novel approaches employed by product liability claimants. Indian law is, however, dynamic and often driven by equitable considerations with all the civil courts having an equitable jurisdiction recognised by the Supreme Court. Where there is a lack of special statutory provision, the lacuna may be filled by a common-sense judicial approach as was necessary in an old case involving (unregulated) fireworks. The *Union Carbide* cases involving the Bhopal gas leak disaster, arising out of a product that was not on the market and was in fact part of a manufacturing process also gave rise to significant pronouncements (and some novel theories) in the field of tort and general dangerous products liability. We have avoided detailed reference to this case on account of the uncommon circumstances. The draft Regulations on Food Recall Procedures will require 'reasonable efforts' to be made by the FSSAI to communicate with the end user or customer with specific reference to electronic media (e-mails, telephone calls and press announcements) and it is yet to be seen how these affect the relevant product sales. Where a regulator fails to impose fines or effect its statutory mandate, Indian constitutional law furnishes a commonly used writ remedy that can involve private parties as respondents with the possibility of courts ordering payment of compensation. This was done in a motor accident case and a case involving 54 deaths arising from a fire in a cinema hall caused by an electrical transformer.

The law relating to product recall in India is evolving and we have noticed recent provisions that require recall for perilous or defective products. Industries have been slowly following or enforcing global standards ever since the advent of the internet, which allows activist litigants to obtain information about standards imposed outside India, complied with by global manufacturers (outside India) and flouted in India. The courts have also become quick to appreciate international norms and apply these to test defective products. Examples of such innovative judicial pronouncements can be found in relation to consumer products like mobile phones and cars.

## 23 Product defect

What breaches of duties or other theories can be used to establish product defect?

The Act defines 'defect' in a manner that is sufficiently broad (see references above to this) to cover fitness for purpose and express or implied standards, but there is no express reference to 'design' so it would have to be treated as incorporated by reference in the expression 'fitness for purpose'. The usual civil law remedies such as a suit in a court of original jurisdiction seeking damages on account of a defective product, damages for breach of warranty (within the warranty period) and even prayers for mandatory injunctions to compel the defendant to repair, replace, recall or otherwise mitigate the damage caused by a defective product have been effectively pursued in

Indian courts, though sometimes the remedy can take far longer than a normal commercial process could easily tolerate. Certain products carry warnings about the type of use they are intended for so as to bypass the implied fitness for purpose provisions of the Sale of Goods Act, 1930, and most warranties contain similar language so as to limit the manufacturer's liability for damages, etc, replacement or even simply repair. Interestingly, consumer courts in India, being generally inclined to favour the evidence of a consumer, treat technical defences adopted by manufacturers with some disdain and rarely allow reliance upon long-winded warranty clauses especially if they are incorporated by reference into a manufacturer's standard warranty (see *General Motors v Major Gen B S Subag* [2008 decision of the NCDRC]). Occasionally the consumer courts treat a complainant's case with suspicion when it is apparent that the product has already been well-used and without complaint (see the *Royal Enfield* case cited above in answer to question 11 and *General Motors India Pvt Ltd v GS Fertilizers* [2013 decision of the NCDRC]). Expiry of the warranty period may not prevent a court from awarding damages when the cause of action is stated to have occurred during the warranty, and in some cases the consumer forum may even extend the warranty for the period of distress (see *Balaji Motors v Devendra and Another* [II (2013) CPJ 534 (NC)]).

## 24 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

There is no clear objective standard for a product to be deemed defective except where specific rules have been set out by a statutory authority such as the Bureau of Indian Standards, Food Safety and Standards Authority, Bureau of Energy Efficiency, Export Inspection Council, etc. A court may grant damages to the affected party if it considers a product as defective on account of proven facts. The burden of proof lies on the claimant (subject to evidentiary rules derived from English law that sometimes cast the burden upon the other side) and the standard of proof is the normal civil standard, namely, preponderance of evidence or balance of probabilities to be decided by the adjudicating officer or court. The NCDRC have held that although the strict rules of evidence do not apply for consumer cases, 'the dispute is to be decided on the yardstick of reasonable probability on the basis of the facts brought on record'. As discussed above in response to question 11, reliable and un-rebutted evidence may be accepted depending on the facts and circumstances, especially if the court considers the witnesses to be unbiased. Witness evidence can equally be rejected if the witnesses seem inclined to be biased or in the event of contrary testimonies or affidavits. The controversy is usually decided simply on the basis that the evidence of a particular witness seems more credible or reliable.

## 25 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

Although the law provides that any person who trades in goods or provides services in any manner, such as the manufacturer, seller, importer, distributor, wholesaler, packer, retailer, etc, may be held liable for injuries or damages, or both, caused by defective or spurious products. The courts tend to fix liability for defective products only on the manufacturer. In *Ram Shankar Yada v JP Associate Ltd* [I (2012) CPJ 110 NCDRC paragraph 5, the National Commission has observed: 'In any case, it is settled law that for any manufacturing defect in a product, it is the manufacturer and not the dealer who could be held liable.' In reviewing the definitions of 'complaint', 'defect', 'deficiency' and 'trader' (read with 'manufacturer' since 'trader' includes a manufacturer) as contained in the Consumer Protection Act, one may find the foregoing statement of law to be

contradicted by the statute. Nevertheless, in our view this should be read in the context of a normal dispute where both the manufacturer and the seller or dealer are made parties and, where the manufacturer is unavailable or out of India, the complaint would lie only against the seller and the action would not fail for want of the seller's fault in importing defective products. Similarly if fault cannot be pinned on the manufacturer on account of bad pre-sale storage conditions (in, for example, the sale of cement), then the manufacturer, dealer and even the retailer may be jointly liable (see *Bhopal Steels v Govind Lal Sahu & Others III* (2008) CPJ 89 NCDRC). Thus, more than one party may be held liable in respect of the same damage, but again the apportionment of liability will depend on a finding of fault.

The law of contract admits claims depending on privity and generally allows for damages based on the 'loss or damage caused [...] which naturally arose in the usual course of things from such breach'. Although tort law is intended to be more restrictive (damages based primarily on reasonable foresight), it allows for more potential defendants.

## 26 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

Causation requires a direct link between the product defect and the injury caused. A possible novus actus interveniens (outside act or intervention of a third party) can be asserted as a defence to the principle of causation (in *K Madhusudan Rao v Air France*, Revision Petition No. 3792 of 2008 decided by the NCDRC on 1 April 2010, a case was successfully defended relying on this principle). In other words, the product defect must be treated as a sine qua non or causa causans for the injury and not a contributing factor.

The law in this regard derives from a few unfortunate cases such as one involving a defective unserviced escalator, which caused the death of a minor (*Geeta Jethani and Others v Airports Authority of India III*, 2004 CPJ 106 NC). Although the manufacturer (Otis) was made a party to the litigation, it was not held liable, due to the lapsed warranty and maintenance contract so that the owner-operator of the escalator was held to be negligent. The doctrine of res ipsa loquitur may be invoked to transfer the burden of proof onto the manufacturer. In such cases it could be argued that maintenance should only be required to ensure that the machinery functions at its optimum capacity, but the manufacturing process should be such that there are built-in safety mechanisms (such as an auto-cut mechanism in case of an escalator) to prevent the machine from becoming hazardous, and the absence of such safety mechanisms should be considered a defect in the manufacturing process. If, following an accident that caused death or injury such as in *Geeta Jethani*, it were assumed that the product was defective, then the manufacturer must establish that the defect (or other failure due to bad maintenance) was not noticeable as one that derived from the manufacturing process. Ordinarily the burden of proof to demonstrate that a product caused a specific injury would be on the claimant, but there have been several instances of defects leading to an unreasonable number of visits to the workshop (see *TELCO* case, question 11) or where engine replacement was necessary during the warranty period (see *Honda Siel Cars* case, question 12).

## 27 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Post-sale duties are ordinarily imposed by contract in the form of a warranty, and manufacturers generally limit the terms of the warranty so as to avoid consequential loss or damages on account of a defective product, leaving themselves liable only to repair a product that has a 'manufacturing defect'. The provisions of the Sale of

Goods Act and the CPA (see questions 18 and 19) impose an automatic 'fitness for purpose' warranty and although this can be limited by contract, consumer courts are not always open to technical limitations imposed by a small-print warranty. There is now a new set of recall procedures emerging from the Food Safety and Standards Act, which require any food business operator to notify the FSSAI or initiate recall procedures if he or she discovers that the food processed, manufactured or distributed is not in compliance with the provisions of the legislation or is unsafe for consumption. Medical practitioners are now obliged to report all occurrences of food poisoning brought to their attention to a 'food safety officer', so designated under the Act. These and certain other statutory provisions such as in the Drugs and Cosmetics Act require reporting, product recall, steps to contain distribution of a defective product and impose other positive post-sale duties. In *National Seed Corporation Ltd v M Madhusudhan Reddy and Another* (AIR 2012 SC 1160), the Supreme Court rendered its judgment for the complainant (seed purchaser) partially on the ground that the company had not responded to complaints and its representatives had not even visited the field where the crop was said to be inadequate due to the defective seeds.

## Limitations and defences

### 28 Limitation periods

What are the applicable limitation periods?

The applicable civil limitation periods are set out in the Limitation Act, 1963, which generally imposes a three-year limitation period for all civil claims. The CPA actually reduces the limitation period from three years to two years but allows for an extension of limitation if the 'complainant satisfies the district forum, the state commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint' within the period of two years (see *Pawan Kumar Kamra v JC Hospital II* (2013) CPJ 58). However, the new trend is to seek specific reasons for the delay and an unjustified delay is only condoned in exceptional cases and in the interest of justice (see *DDA v Rajesh Tiwari II* (2013) CPJ 23B (NCDRC)) for a case where the delay was reluctantly condoned and *Satyam Computer Services Ltd v A Prakash and Another II* (2013) CPJ 18B (NCDRC)) where a delay of 56 days was not condoned.

Some criminal offences are also subject to limitation. The Criminal Procedure Code, 1973 provides that the period of limitation for offences punishable with a fine only would be six months; where the offence is punishable with imprisonment for a term not exceeding one year, the period of limitation is one year; and where the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, the period of limitation is three years. The period of limitation commences on the date of the offence or if the offence or offender is not known, the first day on which the offence comes to the knowledge of the person aggrieved by the offence, to the knowledge of any police officer or the first day when the identity of the offender is known. There is no limitation for an offence punishable with imprisonment for a term of more than three years.

### 29 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

The state-of-the-art defence was relevant in the *Geeta Jethani* escalator case referred to in question 26 (it was a 14-year-old machine) and this may have influenced the court's decision not to impose liability on the manufacturer since the escalator was old and having no responsibility for its maintenance, the question of defective design after so many years was not considered relevant. Given the reasonable foresight principle applied in tort cases that are approximated for

### Update and trends

Recent developments under the Food Safety and Standards Act are noteworthy as they continue to affect food safety with the Food Safety and Standards Authority exercising an increasingly important regulatory and occasionally prohibitive role (dairy products from China were banned in 2008 and the ban was extended in June 2013 for another year). The trend of the National Consumer Disputes Redressal Commission to refuse case appeals filed after expiry of the limitation period and occasional pronouncements that set the law back on the old and clear path of tested evidence are always welcome. Although there have been no particularly exciting developments relating to product liability law in the last 12 months, both the consumer courts and the civil courts across India are gradually imposing directions on manufacturers and suppliers whose products are reported as defective. The increasing use of the Competition Act to rein in unfair terms imposed by builders and other suppliers will also eventually impact product liability and weighted standard terms that could be found to be unfair or restrictive consequent to abuse of dominance. Occasional judgments imposing punitive damages (permitted by the Consumer Protection Act following a 2001 amendment), may also discourage manufacturers from selling substandard products that are too cheap to litigate over.

the purposes of product liability, it would be reasonable to assume that if a product defect could not be discovered within the limitations of science and technology at the time of distribution, the manufacturer could exonerate itself. Once the product has been found to be defective, particularly if such defect is discovered during the warranty or annual maintenance contract period, the manufacturer or maintaining agency would be required to bear the burden of proof and prove that the product defect could not be discovered within the limitations of science and technology at the time of distribution.

### 30 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

It would certainly be arguable that a product that complies with statutory standards or requirements is not defective and as such the compliance would be taken as a defence.

### 31 Other defences

What other defences may be available to a product liability defendant?

Most of the possible defences are mentioned above and these would include: contributory negligence; voluntary assumption of risk (for example, in a stress test where the patient signs a disclaimer before using the treadmill in a hospital); limitation (see *Suresh Baban Gaekar v ICICI Bank and Others* [II(2013) CPJ 474 (NC)]); jurisdiction (see *Executive Engineer, Irrigation Division, Gonda v Neeraj Kumar* [II(2013) CPJ 127]); locus standi (*Amita Sharma v BHEL* [II(2013) CPJ 505(NC)]); the state-of-the-art defence; normal wear and tear without an obligation to maintain a defective product (see *General Motors India Pvt Ltd v GS Fertilizers* (2013 decision of the NCDRC)); misuse of the product; third-party interference; contractual terms limiting liability; etc. For certain products purchased with a clear contract setting out that the goods are sold on an as-is-where-is basis without any post-sale responsibilities of the seller, it would also be a defence for the seller to state that the responsibility had been assumed by the buyer.

### 32 Appeals

What appeals are available to the unsuccessful party in the trial court?

An unsuccessful litigant can file a regular first appeal in an appellate court if he or she is dissatisfied with the trial court judgment. Similarly, provisions for appeals from the district forum to the state commission, and from the state commission to the National Commission are provided for in the CPA. It is also possible for an unsuccessful appellant or respondent to approach the Supreme Court of India if he or she is dissatisfied with a final judgment of the National Commission. An order attains finality if no appeal is filed within a prescribed period of limitation. The ordinary period of limitation for an appeal is normally 30 days (plus the time taken to obtain a certified copy of the judgment), except for appeals to the Supreme Court, for which the period is prescribed by the Constitution of India to be 90 days.

### Jurisdiction analysis

### 33 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability law in India is developing rapidly along with increased consumerism and the advent of technology-driven products. There may be a need for a special product liability law, but this has not necessarily dented the availability of remedies since defective products are covered both by special acts and also by the CPA. It may be possible in the future for heavier penalties and liabilities to be imposed so as to deter manufacturers, traders and distributors from manufacturing or dealing with substandard products, but at present, India can ill afford to have the further burden of mass litigation or even substantial class actions and attendant higher awards. This would suggest that although product law in India is not as well developed as it might be, it is reasonably adequate both for the purpose of deterrence and for reasonable compensation.

### 34 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

In one of the few consumer cases to be decided in 2012 by the Supreme Court of India (see the *National Seed Corporation* case cited in question 11), the court interpreted the definition of a 'consumer' broadly to include farmers who had purchased defective seeds despite the existence of a separate law (the Seeds Act) which regulated seed sales as the Seeds Act did not provide for compensation. The court held that the Consumer Protection Act was a beneficial legislation and assuming an apparent inadequacy in the provisions of the Seeds Act, there was no reason to exclude farmers from the definition of 'consumer'. While remaining traditionally conservative in the quantum of damages for deficient products and services, the consumer courts and the Supreme Court freely admit claims and avoid technical disqualifications to dismiss or completely deny relief.

### 35 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

Consumerism is growing and the Ministry of Consumer Affairs, Food and Public Distribution's department of consumer affairs regularly publishes advertisements encouraging consumers to appreciate their rights and to approach the relevant consumer courts. There are

a fair number of NGOs and consumer associations that assist consumers in different districts with some cases being fought on behalf of aggrieved and indigent consumers by the relevant associations that also spread awareness. The climate for consumer litigation may not have fully permeated to the village level, but it has certainly reached a high level of sophistication in the urban areas of India. India has a fairly litigious society with no social restraint to prevent initiation of legal proceedings including actions against a government body. This results in a healthy consumer environment that is only hamstrung by the volume of cases in our courts and the time taken to decide those cases. Efforts are under way to improve this slow but steady justice system and these measures should take effect eventually.

### 36 Efforts to expand product liability

Please describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

Legal aid is available under the Legal Services Authority Act (discussed in response to question 14), class actions are uncommon and contingency fees are not permitted in India. Third-party litigation funding is also not common as contingency fees are not permitted (see questions 15 and 16). The courts generally take a conservative outlook towards damages and compensation and this is not restricted to consumer cases but also extends to compensation granted for accidents and torts. Access to justice for claimants has improved pursuant to the generally open-door policy of the consumer courts, the NCDRC and the Supreme Court (as discussed in question 34). There are occasional aberrations in the process of deciding consumer cases, as in some consumer forums where there are an excessive number of cases and a lack of resources, staff or even members, this results in a lack of uniformity in the administration of such cases, but the general trend is positive. In Delhi alone there has been a significant improvement in the time taken to decide original complaints.



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