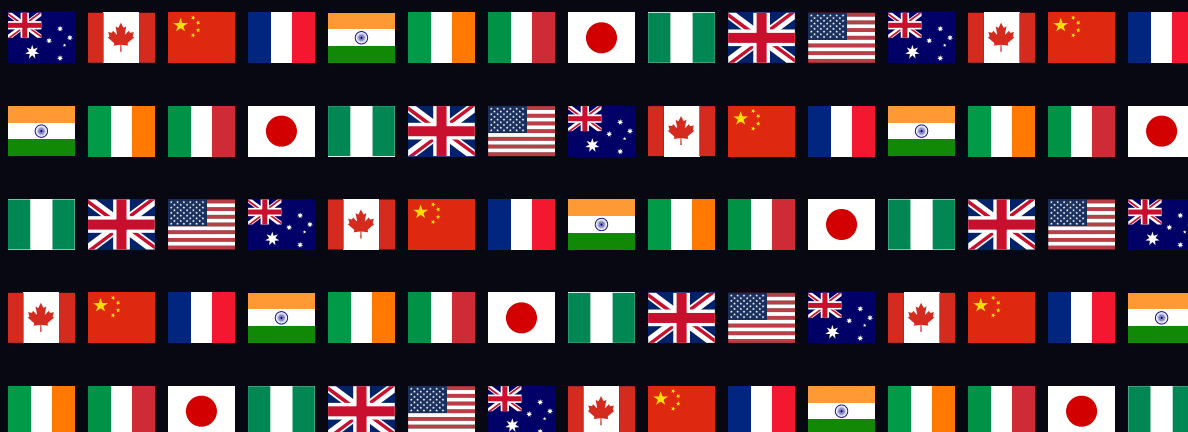


PRODUCT LIABILITY

India



Product Liability

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Quick reference guide enabling side-by-side comparison of local insights into the civil litigation system; evidentiary issues and damages; litigation funding, fees and costs; sources of legal framework; limitations and defences; settlement and alternative dispute resolution; jurisdiction analysis; and recent trends.

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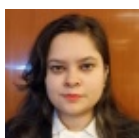
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CIVIL LITIGATION SYSTEM

The court system

What is the structure of the civil court system?

India has a unified three-tier judicial structure with 28 states, eight union territories and one national capital territory, and these are further subdivided into over 780 administrative districts. Each district has a district court complex with several courts exercising original civil and criminal jurisdiction with limited appellate jurisdiction. There are 25 high courts at the state and union territory levels (some states have more than one bench and each high court has multiple benches) 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. For consumer complaints, the fees payable depends upon the value of goods or services and compensation claimed, the fees payable is nominal but it is graded depending on the claim value.

The Consumer Protection Act 2019 (CPA 2019) replaced the Consumer Protection Act 1986 (the Old Act). The Old Act was enacted to create a special three-tier system of consumer courts (called district forums, state commissions and the national commission). India has over 678 district commissions, 35 state commissions and the National Consumer Disputes Redressal Commission (NCDRC) with multiple benches. Large cities have more than one district forum and each state (and some union territories) generally has a state commission for appeals and to exercise original jurisdiction above a pecuniary limit. District forums have jurisdiction to entertain cases where the value of goods and services does not exceed 5 million rupees and for the state commission the jurisdiction covers a claim value that exceeds 5 million rupees but does not exceed 20 million rupees. The NCDRC has its seat at New Delhi and has been vested with supervisory powers over the state commissions and district forums. The NCDRC also has original jurisdiction above a threshold value of 20 million rupees.

Most provisions of the CPA 2019 came into force on 20 July 2020. The CPA 2019 now imposes liability on manufacturers for defects in the manufacture, construction, design, testing, service, marketing, advertising, etc. of a product resulting in personal injury or property damage to a consumer.

The CPA 2019 also covers transactions made through electronic means, e-commerce and over the internet. The Central Consumer Protection Authority (CCPA) provided for under section 10 of the Act was established by the Ministry of Consumer Affairs and Public Distribution through a notification of 24 July 2020. The mandate of the CCPA is to promote, protect and enforce the rights of consumers, and it has its headquarters at Delhi.

Law stated - 30 August 2023

Judges and juries

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

The role of the judges is to interpret the law, assess or appreciate the evidence presented and control how hearings and trials unfold in their courtrooms for civil cases. As per section 19 of the CPA 2019, the CCPA may conduct or make the Director General of the CCPA conduct a preliminary enquiry to ascertain the veracity of any complaint received by it, concerning violation of consumer rights, any unfair trade practice or any false or misleading advertisements. All other matters, even those involving the state, are adversarial. India currently has no 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 as they were considered to be susceptible to media and public influence.

Although presiding officers in the consumer forums follow the format of a civil proceeding under the Civil Procedure

Code 1908 (the Code), consumer disputes are not supposed to be decided by strict reference to the provisions of the Code (see *Indian Airlines Ltd v CERS*, 1991, NCDRC), affidavit evidence from opposing parties is usually considered sufficient and cross-examination is rarely considered necessary for a consumer dispute.

Law stated - 30 August 2023

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, although it is perfectly open to a plaintiff to initiate a civil suit under the law of tort. India's earlier consumer protection regime envisaged complaints against defective goods. The CPA 2019 contains a separate chapter on 'product liability', it is 'new' since it was not part of the earlier Act, but the 1986 Act provisions covered product liability in its basic form. The 2019 Act covers action against defaulting manufacturers or service providers for the sale of (defective) products causing personal injury, death or property damage and creates the new CCPA to exercise a wide range of powers and functions allocated to it under the provisions of section 18 of the Act, the system of pursuing a consumer complaint remains unchanged.

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 relief such as a mandatory injunction 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, that has territorial jurisdiction over the defendants. A similar procedure is prescribed for consumer complaints, but in consumer cases the procedure is simpler, it is initiated by a complaint, and upon payment of nominal fees. A complaint alleging violation of consumer rights, unfair trade practices or false or misleading advertisements can now also be made under section 17 of the CPA 2019 to the district collector, the commissioner of the regional office or the CCPA. A new procedure of e-filing at <https://edaakhil.nic.in/> has also been initiated.

Civil proceedings differ significantly from those before a consumer forum as 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 opposing parties are given an opportunity to file evidentiary affidavits, and the matter is usually decided without cross-examination, avoiding the tedious process of a trial.

Law stated - 30 August 2023

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?

Although, the CPA 2019 does not contain any pre-filing requirements, it is common for parties to issue a legal notice or demand 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. Section 37 of the CPA 2019 prescribes reference to mediation at the first hearing, after admission of the complaint or at any later stage if it appears to the district commission that there exist elements of settlement that may be acceptable to the parties. In such circumstances, after obtaining the consent of the parties, it is provided that the commission shall refer the parties for mediation and in such cases the provisions of Chapter V of the CPA 2019, relating to mediation, apply.

In the civil court system, there is presently no requirement for mandatory mediation or conciliation, except in commercial cases, but as per the provisions of section 89 of the Code, most civil courts do suggest or require mediation or conciliation at the initial stages of a new lawsuit.

Law stated - 30 August 2023

Summary dispositions

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

The procedure under the Old Act and the CPA 2019 has always been a summary procedure involving only the opportunity to respond to allegations and some basic standard of proof deriving from affidavits affirming a certain state of facts. This is expected to yield a quick process of dispute resolution and close consumer disputes within a few months. In practice, it can take much longer, as the consumer commissions have (without exception) received more complaints than they can decide within the time limits contemplated by the CPA 2019.

The procedure for cases filed as civil suits is different and takes much longer because, although there is provision for a summary suit to be decided quickly, in practice, leave to defend is usually given and trial process then takes a long time. Under the provisions of Order XII, Rule 6 of the Code of Civil Procedure, courts may, at any stage of the suit, pass a judgment in terms of the facts that 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 occur 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 the immediate deposit or payment of the undisputed amount. A defendant may apply for liberty to defend a summary suit through an affidavit explaining his or her defence and then the same suit may be converted to an ordinary suit once 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 special people's courts). In *Afcons Infrastructure Ltd and Anr v Cheria Varkey Construction Co (P) Ltd and Ors*, (2010) 8 SCC 24, it was held by the Supreme Court that if the parties do not agree to arbitration or conciliation, both of which require the consent of all parties, the court has to consider which of the other three alternative dispute resolution (ADR) processes (people's court, mediation and judicial settlement, which do not require the consent of the parties for reference) is suitable and appropriate and refer the parties to such ADR process. Mediation is now an almost routine initial step before a suit progresses to trial.

Law stated - 30 August 2023

Trials

What is the basic trial structure?

The basic trial structure for civil cases involves hearings on a periodic basis whereby on trial dates one or more witnesses are examined. Several hearings with witness examination, sometimes spread over a long period, culminate in the conclusion of the trial before a case is treated as ready for final arguments. Product liability cases filed under the CPA 2019 are not decided on the basis of a trial, but oral evidence and cross-examination may be permitted in some cases. The length of an adjournment depends on 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 generally open to the public under section 153B of the Code; however, a proviso appended to the same section empowers the presiding officer of the court to restrict 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 opposing party or parties. The process of affidavit exchange (and thus the recording of evidence) can take a few months. Once the evidence is recorded by the exchange of affidavits in a consumer case or by the conclusion of the process of examining and cross-examining witnesses in a civil suit, the trial is over and the case awaits its turn for final arguments.

Law stated - 30 August 2023

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 2019 under section 2(5)(ii) and (v), which recognises 'any voluntary consumer association registered under any law for the time being in force' and 'one or more consumers, where there are numerous consumers having the same interest'. The complaint or complaints may be filed before the concerned district commission, state commission or before the NCDRC, as the case may be. A complaint relating to the violation of consumer rights, unfair trade practices or false or misleading advertisements prejudicial to the interests of consumers as a class, may also be forwarded either in writing or electronically to any one of the authorities, namely, the district collector, the Commissioner of the regional office or the CCPA (under section 17). The CCPA under section 18 of the CPA 2019, 'shall protect, promote and enforce the rights of consumers as a class and prevent violations of consumer's rights under this Act'. On a joint reading of section 2(5)(ii) and (v) and section 17, it becomes apparent that the word 'complaint' employed under section 17 does include complaints or actions brought by consumer representative bodies. The CCPA in some cases operates as a state-sponsored complainant and regulator to protect consumers from unfair trade practices, false or misleading advertisements, etc. and its powers are exercised at the regional level by the commissioner (an existing government officer's position) and at the district level by the district collector. The Code also allows any number of plaintiffs (under Order 1, Rule 8) 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 these cases, the award may be apportioned amongst the plaintiffs in such manner as the court deems fit. While it is still uncommon for group action to be initiated through an ordinary tort claim, it is likely that this situation has improved with the introduction of the CPA 2019. Apart from a few actions 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 position under the Old Act was not clear, but two recent Supreme Court decisions have helped to clarify the law.

In *Vikrant Singh Malik v Supertech Ltd And Ors*, (2020) 9 SCC 145 the Supreme Court laid down the test of 'sameness of interest' and held:

'Section 12(1)(c) of the Act applies to a situation where there are numerous consumers 'having the same interest'. In that case, a complaint may be filed by one or more consumers with the permission of the District Forum 'on behalf of, or for the benefit of, all consumers so interested'. The test under Section 12(1)(c) is of the sameness of the interest. The complaint is filed in a representative capacity, on behalf of or for the benefit of all the consumers who are interested. Similarly, under Section 2(1)(b)(iv), in defining the expression 'complainant', the statute incorporates the identical test of the sameness of interest, where there are numerous consumers. In

such a situation, the expression 'complainant' has been defined, inter alia, to include one or more consumers, each of whom has the same interest where there are numerous consumers involved in the dispute.'

Section 35 (1)(c) of the CPA 2019 provides that a complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed in a district commission on behalf of one or more consumers and where there are numerous consumers having the same interest, with the permission of the district commission, on behalf of, or for the benefit of all consumers so interested. The Supreme Court in *Brigade Enterprises Ltd v Anil Kumar Virmani and Ors* (2022) 4 SCC 138 held that:

'15. Section 35(1)(c) enables one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, to file a complaint, on behalf of or for the benefit of all consumers so interested. It is needless to point out that the sine qua non for invoking Section 35(1)(c) is that all consumers on whose behalf or for whose benefit the provision is invoked, should have the same interest. Interestingly, Section 35(1)(c) uses the disjunction 'or' in between two sets of words, namely, (i) 'on behalf of'; and (ii) 'for the benefit of'. Clause (c) of sub-section (1) of Section 35 reads as under:

'35. (1)(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested.'

16. Therefore, a complaint filed under Section 35(1)(c) could either be 'on behalf of' or 'for the benefit of' all consumers having the same interest.

17. Section 38(11) of the Consumer Protection Act, 2019 makes the provisions of Order 1 Rule 8 of the First Schedule to the Civil Procedure Code, 1908 applicable to cases where the complainant is a consumer referred to in Section 2(5)(v), which defines a 'complainant' to mean one or more consumers, where there are numerous consumers having the same interest.'

The Supreme Court has thus clearly laid down a test to determine commonality of interest and it is expected that this may lead to an increase in representative suits or consumer cases by groups of complainants sharing sameness of interest. In *Akshay Kumar v Adani Brahma Synergy Pvt Ltd* (2023 SCC OnLine NCDRC 189), the NCDRC relying upon the decision in *Brigade Enterprise* held that:

'27. As has been laid down by the Hon'ble Supreme Court in Brigade Enterprises (supra), it can be concluded that for filing a Complaint under section 35(1)(c) of the Act in Representative Capacity the complaint should be filed by one or more consumers on behalf of or for the benefit of numerous consumers having same interest.'

Law stated - 30 August 2023

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 are also complaint procedures available through statutory ombudsmen for certain industries. In the case of food, the regulator is the Food Safety and Standards Authority of India, whose powers under section 30(2) of the Food Safety and Standards Act 2006 include the powers of entry and inspection, of search and seizure, and to take samples and destroy defective food items. Similarly, the prescribed authorities for drugs and cosmetics include the drugs inspector and drugs controller, 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 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 three to five 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 24 months, while others can take several years owing to the backlog that remains high as a national average.

Subsection 38(7) of the CPA 2019 provides that each district commission 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 the testing or analysis of commodities; however, in practice these disputes can take much longer in most parts of the country. The time periods were expected to reduce with the enactment of the CPA 2019; however, to date, there is no comprehensive product liability case-specific empirical data available.

Law stated - 30 August 2023

EVIDENTIARY ISSUES AND DAMAGES

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, section 38(9) of the Consumer Protection Act 2019 (CPA 2019) provides that the district commission has similar powers to that of a civil court, it is empowered to summon and enforce the attendance of any defendant or witness, to order the discovery and production of any document or other material object able to be produced as evidence, to receive evidence on affidavits, to requisition reports for analysis or testing from an appropriate laboratory or other relevant sources and issue commissions for the examination of any witness or document. As per the High Court of Bombay (BOMHC) 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 District Commission is laid down in Section 38 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 District Commission. 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.'

In *Avtar Singh Kang v Nature Heights Infra Ltd* [IV (2016) CPJ 43 (Punj)], it was observed that as per section 13(4) of the Consumer Protection Act 1986 (the Old Act), the district forum has the same power that is vested in the civil court under the Civil Procedure Code 1908 (the Code) while trying the suit, regarding the discovery and production of documents. A similar provision has been provided for under section 38(9) of the new Act.

Law stated - 30 August 2023

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 an increasing number of e-courts with documentation uploaded on a computer to enable the court to avoid paper files. Evidence in a civil suit involves the cross-examination of a deponent after he or she has submitted an affidavit of evidence that is akin to examination-in-chief. This cross-examination is recorded by the presiding officer. 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 Another*, 2002 SCC Online NCDRC 20 the National Consumer Disputes Redressal Commission (NCDRC) held that although the cross-examination of a witness or a party before a forum under the Consumer Protection Act, 1986 is not the rule, it is only an exception. When the reputation of a person, such as 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 or her. This was restated in the case of *Neeraj Amarnath Dora v Nandan Hospital & Others* (2011(3) CPR 162 (NC)) and it was further stated that state commissions as well as district forums should follow the practice of asking a party to submit interrogatories on affidavit instead of permitting lengthy oral cross-examination. In *Cellular Operators Association of India and Anr v Nivedita Sharma and Ors*, 2013 (3) CPC 468 it was held by the NCDRC that the provisions of section 13(2) and (3) of the Old Act permitted the various consumer forums to receive evidence (only) by way of affidavit; however, when a party insists that he or she wants to cross-examine the deponent of the affidavit to prove that the affidavit cannot be relied upon, natural justice requires that permission to cross-examine the witness should be given. In a recent case, *Dr Swaroop Goyal v Goli Venkateshwaar Rao* (2019 SCC Online NCDRC 213), the NCDRC allowed the cross-examination of a witness while relying on *Managing Partner v Smt Smritikana Ghose* (Supra). The position under section 38(6) of the CPA 2019 is that every complaint must be heard by the district commission on the basis of affidavit and documentary evidence, but the district commission may also conduct hearings or examination of the parties in person or through videoconferencing. The Supreme Court in *Dr JJ Merchant and Ors v Shrinath Chaturvedi* (2002) 6 SCC 635 decided on 12 August 2002 held that:

'19. It is true that it is the discretion of the Commission to examine the experts if required in an appropriate matter. It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. The only caution required is to follow the said procedure strictly. Under the Act, while trying a complaint, evidence could be taken on affidavits [under Section 13(4)(iii)]. It also empowers such Forums to issue any commission for examination of any witness [under Section 13(4)(v)]. It is also to be stated that Rule 4 in Order 18 CPC is substituted which inter alia provides that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. It also provides that witnesses could be examined by the court or the Commissioner appointed by it. As stated above, the Commission is also empowered to follow the said procedure. Hence, we do not think that there is any scope of delay in examination or cross-examination of the witnesses. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still a party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephonic conference and at the initial stage this cost should be borne by the person who claims such video conference. Further, cross-examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time.'

The Supreme Court in *Iffco Tokio General Insurance v Pearl Beverages* (2021) 7 SCC 704 decided on 12 April 2021 reaffirmed the view above.

Law stated - 30 August 2023

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 of the Code provides for the appointment of commissions to enquire into questions involving scientific investigation, adjustment of accounts, taking evidence, etc. Ordinarily, the report of the commission is treated as evidence, but not in circumstances where the court deems fit to order further inquiry. Section 45 of the Indian Evidence Act recognises expert testimony 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.

A Central Consumer Protection Authority notification dated 11 October 2021 contains the procedure to engage experts and professionals in the fields of consumer rights and welfare, consumer policy, law, medicine, food safety, health, engineering, product safety, commerce, economics, public affairs, administration or such other disciplines related to consumer protection. Experts may also be appointed by district or state consumer commissions depending upon the facts and circumstances of each case. Section 38(2)(d) of the CPA 2019 grants the commission power to requisition a report or test result from an 'appropriate laboratory' or 'other relevant source' similar to provisions in the Code, so that expert evidence is usually sought through a court-requisitioned report rather than oral testimony and cross-examination. The 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 *V Kishan Rao v Nikhil Super Speciality Hospital & An r*, (2010) 5 SCC 513 the Supreme Court held:

'Before the Consumer Fora, if any of the parties want to adduce expert evidence, members of the Fora by applying their mind to the facts and circumstances of the case and the materials on record, may allow the parties to adduce such evidence if it is appropriate to do so in the facts of that case... these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence.... In most of the cases the question whether a medical practitioner or the hospital is negligent or not is a mixed question of fact and law and the Fora is not bound in every case to accept the opinion of the expert witness.'

In the case of *PHI Seeds Ltd & Anr v Sri Subramanya & Another* [IV (2015) CPJ 512 (NC)] , the NCDRC held that because the complainant had not stored a few seeds to send them for the expert to examine, it could not be a ground to deny the genuine claim of the complainant. In *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 appellant company when it failed to examine the resulting crop and 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 & Anr* [(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 *res ipsa loquitur* doctrine and upheld the state commission's award against the manufacturer [see *Tata Engineering & Locomotive Co Ltd (TELCO) v Subhash Ahuja and Anr* , [2013 SCC Online NCDRC 425].

In *Dr Harish Kumar Khurana v Joginder Singh and others* , (2021) 10 SCC 291 the Supreme Court relying upon *V Kishan Rao v Nikhil Super Speciality Hospital & Another* 2010 5 SCC 513 held that:

'It would be apposite to note that in the very decision this Court has expressed the view that before forming an opinion, expert evidence is necessary. The Fora under the Act must come to a conclusion that a case is complicated enough to require the opinion of an expert or the facts of the case are such that it cannot be resolved by members of the Fora without the assistance of the expert opinion.'

Section 66 of the Act further empowers the national commission and the state commissions to direct an individual, organisation or an expert to assist them when an application is made by a complainant or otherwise if it involves the larger interest of the consumers.

Law stated - 30 August 2023

Compensatory damages

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

The CPA 2019 provides for punitive damages (see the proviso to section 39(d) of the CPA), but punitive damages were rarely awarded under the Old Act; instead, there is commonly an award made for 'mental agony and suffering' which may cover non-compensatory damages that derive from inconvenience caused to the complainant. These damages may 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. There is a new definition of 'harm' in the CPA 2019 that seems to go beyond the dictionary definition of the word, so it remains to be seen whether this will result in a change in the awards for consumer cases. Most of the consumer courts 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 CPA 2019 allows for punitive damages, the question of whether punitive damages can be awarded by a consumer court through a lawsuit (that claims a large amount to discourage similar conduct in the future) was decided in the matter of *Magma Fincorp Ltd v Rajesh Kumar Tiwari* , (2020) 10 SCC 399, wherein the Supreme Court held:

'62. The proviso to Section 14(1)(d) of Consumer Protection Act, 1986 empowers the District Forum to grant punitive damages in such circumstances as it deems fit. Punitive damages are not generally awarded in cases of breach of contract unless the act is so reprehensible that it calls for punishment of the party in breach, by imposition of punitive and/or exemplary damages. Compensation which is compensatory, has to be assessed taking into account relevant factors, such as the loss incurred by the claimant, though some amount of guess work and/or estimation may be permissible. In the instant case, the District Forum did not even undertake the exercise of assessment of the loss/damages, if any, suffered by the complainant by reason of non-service of notice before taking possession of the vehicle.

91. A forum constituted under the Consumer Protection Act has, as observed above, the power to award punitive damages. Punitive damages should, however, be granted only in exceptional circumstances, where the action of the Financier is so reprehensible that punishment is warranted. To cite an example, where a Financier erroneously and/or wrongfully invokes the power to repossess without notice to the hirer, causing thereby

extensive pecuniary loss to the hirer or loss of goodwill and repute, a forum constituted under the Consumer Protection Act may award punitive damages.'

The Delhi High Court in the matter of *Paras Jain v Amazon Seller Services Pvt Ltd*, 2021 SCC Online NCDRC 312 followed the above-mentioned case.

This probably derives from the fact that most courts require payment of court fees based on the amount of the claim; however, 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 the 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*, 2015 SCC Online NCDRC). The Rajasthan State Consumer Disputes Redressal Commission in *Vikas Arya v Santokba Durlabhji Memorial Hospital and Medical Research Institute and Ors*, II (2017) CPJ 35 (RC), held that the principle for awarding compensation, that one can safely rely upon, is *restitutio in integrum*, and an application of this principle is that the aggrieved person should get that sum of money that would put him or her in the same position as if he or she had not sustained the damage. Application of this principle must necessarily result in compensating the aggrieved person for the financial loss suffered owing to the event, the pain and suffering undergone and the liability that he or she has to incur owing to the disability caused by the event. The same principle applies to product liability cases.

Compensation is usually not restricted to simple reimbursement of expenses and costs 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*, (2012) 4 CPJ 709 (NC) where the hotel operator was held liable and Otis was exonerated, having warned the hotel about preventative maintenance of the lifts on numerous occasions).

Prior to the enactment of the CPA 2019, the law with regard to product liability followed general principles set out in judgments of the NCDRC or the Supreme Court – the CPA 2019 in effect only strengthened existing law expanding definitions and elaborating on what is product liability. 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.

In the case of *Charan Singh v Healing Touch Hospital and Others*, III (2000) CPJ 1 (SC), the Supreme Court held that:

'While quantifying damages, Consumer Forums are required to make an attempt to serve the ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of recompensing the individual, but also, at the same time, aims to bring about a qualitative change in the attitude of the service provider. Indeed, calculation of damages depends on the facts and circumstances of each case. No hard and fast rule can be laid down for universal application. While awarding compensation, a Consumer Forum has to take into account all relevant factors and assess compensation on the basis of accepted legal principles, in moderation.'

In *Britannia Industries Ltd v State of West Bengal*, 2015 SCC Online NCDRC 3315, the NCDRC, discussed the scope of damages that could be awarded to the complainant under section 14 of the Old Act, and held that section 14 of the Act envisages granting compensation for loss or injury that may not necessarily be monetary in nature. A consumer forum can also award compensation for physical, mental and emotional suffering. Section 39(1)(d) of the CPA 2019 enables a consumer to complain and empower a consumer forum to redress injustice to the consumer, irrespective of whether his or her suffering is monetary or otherwise. Compensation is awarded as recompense for loss or injury that need not necessarily be pecuniary in nature. The Supreme Court in *Hyundai Motor India Limited v Shailendra Bhatnagar* 2022 SCC OnLine SC 483 decided on 20 April 2022 upheld the decisions of the State Commission and NCDRC awarding



damages to the respondent and held that:

' 15. If the reliefs granted in a consumer complaint fits any of the statutory provision contained in sub clause (1) of Section 14 of the Act, it would be well within the power and jurisdiction of the Forum to pass directions irrespective of the fact as to whether specifically certain reliefs have been claimed or not, provided that facts make out foundations for granting such reliefs. In any event, it is within the jurisdiction of the said forum to mould the reliefs claimed to do effective justice, provided the relief comes within the stipulation of Section 14(1) of the Act. We find that the relief granted to the respondent comes within the statutory framework. We accordingly do not want to interfere with the decision of the National Commission. We do not find the reasoning of the Commission or the operative part of the order awarding damages to be perverse.'

Law stated - 30 August 2023

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 are available to product liability claimants in certain circumstances, but the concept of moral damages is not generally applied in India. There are few reported cases where manufacturers or service providers have indulged in unfair trade practices, punitive damages have been awarded by the Supreme Court, NCDRC and State Consumer Commissions.

In *Emaar MGF v Dayal Singh* [IV (2015) CPJ 294(NC)], the appellants, who were builders, did not deliver possession of an apartment to the complainant despite receiving a substantial consideration towards such delivery (of possession). The NCDRC held that such unscrupulous acts on the part of builders, who enjoy and utilise the money paid by customers but do not hand over the possession of homes, must be dealt with strictly. The commission further held that a strong message was required to be sent to this type of builder and it awarded a sum of 500,000 rupees as punitive damages (a small amount in our opinion). In *Jalandhar Improvement Trust v Munish Dev Sharma* [IV (2015) CPJ 309 (NC)], the NCDRC, while holding that appeals preferred by the trust or appellant were a gross abuse of the process of law, also awarded punitive damages of 500,000 rupees to the complainant. In the case of *General Motors (India) Private Limited v Ashok Ramnik Lal Tolat* (2015) 1 SCC 429, the Supreme Court held that punitive damages are awarded against conscious wrongdoing unrelated to the actual loss suffered, and such a claim has to be specially pleaded. The Supreme Court in *Star India (Private)Limited v Society of Catalyst and Anr* (2020) 13 SCC 401 has reaffirmed the view taken above and held that:

'15. With regard to the award of punitive damages made by the National Commission, the same could not have been done inasmuch as the complainant in the present case had not prayed for punitive damages in the complaint or proved that any actual loss was suffered by consumers.'

The above-mentioned views have also been reaffirmed in *Fern-An-Ecotel Hotel v Navratan Nahata & Anr* , 2022 SCC Online NCDRC 132, wherein the NCDRC set aside the award of punitive damages of 1,000,000 rupees awarded by the State Commission. It opined that there was no unfair trade practice committed by the Appellant- Hotel and the Complainants had not prayed for such punitive damages in the complaint or proved that any actual loss was suffered by them. The Commission also observed that awarding punitive damages requires evidence that the Opposite Party proceeded intentionally with an unlawful action after knowing that the act was likely to cause injury.

Law stated - 30 August 2023

Other forms of relief

May a court issue interim and permanent injunctions in product liability cases? What other forms of non-monetary relief are available?

The law of injunctions in civil courts is primarily governed by Order XXXIX of the code of civil procedure (the Code) and by provisions of the Specific Relief Act. Section 94(c) of the Code also makes supplemental provision for grant of temporary injunctions. It is also settled that there is no bar in granting injunctions or supplementary orders under section 151 of the Code for compliance with an injunction, but civil courts have the power to punish for contempt. Under the Old Act, consumer commissions did not enjoy the power to grant interim relief [see *Morgan Stanley Mutual Fund v Kartick Das*, (1994) 4 SCC 225] until 2002 when subsection 13(3B) was inserted into the Act. The power to grant interim relief has now again been conferred on consumer commissions by subsection 38(8) of the CPA 2019 empowering the district commission to grant 'such interim order as is just and proper' in fairly wide terms.

Law stated - 30 August 2023

LITIGATION FUNDING, FEES AND COSTS

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 it. Public funding is also available under the Consumer Protection Act 2019 to assist new cases that may be filed by the Central Consumer Protection Authority. Under section 2(1)(c) of the Legal Services Authorities Act 1987, 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter. The Supreme Court in *Hussainara Khatoon v Home Secretary, State of Bihar*, AIR 1979 SC 1369 had called upon the government to frame an appropriate scheme for providing legal aid to the poor. The Court's observations made in 1979 are still operative, but while the Supreme Court itself and many high courts have done a lot to mend the system, paucity of funds, resources, amenities, government apathy and a growing number of disputes still make the Court's directions from 1979 and some stinging criticism of the system ring true even today.

Law stated - 30 August 2023

Third-party litigation funding

Is third-party litigation funding permissible?

Although there is no express bar to the 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 unheard of 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. The Supreme Court in *Bar Council of India v A K Bala Ji & Ors*, 2018 5 SCC 379 held that in India, the funding of litigation by advocates is not explicitly prohibited, but a concurrent reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc) of the Bar Council of India Rules would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding litigation and getting repaid after the outcome of the litigation. The Indian government is increasingly progressing towards new initiatives based on global trends, but parliament is yet to frame a regulatory plan, that will pass judicial muster, for funding litigation. The aforesaid Supreme Court judgments instil some hope for reform and a new system of assistance to would-be claimants may evolve in the future.

Law stated - 30 August 2023

Contingency fees

Are contingency or conditional fee arrangements permissible?

The Bar Council of India Rules, 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). This rule effectively prohibits an advocate from accepting a contingency or conditional fee arrangement.

Apart from the Bar Council Rules, which have expressly prohibited contingency fee arrangements, in the case of *Ganga Ram v Devi Das* (61 PR of 1907, p 280) such an agreement was held to be void for being against public policy and professional ethics. A similar view was taken by a five-judge bench of the Supreme Court in the matter of *Mr 'G', A Senior Advocate of Bombay High Court v Unknown* (1955 1 SCR 490) wherein a senior advocate, Mr G, entered into a conditional fee agreement with his client on the terms that the client would pay him 50 per cent of whatever he wins. Later, the matter was reported to the Bar Council and, relying upon the findings in an investigation carried out by the three members of the Bar Council, the Bombay High Court suspended Mr G for six months. Subsequently, Mr G appealed to the Supreme Court against this suspension order. The Supreme Court observed that the conduct of Mr G amounted to professional misconduct and it upheld his suspension. This position at law seems to have remained constant since the *Ganga Ram* case of 1907 in view of the 2018 Supreme Court judgment in the matter of *Bar Council of India v A K Balaji & Ors*, (2018) 5 SCC 379.

Law stated - 30 August 2023

'Loser pays' rule

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

Costs are awarded to the successful party in litigation in accordance with the provisions of section 35(2) of the Code. While referring to the section 35(2), the Supreme Court in *Salem Advocate Bar Association v Union of India*, (2005) 6 SCC 344 observed that:

'When section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party...[and that] costs have to be actual reasonable costs including cost of the time spent by the successful party, the transportation and lodging if any, or any other incidental costs besides the payment of court fee, lawyer's fee, typing and other costs in relation to the litigation.'

However, despite such precedents and directions, successful litigants are only partially indemnified against their actual

legal costs and as a matter of practice only nominal costs are awarded. In a case decided by a civil court, the court can order payment of costs incidental to the suit (costs follow the event). Section 35(2) of the Civil Procedure Code, 1908 expressly provides that '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 false or vexatious claims, 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. In *Indian Council for Environmental Action v Union of India*, (2011) 8 SCC 161, the Supreme Court held that the courts must adopt a pragmatic approach and, in appropriate cases, realistic costs and compensation must be ordered to discourage dishonest litigation; however, even today there are hardly any cases of significant cost awards. This practice is also followed in the consumer courts and it is uncommon for any substantial costs to be awarded.

Law stated - 30 August 2023

SOURCES OF LAW

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 and, as explained above, the Consumer Protection Act 2019 (CPA 2019) has introduced a new chapter on product liability effective from 20 July 2020. The Consumer Protection Act 1986 had provisions for a complaint to be filed in relation to goods that were hazardous to life and safety (in contravention of any standards imposed by law) or otherwise defective, defining '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', but this has now been expanded under the new definition of 'harm' to cover more products. Section 82 of the CPA 2019 creates liability 'for any harm caused by a defective product manufactured by a product manufacturer or serviced by a product service provider or sold by a product seller', and section 83 now makes all three parties liable. There are other specific statutes that contain provisions relating to product safety, standards and regulations, such as:

- the Food Safety and Standards Act 2006 and the Food Safety and Standards Rules, 2011;
- the Drugs and Cosmetics Act 1940 and the Drugs and Cosmetics Rules, 1945;
- the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 and the Drugs and Magic Remedies (Objectionable Advertisements) Rules 1955;
- the Agricultural Produce (Grading and Marketing) Act 1937;
- the Bureau of Indian Standards Act 2016;
- the Insecticides Act 1968;
- the Standards of Weights and Measures Act 1976;
- the Sale of Goods Act 1930;
- the Prevention of Food Adulteration Act 1954; and
- the Legal Metrology Act 2009.

A general duty is also imposed under section 16 of 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 CPA 2019 in section 2(47) defines 'unfair trade practices' (deriving from the repealed Monopolies and Restrictive Trade Practices Act 1969) as covering any form of false or misleading representation, statement or advertisement; these are actionable through the usual consumer complaint process. Chapter VI of the CPA 2019 creates 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.

The CPA 2019 is directed at changing the law in favour of consumers by increasing the list of causes of action set out under what constitutes a complaint. It widens the concept of purchase to include online transactions. Consumer rights have been defined for the first time and these now include the right to be protected against 'marketing of goods, products or services which are hazardous to life and property' and 'the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices'. Interestingly, the CPA 2019 also imposes liability upon individuals who endorse an advertisement 'which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement', thus widening the scope for action against not only the manufacturer, seller, trader and service provider but also against the person endorsing the relevant goods (such as an actor or well-known personality known as the 'endorser'). The new definition of 'harm' in relation to product liability covers damage to any property other than the product itself. Thus, harm is defined to include personal injury, illness or death, mental agony or emotional distress, or any loss of consortium or services or other loss resulting from the foregoing. Injury (unlike the provisions of the Warsaw/Hague/Montreal Convention in Civil Aviation) has been specifically defined to include 'any harm whatever illegally caused to any person, in body, mind or property' thus covering mental agony in addition to corporal or physical injury. Product liability is also defined widely in the CPA 2019 to include the responsibility of a product manufacturer or product seller to compensate for any harm caused to a consumer by any defective product manufactured or sold by that person, or any service rendered in relation thereto. All three expressions (ie, product manufacturer, product seller and product service provider) are widely defined so as to include parties connected with the sale process. The Central Consumer Protection Authority has been set up under section 10 and empowered not only to regulate but also to promote, protect and enforce the rights of consumers as a class. Finally, section 20 of the CPA 2019 contains the first statutory provision for the enforced recall of goods or withdrawal of services that are dangerous, hazardous or unsafe, as well as the reimbursement of the price of these goods.

Law stated - 30 August 2023

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. New statutory rights and remedies will certainly affect the liability of various players and, naturally, insurance. Courts are generally guided by the principles of justice, equity and good conscience as precedent. Thus, product liability

claimants 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; these complaints also serve to accelerate settlements, as the criminal proceedings, in most cases, are 'compoundable'. The Drugs and Cosmetics Act 1940 also provides for criminal liability for the manufacturers and producers of medicinal products or cosmetics, etc, that do not adhere to the prescribed standards with the maximum punishment being life imprisonment and a fine up to one million rupees. Provisions of the Indian Penal Code are also attracted to provide punishment to offenders for false weights and measures (imprisonment up to one year along with fine), adulteration of goods (food and drugs, etc: six months' imprisonment or a fine of 1,000 rupees, or both) and false property marks or forgery of documents (two years' imprisonment or a fine, or both).

In *Airbus Industrie v Laura Howell Linton*, 1994 SCC Online Kar 1370, a scheduled passenger flight from Bombay to Bangalore, impacted earth nearly 2,300 feet before the runway began and promptly hit the boundary wall during an attempt to land at Bangalore airport. As a result, the aircraft's wings, fuselage and other components disintegrated. This resulted in the death of 92 passengers and four crew members, while the remaining 54 people suffered injuries of different severity. In an action brought by the appellants to claim compensation from Indian aircraft manufacturers, airlines, and airport authorities, the respondents claimed the Texas court to be a more proper forum because India had no strict product liability law. The claim of the respondents was dismissed by the court and their liability was determined based on common law concepts of causation and negligence rather than strict product liability, concluding that 'the mere fact that the Indian Courts do not have the strict product liability law' was irrelevant. It was acknowledged that (at the time) the doctrine of strict product liability was not recognised in India. The municipal law of India here section 20(c) of the Code of Civil Procedure 1908 conferred jurisdiction upon the Indian Court even with respect to the foreign defendants. The Supreme Court by then already had occasion to deal with mass tort disasters (the Bhopal gas disaster of 1984), while cases like *Airbus* sowed the seeds for today's product liability law, India remains conservative and reasonable.

Law stated - 30 August 2023

Consumer legislation

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

The Consumer Protection Act 2019 (CPA 2019) contains provisions that impose new statutory duties and it has been formulated to allow for complaints against defective goods or services or goods that will be hazardous to life and safety when used or offered for sale to the public, as well as false and misleading advertisements or for storing, selling, distributing or importing adulterated products or spurious goods. The general provisions of the CPA 2019 cover faults, imperfections and shortcomings in the quality, quantity, potency, purity or standards that ought to be maintained under any law for the time it is in force or under any contract, express or implied. Depending on the claimed amount, the district commissions, state commissions and the National Consumer Disputes Redressal Commission (NCDRC) are adequately empowered under the CPA 2019 to provide any of the following relief in the case of defective goods or products:

- directions for the offending party to remove the defect;
- directions to the seller, manufacturer, supplier etc. to replace the goods with new goods of a similar description, which must be free from any defect;
- return the price or consideration to the complainant;
- pay such amount that may be awarded as compensation to the consumer for the loss or injury suffered by the consumer owing to the negligence of the other party, and, in a fit case, award punitive damages;

- discontinue the unfair trade practice or the restrictive trade practice or not repeat them;
- cease and desist manufacturing hazardous goods;
- not offer hazardous goods for sale;
- withdraw hazardous goods from being offered for sale; and
- payment of adequate costs (these are rarely actual costs).

In a recent decision *National Insurance Co Ltd v Harsolia Motors and Ors*, 2023 SCC Online 409, the Supreme Court of India (the SC) explained the real purpose and intent of the Consumer Protection Act, 1986. The SC held as follows:

'21. The Act, 1986 is a social benefit-oriented legislation and, therefore, the Court has to adopt a constructive liberal approach while construing the provisions of the Act. To begin with the Preamble of the Act, 1986 which can afford useful assistance to ascertain the legislative intention, it was enacted to provide for the protection of the interests of consumers. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled law that a Preamble cannot control otherwise plain meaning of a provision.

22. In fact, the law meets long felt necessity of protecting the common man from such wrong for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interests of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively and inefficiently for reasons which are not necessary to be stated.

23. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the ambit and reach of the Act. Each of these definitions are in two parts, one explanatory and the other inclusive. The explanatory or the main part itself uses expressions of amplitude indicating clearly its wide sweep within its ambit to widen such things which otherwise would have been beyond its natural import.

24. The provisions of the Act, 1986 thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit-oriented legislation. The primary duty of the Court/Commission while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objective of the enactment.'

Law stated - 30 August 2023

Criminal law

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

Chapter VII of the CPA 2019 contains reference to some new offences and criminal penalties punishing an accused person for false or misleading advertisement, punishing an accused person for manufacturing for sale or storing, selling or distributing or even importing products containing adulterants or that are spurious. The Act also imposes criminal penalties for non-compliance with orders of the district commission or state commission or NCDRC: the punishments may range from a fine to three years' imprisonment, which is similar to the penalty for disobedience regarding the orders of the Central Consumer Protection Authority. A punishment of life imprisonment and fine of not less than 1 million rupees is imposed under section 91 of CPA 2019 in cases where the manufacture of spurious goods for sale or for storing or selling or distributing or importing results in the death of a consumer. Several other laws

impose criminal sanctions in the form of punishments for a violation of standards, adulteration or for the sale of unsafe, hazardous or spurious products.

There have also 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 Indian Penal Code contains provisions for the fraudulent use of weights and measures and provisions in relation to the adulteration of food and drink, drugs, etc, so that punishment (imprisonment or a fine, or both) can be imposed in these cases. The Food Safety and Standards Act 2006 provides for imprisonment for life and a heavy fine to discourage the manufacture, storage, sale, distribution or import of any article of food for human consumption that is unsafe, as well as 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 as a result of an advertisement for a product claiming to cure any of the ailments specified in the Act (such as appendicitis, arteriosclerosis, cancer or blindness).

Law stated - 30 August 2023

Novel theories

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

With the advent of a new product liability law imposing liability for defective products, novel approaches will certainly be 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. 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; however, this case also eventually prompted Parliament to enact the Civil Liability for Nuclear Damage Act 2010. The Regulations on Food Recall Procedures enforced from 2013 require 'reasonable efforts' to be made by the Food Safety and Standards Authority of India (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 and how the recall provisions and powers in the CPA 2019 will be given effect to.

Law stated - 30 August 2023

Product defect

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

The CPA 2019 defines 'defect' under section 2(10) and 'design' under section 2(11) in a manner that broadly covers fitness for purpose and express or implied standards. 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, replacement or 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.

The National Consumer Disputes Redressal Commission (NCDRC) has also laid down, in this regard, that if standards prescribed under some law are not maintained, the product shall be construed as hazardous (see *Asia Tea Company and Ors v On behalf of Commissioner, Civil Supplies and Consumer Protection Department*, I (2017) CPJ 461 (NC)). Occasionally, the consumer courts treat a complainant's case with suspicion when it is apparent that the product has already been well used without complaint (see the *General Motors India Pvt Ltd v GS Fertilizers*, 2013 SCC Online NCDRC 126). 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 & Others* [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)).

Law stated - 30 August 2023

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 when it is covered under the definition of the word 'defect' appearing in the definition clause and where specific rules have been set out by a statutory authority such as the Bureau of Indian Standards, the Food Safety and Standards Authority, the Bureau of Energy Efficiency or the Export Inspection Council. The CPA 2019 under section 2(10) defines the term 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 or product and the expression "defective" shall be construed accordingly.' A court may grant damages to the affected party if it considers a product as defective on account of proven facts. Ordinarily, the burden of proof lies on the claimant (subject to common law evidentiary rules that sometimes cast the burden on the other side), and the standard of proof is the normal civil standard: namely, the preponderance of evidence or balance of probabilities to be decided by the adjudicating officer or court, but in certain cases, it can be shifted onto the manufacturer as well (see *Tata Motors v Rajesh Tyagi and HIM Motors Show Room-II*, 2014 (1) CPC 267).

Law stated - 30 August 2023

Possible respondents

Who may be found liable for injuries and damages caused by defective products? Is it possible for respondents to limit or exclude their liability?

The law now 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 damage, or both, caused by defective or spurious products. However, the courts have tended to fix liability for defective products predominantly on the manufacturer. In *Ram Shankar Yadav v JP Associates Ltd* [I (2012) CPJ 110] 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', 'product manufacturer', 'product seller' and 'product service provider' contained in the CPA 2019 along with the new Chapter VI, one may find the foregoing statement of law to be inconsistent with the new 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 onto the manufacturer on account of bad presale storage conditions (for example, in 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 NC]). 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 & Others* [I (2014) CPJ 344 (NC)]). The CPA 2019 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 definition of 'product liability' reflects that in order to establish a claim of product liability, a complainant must establish 'harm' caused by a 'defective' product. The product not being 'defective' or the absence of any 'harm' caused to the consumer by use of the product are valid defences to a product liability action.

Law stated - 30 August 2023

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 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. 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 evolves from a few unfortunate cases such as one involving a defective escalator that was not serviced, which caused the death of a minor (*Geeta Jethani and Others v Airports Authority of India* [III 2004 CPJ 106 NC]). In *Karuna Ketan Biswas v Airports Authority of India and Ors* [II (2013) CPJ 37 (WB)] the Airport Authority of India was held not liable for deficiency in their services but was directed to compensate the complainant by way of an ex-gratia payment of 50,000 rupees. 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 the owner-operator of the escalator alone 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 for an escalator or emergency brakes in a lift) to prevent the machine from becoming hazardous, and in 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 *Jethani v AAI* case. Once it is assumed that the product is defective, 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 where there have been several instances of defects leading to an unreasonable number of visits to the workshop (see the *Tata Engineering & Locomotive Co Ltd (TELCO) v Subhash Ahuja and Anr*, 2013 SCC Online NCDRC 425) the burden may be shifted onto the manufacturer. The burden of proof to show any defect in goods is 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)), but once a product is proved to be defective, the manufacturer must be liable if it caused injury unless

such injury is expressly excluded by contract or accepted by the user through the *volenti non fit inuria* doctrine.

Law stated - 30 August 2023

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 damage 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 1930 and the CPA 2019 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. Section 2(47)(viii) of the CPA 2019 adds to the list of unfair trade practices the 'refusing, after selling goods or rendering services, to take back or withdraw defective goods or to withdraw or discontinue deficient services and to refund the consideration thereof, if paid, within the period stipulated in the bill or cash memo or receipt or in the absence of such stipulation, within a period of thirty days'. Thus, it is the duty of the seller, manufacturer or service provider to take back and withdraw defective goods or discontinue deficient services after sale of the concerned products. There is a 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, 1940 require reporting, product recall and steps to contain the distribution of a defective product and impose other positive post-sale duties. In cases where an express warranty is provided by the manufacturer as a part of its post-sales service commitment, consumer forums are not inclined to extend this period of warranty or hold the manufacturer responsible for repairs beyond the contractual period of warranty; 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)]). In cases of breach of post-sale duties, the consumer commissions, subject to the terms of the contract between the parties, can direct the manufacturer or service provider to repair or replace the goods in question or improve the service quality. The law regarding injuries caused after warranty is still not settled, it is our view that consumer products if not broken or tampered with should not injure people from product defects even after warranty.

Law stated - 30 August 2023

LIMITATIONS AND DEFENCES

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. Section 69 of Consumer Protection Act 2019 (CPA 2019) 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. In *National Insurance Co Ltd v Hindustan Safety Glass Works Ltd*, AIR 2017 SC 1900, the Supreme Court ruled – '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.' In this case, 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 Old Act cannot be strictly construed to disadvantage a consumer in a case where a supplier of goods or services is instrumental in causing a delay in the settlement of the consumer's claim.

The limitation period of two years under the 2019 Act is generally extendable for cause and the limitation period of three years in a civil suit is not extendable though this was done for Covid 19. In *Lt General Brijesh Kumar Singh v Suncity Projects Pvt Ltd & Ors* [CC/216/2021] decided on 28 October 2022, the Delhi State Consumer Disputes Redressal Commission while deciding the question of limitation for a complaint regarding possession of a flat held as follows:

'It is a settled legal proposition that failure to give possession of flat is continuous wrong and constitutes a recurrent cause of action and as long as the possession is not delivered to the buyers, they have every cause, grievance and right to approach the consumer courts.'

Relying on the above settled law, it is clear that failure to deliver possession being a continuous wrong constitutes a recurrent cause of action in favor of the buyer and therefore, till the time possession is not delivered to the Complainant, he is within right to file the present complaint before this commission. Consequently, the present complaint is not barred by limitation as per Section 69 of the Consumer Protection Act, 2019.'

From the foregoing, it is clear that even though the CPA 2019 prescribes a period of limitation of two years for filing claims before the consumer authorities, this period can be extended in circumstances wherein the cause of action is ongoing and for other good cause. The provision contained in section 69 of CPA 2019 is *pari materia* to section 24A of the earlier CPA 1986. In *Gian Gupta v DDA* (decided on 16 August 2021), the Delhi State Consumer Disputes Redressal Commission held as follows:

'9. The expression, 'shall not admit a complaint' occurring in Section 24A is sort of a legislative command to the Consumer Forum to examine on its own whether the Complaint has been filed within limitation period prescribed thereunder. As a matter of law, the Consumer Forum must deal with the complaint on merits only if it has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the Consumer Forum to take notice of Section 24A and give effect to it. If the complaint is barred by time and yet, the Consumer Forum decides the complaint on merits, the forum would be committing an illegality.'

As per this judgment, the consumer forums can deal with a complaint on merits only when they are filed within a period of two years. In case, the complaint is filed beyond this period, then the delay can be condoned due to sufficient cause which is to be recorded by a forum in writing, however, as per this judgment usually the forums are bound to follow the general rule relating to limitation for filing a consumer complaint, which is two years.

Law stated - 30 August 2023

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 *Geeta Jethani and Others v Airports Authority of India* [III, 2004 CPJ 106 NC] (the escalator was 14 years old), and this may have influenced the court's decision not to impose liability on the manufacturer: since the escalator was old and they had 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 maintenance agency may assert such a defence and then would be required to bear the (high) burden of proof to prove that such a product defect could not have been discovered within the limitations of science and technology at the time of distribution.

Law stated - 30 August 2023

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 could be argued that a product that complies with statutory standards or requirements is not defective, and, as such, the compliance would be taken as a defence. In the National Consumer Disputes Redressal Commission (NCDRC) decision of Banta Ram v Jai Bharat Beej Company and PHI Seeds Ltd (II (2013) CPJ 617 (NC)), wherein the findings of the district forum and the state commission that the petitioner failed to prove that the seed supplied by the respondents to the petitioner were of inferior quality and did not meet the mandatory standards or requirements was upheld. As per the CPA 2019, a defence can be raised to the effect that such warranty or guarantee is based on an adequate or proper test, however, the burden of proof of such defence shall lie on the person raising such defence.

Law stated - 30 August 2023

Other defences

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

Most of the possible defences include:

- Voluntary assumption of risk (eg, 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 or other third party;
- Locus standi (Amita Sharma v BHEL [II (2013) CPJ 505(NC)]);
- The state-of-the-art defence, namely, the product met applicable industry standards at the time when it was manufactured;
- Contributory negligence of the buyer (which can also be 100 per cent);
- Examination of the goods by the buyer prior to purchase caveat emptor;
- Contractually agreed warranties, 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, 2013 SCC Online NCDRC 126) and Mahindra and Mahindra Ltd v Parampal Singh (First Appeal No. 881 of 2015, decided 19 January 2017 – SCDRC Chandigarh); and
- Commercial purpose (not personal use), (see Crompton Greaves Ltd v Daimler Chrysler India Pvt Ltd and Ors (IV (2016) CPJ 469 (NC)), wherein the NCDRC held that:

'If a car or any other goods are obtained or any services are hired or availed by a company for the use/personal use of its directors or employees, such a transaction does not amount to purchase of goods or hiring or availing of services for a commercial purpose, irrespective of whether the goods or services are used solely for the personal purposes of the directors or employees of the company or they are used primarily for the use of the directors or employees of the company and incidentally for the purposes of the company.'

There are also certain defences that are available under section 87 of CPA 2019. These are provided as follows:

1. A product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified.
2. In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable, if:
 1. the product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer;
 2. the product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used;
 3. the product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; or
 4. the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.
3. A product manufacturer shall not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product.

Law stated - 30 August 2023

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 commission to the state commission under section 41 and from the state commission to the NCDRC under section 51 of the CPA 2019 have been provided. 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 the prescribed period of limitation.

Law stated - 30 August 2023

SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

Settlement

What rules and procedures govern the settlement of product liability cases?

Chapter V of the Consumer Protection Act 2019 (CPA 2019) only relates to mediation and sections 74 to 81 have been

enacted for this purpose. The Act provides for the establishment of a consumer mediation cell attached to all consumer commissions as well as the mechanism for its functioning. Section 37 of the CPA 2019 provides that the district commission may on the first day of hearing or later refer the parties to mediation with their consent. Section 74 covers establishment of such consumer mediation cells while sections 79 to 81 covers the procedure for mediation, recording a settlement and of passing a suitable order recording the settlement. Section 89 of the Civil Procedure Code 1908 (the Code) contains mechanisms for settlement of disputes outside the court covering arbitration conciliation, settlement and mediation in civil suits. The establishment of Lok Adalats or people's courts and their functioning is covered by the Legal Services Authority Act 1987. Section 12A under Chapter IIIA of the Commercial Courts Act 2015 also provides mandatory pre-litigation mediation if the relief sought is not urgent.

Law stated - 30 August 2023

Alternative dispute resolution

Is alternative dispute resolution required or advisable before or instead of proceeding with litigation? How commonly is ADR and arbitration used to resolve claims?

Alternate dispute resolution (ADR) mechanisms are seeing a constant rise in popularity in India, especially owing to the heavy burden on the courts. Arbitration and conciliation have become something of a norm in the cases of contractual disputes. There is a spill-over of ancillary litigation arising from arbitration cases that still go to the courts. The Commercial Courts Act, 2015 provides for mandatory pre-litigation mediation if the relief sought is not of an urgent nature. As per Section 37(2) of the Act, where the parties agree for settlement by mediation and give their consent in writing, the District Commission, within five days of receiving consent, will refer the particular matter for mediation. Further, section 80 of the CPA 2019 provides for settlement of disputes through mediation.

In pursuance of the aforesaid mediation related purposes, the Consumer Protection (Mediation) Rules, 2020 (effective from 15 July 2020) have also been promulgated under the CPA 2019 to ensure speedy redressal and settlement of disputes through mediation within a period of three months.

Similarly, section 89 of the Civil Procedure Code also provides for a situation 'where it appears to the court that there exist elements of a settlement that 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 special people's courts). Mediation is seen as the future of dispute resolution in India and it is encouraged in almost every case as a process prior to adjudication. Trained mediators are now available in most courts and even for consumer cases.

Law stated - 30 August 2023

JURISDICTION ANALYSIS

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. The Consumer Protection Act 2019 (CPA 2019) creates liability, rights, remedies and duties hitherto unknown or relatively unrecognised. Although product liability law is not as well developed as it might be, the CPA 2019 goes beyond deterrence and seems to cover reasonable compensation and even restitution. The courts have tried to establish strict liability in cases leading to injuries caused by a product even if the manufacturer was careful while making the product and fault is not proved.

That the law (and the imposition of reasonable penalties or awards) was inadequate to deter unscrupulous large-scale manufacturers was well known, but the present state of affairs suggests real change and may cause the present system of lower insurance costs and somewhat lower pricing to change. The Department of Consumer Affairs has introduced consumer awareness programmes to apprise consumers of their rights and remedies. Such programmes contribute to the growth and development of consumerism in India. Concomitantly, with the increase in the volume of internet connectivity and the number of smartphone users, more consumers are engaging in online shopping, which is further widening the scope of product liability laws. The CPA 2019 now specifically includes, in the definition of a consumer, a person who 'buys any goods' or 'hires or avails any services', or both, and includes offline or online transactions through electronic means or by teleshopping, direct selling or multilevel marketing. E-commerce and electronic service providers have also been defined under the CPA 2019. The CPA 2019's inclusion of 'e-tailers' is another step forward in bringing the law in tune with the needs and realities of the present time.

Law stated - 30 August 2023

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 enforcement of the CPA 2019 from 2020 and establishment of the Central Consumer Protection Authority (CCPA) are still relatively recent. The 'new' Act 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. The Supreme Court of India (see *National Seed Corporation Ltd v M Madhusudhan Reddy and Another*, AIR 2012 SC 1160) 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. In a recent case of the Supreme Court in *Nandan Biomatrix Ltd v S Ambika Devi & Ors* [(2020 13 SCC 130)], the Supreme Court relied upon the ruling laid down in the above-mentioned case. This trend continued in *Punjab University v Unit Trust of India*, (2015) 2 SCC 669, in which case, the Supreme Court decided that the Punjab University may be treated as a consumer. In the 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(7) of the CPA 2019 clearly specifies that a consumer means any person who buys any goods or hires or avails themselves of a service for a consideration. In the case of *Canara Bank v United India Insurance Co Ltd & Others*, 2020 3 SCC 455, the Supreme Court rejected an argument based upon privity of contract allowing claims by third-party beneficiaries (farmers) who had paid the premium but had contracted through an intermediary. 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.

Ambrish Kumar Shukla & Ors v Ferrous Infrastructure Pvt Ltd (I (2017) CPJ 1 (NC)) is a landmark judgment that paves the path for class-action suits and complaints in India as it allows consumers with common grievances to join each other and directly approach the National Consumer Disputes Redressal Commission (NCDRC) as a group subject to the fulfilment of conditions concerning the pecuniary jurisdiction of NCDRC. The NCDRC judgment in *Ambrish Kumar Shukla* was affirmed by the Supreme Court in August 2020 [*Vikrant Singh Malik v Supertech Ltd*, (2020) 9 SCC 145].

In *Hyundai Motor India Limited v Shailendra Bhatnagar* 2022 SCC OnLine SC 483 the State Commission granted relief to the respondent on account of injuries sustained due to the non-deployment of the air bags and NCDRC upheld the said decision. The Supreme Court dismissed the appeal of the car manufacturer, reaffirming the view taken by NCDRC and held that:

'9. There are findings of the two fora about the defect in the product sold, in this case being a vehicle. This was

sold with front airbags and there was frontal damage. The airbags did not deploy. The accident caused injuries to the respondent. The appellant referred to various portions from the owner's manual to contend that the impact of the collision was not sufficient to activate the sensor which in turn would have resulted in deployment of the airbags. We would not like to revisit the facts on which findings have been returned by the two fora against the appellant. The State Commission relied on the principle of Res Ipsa Loquitur to affix the liability of the manufacturer as regards defect in the airbag system, having regard to the nature of the collision. The National Commission affirmed this finding referring to certain photographs of the damaged vehicle, which showed substantial frontal damage. In such circumstances, both the aforesaid fora took the view that expert evidence was not necessary in the subject case. Such view cannot be faulted as being unreasonable, in the given facts.'

Law stated - 30 August 2023

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.

The level of consumerism is growing in India due to increase in the standard of living and rapid globalisation. The Ministry of Consumer Affairs, Food and Public Distribution's nodal body which is the Department of Consumer Affairs regularly publishes advertisements encouraging consumers to appreciate their rights and to approach the relevant consumer courts. Several non-governmental organisations (NGOs) mostly comprised of consumer associations assist consumers in different districts, with some cases being fought on behalf of aggrieved and indigent consumers. Consumer associations also spread awareness. The role of NGOs has become increasingly significant over the past two decades. These organisations are registered under the Societies Registration Act, under the Companies Act or as charitable trusts. The NGOs have undertaken activities to promote a consumer movement. They perform several functions, such as creating awareness about consumer rights, and they educate the general public about consumer problems and remedies through seminars, workshops and training programmes. 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, namely, what the first author had described as the 'pendency pandemic'. Efforts are under way to improve this slow but steady justice system, and these measures should take effect eventually.

Under the provisions of the CPA 2019, the E-Commerce Rules, 2020 have been notified by the central government for prevention of unfair trade practices in e-commerce and protection of the interests and rights of the consumers. The E-Commerce Rules, 2020 specify the duties and liabilities of e-commerce entities (marketplace and inventory model) and sellers on e-marketplaces. The Advertising Standards Council of India, a non-government body, had developed a code for self-regulation in advertising in the absence of any legal framework. With the notification of the CPA 2019, the Central Consumer Protection Authority (CCPA) has already been established to regulate matters, inter alia, relating to false or misleading advertisements. The CCPA can impose a penalty of up to 1 million rupees on a manufacturer or endorser of misleading advertisements or any person who is found to publish or is a party to the publication of misleading advertisements, and for every subsequent contravention by a manufacturer or endorser up to 5 million rupees. It can also prohibit an endorser of a false or misleading advertisement from making endorsement of any product or service for a period that may extend to one year and, for every subsequent contravention, for a period that may extend to three years.

The CCPA regularly issues show-cause notices to regulate various companies and commercial entities for violating advertising norms and to promote misleading advertisements. These show cause notices pertain to various sectors,

such as online betting apps, electronic vehicle manufacturers, water purifiers, paints, floor cleaner, apparel, disinfectants, online sale of acids, etc. An advisory was also earlier issued to industry associations highlighting provisions of the Consumer Protection Act to impress upon their members not to make false claims about the effectiveness of their product or products against covid-19 where such effectiveness was not supported by competent and reliable scientific advice.

The Supreme Court has in the recent judgment of Alpha G184 Owners Association v Magnum International Trading Company Pvt Ltd , 2023 SCC Online 625, observed that the CPA 2019 has been enacted to promote consumerism in India by providing a very flexible procedure for consumers to approach consumer forums and hence a technical approach in construing provisions of the Act against consumers should not be adopted by consumer forums and courts. The Supreme Court held as follows:

'15. The Consumer Protection Act, 1986; 68 of 1986 (hereinafter referred to as 'the 1986 Act') and the Consumer Protection Act, 2019; 35 of 2019 (hereinafter referred to as 'the 2019 Act') have got a laudable objective. The 2019 Act facilitates the consumers to approach the forums by providing a very flexible procedure. It is meant to encourage consumerism in the country. Any technical approach in construing the provisions against the consumer would go against the very objective behind the enactment.'

Law stated - 30 August 2023

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 has rapidly evolved in India owing to the pace of globalisation and the advent of e-commerce, which now delivers more products to consumers in remote locations. In light of these developments, it had become incumbent upon the legislature to protect consumers and buyers by creating statutory product liability related laws, and thereby providing them with the right to be informed and to complain in the event of sale of defective products. The CPA 2019 came into force on 20 and 24 July 2020. This Act repealed the earlier CPA of 1986 and hence was enacted with a view to address the lacunae in the earlier Act. It also widened the scope of consumer rights in order to cover product liability through a separate chapter, which includes e-commerce, direct selling, tele-shopping and other marketing modes in the age of digitisation given that the earlier law came into force well before the advent of the internet.

The CPA 2019 is overarching and governs all consumer contracts for goods and services with new provisions for product liability. The CPA 2019 sets out the powers of a new regulatory authority to recall products and cancel licences if any consumer complaint affects the public. The Act also provides for mediation to resolve disputes and also suggests a simplified judicial process to ensure inexpensive access to justice. There are also provisions for stringent penalties, including life imprisonment in certain cases, and it has provisions to protect e-retail consumers. Key features of the CPA 2019 include the establishment of the CCPA, 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 CCPA action to enforce the recall, refund or return of products.

Access to justice often depends upon the availability of legal aid. Provisions for legal aid have been made in the Legal Services Authorities Act, 1987, which was enacted with a view to enhance access to justice for citizens of India. Access to justice has improved pursuant to the generally open-door policy of the consumer courts, the NCDRC and the Supreme Court. There are occasional aberrations in the process of deciding consumer cases, such as in some consumer commissions 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 consumer cases, but the general trend is positive. The Supreme Court has departed from the strict principles of civil procedure to support consumer rights and in 2016 it

ruled that if a case was dismissed on the ground of maintainability (eg, owing to some technical default or defect), a second complaint filed on the same facts and cause of action could still be maintainable (see *Indian Machinery Co v Ansal Housing & Construction Ltd* (2016) 3 SCC 689).

In a judgment delivered by the Supreme Court in *M/s Imperia Structures Ltd v Anil Patni and Anr* [(2020) 10 SCC 783] it was held that remedies under the CPA 2019 were in addition to the remedies available under special statutes. This view was reaffirmed in *Ireo Grace Realtech Private Limited v Abhishek Khanna* [(2021) 3 SCC 241]. In this recent judgment (*Imperia Structures*), the Court also dealt with the validity of one-sided and unreasonable contract terms and held:

'Incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(47) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer forum were in no manner restricted to declare a contractual term as unfair or one-sided as an incident of the power to discontinue an unfair or restrictive trade practice. An unfair contract has been defined in the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. There is now a statutory recognition of a power which was only implicit under the 1986 Act.'

In the recent case of *Neena Aneja v Jai Prakash Associates Ltd* [(2022) 2 SCC 161], the Supreme Court while determining the pecuniary jurisdiction with respect to matters instituted under the erstwhile CPA of 1986 also expressed its views on providing access to justice to consumers and the need for speedy disposal of consumer cases. The judgment provides:

'The 2019 Act, as indicated by its long title, is enacted to provide 'for protection of the interests of consumer'. The Statement of Objects and Reasons took note of the tardy disposal of cases under the erstwhile legislation. Thus, the necessity of inducing speed in disposal was to protect the rights and interests of consumers. The 2019 Act has taken note of the evolution of consumer markets by the proliferation of products and services in light of global supply chains, e-commerce and international trade. New markets have provided a wider range of access to consumers. But at the same time, consumers are vulnerable to exploitation through unfair and unethical business practices. The Act has sought to address 'the myriad and constantly emerging vulnerabilities of the consumers'. The recurring theme in the new legislation is the protection of consumers which is sought to be strengthened by procedural interventions such as strengthening class actions and introducing mediation as an alternate forum of dispute resolution.'

The 'new' statute CPA 2019, which came into force in 2020, has certainly empowered consumers and improved access to justice. It remains to be seen whether access to justice will also yield results, relief and final non-appealable awards.

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UPDATE AND TRENDS

Emerging trends

Are there any emerging trends or hot topics in product liability litigation in your jurisdiction?

Product liability litigation in India has, since its inception, been an endeavour to uphold the rights of consumers and the current trends suggest new government policy and legislation piqued by the advent of e-commerce.

The Consumer Protection Act 2019 has been a step in the right direction to enhance the ambit of consumer rights. Significant provisions of this relatively new legislation include the incorporation of the Central Consumer Protection Authority (CCPA), a body tasked with broader oversight of consumer matters. The CCPA has been established to promote, protect and enforce the rights of consumers as a class. It is empowered to conduct investigations into violation of consumer rights and institute complaints or prosecution, order recall of unsafe goods and services, order

discontinuation of unfair trade practices and misleading advertisements, impose penalties on manufacturers, endorsers or publishers of misleading advertisements. The CCPA's guidelines issued on 4 July 2022 regarding levy of service charges by restaurants have resulted in a healthy public debate on whether restaurants can and should add on a mandatory or discretionary service charge (plus taxes) through express indication in the restaurant menus. The guidelines have been challenged and their operation stayed by the Delhi High Court in the matter of the National Restaurant Association of India and Ors v Union of India and Ors , Writ Petition (Civil) No. 10683 of 2022, which is currently an ongoing dispute pending before the Delhi High Court.

The 2019 Act has enhanced provisions concerning the institution of class action suits by consumers, as provided for under section 35 (1)(c) of the Act. The government has also notified the Consumer Protection (Mediation) Rules, 2020. However, their efficacy with respect to the speedy disposal of consumer disputes is not yet proven. The Advertising Council of India (ASCI) has issued 'Guidelines for Influencer Advertising in Digital Media' in 2021 to safeguard the interests of consumers, influencers, marketers, and the advertising industry, the effect of these is yet to be fully appreciated and tested through the courts for a consumer fora.

The Consumer protection (E-Commerce) Rules, 2020 have also been notified to protect the interests of consumers in the course of day-to-day online transactions. The rules were notified by the Ministry of Consumer Affairs, Food and Public Distribution on 23 July 2020, under the Consumer Protection Act, 2019, with an intent to prevent unfair trade practices in e-commerce and to protect the interest of the consumers and to ensure that there is transparency in e-commerce platforms and also to further strengthen regulations that govern the same. Online selling platforms have now been subjected to consumer legislation and the effects and benefits are yet to be seen. A recent advisory has been issued by the Ministry of Consumer Affairs on 23 May 2023 whereby retailers cannot compel customers to provide their personal contact information to generate the bill of a particular purchase. This is a welcome step which will help protect consumers data privacy of consumers. The Digital Data Protection Bill, 2023 is expected to be notified as law in force very soon. It was passed by both houses of the Parliament in August 2023.

On 10 August 2023, the Ministry of Consumer Affairs also released the 'Additional Influencer Guidelines for Health and Wellness Celebrities, Influencers and Virtual Influencers'. The Advisory provides that celebrities, influencers and virtual influencers should not endorse or distribute information or advertisements about any health and wellness product or service in a manner that implies or encourages its usage for diagnosing, curing, alleviating, treating or preventing any disease, disorder or condition which is prohibited from being advertised under any law for the time being in force or under any rules or regulations made thereunder. These additional guidelines are aimed at regulating the health and fitness influencing industry which has now become quite prevalent in India. These influencers are also required to provide disclaimers while endorsing health and fitness products.

The Indian consumer protection provisions, courts and mechanisms of adjudication will no doubt be dealing with new technologies and issues hitherto unknown to jurisprudence, the authors feel that the system is ready for challenges though it requires some improvement to speed up the process of adjudication.

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Jurisdictions

	Australia	Clayton Utz
	Canada	Cassels
	China	BUREN NV
	France	Kennedys Law LLP
	India	I.L.A. Pasrich & Company
	Ireland	Mason Hayes & Curran LLP
	Italy	Gianni & Origoni
	Japan	Nagashima Ohno & Tsunematsu
	Nigeria	Ajumogobia & Okeke
	United Kingdom - England & Wales	Kennedys Law LLP
	USA	Dechert LLP