

India: The Consumer Protection Act 2019 - Exposures & Liability Insurance Protection¹

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Governments all over the world are passing legislations to ensure protection to the consumer in every field. In India, Repealing The Consumer Protection Act, 1986, The Consumer Protection Act 2019 was enacted to address the many and constantly emerging vulnerabilities of the consumers. What do these changes in the legislation mean and hold for liability insurance in India? The articles discusses some of the major changes and their influence on liability insurance and talks about the relevance particularly of product liability and professional indemnity insurance policies. The likely impact on liability insurance can be gauged from the fact that an entire chapter in the Act is dedicated to product liability.

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“The penal law of ancient communities is not the law of crimes, it is the law of wrongs the person injured proceeds against the wrong doer by an ordinary civil action and recovers compensation in the shape of money damaged if he succeeds.”

- Sir Henry Maine

The long awaited, much debated and well reformed consumer protection legislation is finally in place - The Consumer Protection Act 2019. It attempts to widen the ambit of the legislation and simplify the processes towards achieving the avowed objective of consumer protection.

It is heartening to see the law makers discussing the nuances of various provisions of the bill. Some extracts from the Loksabha debate are given below.

“Now to end, I would like to put forward a true example where a woman tried to sue a butter company that had printed the word ‘LITE’ on its product’s packaging. She claimed to have gained so much weight from eating that butter, even though it was labelled as being ‘LITE’. In the court, the lawyer representing the butter company simply held up the container of butter and said to the judge, “My client did not lie. The container is indeed light in weight”. The woman lost the case. From this, it is evident that consumer protection is a crucial and sensitive matter which is to be dealt with proper caution. I hope this Bill will make concerned changes to make itself more promising”

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“I can give you a good example about it. One day, a man came to me. He told me that his dhoti is torned due to a nail fitted in railway seat. I asked him to file a complaint against railways. He filed a complaint. The litigation took a long time but at last the court ordered railways to pay the expenses of fares for trips to Mumbai and also to gift of 2 dhotis to the complainant. This is a classic example of alertness and awareness. Government cannot intervene in everything and everywhere. Citizens should be cautious about their consumer rights and also to fight against injustice. You have given the much needed protection to them through this bill. But, I think awareness is the key to all the problems. We should focus more and more on awareness. We should come out with more ‘Jago Grahak Jago like Campaigns’. Lastly, I would like to reiterate that more funds should be allocated for courts. We cannot discuss all the issue of the bill due to paucity of time. But, I think commitment and willingness of the Government is more important.”

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(Source: Loksabha Debates - Tuesday, July 30, 2019/ Shravana 8, 1941 (Saka))

One of the major advantages this Act has bestowed upon the consumer is that the aggrieved party can now file the complaint even from where he/she resides unlike earlier where it had to be filed in the jurisdiction where the seller or service provider is located. The earlier provision had significant cost and time implications for the complainant. The latest provision is more beneficial to the consumer because e-commerce and e-transactions are on the rise and the service providers/ sellers may have their registered offices anywhere in the world.

Let us now look at some of the salient features of the Consumer Protection Act (CPA), 2019

Consumer: Who is a consumer is defined under Sec 2(7) of the Act. A consumer is defined as a person who buys any good or avails a service for a consideration. It does not include a person who obtains a good for resale or a good or service for commercial purpose. It covers transactions through all modes including offline and online through electronic means, teleshopping, multi-level marketing or direct selling. It does not include anyone obtaining goods or availing services without consideration.

Rights of Consumers: The rights which are listed under Sec. 2(9) include:

- i) the right to be protected against the marketing of goods, products or services which are hazardous to life and property;
- ii) 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;
- iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;

- iv) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;
- v) the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and
- vi) the right to consumer awareness.

Central Consumer Protection Authority: The Act provides for the establishment of an executive agency known as the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers; make interventions when necessary to prevent harm to consumer arising from unfair trade practices and to initiate class action including enforcing recall, refund and return of products, etc. This fills an institutional gap in the regulatory regime.

Penalties for Misleading Advertisement: Provision is made for imposing penalties on a manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers. An endorser of misleading advertisement also can be punished.

Consumer Disputes Redressal Commission: The Act provides for several provisions to simplify the consumer dispute adjudication process. The pecuniary jurisdiction for such redressal commissions have been enhanced in comparison with the 1986 Act. The Act provides for establishment of consumer mediation cell as an Alternate Dispute Resolution Mechanism. Consumer Mediation Cell will be attached to the Redressal Commission at the District, State and at the National level.

Product Liability: This is a major and significant inclusion in the Act. It codifies the principle of product liability with respect to sale or supply of defective products or delivery of defective services to consumers. It specifies liability of product manufacturer, liability of product service provider, liability of product sellers, exceptions to product liability action. The chapter, dealing with product liability, shall apply to every claim for compensation under a product liability action by a complainant 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. This also specifies the situations in which exceptions to product liability action apply.

Definitions of Product liability and Product liability action are given below.

Sec 2(34): "product liability" means 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;

Sec 2(35): "product liability action" means 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.

What do all these mean and hold for liability insurance in India?

It is important to note that for the first time a complete chapter is dedicated to product liability in the Act. Who and when is responsible is specified with timelines for various actions. Authority also has been given to grant punitive damages if the circumstances dictate. It may be noted that a product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product.

The Act provides for both civil and criminal penalties including specifying the amounts. So, all entities in the product supply chain are expected to be proactive and vigilant and put in place best practices in every sphere – be it design, production, labeling, marketing or distribution. Should something go wrong in spite of all the care, caution and best practices, the port of call should be insurance cover. The following covers are considered relevant in this context while a few other covers also may become necessary depending upon circumstances.

Product Liability Insurance Policy:

Anyone who makes products available to the public runs the risk of being held responsible for the injuries those products cause. Claims may result from a defect in the product, a deficiency in the packaging, inadequate or wrong labelling on any information relating to the product. Governments all over the world are enacting legislations in this sphere and taking steps for vigorous enforcement of the same.

Defects in the product may be due to:

- Manufacturing defect
- Design defect
- Faulty packing
- Incorrect instructions as to the use of the product

The purpose of the product liability Insurance is to indemnify the manufacturer, distributor, wholesaler, and retailer against claims of any third party bodily injury/ property damage resulting from the use or consumption of product manufactured, sold, distributed or handled.

In India there is no specific legislation that provides the complete legal framework for product liability claims. There are laws like The Sale of Goods Act 1930 and The Indian Contract Act 1872 besides The Consumer Protection Act 2019 that are relevant for product liability action. The discussion in this article is primarily focused on exposures from The Consumer Protection Act 2019.

Product liability insurance offers indemnity in respect of claims from third parties arising out of defects resulting in:

- **Personal Injury:** Bodily injury (including death and illness), disability, shock, fright, mental anguish or mental injury.

(Relating to the caselaw in this area, of immediate recall value is the judgement of The Delhi High Court on 30 May 2019 directing Johnson and Johnson to pay Rs. 25 lakh each to 67 patients in hip implant cases. Earlier, India's drug regulatory authority had asked J&J to pay Rs. 65 lakh and Rs. 74 lakh as compensation to two unidentified patients in Maharashtra)

- **Property Damage:** Physical injury or destruction of tangible property including the loss of use thereof.

Product liability insurance policy provides indemnity to the insured in respect of:

- Legal costs in defending proceedings brought against them alleging wrongful acts
- Any damages awarded to the claimants including out of court settlements

Product Recall Expenses: It is possible to cover product recall expenses under product liability policy as an extension or as a separate policy. This covers expenses associated with recalling a product from the market. A product recall is a request to return to the maker, a product or a batch of products usually over safety concerns or design defects or labelling errors that are likely to cause personal injury or property damage to a third party or damage reputation to the manufacturer.

Some of the Recalls in India in recent past are:

- Honda Motorcycle recalls 50,000 units of four variants to inspect front brakes
- Torrent Pharma recalls around 2.30 lakh bottles of high BP treatment tablets from US
- FDA asks Nestle to recall maggi noodles from stores

Product recall expenses mean the reasonable and necessary costs associated with recalling a product. Indicative list of expenses is given below.

- Communications to notify such as radio and television announcements and printed advertisements;
- Shipping cost from any purchaser, distributor or user to the place or places designated
- Extra expense to rent additional warehouse or storage space
- The cost to hire additional persons other than the regular employees to assist in the process.

As regards Recall of products, Consumer Protection Act 2019 Section 20 states as under:

“Where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order as may be necessary, including -

- a) recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe;
- b) reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and
- c) discontinuation of practices which are unfair and prejudicial to consumers' interest:

Provided that the Central Authority shall give the person an opportunity of being heard before passing an order under this section.”

Similarly BIS Act 2016, Drugs and Cosmetics act 1940 read with Medical Devices rules 2017 and Food Safety and Standards Act 2006 also provide for recall of goods.

Government mandated recalls are generally excluded under the policy. Even in situations where some coverage is available, it is a qualified and conditional cover.

Product liability policy can be also taken as a part of CGL (Commercial General Liability) which includes product liability, premises liability, operations liability and completed operations liability. International Risk Management Institute (IRMI) describes CGL as under:

“A standard insurance policy issued to business organizations to protect them against liability claims for bodily injury (BI) and property damage (PD) arising out of premises, operations, products, and completed operations; and advertising and personal injury (PI) liability”

The policy provides indemnity to the insured in respect of:

- Legal costs in defending proceedings.
- Any damages awarded to the claimants including out of court settlements

Professional Indemnity Insurance:

Professionals have a duty to offer reasonable skill and care, as part of the service they provide. If they fail to exercise this duty and are subsequently proven to be negligent and if any loss is caused, they may be liable for the losses incurred by their customers or other third party. No matter how good professionals are at their jobs or how good their attention is to detail, there is always the possibility for small mistakes to be made. Proving innocence may cost and it pays to be protected.

Professional indemnity (PI) insurance offers indemnification to professionals who provide advice or services to their customers against legal liabilities arising from acts, omissions or breaches in the course of discharge of their professional duties. In simple terms, this means that if a professional does something or omits to do something in the course of his/her work, and the principal suffers injury or financial loss as a result, professional indemnity insurance responds. This policy is also known as Errors & Omissions (E&O) Liability insurance policy. The policy provides indemnity to the insured in respect of:

- Legal costs in defending proceedings brought against them alleging wrongful acts.
- Any damages awarded to the claimants including out of court settlements

Major exposures emanating from the provisions of the Act and possible insurance covers are mapped here. Product liability is relevant for tangible products and professional indemnity cover is for services.

Sections under CPA 2019	Insurance Cover
<p>Section 83: A product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product.</p>	<p>Product liability/ Professional Indemnity</p>
<p>Section 84 (1) : A product manufacturer shall be liable in a product liability action, if-</p> <ul style="list-style-type: none"> a) the product contains a manufacturing defect; or b) the product is defective in design; or c) there is a deviation from manufacturing specifications; or d) the product does not conform to the express warranty; or e) the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage. 	<p>Product liability / Product Guarantee</p>
<p>Section 84 (2) : 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.</p>	<p>Product Liability</p>
<p>Section 85: A product service provider shall be liable in a product liability action, if-</p> <ul style="list-style-type: none"> a) 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 b) there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or c) the service provider did not issue adequate instructions or warnings to prevent any harm; or d) the service did not conform to express warranty or the terms and conditions of the contract. 	<p>Professional Indemnity</p>
<p>Section 86: A product seller who is not a product manufacturer shall be liable in a product liability action, if:</p>	<p>Product liability insurance with appropriate cover widening</p>

<p>a) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or</p> <p>b) he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or</p> <p>c) 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</p> <p>d) the product has been sold by him and the identity of 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</p> <p>e) 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.</p>	<p>endorsements like Vendors liability clause, Technical Collaboration inclusion clause, Mixing and Blending clause etc.</p>
<p>Endorser Liability -Section 21:</p> <p>1) Where the Central Authority is satisfied after investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may, by order, issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher, as the case may be, to discontinue such advertisement or to modify the same in such manner and within such time as may be specified in that order.</p> <p>2) Notwithstanding the order passed under sub-section (1), if the Central Authority is of the opinion that it is necessary to impose a penalty in respect of such false or misleading advertisement, by a manufacturer or an endorser, it may, by</p>	<p>CGL/ Combination of covers</p>

order, impose on manufacturer or endorser a penalty which may extend to ten lakh rupees: Provided that the Central Authority may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees

3) Notwithstanding any order under sub-sections (1) and (2), where the Central Authority deems it necessary, it may, by order, prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service for a period which may extend to one year : Provided that the Central Authority may, for every subsequent contravention, prohibit such endorser from making endorsement in respect of any product or service for a period which may extend to three years.

4) -----

5) No endorser shall be liable to a penalty under sub-sections (2) and (3) if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him. (This is a defence available under the Act itself)

It is not that the product seller or product manufacturer is liable in all circumstances. The Act does list exceptions to product liability action under Section 87 providing the primary defence to them.

Insurance is not a remedy or solution for all exposures. Insurance is meant for unintentional errors and not for intentional, deliberate and dishonest acts. Insurance is for those aspects of negligence which creep in despite all the care and caution. Further, it must be noted that all insurance policies have exclusions which need to be reviewed carefully before purchasing any policy.

Reference :

- *The Consumer Protection Act, 2019 (India)*

¹Disclaimer: The information contained and ideas expressed in this article represent only a general overview of subjects covered. It is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insurance buyers should consult their insurance and legal advisors regarding specific coverage and/or legal issues.

