

Prelude – Product Liability and Consumer Protection Regime in India Prior to 2019

Prior to 2019, India did not have a specific legal regime relating to product liability, nor did it have a statutory regime of “lemon law” or a strict liability regime as in some other countries such as the United States.

A product liability claim was lodged within the existing laws of contract and tort. Absent a specific regime governing product liability, such claims were founded and derived from legislations such as: the Sale of Goods Act, 1930, the Consumer Protection Act, 1986, and the Indian Contract Act, 1872. Also, product liability was governed by a mixture of case law, both in the civil and criminal aspects, which led to much confusion and different approaches.

Apart from these, industry sector-specific laws touched upon principles of product liability such as the Drugs and Cosmetics Act, 1945 and the erstwhile Prevention of Food Adulteration Act, 1954 (which was repealed by the Food Safety and Standards Act, 2006) were also relied upon. In addition, the statutory standard-setting organization, the Bureau of Indian Standards (BIS) established under the BIS Act, 2016 also exercised its wide range of powers to protect the interests of consumers. However, until recently, there was no comprehensive legislation to cover the aspect of product liability.

This has been now addressed to a large extent by The Consumer Protection Act, 2019 (CPA 2019). From the standpoint of the auto industry, even the Motor Vehicles (Amendment) Act, 2019 has brought about certain sector specific changes vis-à-vis product liability. Most notably, the changes are two-fold. First, there is now a provision whereby the Central Government may, by notification, prescribe conditions for alteration of motor vehicles, in which case, the warranty granted by the manufacturer shall not be considered to be void. Second, the amended Motor Vehicles Act contains provisions for the recall of vehicles in case of defects. The provision pertaining to recall, however, is yet to be notified. In case of the recall of vehicles, the manufacturer is required to reimburse the cost of the motor vehicle or replace/repair the defective motor vehicle and pay fines and other dues.

The present write-up focuses on the changes brought about by the CPA 2019. The CPA 2019 was passed by the Indian parliament on 6 August 2019 and received the Presidential assent on 9 August 2019. However, it has not yet been brought into force but hopefully it is only a matter of time before this happens.

Salient Features of The CPA 2019

CPA 2019 provides for stricter and enhanced protection for consumers. This is done by imposing hefty penalties for breaches. For misleading advertisements a manufacturer or service provider may be imprisoned for a maximum term of two years and receive a fine of up to INR Ten Lakhs; for subsequent offences, this could go up to imprisonment for a period of five years and a fine of up to INR Fifty Lakhs. Misleading advertisement is defined as “one which falsely describes a product or service or gives a false guarantee or express or implied warranty as regards a product or deliberately conceals important information”. Consumer rights, (such as the right to consumer awareness or the right to be assured access to a variety of products etc.) have been clearly identified and these are sought to be enforced through a multi-tiered scheme as briefly elaborated below. There is now a shift in principle of *buyer beware* to *seller beware*. This has been done by introducing the concept of product liability and establishment of watchdogs/authorities for an effective administration of consumer grievances. For instance, CPA 2019 envisages the establishment of:

- i. The Consumer Protection Councils (CPC) at the Central, State and District levels to render advice on promotion and protection of consumer rights.
- ii. The Central Consumer Protection Authority (CCPA) to regulate matters relating to violation of consumer rights, unfair trade practices and false or misleading advertisements prejudicial to consumer interest.

The CPA 2019 also introduces an investigation wing to the CCPA to conduct inquiries and investigations as may be directed by the CCPA. The investigating agency has wide powers of search and seizure to aid in the process of investigation. Such inquiry may be conducted either *suo motu* or based on a complaint received. Upon investigation, if the CCPA finds that there is a violation of consumer rights or unfair trade practices, it may order:

- a. Recall of goods;
 - b. Reimbursement of the prices of the goods recalled; and
 - c. Discontinuation of such activities found to be constituting unfair trade practices or violating consumer rights.
- iii. As was the case in the earlier Consumer Protection Act of 1986, under the CPA 2019 also, there are Consumer Disputes Redressal Commissions at the District, State and Central levels. And like before, the CPA 2019 empowers consumers to file a consumer complaint with these consumer redressal fora.

Noticeably, the CPA 2019 also provides for mediation. The National, State or District Consumer Disputes Redressal Commissions, as the case may be, can refer the parties to mediation through the mediation cell (to be established with each such Consumer Disputes Redressal Commission).

Clearly, if compared to the earlier act of 1986, the CPA 2019 is far more comprehensive and in tune with the consumer protection regimes elsewhere around the world.

Product Liability Under The CPA 2019

Sections 82 to 87, appearing in Chapter VI of the CPA 2019, provide an all-encompassing mechanism which would apply to every claim for compensation under a product liability action.

The CPA 2019 defines product liability as *“the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto”*.¹

Product liability action is defined to mean *“a complaint filed by a person before a District Commission or State Commission or National Commission, as the case may be, for claiming compensation for the harm caused to him”*². Such complaint can be filed against a product manufacturer or a product service provider or a product seller, as the case may be.³

Product manufacturer refers to a person who *“(i) makes any product or parts thereof; or (ii) assembles parts thereof made by others; or (iii) puts or causes to be put his own mark on any products made by any other person; or (iv) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or (v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or (vi) being a product seller of a product, is also a manufacturer of such product”*.⁴

Product seller, in relation to a product, means a *“person who imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes (i) a manufacturer who is also a product seller; or (ii) a service provider”*.⁵

With such wide-ranging definitions, CPA 2019 surely aims to bring within its fold every possible aspect of a product liability claim or action.

Liability of Product Manufacturer

CPA 2019 envisages individual criteria for attracting product liability by the manufacturer, seller and service provider respectively.

A product manufacturer shall be liable in a product liability action, if –

- i. the product contains a manufacturing defect; or
- ii. the product is defective in design; or
- iii. there is a deviation from manufacturing specifications; or
- iv. the product does not conform to the express warranty; or
- v. the product fails to contain adequate instructions of correct usage to prevent harm or any warning regarding improper or incorrect usage.

Noticeably, a product manufacturer shall be liable in a product liability action, even if he proves that he was not negligent or fraudulent in making the express warranty of a product.

Liability of Product Seller

A product seller who is not a product manufacturer shall be liable in a product liability action, if –

- i. he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or
- ii. he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or
- iii. he has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or
- iv. the product has been sold by him and the identity of the product manufacturer of such product is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or
- v. he failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

¹ Section 2 (34), Consumer Protection Act, 2019.

² Section 2 (35), Consumer Protection Act, 2019.

³ Section 83, Consumer Protection Act, 2019.

⁴ Section 2 (36), Consumer Protection Act, 2019.

⁵ Section 2 (37), Consumer Protection Act, 2019.

Liability of Product Service Provider

A product service provider shall be liable in a product liability action, if –

- i. the service provided by him was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or
- ii. there was an act of omission or commission or negligence or conscious withholding of any information which caused harm; or
- iii. the service provider did not issue adequate instructions or warnings to prevent any harm; or
- iv. the service did not conform to express warranty or the terms and conditions of the contract.

Exceptions to a Product Liability Action

CPA 2019 also envisages some exceptions to the definition of product liability or defences to a product liability action. These are summarized below:

- i. The product was misused, altered or modified at the time of harm. Curiously, while drafting this exception, it is stated that in the above situation, there cannot be a product liability action against a product seller. This is somewhat intriguing since this exception should equally apply to a product manufacturer or a product service provider.
- ii. In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable, if:
 - a. Product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to the employer; or (ii) 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; or
 - b. 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
 - c. The complainant, while using the product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.

- iii. A product manufacturer will also 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.

Conclusion

The introduction of a strict regime combined with the CCPA clearly assist in safeguarding consumer interests. The CPA 2019 expands the tentacles of the consumer protection regime down to the grassroots level with the establishment of various organs functioning at different levels. As before, a consumer can approach the various disputes redressal fora envisaged under the CPA 2019. In addition, a complaint relating to violation of consumer rights or unfair trade practices or misleading advertisements, which are prejudicial to the interests of the consumers as a class, may be investigated by the CCPA.

Even though, some aspects of the CPA 2019 are unclear, the new regime is definitely set to change the legal landscape of India pertaining to product liability, with deterrent punishments and strict liability on the manufacturers and endorsers. The ease of approaching the consumer forums and the strict regime will only push consumers to experiment with the new act to a new high. Class actions, threat of immense damages, social media campaigns, and punitive damages are gaining traction in India. Like other developed countries, establishment of a product liability regime is inevitable. Product manufacturers, sellers and service providers will need to ensure that they have done their due diligence properly to be compliant with the various requirements under the different legislations. A checklist of such compliances backed with proper legal and technical advice would go a long way in protecting their interest and the interest of the consumers.

Contacts



David Goh

Partner, Hong Kong
T +852 2103 0350
E david.goh@squirepb.com



Bindu Janardhanan

Registered Foreign Lawyer, Hong Kong
T +852 2103 0351
E bindu.janardhanan@squirepb.com