

Product Liability

Contributing editors

Gregory L Fowler and Simon Castley



2017

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Product Liability 2017

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Published by
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London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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First published 2008
Tenth edition
ISSN 1757-0786

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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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 29 states, six union territories and one national territory, further subdivided into over 686 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. Most civil claims are accepted subject to payment of ad valorem court fees but no court fees is paid for consumer cases, which form the bulk of product liability cases.

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 over 620 district consumer dispute redressal forums, nearly three dozen 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 10 million rupees.

The consumer courts have a fairly wide jurisdiction in relation to defective goods, product liability and deficiency in service. Under section 24B the adjudicatory fora under the Consumer Protection Act, 1986 have been constituted to resolve complaints of consumers about: (i) unfair or restrictive trade practices by traders and service providers; (ii) defects in goods purchased or agreed to be purchased; and (iii) deficiencies in the provision of services availed of or hired (see *State of UP. and Ors vs All UP. Consumer Protection Bar Association* (AIR 2016 SC 5368)). 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 a judge of a High Court or an advocate for at least 10 years in a High Court or of two or more such courts in succession (as per the Amendment Bill 2016). Similarly, in the case of the National Commission, the Amendment Bill 2016 has amended section 20 of the 1986 Act, and accordingly, the head of the National Commission is a judge of the Supreme Court or an advocate for at least 10 years in a High Court or of two or more such courts in succession. 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 Income Tax Appellate Tribunal, National Company Law Tribunal, Competition Commission of India, Customs, Excise and Service Tax Appellate Tribunals, Debt recovery 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.

The Consumer Protection Bill 2015 seeks to repeal and replace the CPA. It was introduced in Parliament to widen the ambit of, and modernise, the law on consumer protection because of changes in the markets with specific focus on product liability in India. The proposed bill (which may have become applicable law by the time this is printed) provides for liability of the manufacturer for defects in the manufacture, construction, design, testing, service marketing, etc, of a product resulting in personal injury or property damage to a consumer.

The proposed bill also covers all transactions made through electronic means, teleshopping and multilevel marketing. It proposes to set up the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers and this authority will:

- inquire into violations of consumer rights, investigate and launch prosecution at the appropriate forum;
- pass orders for recall of goods, or withdrawal of services and reimbursement of the price paid as also directions for discontinuation of unfair trade practices;
- issue safety notices and orders for withdrawal of advertisements; and
- partially or wholly declare contracts that are unfair to a consumer as being void.

The claimant can file a complaint with the district, state or national commission in order to remove any defect, replace the relevant goods, return the price paid, stop sale or manufacture of hazardous products, discontinue unfair trade practices or pay compensation for any loss suffered by the consumer.

The bill also aims at simplifying the consumer dispute resolution process in the consumer forums including enhancing the pecuniary jurisdiction of the Consumer Grievance Redressal Agencies (the new name for the existing Consumer Dispute Redressal Forum), granting them powers to review their own orders by the district and state commissions. The bill also seeks to introduce mediation as a mode of alternate dispute resolution.

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, when the government abolished jury trials since they were susceptible to media and public influence. Minor issues in rural areas are handled through the panchayati raj system involving village assemblies and elders.

The role of the judges is to interpret the law, assess the evidence presented and control how hearings and trials unfold in their courtrooms. Although, the presiding officers in the consumer forums follow 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. In a recent case the NCDRC ruled that if a party seeks to cross-examine a deposing witness to test his or her veracity, the consumer forum or commission 'should' allow cross-examination. 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 (under the 1986 Act) have been 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, and others lately have included minor penalties (the CPA was amended in 2002 to allow for 'punitive damages').

The proposed Consumer Protection Bill, 2015 also provides for penalties to be levied against persons who fail to comply with an order of either of the commissions, and such persons will also be liable for imprisonment from one month to three years, or with a fine.

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 does not presently have a well-developed product liability redressal system involving statutory standards that can be enforced through either civil proceedings or consumer court actions initiated by the state, but, the proposed Consumer Protection Bill 2015 may change this once enacted. The bill contains a separate chapter on 'product liability'. It covers action against defaulting manufacturers or service providers for the sale of (defective) products causing personal injury, death or property damage and creates a new CCPA to exercise a wide range of powers and functions allocated to it under the provisions of the proposed section 16. There are, however, already existing 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 that has been certified to be BIS-compliant; a 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 Safety and Standards 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 the 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 to initiate a civil suit, a response (written statement) has to be filed within 30 days of 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 or forum procedure in a similar but simpler manner without preset 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 (ie, trial procedures), 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 or lok adalat 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 because of the subsequent appellate proceedings. An automatic reference to mediation may soon be incorporated into the law once the new Bill of 2015 is passed.

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. Since the establishment of the District Consumer Dispute Redressal Forums, approximately 3.7 million consumer complaints have been filed out of which about 3.4 million consumer complaints have been decided. 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 Consumer Protection Act 1986 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 lawsuits 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 contingency 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 initiated 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. The National Consumer Commission reported in *Ambrish Kumar Shukla & 21 Ors v Ferrous Infrastructure Pvt Ltd* (I (2017) CPJ 1) that as per section 12(1)(c) of the 1986 Act, such a complaint must necessarily be filed on behalf of or for the benefit of all the persons having a common grievance, seeking common relief and consequently having community of interest against the said service provider. A complaint on behalf of only some of them, therefore, will not be maintainable (also see *Swapan Kumar Mukherjee v Kashinath & Ors* (Complaint Case No. CC/202/2014, decided on 6 April 2017 - SCDRC West Bengal)). This clause shall be altered with the coming of the new Consumer Protection Bill 2015 and the CCPA will eventually be conferred with the power to protect and enforce the rights of consumers including the right to be protected against the marketing of goods or products and services that are unsafe or hazardous to life and property, the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be. The CCPA will serve as a state-sponsored complainant and regulator to protect consumers from unfair trade practices, false or misleading advertisements, etc, and its powers will be exercised at the regional level by the Deputy Commissioner (an existing government officer's position) and at the district level by the district collector.

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 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 owing 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 of 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. The time periods may reduce once the new Act comes into force, but much depends on the effect of the change in pecuniary jurisdiction whereby disputes below 5 million rupees are to be transferred from state commissions to the newly renamed district commissions (presently called district forums) speeding up claims for more than this amount and potentially slowing down claims at the entry level. With over 629 district forums and 35 state commissions, the handling of the consumer 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 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. A dispute originating from the FSSAI involving a major noodle manufacturer's product (Maggi) is still proceeding through the appellate machinery.

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.

The Consumer Protection Bill, 2015 provides for mediation as an alternative dispute mechanism for faster disposal of cases. The bill also has provisions (sections 42 and 53) for setting up of circuit benches to facilitate quicker disposal of complaints at the state commission and national commission levels and there are enabling provisions for consumers to file complaints electronically, which should allow for increased efficiency and quicker adjudication.

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.

As per the High Court of Bombay in the case of *Mumbai Grahak Panchayat and Ors v State of Maharashtra and Ors* (Public Interest Litigation No. 156 of 2011, decided on 5 May 2017 – BOMHC):

The procedure for dealing with the complaints filed before the State Commission/District Forum is laid down in Section 13 which shows that various powers including the powers of a Civil Court under the Code of Civil Procedure, 1908 of summoning and enforcing the attendance of parties and witnesses, receiving evidence on affidavits, discovery and production of documents, requisitioning of the reports from the appropriate laboratory and issuing of any commission for the examination of witnesses have been conferred on the State Commission and District Fora. For the purposes of provisions of Sections 193 and 228 of the Indian Penal Code, the proceedings before the District Forum and State Commission shall be deemed to be a judicial proceeding. It is also provided that the District Forum and State Commission shall be deemed to be a Civil Court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

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 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 of Civil Procedure (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. However, in the case of *Con Décor Rep by its Managing Partner v Smt Smritikana Ghose and Anr* (Revision Petition No. 518 of 2002) the NCDRC held that although cross-examination of a witness or a party before a forum under the Consumer Protection Act is not the rule, it is only an exception, when the reputation of a person, like a medical practitioner in the case of alleged medical negligence is involved, he or she will have the right to cross-examine any person alleging professional negligence against him. When it is merely a question as to the veracity of the statement of a witness, cross-examination is not generally permitted. In a civil case (ie, proceedings initiated by a civil suit), cross-examination of a witness is carried out by opposing counsel. An affidavit of evidence is filed, it is formally exhibited along with oral testimony before the recording judicial officer and then documents are marked with a short examination-in-chief procedure that is often followed by a (usually exhaustive and exhausting) cross-examination process. The latter can take up multiple court dates. Thus if party P produces or summons a witness PW1 and the opposing party is D, the witness may be cross-examined by the opposing party's advocate (rarely by the opposing party), that is by D's advocate or rarely by D himself. 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. This cross-examination procedure is dispensed with for most consumer disputes.

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 be appointed by consumer forums or courts, depending upon the facts and circumstances of each case. However, the case should be complicated enough to require the opinion of an expert. As per section 45 of the Indian Evidence Act, expert testimony is possible and generally cross-examination follows expert testimony. Expert testimony and opinions are limited to technical points, but experts are usually produced by the concerned party seeking to rely on their testimony. Section 13(4) of the CPA grants the forum 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. Unrebutted expert evidence may be accepted especially if the respondent company fails to examine the defective product or the resulting damage. In the case of *PHI Seeds Ltd & Anr v Sri Subramanya & Anr* [IV (2015) CPJ 512 (NC)] the NCDRC held that merely because the complainant had not stored a few seeds so as to send them for examination of the expert, that could not be a ground to deny the genuine claim of the complainant. 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 thus dismissed. The same principle was also relied upon by the NCDRC in the case of *Seed Works International Pvt Ltd v Nampelly Sudhakar* [II (2015) CPJ 587 (NC)] and in *Hindustan Motors Limited v Ashok Narayan Pawar & Anr* [I (2015) CPJ 457 (NC)]. 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 such a 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 the case of *Ganesh Ram v Prop Kisan Agro Sales* [(2004) (III) CPJ 17 (NC)], the NCDRC, while determining whether or not there was a defect in the seeds, heavily relied on the seller's expert report, and decided the case against the complainant solely on the basis of the expert's report, which did not find any defect in the seeds. In a case where the vehicle had to be taken to the workshop 36 times during its warranty period the NCDRC 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 NCDRC in 2015 awarded 11 million rupees (10 million as compensation and 1 million as punitive damages) against the Apollo Hospital in New Delhi for wrongful delivery of a child causing permanent damage to his brain in a negligent medical procedure in 1999 (*Dr Indu Sharma v Indraprastha Apollo Hospital* [Consumer Case No. 104 of 2002; decided on 22 April 2015]). 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* [Original Petition No. 179 of 1994; decided on 9 November 2012] where the hotel operator was held liable and Otis was exonerated, having warned the hotel about preventative maintenance on numerous occasions).

The law with regard to product liability so far 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 generally 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 has its foundation deriving from 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 the case of *Mrs Rashmi Handa & Ors v OTIS Elevator Company (India) Ltd & Ors* [I (2014) CPJ 344 (NC)] the NCDRC, awarded damages of more than 30 million rupees along with interest at the rate of 9 per cent because of a faulty lift leading to the death of a senior government officer. The NCDRC followed precedents relating to death caused in motor accident cases (multiplier based on age of deceased times income and dependency with provision for income growth plus interest) and apportioned the greater part of the award on the manufacturer and service provider, namely Otis (70 per cent); the employer (Chairman of the Research and Analysis Wing) was only held liable for 5 per cent of the award and the Military Engineering Services who handled day-to-day maintenance were held liable to the extent of 25 per cent.

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 Sael Cars India Ltd v Indra Pati Singh and Others* (I (2011) CPJ 382). Guidelines for granting compensation have been set by the NCDRC (see *Ghaziabad Development Authority v Yogesh Chandragupta* (I (2005) CPJ 23 NC).

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. A manufacturer of a product as a potential defendant would usually be beyond the criteria for legal aid and thus be left to defend a product liability claim without legal aid. Public funding will also assist cases filed by the CCPA. The CCPA is to be set up under the new Act once the Act is passed by Parliament and comes into force (see question 7 for details).

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 that make 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 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 discretionary 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. In the case of *Bonder & Anr v Hem Singh & Ors* (2009) 12 SCC 310, on finding that the defendant did not have a sustainable case, either in law or equity, the court allowed the appeal and quantified the cost to be paid by the defendant at 50,000 rupees.

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 CPA 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 that 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 Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 and the Drugs and Magic Remedies (Objectionable Advertisements) Rules 1955;
- the Legal Metrology Act 2009 and the Legal Metrology (Packaged Commodities) Rules 2011;
- the Indian Contract Act 1872;
- the Essential Commodities Act 1955;
- the Agricultural Produce (Grading and Marketing) Act 1937;
- the Bureau of Indian Standards Act 1986;
- the Insecticides Act 1968;
- the Standards of Weights and Measures Act, 1976; and
- the Energy Conservation Act 2001.

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 CPA 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. The proposed CPA, 2015 contains a chapter creating a new statutory product liability that derives from:

- personal injury, death, or property damage caused to the consumer resulting from defects in the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labelling of any product, making the manufacturer or producer liable; and
- manufacturing defects, deviations from manufacturing norms, lack of proper instructions and warnings and failure to conform to an express warranty.

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. Courts are generally guided by the principles of justice, equity and good conscience as also precedent. 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 also serve to accelerate settlements since the criminal proceedings in most cases are 'compoundable'.

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

The CPA has been described above and many provisions of the proposed Consumer Protection Bill 2015 are detailed above. The 1986 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. Criminal product liability may arise for non-compliance with statutory requirements; some examples of regulatory laws affecting product sales, manufacturing or distribution are:

- the Agriculture Produce (Grading and Marking) Act 1937;
- the Indian Standards Institutions (Certification Marks) Act 1952;
- the Food Adulteration Act 1954;
- the Drug and Cosmetics Act, 1940; and
- the Standards of Weights and Measures Act 1956.

In most cases, it is the state or central government that initiates prosecution for breach of statutory provisions. The Bureau of Indian Standards Act 1986 imposes monetary penalties without necessarily treating the relevant violation as an offence, but the same act also imposes criminal sanctions (imprisonment for a term that may extend to one year or fine up to 50,000 rupees or both) for improper use of the ISI standard mark or any colourable imitation thereof without a valid licence (granted by the bureau).

As per the Consumer Protection Act 1986, where a trader or a person fails to comply with the orders of the district forum, State Commission or the National Commission, he or she shall be punishable with imprisonment for a term that shall not be less than one month and shall not exceed more than three years, with or without a fine.

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 because of a negligent act of another (operator, manufacturer or repair person), 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 and 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 Regulations on Food Recall Procedures enforced from 2013 require 'reasonable efforts' to be made by the FSSAI to communicate with the end user or customer with specific reference to electronic media (emails, 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 and complied with by global manufacturers outside India and then 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, but India still does not have a mandatory recall procedure for defective cars. The system of mandatory recall may be introduced by the CCPA (see question 7) once the new Act becomes applicable law.

23 Product defect

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

The existing CPA defines 'defect' in a manner that is sufficiently broad (see above references to this aspect) 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 Suhag* [2008 decision of the NCDRC]). The NCDRC has also laid down, in this regard, that section 2(1)(e)(v) of the Consumer Protection Act 1986 clearly implies that if standard prescribed under some law are not maintained, the product shall be construed to be hazardous (see *Asia Tea Company and Ors vs On behalf of Commissioner, Civil Supplies and Consumer Protection Department, Consumer Association of India* (1(2017)CPJ461(NC)). 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 in 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 (see *Ashok Leyland Ltd v Gopal Sharma & Ors* [II (2014) CPJ 394 (NC)], 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 has 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 in 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. Product liability of the manufacturer or seller can sometimes be avoided by labels that the product carries 'no guarantee', 'no exchange', 'no return' or that the company shall not be responsible after the product is installed. The seller (*Sandeep Marbles*) was held liable for deficiencies in the product in the case of *Sandeep Marbles v Jagdev Singh* [I (2014) CPJ 116 (Punj.)], but in a recent case, the NCDRC took the view that use of the product during the dispute and an exemption clause on the box (stating 'the company shall bear no liability after the tiles are fixed') were sufficient to fully displace the manufacturer's liability (see *H&R Johnson (India) Ltd & Ors v Lourdes Society Snehanjali Girls Hostel & Ors* [IV (2013) CPJ 475 (NC)]). As mentioned above, the proposed Consumer Protection Bill, 2015 contains a separate Chapter on product liability, whereby a manufacturer:

shall be liable in any product liability action, to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

- (a) *the product contains a manufacturing defect or there is a deviation from manufacturing specifications;*
- (b) *the product is defective in design;*
- (c) *the product failed to contain adequate instructions of correct use to avoid danger or warnings of the improper/incorrect use;*
- (d) *the product did not conform to an express warranty with respect to the product made by the manufacturer or product seller;*
- (e) *the defendant was the manufacturer of the actual product that was the cause of harm for which the claimant seeks to recover compensatory damages; and*
- (f) *the dangerous aspect of the product was the proximate cause of the harm suffered by the claimant.*

Section 73 of the bill thus requires satisfaction of a total of six conditions – much depends on how the courts will interpret this section, but the requirement of ‘all of the following’ and the use of the word ‘and’ at the end of sub-clause (e) will inevitably defeat many actions filed against manufacturers in reliance upon this section if it remains unamended.

25 Possible respondents

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

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. However, the courts tend to fix liability for defective products predominantly on the manufacturer. In *Ram Shankar Yada v JP Associate Ltd* [I (2012) CPJ 110 NCDRC paragraph 5, the NCDRC 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) contained in the CPA, 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 against a seller who has imported defective products. Similarly, if fault cannot be pinned on the manufacturer on account of bad presale storage conditions (in, for example, the sale of cement or chocolates), 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 (see the case of *Mrs Rashmi Handa, & Ors v OTIS Elevator Company (India) Ltd & Ors* [I (2014) CPJ 344 (NC)]). The proposed Consumer Protection Bill 2015 provides for liability of the manufacturer or producer resulting from defects in the manufacture, construction, design, formula, preparation, assembly, testing, service, warnings, instructions, marketing, packaging or labelling of a product.

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 demonstrate that the causal link between the loss caused and the defendant’s area of responsibility is broken (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 since a theft of a passenger’s valuables in a hotel lobby could not be pinned upon the airline that had arranged for the hotel on account of a cancelled flight). Similarly, a 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, owing 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 (see *Ashok Leyland Ltd v Gopal Sharma & Ors* [II (2014) CPJ 394 (NC)]. In the case of *Vinaya Vilas Sawant (Smt) v Union of India* [Revision Petition No. 864 of 2006] the NCDRC held that it is the duty of the railways to

maintain, in good order, platforms, foot paths, over bridges for ingress and egress of the passengers, and therefore the railways were held to be negligent when a footbridge collapsed causing injury to a passenger.

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 or emergency brakes in a lift) to prevent the machine from becoming hazardous, and the absence of such safety mechanisms, there could be an automatic presumption of defect in the manufacturing process following an accident that caused death or injury such as the above-cited case titled *Geeta Jethani v AAI*. Once it is assumed that the product is defective, then the manufacturer must establish that the defect (or other failure owing to bad maintenance) could not have arisen from the manufacturing process. In a manufacturing defect case, the plaintiff still bears the burden of proving that the product in question was faulty or defective. Often the manufacturer’s design or marketing standards can be used to show that the product was defective, but proving how or why the flaw or defect occurred can be difficult for the complainant. 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 the *TELCO* case, in question 11) or where engine replacement was necessary during the warranty period (see the *Honda Siel Cars* case, cited in question 12). The burden of proof to show any defect in goods is on always on the person who alleges the deficiency, and the cost of getting the product tested must ordinarily be borne by the party alleging the defect (see *Jai Prakash Verma v JK Lakshmi Cement Ltd II* (2013) CPJ 54 (NC)).

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’. 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 small-print warranties. 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 owing to the defective seeds. In cases where an express warranty is provided by the manufacturer as a part of its post-sales service commitment, the consumer forums are not inclined to extend this period of warranty or hold the manufacturer responsible for repairs beyond the contractual period of warranty [see *Godrej GE Appliance Ltd v Satinder Singh Sobti* (2000 (1) CPC 602 NC)]; however, 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 (see *Ashok Leyland Ltd v Gopal Sharma & Ors* [II (2014) CPJ 394 (NC)]).

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 *National Insurance Co Ltd v Hindustan Safety Glass Works Ltd* (AIR 2017 SC 1900)). In this case, the Hon'ble Court ruled that the complaint was barred by limitation as it was filed on 13.08.1996 while the loss or damage to the insured properties had taken place in August 1992. The insured was awarded an amount of over 2 million rupees with interest at 9 per cent per annum. The court specifically laid down that the provision of limitation in the Act cannot be strictly construed to disadvantage a consumer in a case where a supplier of goods or services itself is instrumental in causing a delay in the settlement of the consumer's claim. 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. In the case of *Haryana Agro Industries Corporation Ltd v Narinder Singh* (III (2015) CPJ (181) NC) the NCDRC condoned the delay as the case of the petitioner on merits appeared to be sound. Delay has been condoned in cases where the time taken to obtain a legal opinion, to complete official formalities, caused by wrong advice or because of a mistake of the legal counsel (see *United India Insurance Co Ltd NM Mohammed Jakeer Hussain* [II (2014) CPJ 235 (NC)] and *Seema Garg v Oriental Insurance Co Ltd* [II (2014)SPJ 5 (NC)]), and it is not customary to make the concerned lawyer, adviser or other professional liable in place of the original defendant tortfeasor against whom an action has become time-barred, hence delays can be condoned in such cases. The 2015 Bill continues the two-year limitation period subject to a similarly worded provision to condone delays.

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 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: 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]), a manufacturer is not liable for the acts of negligence committed by a repairer [II (2014) CPJ 202 (NC)] or other third party; locus standi (*Amita Sharma v BHEL* [II(2013) CPJ 505(NC)]); the state-of-the-art defence; contributory negligence of the buyer; examination of the goods by the buyer prior to purchase; contractually agreed warranties or waivers or disclaimers; contractually agreed limitation of liability (possibly introduced into the terms accompanying a product or in a click-through agreement); normal wear and tear without an obligation to maintain a defective product and 'commercial purpose' (see *General Motors India Pvt Ltd v GS Fertilizers* (decided 7 February 2013 by the NCDRC) and *Mahindra and Mahindra Ltd v Parampal Singh* (First Appeal No. 881 of 2015, decided 19 January 2017 - SCDRC Chandigarh)) but the same may be overruled following a recent three-judge NCDRC bench case titled *Crompton Greaves Ltd v Daimler Chrysler India Pvt Ltd and others*, which was recently argued by the first author and the judgment of the NCDRC is awaited); misuse of the product; third-party interference. 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-sales responsibilities of the seller, it would also be a defence for the seller to state that he or she had in effect disclaimed seller's responsibility.

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 NCDRC 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 NCDRC. 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. The Supreme Court has laid down in the case of *State of U.P. and Ors vs All U.P. Consumer Protection Bar Association* (AIR 2016 SC 5368) that:

Against the decision of the district forum upon an original complaint a remedy of an appeal is provided to the State Commission. The State Commission also has jurisdiction where the amount claimed is in excess of 2 million rupees (complaints below that amount lie before the district fora) and up to 1 million rupees. Appeals from orders of the State Commission lie to the National Commission.

The forums have to take into consideration very minute aspect of the appeal at hand and rule accordingly. In the case of *Bunga Daniel Babu v Sri Vasudeva Constructions and Ors* (AIR 2016 SC 3488), the Supreme Court had allowed the appeal, even though it was dismissed by the State

and National Consumer forum on the ground that the appellant was not qualified to be a consumer, as 'there has to be appropriate adjudication with regard to all the aspects except the status of the Appellant as a consumer by the appellate authority'. Whereas, in the case of *Mukul Diesel vs New India Assurance Co Ltd and Ors* (First Appeal No. 46 of 2010, decided on 3 May 2016 - NCDRC), the National Consumer forum dismissed the appeal as the appellant had not been able to establish his case and thus the appeal had no force.

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 is certainly 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 1986. 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 with the advent of the CCPA (see question 7), 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. The Court has tried to establish the phenomenon more strongly in a recent case by saying that in a case of strict liability, the manufacturer is liable for injuries that the product causes even if the manufacturer was careful while making the product. The Court has further stated that as per strict product liability, a manufacturing defect is one which was not intended to be manufactured and that this kind of defect occurs when the product deviates from its intended design and becomes more dangerous than the consumer expects it to be (see *Ram Nath Mishra v Bharat Krishi Corporation and Ors*, Appeal No. 451 of 2007, UPSCDRC, decided on 7 December 2016). In this case, the redressal forum ruled that 'it is not only a case of deficiency in service arising out of the manufacturing defect but also is a case of unfair trade practice by selling an old accidented tractor as a new one which borderlines to the offence of fraud'. In *Corpus Juris Secundum*, it is stated as follows:

On a sale of a motor vehicle by a manufacturer to dealer there may be an implied warranty that it is reasonably fit for, or adapted to, the uses for which it is made and sold; and such a warranty is not excluded by the silence of the contract of sale as to warranties.

That the law (and the imposition of reasonable penalties or awards) is inadequate to deter unscrupulous large scale manufacturers is also well known, but the present balance is maintained to retain lower insurance costs and somewhat lower pricing norms.

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?

The most noticeable reform on the horizon is the Consumer Protection Bill 2015, which is extensively discussed above. It contains a special Chapter on product liability but most consumer advocates will argue that it does not go far enough to impose higher product liability standards (see especially question 24). 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) that regulated seed sales as the Seeds Act did not provide for compensation. This trend has continued in the more recent case of *Punjab University v Unit Trust of India* by which the Supreme Court decided that the Punjab University may be treated as a consumer. However, in the recent case of *Pratibha Pratisthan and Ors v Manager Canara Bank and Ors* (AIR 2017 SC 1303) the Supreme Court held that a trust is not a person and thus, cannot be treated as a consumer. Section 2(1)(d) of the 1986 Act clearly specifies that a 'consumer means any person who' buys a commodity or hires or avails themselves of a service. Having held in 2012 that the Consumer Protection Act was a beneficial piece of 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', the court held that where there was no intent towards profiteering and commercial activity there was no reason to exclude the university from the definition of a 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.

In the past two years, there has been a perceptible increase in the number of product liability claims in India, especially pertaining to manufacturing defects. In the case of *Ess Pee Automobiles Ltd v SPN Singh* [I (2015) CPJ 192 (NC)] the NCDRC directed an automobile company to replace the engine of the car and return it to roadworthy condition, imposing relatively high costs of 100,000 rupees on account of harassment and mental agony to the consumer. See also *Hindustan Motors Ltd v Ashok Narayan Pawar* [I (2015) CPJ 457 (NC)] where a new car or its price along with interest was ordered to be given to the complainant.

35 Climate for litigation

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



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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 nothing preventing the 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 the 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 or ease claimants' burdens

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

Product liability law is developing in India owing to the pace of globalisation and the advent of e-commerce, which delivers more products to consumers in remote locations. It became incumbent upon the legislature to protect consumers and buyers by creating statutory product liability, providing them with the right to be informed and to complain in the event of the sale of defective products. As discussed extensively above, a bill has been introduced in Parliament to replace the CPA. The bill is overarching and governs all consumer contracts for goods and services. The Consumer Protection Bill 2015 has provisions to introduce

product liability and it sets out powers to a new regulatory authority to recall products and cancel licences if any consumer complaint affects the public. The bill also provides for mediation to resolve disputes and also suggests a simplified judicial process to ensure inexpensive access to justice. The bill provides for stringent penalties, including life imprisonment in certain cases, it has provisions to protect e-retail consumers. Key features of the new bill include establishment of an executive agency called the Central Consumer Protection Authority, to protect and enforce the rights of consumers. The authority will intervene when necessary to prevent consumer detriment arising from unfair trade practices and to initiate class action, including enforcing recall, refund and return of products.

Access to justice is also dependent on legal aid. Legal aid is available under the Legal Services Authority Act (discussed in question 14). 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 a recent case, the Supreme Court has ruled that if a case was dismissed by the National Tribunal on the basis of non-maintainability due to default or non-prosecution, a second complaint filed on the same facts and cause of action will be maintainable (see *Indian Machinery Co v Ansal Housing & Construction Ltd* ((2016) 3 SCC 689). In Delhi alone, there has been a significant improvement in the time taken to decide original complaints.

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