CHAPTER V
SUMMARY AND CONCLUSIONS

The market system that has evolved over the centuries instead of tending towards being perfect has actually been highly distorted. The resulting asymmetry of informative has often put the consumer at a disadvantage requiring extra-market intervention. Though the need for consumer protection is more in countries like India where the markets tend to be more predatory, the consumer protection systems are much better evolved in developed countries like Germany. The study is set in a comparative perspective with a view to draw lessons from the more evolved systems.

The purpose of the Study

The thesis tries to show why state intervention is needed in order to protect the interests of the consumers. What instruments can be used by the state to protect the consumers? What are the justifications of the economic analysis of the liability and the regulation in providing incentives to the parties to take precautions to reduce the risk of harm? Why do we need to use the optimal mix of the alternative legal system? How effectively are the established instruments of ex-ante and ex-post systems are functioning India? The study has also made an attempt to review the experience of the consumer protection in developed countries like Germany in order to draw some possible lessons for India.

Need for State Intervention

According to the traditional liberalist view, the market is the best instrument to protect the interests of the consumer. However, the divergence from the perfect market conditions leads to the causes and consequences of market failure.

The traditional theory of market failures such as exploitative theory suggests that the state should frame the rules to protect the weaker party (consumer) against the stronger party (producer) especially, in standard form of contracts where there is unequal bargaining power prevails between the consumer and producer. Modern capitalism is not market capitalism but
monopoly capitalism, where the monopolies can not only dictate the terms and conditions but also manipulate the consumers.

The modern theory of market failure such as Nelson and Darby & Karni's nature of goods suggests that neither in the case of search goods nor in the case of credence goods but in the case of experience goods, the protection of the consumer needs to be reviewed because of informational asymmetry about the attributes of the products.

The theoretical model of asymmetric information which was developed by Akerlof as a *lemons principle*, indicates that the producer has much more information about the attributes of his product than the consumer does. Thus, consumer will estimate the quality of a product on an average which results that the product of above average quality do not have the market. At certain stage no product will be traded, accordingly no market will exist because only bad quality products exist in the market, which is known as *race to the bottom* or *adverse selection*.

The study, first of all, put emphasis on the theories of market induced correctives, such as the theory of signal and the theory of reputation, of market failure. The theory of signal is broadly based on warranties, advertisements and prices. In the case of warranties, the higher quality producer can provide an additional unit of warranty at a lower cost than the lower quality producer can, which signals the consumer that the higher quality producer can stay longer in the market compared to the lower quality producer. Consumers can get the information on an unobservable quality from an absolvable advertisement. The theory of positive relationship of advertisement and the theory of experimenters on advertisement shows that the highly advertised products experienced repeat sales compared to the less advertised products.

The theory of price signals reveals that the firm which cheats the consumer by providing low quality product at higher prices may go out of market because some of the potential consumers may not purchase a product from that firm based on the product specific information. According to the theory of reputation, the consumer will repeat their purchase based on the current experience, if the quality of a product is good. Thus, the producers have incentives to provide high quality products to the consumers. Similarly, consumer’s quick learning about the attributes of the products may also provide incentives to the producer to provide high quality
products to the consumers. However, in reality the theories of signal and the reputation are unable to correct the problems of informational asymmetry because of prevalence of moral hazard and adverse selection which may lead to inefficient risk sharing between the consumer and the producer.

The treatment of marginal and infra-marginal consumers by the producer, the underestimation of product risks by the consumer and the non-prevalence of asset specificity may be unable to correct the market imperfections by market induced correctives. In a perfect market economy, the introduction of consumer protection may reduce the welfare of consumers because non-existence of free exchange of goods and services. Markets in developed countries like Germany may work effectively because of highly developed reputation in the market place compared to markets in developing countries like India.

The introduction of consumer protection is very much needed in India because of the prevalence of illiteracy, ignorance, poverty and asymmetric information which may keep the consumer in a weaker position. Consumers are unable to gain from the producers signals. And the high degree of monopoly power which prohibited the development of reputation in the Indian markets. In theory, state can protect the consumer by way of liability system or by way of regulatory system or by both.

**The theory of the alternative legal systems: Liability System**

The liability system came into play an effective role in consumer protection since change of its doctrines from caveat emptor to caveat venditor. Further, the asymmetric information between the consumer and the producer favours the introduction of product liability or strict liability. In the case of weaker party protection, based on several reasons, strict liability is preferred to negligence rule.

The liability system is an ex-post approach where the parties are liable to damages, after the harm occurs. The perfect liability system will provide incentives to the parties to take precautionary measures to reduce the risk of harm, just like as the way in which the perfect market protects the interests of the consumers. On the other hand, the liability system is unable to provide incentives to the tortfeasor to reduce the risk of harm because of law’s delay,
rational apathy, weak causation links, informational disadvantage particularly in the case of scientific and technological knowledge, inadequate tortfeasor's wealth, problems involved in the calculation of the damages in the case of pain and sufferings etc. Thus, the effectiveness of the liability system on the parties is as similar as the effectiveness of the market induced correctives on the market imperfections. Therefore, the liability system in which the consumer is not perfectly sheltered either in terms of product safety or in terms of insurance, favours the regulatory system.

Regulatory System

In the case of regulatory system the state plays a major role both in the formulation as well as enforcement of laws. According to Prof. Ogus, there are three different degrees of state intervention such as regulation of information; standards, licensing and price controls. Licence is the highest degree of state intervention because the firm has to take prior approval from regulatory agency in order put the product into circulation. Each and every degree of state intervention involves costs, especially, in the case of regulatory standards there are three types of costs such as administrative costs, compliance costs and indirect costs. Normally, under certain circumstances, regulatory agencies may work not only as barriers to trade but also they impose certain cost on consumers. The regulatory system is an ex-ante approach where the parties have to pay the fine even before harm occurs and after violation of the regulatory standards. The standards have been formulated irrespective of whether harm occurs. However, the advantages of the regulatory system are such as informational advantage over scientific and technological knowledge, fining the tortfeasor for the violation of the standards based on the expected damage, and the applicability of the regulatory agency decision to the whole nation may overlap because of the regulatory capture, high administrative costs, the rigidity in the case of reformulating the standards, imposition of common regulatory standards on private goods- where standards varies from individual to individual, informational disadvantage over private parties etc.

Mixed use of the alternative legal systems

The above analysis clearly indicates that none of the alternative legal systems has uniqueness in reducing the risk of harm by providing incentives to the parties. Therefore, there is a need for
usage of mixed from of regulation and liability. If this is the case, one has to be clear about the following questions:

Is it necessary to protect the tortfeasor from the liability, if he complies with the regulatory standards? and

Is it necessary to make the tortfeasor liable, if he does not comply to the regulatory standards?

The arguments show that the compliance of regulatory standards by the tortfeasor does not necessarily relieve him from the liability and also the non-compliance of regulatory standards by the tortfeasor does not automatically make him liable.

Neither regulation nor liability provides incentives to the parties to exercise the socially desirable level of care stress the importance of working of this alternative legal system as substitutes as well as complementarities. Every one favours the alternative legal system but there is no answer yet on what is the optimal mix of alternative legal system? It is mainly because the optimal mix of alternative legal system varies from country to country and case to case. Thus, it is really difficult to set the optimal mix of legal system. However, within my point of view the optimal legal system is to be the one in which the regulatory system set the standards as minimum and the courts also taken it into the consideration and award the compensation to the victims whenever the regulatory standards are unable to internalise the risk of harm. Similarly the minimum regulatory standards perhaps reduce the risks of harm up to some extent whenever the liability system is unable to provide the compensation to the victims.

Bringing doctors services under the purview of Consumer protection Act, 1986 in spite of the regulatory provisions of Medicines Act and the establishment of the SEBI in order to regulate the stock exchange market in spite of the Companies Act clearly not only indicates the prevalence of ex-ante and ex-post approaches in India but also indicates the working of alternative legal system as a substitute as well as complementary in order to reduce the risk of harm.
Consumer Protection in India

The economic theory of consumer protection which argues for state intervention to protect the interests of the consumers is more or less applicable to the Indian situation. Based on the theoretical analysis of liability versus regulation, the study on Indian consumer protection has been focused on the functioning of the alternative legal system in India such as the Consumer Protection Act, 1986 (amendment, 1993) as an ex-post approach and the Bureau of India Standards Act, 1986 as an ex-ante approach in order to protect the interests of the consumer.

In general, the alternative legal system in India plays an important role in protecting the rights of citizens. Before enactment of the Consumer Protection Act, 1986 there were several rules and regulations either directly or indirectly to protect the interests of the consumer. However, not only were most of these rules and regulations are non-compensatory in nature but also the civil courts are unable to provide adequate legal remedies to the consumers because of law's delay, higher litigation costs and complex legal procedure. Thus, the Consumer Protection Act (CP Act) has been enacted by the parliament in 1986, which is not only compensatory in nature but also under the provisions of CP Act a separate three-tier courts (Consumer Disputes Redressal Agencies- CDRAs or Consumer Forums- Fora) at the District, the State and the national level were established with the objectives of providing speedy, inexpensive and simple redressal to the consumers.

The Consumer Protection Act, 1986 (Amendment, 1993): The CDRAs (as an Ex-Post approach)

The three-tier CDRAs differs in terms of its members, pecuniary, revisional, and administrative jurisdictions. The members (both legal and non-legal) of CDRAs are not eligible to re-appointment. The consumers has to file a case within two years from the date when cause of action arises, however even after two years the Fora may entertain a case based on sufficient reasons. The consumers have to pay fine up to Rs. 10000 for frivolous or vexatious complaints. After the proceedings the Fora issue an order to the concerned party. The dissatisfied party(s) may go for an appeal even up to the Supreme Court. The parties need not engage a lawyer; no court fee and the environment of the Fora should be informal. The CP Act is not in derogation of any other law.
Research Design

The functioning of the CDRAs has been analysed based on primary as well as secondary data. The collected data from the selected Fora such as District Forum of Ranga Reddy (least number of cases filed by the consumer) and the Nellore (largest number of cases filed by the consumer), State Commission of Andhra Pradesh, and the National commission; the collection of the Consumers (those who approached the Fora) opined based on the questionnaire schedules; and the collection of the views of the members of the Fora (District Forum of Ranga Reddy and the State Commission of Andhra Pradesh) as well as the Consumer Counsel based on the oral interviews, will be taken into the consideration in the analysis of the functioning of the CDRAs. It gives an information on how many cases were filed, on which categories consumers have very many grievances; on what the cases pending rate is; and on what per cent of cases are disposed/ dismissed within the time limit prescribed by the CP Act, 1986. In other words, whether the Fora is fulfilling the objectives (speedy, simple and inexpensive redressal to the consumers) of the CP Act, 1986?

Findings Based on the Empirical Work

The data analysis shows that the majority of cases were filed by the consumers against the category of Public Utilities, Government Departments, Insurance firms and Banks & Financial Institutions. It also indicates that the rate of pending cases is low except in the State Commission of the Andhra Pradesh and the majority of total filed cases were not given judgement by the Fora within the prescribed time limit. The percentage of disposed cases such as cases disposed in favour of consumers and the cases disposed as withdrawn by the consumers were high except in the National Commission.

The Multiple Regression Analysis shows that the court success can be influenced by bribe. It also indicates that the court success will be purely based on the facts of the case but not on the engaging of a lawyer by the consumer or the educational background of the consumer.
In an oral interview the members of the State Commission of Andhra Pradesh and the District Forum of Ranga Reddy, expressed their view that there is no biased judgement or bribes in the functioning of the Fora. However, they viewed the consumer should appear before the fora between 1 to 5 times. They also felt that the law’s delay mainly because of delay in notices served to the parties and the granting of adjournments liberally wherever the Government is opposite party. They are against the permanent appointment of members, the possession of legal knowledge by the non-legal members may be an advantage and two to three members are enough to run the day to day activities of the Fora.

They also viewed that the consumer education should be introduced in educational institutions and the establishment of local level Fora is advisable, however one has to consider the cost effectiveness on the exchequer. The interviewed members opined that the governments and the voluntary organisations should create awareness among the consumers and especially the non-governmental organisations should work for consumer protection without misutilisation of its provisions.

In an oral interview the consumer counsel opined that the involvement of lawyers is an advantage to the consumers and the fee for lawyers will differ from case to case and person to person in spite of prevalence of Lawyers Fee Act. They viewed that consumers’ appearance before Fora for more than five times is not necessary. The reason for frequent appearance before Fora by the consumers is not the involvement of lawyers but because the members of the Fora are not following any criteria regarding granting of adjournments. They favour the temporary appointment of the members of the Fora, the legal knowledge of non-legal members may be an advantage and two to three members are enough to run day to day activities of the Fora.

They also favoured the introduction of consumer education in educational institutions and the establishment of local level Fora. In their opinion the Government should not only need to create awareness among the consumers but also to provide adequate financial assistance to the Fora. The majority of the consumer counsel was dissatisfied with the working of voluntary organisations. The drawn consensus on the functioning of the CDRAs based on the empirical work has been critically examined with the theory of alternative legal system.
CDRAs: The theory of the alternative legal systems

The CDRAs are easily accessible to the consumers not only because there is no court fee but also, because the Fora should provide simple and speedy redressal to the consumers. The State Governments can establish more than one Forum, if necessary. However, the CDRAs has also proved that they are not competent to provide incentives to the tortfeasor in the case of law’s delay, tortfeasor being out of business, weak causational links, inadequate tortfeasors wealth and compensation for pain and sufferings. There is no doubt the environment of the Fora is far better than the civil court, however we need to take some steps in order to keep informal environment, especially the non-legal members should to play a major role in encouraging the consumer to present his case freely and frankly without any fear.

Suggestions to policy makers

The objective of speedy disposal is not fulfilled by the Fora because of on an average 68 per cent of cases were not cleared within prescribed time limit. At the same time the Fora is not providing redressal to the consumers not because the case is out of the purview of the CP Act but because the case need a lot of investigation which is not possible to dispose within prescribed time limit. Thus, one should need to think of pros and cons of speedy disposal and may perhaps need to establish ‘workable time bound programme’.

The calling of the consumers by the Fora more than the required times may lead to adverse effects on consumers such as rational apathy. The data also indicates that the appearance before Fora by the consumers varies from 1 to 32 times. Thus the Fora is unable to fulfil the objective of providing inexpensive redressal to the consumers. Therefore, the Fora need to take some necessary steps in order to minimise the appearance before the Fora by the consumers.

The involvement of the lawyers in the Fora may be advantageous to the consumers. However, it may lead to establishment of more legal jargons in day to day activities of the Fora, law’s delay because of frequent adjournments; especially, whenever consumer attends part-in-person and the opposite party engaging of a lawyer may raise the difficulties to win the case by the consumer. It may also further lead to the Fora failing to not only fulfil the objectives of providing simple redressal to the consumer but also failing to achieve the purpose of
appointment of non-legal members. Thus, it is necessary to take some measures such as establishment of some criteria in granting adjournments to lawyers as well as keep the informal environment.

The imposition of fine of up to Rs. 10,000 on consumers for frivolous and vexatious complaints is a premature policy because of not only the CDRAs themselves are unable to draw a clear cut border line between the goods and services which have come under the definition of the consumer and all over the country the full functioning of the CDRAs being not earlier than 1993 but also majority of the Indian consumers still not being aware of the existence of such Fora in the country. These type of policies may deter the consumer to approach the Fora in order to get redressal and also it is unable to provide any incentives to the tortfeasor to take precautions in order to reduce the risk of harm. The study also shows that some of the Fora are too liberal to award compensation to the consumers and even if the case is not under the purview of the CP Act, may impose costs on the consumers. Thus, it is necessary to take some steps such as that the Fora should need to follow the scope of the CP Act in the case of award of compensation to the consumers and the establishment of scrutiny department in the Fora may reduce the adverse effects on consumers wrong filing.

That the Fora is not empowered to grant interim order may perhaps lead to adverse effects on consumer protection especially in the case of public utilities. Keeping in view of law’s delay in CDRAs, which suggests the think of providing power to the Fora to grant the interim order, for the required cases.

The study also reveals the adverse effects of appreciation of the members of the Fora in the case of award of costs of application, rate of interests, allowing the cases filing both originals as well as appeals even after expire of time limitation, and the granting of adjournments suggests the reduction of the appreciation of the members of the Fora in order to reduce the adverse effects on consumers.

The largest filing by the consumers against the category of Public Sector Units such as Public Utilities, Government Departments, Insurance, and the Banks & Financial Institutions, clearly indicates that there is need of policy measures to create consumer friendly transactions.
The ineffective market system and the liability system in protecting the interests of the consumer stress the need of usage of regulatory system. Thus, the study will also focus on the functioning of the Bureau of Indian Standards (BIS) as an ex-ante approach, how effectively it protects the consumer? The study will be based on secondary sources only.

*The Bureau of Indian Standards Act, 1986: BIS (as an Ex-ante approach)*

The Bureau of India Standards (BIS) was established in the place of Indian Standard Institute (ISI) by the enactment of the BIS Act, 1986 in order to meet the day to day requirements in the field of standards and certifications. In its structure the BIS consists of 115 members, 5 regional offices including Head quarters at New Delhi, 14 branch offices, 9 inspection offices and 8 laboratories. In its functions the BIS, mainly formulate the standards and grant the licences to the producers once after meeting the requirements of the Standards to use the ISI Mark, which is either voluntary or mandatory in nature. The licensee has to pay nominal fee. In the case of a person who use the ISI Mark without getting licence from the BIS may have to pay fine or imprisonment or both. Licences are granted initially for one year and renewed based on criteria. In the case of misuse of ISI Mark by the licensee, after investigation the Bureau may cancel the licence or take necessary legal action against the licensee.

The standards formulated by the BIS were based on multi-disciplinary co-ordination such as consumer protection, environmental protection and energy conservation.

The BIS laboratories will do the quality testing of a product for certification mark. In addition to BIS labs, there are other laboratories recognised by the BIS for product testing, in case of demand.

The BIS is promoting its standard formulation activities by choosing its members from different fields and the Government of India’s policy of buying products which has ISI Mark indicates the important role of the BIS as a regulatory agency in India. The BIS also promoting its informational activities by conducting industry wise conferences, seminars and workshops. The Bureau also has its own well-equipped library. It is increasing its international activities in order to gain mutual advantages in the field of formulation and promotion of standards.
The BIS is controlling its activities by its inspecting officers by drawing samples both from the factory as well as from the open market.

**The BIS: the theory of the alternative legal systems**

The functioning of the BIS shows that the majority of the BIS standards are voluntary in nature which may enable the BIS to provide any incentive to the tortfeasor to take precautions to reduce the risk of harm. It is also unable to provide adequate compensation to the consumers, if the ISI Marked product is in defect, because the Bureau is unable to investigate the product defect especially from the used product, whether product is defective due to misuse by the consumers or non-compliance of standards by the licensee. This might be because the regulatory agency does not have an adequate information about the usage of the ISI marked product by the private parties that is consumers. The study also shows that the BIS is not providing adequate incentive to the tortfeasor except to withdraw or cancel the licence. The dissatisfied parties about the decision of the BIS may approach the civil court. The study is also shows that the BIS is unable to keep its credibility in the case of third party assurance because it is not following the provision of Certification Marks Manual (CMM) for sample testing.

It seems that the BIS is enjoying monopoly power in formulation of standards and certification marks. As a matter of fact the BIS major finance is from certification fee, which may indicate that the BIS is acting as a commercial test agency. It is very difficult to get the information from the BIS because it keeps almost all information under the category of confidential or secret, which may lead to closing the doors for resource persons and academicians in order to evaluate the functioning of the BIS in protecting the interests of the consumers. The adverse effects of commonly imposed standards by the BIS in the case private goods does not apply to voluntary standards. However, this is true in the case of mandatory standards.

There is no distinction between the consumer and the commercial concerns in the case of compensation from the BIS. As a matter of fact, in the case of redressal of grievances, commercial complaints will be benefited from the BIS compared to consumers. The administrative costs of the BIS will occur irrespective of the harm which may occurs, however it can reduce its administrative costs by adopting probabilistic methods of enforcement.
The BIS policy on review of standards once in five years clearly indicates the regulatory agencies are rigid in modifying the standards. As a centralised regulatory agency, the BIS is not free from the regulatory capture because its attitude towards mobilisation of resources; unequal representation between the consumer and industry & trade; the centralised formulation of standards and testing.

The compliance with BIS standards by the tortfeasor does not protect him from the liability, in the event of harm. At the same time non-compliance of the BIS standards does not automatically lead to tortfeasors liability. However, in the case of mandatory standards of the BIS, the producer will not allowed to circulate his products unless until it meets the requirements of mandatory standards.

Suggestions to Policy Makers

The BIS needs to formulate the standards for its day to day activities in order to improve its quality of work. The BIS needs to take some measures in order to improve the representation of the consumers in its formation of standards and certification marks. The BIS also need to review its policy measures in the case of cancellation of the licence, whenever the licensee is unable to meet the BIS standards may lead to adverse effects especially in the case of important products. The BIS need to follow strictly the provisions of Certification Marks Manual in sample collection both from the market as well as factory in order to provide third party assurance to the consumers. The activities of the BIS which are related to the consumer interests such as mandatory certification, consumer redressal etc. may be better to brought under a separate department in order to provide better protection to the consumers.

The BIS also needs to change its policy on reviewing standards once in five years because of rapid change in science and technology. It may be advisable for the BIS to increase its branch offices with at least one in every state in order to function effectively in its formulation of standards, certification and enforcement of standards. The BIS needs to adopt a policy in information dissemination to the consumers in the case of product hazards in order to avoid adverse effects. The analysis clearly indicates that either CDRA or the BIS has uniqueness in providing the incentive to the tortfeasors in order to take precautions to reduce the risk of
harm. At the same time the overlap between the CDRAs and the BIS may perhaps propose the optimal mix of both the systems in order to protect the interests of the consumer by providing incentives to the tortfeasor. The alternative legal system needs so be effective in India because of the absence of social security system in health related risks.

The compliance with the BIS standards may not protect the tortfeasor from the liability and also the non-compliance of the BIS standards may not automatically lead to tortfeasors liability. Thus, the BIS as well as the CDRAs need to work as substitutes as much as complementarities in protecting the interests of the consumers. The BIS mandatory standards will provide some incentives to the tortfeasor in the case of ineffective liability system. Similarly, liability system will provide some incentives to the tortfeasor in the case of ineffective BIS standards.

The review of the experiences of developed countries like, Germany on consumer protection may be helpful for drawing some possible lessons to improve the consumer protection in India. It is interesting to do a comparative study between the civil law country, Germany and the common law country, India in the field of consumer protection.

*Consumer Protection Experience in Germany: German Liability System*

The prevalence of asymmetric information and the misperception of product risks by the consumers favour the argument of state intervention in Germany in order to protect the interests of the consumers. The state may protect the consumer by way of alternative legal system. The study will focus on the review the functioning of the German ex-post approach such as contract law, tort law, Product liability Act, 1990 & the European Product liability Act, 1985 (EC Directives) and the German ex-ante approach such as the Appliances Act, 1992, the DIN norm and the EC Product Safety Law.

*The German Civil Code: Contracts and the Torts*

The German liability system is based on the German Civil Code (GCC). However, in the case of consumer law, it appears to be the case that it plays major role because the German
legislatures hardly passed any bill in the field of consumer law apart from the transposition of EC Directives.

In Germany, the aggrieved consumer has to approach civil courts in order to get compensation either based on Product Liability Act or based on Tort Law. In civil court system there is a separate court for appeal i.e. the Court of Appeal for lower courts. The decision of the county court is final, if the monetary value of the case is less than DM 1500. In the case of litigation costs the looser has to pay the winner. The lawyers insurance system prevails in Germany. In the case of legal aid, even the higher income people can also get the financial assistance based on repayment within 48 months. The pending rate is lower except in the Federal Supreme Court. The lower pending rate may be the result of the Act, 1977, which not only reduce the number of presence before the court by the parties but also puts a time limit on the stages of the trial. The social security system may settle the cases out of court especially in the case health related risks. There are a few cases such as Honda, Milupa I, II, & III were gone up to the Federal Supreme Court. Thus, the social security system works as a substitute to the alternative legal system in protecting the interest of the consumers. It also reduces the administrative costs of the liability system. The argument of the insurance lobby is on the other side of the coin, which is out of the purview of the study.

The product liability claims in Germany will be based on contracts and torts. According to the GCC, the seller is strictly liable for breach and also he is liable based on negligence rule for positive and pre-contractual breach.

A product may be deficient because it may be either defective or a warranted attribute may not be present. The warranty claims are based on the misrepresentation. The seller is strictly liable for warranty claims; however, victim is unable to get compensation for consequential damages.

In the case of commercial transactions the merchant has to examine the goods on receipt immediately and notify the seller in the case of defects. The burden of proof rests on the purchaser. The calculation of damages varies based on breach such as unwarranted representation, breach of pre-contractual duties etc., however the claimant must be put into the position he would be in, if the circumstances giving rise to his claim for damages had not occurred. Especially, the pure financial loss can be covered under the breach of contract only.
The seller is also liable for grossly negligent act of the person he employed. The consumers those who suffer damages due to product defects may get compensation.

A person who intentionally or negligently, unlawfully injures the life, body, health, freedom of property or other right of another is bound to compensate him for any damage arising from that. In general, the distribution of unsafe or defective products by the manufacturer is unlawful and he is liable for the breach of duty of care such as manufacturing defects, design defects, warning defects and insufficient post-market defects.

Normally, the burden of proof rests on the plaintiff, however, a reversal of the burden of proof established by the Federal Supreme Court in the Chicken pest case, 1968. In the case of causation, the burden of proof rest on the plaintiff unless the reliance on prima facia evidence applies. The market share liability is yet to be practiced in Germany.

The plaintiff has to claim compensation within 3 years from the date of cause of action arises, however irrespective of the plaintiff's awareness of the damage, the period of limitation is 30 years.

The producer is liable for the conduct of the persons he employs, however there are some exception. In the case of compensation the claimant must be put into a situation that would have existed if the damaging even has not taken place. The plaintiff is also entitled to receive damages for pain and sufferings, however the amounts are determined by the courts which varies widely. A civil remedy is possible from the breach of statute protective laws such as pharmaceuticals, food, technical equipment and the criminal code.

**The EC Product Liability Law**

The emergence of European union has formulated the common consumer protection policy by introducing Product Liability Act, 1985 in order to reduce differences in legal system among the Member States to compensate consumers based on strict liability. The manufacturer of a finished product as well as raw materials will be treated as producer. The supplier of anonymous product may also be treated as producer, if he is unable to identify the actual
producer. The manufacturer is liable for damage caused by his defective product. The product will be defective if it does not meet the user expectation test, however, a product is not defective because a better product can be put into circulation. The manufacturer can avoid liability in the case of the state of the art defence, subsequent defect defence, regulatory defence, defence of non-commercial manufacturing and distribution, products not put into circulation and component part defence.

Compensation may be received by the victim or by the kith and kin of the victim. The EC Directive does not apply for damages for pain and suffering, which is left to the national law.

There is a cap on compensation, in the case of death or injury the upper ceiling of 70 million ECU. In the case of property damage the lower optional threshold of 500 ECU.
There is a 3-year time limitation for compensation claim. The maximum time limit is 10 years from the date of product put into circulation. The burden of proof rests on the injured party.

The implementation of EC Directives is fulfilled with the enactment of Product Liability Act, 1989 by the German Parliament. The German Product Liability Act, 1989 (GPL Act) is based on liability without fault.

**The German Product Liability Act, 1989**

The GPL Act provides remedy only if the product is used for personal consumption. The manufacturer is liable for the violation of the duties of care such as manufacturing, design and warning but not for product observation. The product is defective, if it does not fulfil the consumers expectation test, however it is not defective simply because of better product can put into the market. The manufacturer can avoid liability in the case of the state of the art defence, subsequent defect defence, regulatory defence, defence of non-commercial manufacturing and distribution of products not put into circulation and component part defence. Liability is extended to producer of a product, component parts, raw materials, quasi-producer, importer, and supplier if he is unable to identify the actual producer within certain time limit.
Normally, damages are awarded for death or injury. In the case of property damages, compensation will be awarded if the product is used only for personal consumption. There is a cap on the liability, in the case of death or injury a ceiling of DM 160 million. There is no limit for property damages, however, victim is eligible to get compensation if the damages exceed DM 1125. Damages for pain and suffering recoverably is only under § 847 of the GCC based on negligence rule. Contributory negligence also prevails in the damage compensation. The plaintiff is required to show the damage, defect and causation, however, it may be assisted by *prima facie* evidence.

The consumer has to claim his damages within 3 years from the date of cause of action arise. The maximum time is 10 year from the date of product put into circulation.

The GPL Act does not provide remedy in the case of pure financial losses, breach of seller representation, property damages for commercial purposes, damages for primary agricultural and games, damages arises for insufficient product observation, damages for pain and suffering, statute limit above 10 years, damages exceeds DM 160 million and damages less than DM 1125 compared to the GCC.

The supplier of a product is liable if he is unable to identify the actual producer within a month, under the CPL Act, which is not the case in EC Directives. There is substantive disuniformity among Member States on primary agricultural and games, development of risk defence and cap on amount of damages.

In Germany, the presence of social security system substitutes the alternative legal systems in the case of health related risks. In addition, the lawyers insurance system is much more useful to the commercial people than to individual consumer, which indicates that the weaker has to pay the stronger. At the same time, there is no separate court for consumer grievances. There is prevalence of hidden case law in the filed of consumer protection. Higher litigation costs and ceilings on appeals may deter the consumer to approach the civil courts in order to get compensation. Moreover, the state of art defence seems to be the advantage of the manufacturer to escape from the liability.
The lessons drawn from the German liability system to the Indian liability system

The presence of law’s delay in the Indian liability system suggests the need for introduction of the German model of a separate court of appeal. In the case of health related risks, the German social security system is working as a substitute to the alternative legal system to protect the interests of the consumers. In the case of India, not only the liability system is unable to provide adequate compensation in health related risks but also that majority of patients are unable to hire the services of the doctor, suggests adaptation of German model of social security system in India.

The German model of pecuniary limitation on filing of a case in civil court against property damages may as well be introduced in the Indian liability system in order to reduce the law’s delay as well as reduce the resource wastage. The German liability system is practising the principle of reversal of burden of proof for negligence and is based on the imbalance in respective sphere of knowledge of manufacturer and the consumer. Thus, it may be advisable to introduce such principle in Indian liability system in order to improve the consumer protection.

The German liability system pronounce its judgements based on the duties of care neglected by the manufacturers such as manufacturing defects, design defects, warning defects and insufficient post-market surveillance which provides incentives for the tortfeasor. Thus, it is advisable to practice such type of procedure in the consumer grievances to protect the interest of the consumers.

In Germany the liability system is providing an opportunity to the consumer to file a case within 3 year from the date of cause of action arises. Thus, it is advisable to introduce such time limitation in filing the case, which may perhaps give more opportunity to go for out of court settlement.

In Germany the tortfeasor will be protected from the liability, if he complies mandatory standards and they may give incentives to the tortfeasor to take precautions to reduce the risk of harm. Thus, under the assumption that regulatory authorities are not easily influenced by the interest groups and also that they have better capabilities to get the information on science and
technology in order to set the standards may suggest the protection of tortfeasor from the
liability, if he complies with the mandatory standards even in India, which may provide
incentives to the tortfeasor.

The German model of providing financial assistance to higher income people in order to meet
the litigation costs, based on pay back criteria may increase the accessibility of the liability
system to the consumers. Thus, it is advisable to introduce such a policy in Indian liability
system in order to increase the accessibility to civil courts compared to the CDRAs to the
consumers, if India is free from corruption.

*The German Regulatory System*

The German standards were set by both public as well as private technical associations, which
indicates the decentralised and complex system which prevails in product safety and technical
safety laws. The technical safety law not only provides protection to life, health, property and
the environment but also provides the legal guarantees in connection with economic activities
bound up with certain technical issues. The assumption that the legislatures are not having
sufficient expertise of their own in science and technological regulations stresses the need of
adaptation of undefined general clauses such as *generally recognised rules of art or state of
the art or state of science and technology*. Keeping in view of rapid changes in science and
technology, the *deviation clause* was adopted in the case of conformity of regulatory standards
by the tortfeasor, may perhaps reduce the hindrance of progress.

There are several rules and regulations were enacted by the German parliament in order to
protect the interests of the consumers. However, the study will focus on the Appliances Act,
the DIN norm, and the EC Product Safety Law in order to draw some possible lessons for
Indian regulatory system to improve the protection of consumers.

*The Appliances Act, 1968 (Amendment, 1992)*

It provides some legal guarantee for the safety mark GS= geprüfte Sicherheit (Safety test). Its
safety standards are generally based on the principles of *generally recognised rules of the art*
or state of the art. The manufacturers, importers and occasionally the dealers were brought under the purviews of the Appliances Act (GSG). It will applicable to all technical work materials for which there are no statutory regulations. Consumers will be protected by the GSG, if they use the appliances properly.

The technical safety standards are formulated by the various private standard agencies such as DIN. The test criteria are laid down in detail for all standardisation work in DIN 3000/ VDE 1000 and DIN 820 part 12. The rational of technical as well as economic factors will be taken into the consideration in safety design, however in case of doubt safety requirements take priority over economic considerations. The manufacturers are free to adopt their own methods to meet the safety standards based on the deviation clause. In principle, products can be placed into the market without prior permission, in case of regulatory control the manufacturers who depart from regulatory position are under obligation to provide proof of equal safety standards being met. The manufacturer is not under obligation, if he provides technical work material according to the instruction of the user.

The GSG does not have any obligation to test the technical work materials, however it offers the manufacturers and importers to use GS Mark, once after getting conformity by recognised test centres that the appliances meet the required safety standards. The GS Mark serves, to the consumers to chose safe products in an easy manner; to the manufacturers it serves the marketing interests; and to the Trades Supervisory Officers (TSOs) it reduce the burden of control to the some extent.

The competence of the test centres for the design test will be determined by the legal ordinance. The time limit of test certificates issued by the test centres varies widely. The test centres will inform the TSOs only when the defects found were not removed or unsafe appliances were put into the circulation by the manufacturers. The test centres were not only empowering spot visits but also is entitled to remove defective appliances in the process of production. They also have to transfer the experience from test work into standardisation and regulatory work. In an decentralised testing system, the manufacturer may chose the test centre according to his convenience, however, these adverse effects may be reduced by increasing the competition among the test centres, extended information net work among test centres and have control on the test centres by the Federal Institute for Industrial Safety.
In Germany, the GS mark will be monitored by the TSOs, however they have wide range of tasks, which makes them unable to make systematic control but they have to check technical work material whenever they receive complaints. Much of the supervisory activity done by the TSO at the fairs and important trans- exhibitions, may reduce the administrative cost of the regulatory agency but these type of control is limited to visual inspection which is unable to provide adequate incentives to the manufacturers.

The TSOs were empowered to issue prohibitionary orders, if a defective product causes damages. They also are empowered to bring immediate execution of prohibitionary orders in the case of further intensification of hazards by a defective appliance. The prohibitionary order is to be used against manufacturers, importers and only under exceptional case against traders. The prohibitionary orders are valid throughout Germany even if they are issued by a state authority. The prohibitionary orders were published under the GSG in order to warn the owners of defective appliances and to bring attention to the traders as well as potential users about the hazards of the appliances. The prohibited products were also reported to the EC rapid information exchange in order to disseminate the information to the Member States once after investigation.

*The DIN Norm*

It plays a major role on the formulation and dissemination of German standards both at home as well as abroad. It established its position in the field of standardisation by multiplicity of co-operative relationships embodied in agreements with both the Federal and State Governments, associations, and technical & scientific bodies.

The formulation of standards in DIN would be based on neither substantive evaluation of the findings nor actual involvement of interest groups but only the procedure specified in DIN 820 part 1 and 4 of 1974/ 75. Normally, the procedure for standard formulation leading up to publication of a standard will take 3 years, if no specific delays arise. The decision on standards will be based on consensus principle and the standards are subjected review once in 5 years. The DIN has no enforcement power, so the compliance of standards will be left to the manufacturers concern.
The Consumer Council (CC) has been set up under the DIN in order to improve the representation of consumer interests in formulation of standards and the CC will be fully financed by the Federal Ministry for Economics. The representation of the consumer interests will be within the procedural framework laid down by the DIN 820 for standard formulation. The CC reserves the right to break-in the course of preparation of standards in order to assert the interests of the consumers.

A large portion of DIN standards is based on the European and international harmonisation work. However, the German state of the art is a little bit higher than the European as well as international standards, thus the adaptation of international standards in to the DIN standards is not that much easy?

*The EC Product Safety Law*

It is mainly to harmonise the laws of Member States and thereby remove barriers to trade and distortion of competition within the community, may perhaps improve the consumer protection. EC proposes to achieve this aim by imposing general safety requirements on all applicable products which enter into European market. As a general rule, the conformity of a product with the general safety requirements is certified by a certain procedure and documented by the CE Mark. However, the CE mark is a conformity mark and not the safety mark.

The European standard organisations such as the CEN, the CENELEC and the ESTI are assisted the task of marking the technical specifications. The Member States can be representing by one vote based on territorial representation in the European standards formulations. The EC Product Safety Act, 1992 ensure that the products placed on the market are safe. The manufacturers should comply with the general safety requirements. The Member States are obliged to adopt necessary rules and regulations to ensure that the manufacturers and the distributors comply with the EC Directives and also Member States need to appoint competent authorities to control the compliance of general safety requirements.
The Member States have to inform the EC in the case of withdrawal of a product from the market, except if it is limited to the national concern. The EC will then advise to the Member States, after investigation. The same procedure applies even in the case of emergency situation. The EC will maintain the confidentiality unless until it needs to make it public for safety reasons. The EC Product Safety Law does not cover the second-hand goods, commercial purpose and it does not apply to services.

The formulation of standards and certification marks, in Germany is not only voluntary in nature but also decentralised system. The formulation of standards based on the general clauses such as generally recognised rule of the art or state of the art or state of science and technology may have its own advantage for easy recognition of the standards of the product by the consumer.

The presence of deviation clause in the conformity of standards by the manufacturer rules out the ex-ante approach adverse effects on imposition of common standards in the case of private goods. In Germany tortfeasor will be protected from the liability, if he complies with the mandatory standards. This not only provide incentives to the tortfeasor but also it eliminates the conflicts between the alternative legal system on due level of care.

The supervision of the standards of appliances by the TSOs at fairs and exhibitions may reduce the administrative costs of the regulation, however, it limits itself to the visual inspections only.

The expansion of European standards raises doubts about the continuing importance of the German national standard Institutions and the certification marks such as the DIN and the GS Mark. The higher German state of the art compared to the European and international standards not only reduce the possibilities of adaptation of international standards as DIN standards but also it leads to hidden protection of German Industry.

The decentralised formulation of standards and certification may reduce the influence of interests groups. The dissemination of information about the prohibited products by rapid exchange information may protect he consumer from the product risks.
The lessons drawn from the German Regulatory System for the Indian Regulatory system

The German model of Consumer Council in DIN is to represent the interests of the consumers in the formulation of standards. It may be advisable to introduce in the BIS a similar council in order to improve the consumer interests in standard formulations. The German system of tortfeasors’ protection from the liability, if he complies the mandatory standards, may be adopted in Indian legal system in order to provide incentives to the tortfeasors and eliminate the conflicts between the alternative legal system.

The concept proper use in the GSG may as well needs to be introduced in the BIS in order to provide incentive to the consumers to take possible care in the usage of appliances.

The German procedure of inspection of the appliances by the TSOs at fairs and exhibitions also favour introduction in order to reduce the administrative costs of regulation, especially in a developing country like India, where resources are scarce.

The German model of decentralised formulation of standards and certification marks may as well be introduced in Indian system in order to reduce the interest groups influencing regulatory agencies. It is also necessary to de-link the laboratories and the BIS in order to create competitive environment in standardisation and certification.

The German model of deviation clause in the case of compliance of standards by the tortfeasor may also need to be adopted in Indian system in order to reduce the adverse effects of regulatory system in imposition of common standards in the case of private goods.

The German policy of informational dissemination about the prohibited goods may also need to be adopted in the Indian system in order to protect the consumers from the product risks. It is also advisable to keep the obligation on the manufacturers in the compliance to the regulatory standards in India.

Last but not least, the establishment of the Consumer Disputes Redressal Agencies under the provision of the CP Act, 1986 has its own importance in protecting the interest of the consumer by providing speedy, simple and inexpensive redressal. The study shows that there
are deficiencies in the functioning of the Consumer Dispute Redressal Agencies that's why it is unable achieve the objectives of the CP Act, 1986. In my opinion, the Government needs to take policies on time bound programme of the Fora, the consumer appearances before Fora, environment of the Fora, the appreciation of the members of the Fora, the appointment of members of the Fora, the involvement of the lawyer especially when consumer attend party-in person, and the infrastructure of the Fora, not only in order to fulfil the objective of the CP Act but also to bring effective liability system to develop a market for the complex goods. It is true even in the case of regulatory system such as the Bureau of Indian Standards Act, 1986. The establishment of the Bureau of Indian Standards is of great importance in protecting the interests of the consumer, and in providing markets for the producers of complex goods by formulating the standards and issuing certification marks. However, the reviewed study shows that the BIS is unable to do much for the consumers in a case where ISI product is defective because simply replaces the product and any action against the producer of a defective product cannot be taken. In addition, the stringent measures like cancellation of licences may have adverse effects on the market especially in the case of necessary goods. The BIS is unable to enforce its standards even based on the probabilistic methods raises the doubts about its role as a third party assurances to the consumers. In my opinion, the BIS is enjoying monopoly power, the interests of the consumers is not well protected, and it should formulate standards in its work place in order to improve the quality of BIS work. Thus, the Government of India needs to adopt policies on decentralisation of regulatory system in order to not only establish competitive environment but also reduce the regulatory capture and there is also need of a policy on improving the consumer protection activities by the regulatory system by establishment of the Consumer Council to represent the consumer interests in the standard formulations. Especially, in the wake of liberalisation and privatisation it might be better if there is a separate Ministry for Consumer Affairs or an Independent Statutory Body in order to oversee policies based on incentive structure to protect the interest of the consumers.