CHAPTER: III

CONSUMER PROTECTION UNDER LAW OF TORTS

3.1. Introduction:

In last chapter it is seen that, from the historical period there was a plethora of laws for the consumer protection. The object and interest of almost all these enactments are mainly punitive, though some of these are also preventive in nature. However, none of these laws provide any direct relief to the consumers.

In addition to the remedies under contract and criminal law, consumers have rights under tort law. But, tort law is also not the ideal remedy for injured consumer in India.

From the time people organized themselves in ‘social groups, it was inevitable that conflict of interests will arise leading to internal friction. It was natural that in a society if one suffers damage by a wrongful act of another person, mutuality required that he be compensated for the loss suffered by him. That was the starting point of the law of torts which is ‘concerned with the allocation or prevention of losses which are bound to occur in our society. With the evolution of the right duty syndrome, invasion of rights increased with a corresponding duty not to injure someone else’s rights. “The functions of tort came to be recognized in allocating or redistributing losses.” Now in welfare state tortious liability has become a fundamental law for consumer protection.

In Indian scene, people have been reluctant in pursuing remedies available to them under law of torts. Reasons behind this have been poverty, illiteracy and unawareness prevailing amongst the Indian people, about the tort based remedies. The requirement for a litigant claiming compensation to pay exorbitant amount of Court fee, according to the amount to claim, for bringing a suit, perhaps have been the most discouraging aspect. It has been estimated that in about half century, (1914-1965) only 613 tort cases came up to appellate courts. Subsequent survey in 10 years period (1975-1984), revealed that out of the 56 tort cases reported by the Supreme

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107 Winfield & Jolowicz: Tort IIed Ch. 1 Pg. 1
Court and High Court only 22 involved product liability. Union of India admitted in Bhopal case that:

“The Courts in India are not an adequate alternative forum in which litigation may be resolved, delays in the resolution of these cases in India, and India’s Court system lacks the procedural and practical capability to handle this litigation.”

It may also be worth mentioning in this context that the damages recovered in such actions are no comparison to those awarded by the American Courts, Where lawyers encourage filling claims for high compensation, because they get a share in the damages awarded. Delay in getting relief from the courts has also impeded the tendency to move to the Courts for seeking tort based remedies.

Similar reasons can also be assigned with respect to consumer related torts. Perhaps laxity to sue for tort based remedies has impeded the codification of law of torts in India, despite of the fact that the Bill was prepared by Pollock on the subject. However, gradually in the process of providing better welfare conditions to the people, many aspects of law of torts, were codified in separate enactments.

Consumer Protection Act is also one of these. The decision of the Supreme Court given in M.C. Mehta v. Union of India further establishes that the Indian courts are now prepared even to move ahead of the English Courts in ensuring better welfare conditions to the Indian people.

Though the provisions of the Consumer Protection Act provide ample remedies to an Indian Consumer, yet very many situations are still left over under which the consumer will have to move under law of torts for the redressal of his grievances. It can be aptly said that in India, consumer protection law is in the making and consumer is therefore having several laws and forums available to him to pursue his remedy and to base his claim. Looking to the controversy prevailing in the Country, regarding the coverage of certain services under the four corners of Consumer Protection Act, it becomes obvious to have a discussion of the basis of

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110 D.N. Sarat: Law of Consumer protection in India pg. 79.
112 A.I.R. 1987 S.C. 1099
113 A debate is going on for bringing the health services under the purview of the Act. Further by C.P. Act (Amendment) ordinance 1993, housing services have been specifically included under it, but health services are yet not covered.
the liability recognized under law of torts in England and India. This will also help in making suggestions for codifying the remaining fields, not yet covered by the Consumer Protection Act 1986.

3.2. Function of Law of Torts:

In this chapter before dwelling upon the product liability under law of tort the province and function of law of torts relating to consumer torts will be discussed. The grounds available to consumers for fixing the product liability are basically based upon negligence. This aspect has also been discussed in detail through the help of English and American cases. Some of the specific cases involving breach of duties also deserve discussion in the changing concept of product liability. In due course of time product liability has transformed from negligence based liability to strict liability base. Hence the evolving concept of strict liability in consumer torts has also been discussed. In fact in India we still recognize negligence based liability with a mixture of fault base, as is evidenced from section 14 of the Consumer Protection Act 1986. Still the consumers will have to approach the courts under general Law of Torts, for the cases which will still be not covered under Consumer Protection Act 1986. Hence the discussion carried out in this chapter is of much worth from the consumer’s angle.

In order to understand the true meaning and scope of consumer related torts and tortious liability for defective products and services, the distinction between tort and crime on one hand, and between tort and contract on the other hand, requires to be understood. An example of bailment can be given to differentiate the tort and contract,

“If the bailor’s claim is necessarily founded upon some specific provision in a contract, then not doubt, the bailee’s liability is not tortious but contractual, but if the bailor’s claim rests upon a breach by bailee of one of the bailee’s common law duties, then his liability is as much attributable to the law of torts as is the claim of a visitor against the occupier of premises under the Occupier’s Liability Act.” 114

The process of compensating harms in terms of money equivalent is typical of law of torts, which is also the most important reason for the popularity and growth of the consumer torts all over the world. The process of co modification through tort law

114 Winfield and jolovicz:Tort 2nd ed. Ch.1 pg. 10.
is coming under strong criticism in advanced capitalistic societies.\textsuperscript{115} Co modification and communication are commonly used terms in Marxist literature which relate to the tendency of seeing everything in terms of money value.\textsuperscript{116} It may be noticed that the concentration under tort law is to the harm, caused and this makes it a victim centered branch of law, which focuses much more to the victim and his harm than to the mental element of the wrong doer. In such a situation the tortious liability becomes based on a failure to live up to the expected standard of behavior, in contrast to the contractual liability which rests upon the breach of a moral principle in upholding promises and from criminal liability which is based on international or blame worth non observance of the law.\textsuperscript{117}

3.2.1 Grounds of Liability –

The classified analysis of the grounds of liability in tort was given by Pollock\textsuperscript{118} as under:

“Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person:

[a] It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm; and does cause the harm complained of.

[b] It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

[c] It may be an act violating an absolute right (especially rights of possession or property), and treated as wrongful without regard to the action’s intention or knowledge. This as we seen is an artificial extension of the general conception, which is common to English and Roman law.

[d] It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.

\textsuperscript{115} Quoted in consumer protection laws Dr. rakesh khanna pg. 23.”A critique of American tort law” British journal of law society vol. 8 (1981)

\textsuperscript{116} See in Ghandhi : Law of Torts pg.31.

\textsuperscript{117} Hadden “contract Tort & crime: The forms of legal thought” 87 law Quarterly Review pg.240.

\textsuperscript{118} F Pollock: The law of torts 13\textsuperscript{th} ed. at pg. 18.
[e] It may in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits to avoid prevent.”

Salmonds’ view with regard to the province the function of torts, also deserve to be discussed. He drew three conclusions in this regard. He firstly emphasized that the law of torts is not a static body of rules, but is capable of alteration to meet the needs of changing society. The liability under this head is flexible which may be contracted according to the social needs. Secondly it is not possible to find out a general formula or criterion which will at once explain all the cases in which liability has been imposed in past and also furnish is guide for the decision of the doubtful cases in future. It is now established that the decision of a court to impose liability may be influenced by a number of factors. Thirdly it should be remembered that other factors besides the value of the plaintiff’s interests and the nature of the defendant’s conduct may be relevant. Such factors include (a) historical development (b) vengeance (c) deterrence (d) ability to bear the loss (e) economic social background of the case and now under the present movement for consumer protection, these factors are also coupled with the principle of strict liability of producer or provider of services.

### 3.3. Recognition of Consumer Torts:

As the sanctity and freedom of contract was the cherished slogan which dominated the society in the 19th century so did the concept of duty to take care come to be regarded as essential concept in the 20th century. Perhaps one of the chief agencies in the growth of the idea of negligence is industrial machinery. Early Railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a minister of state to a wandering low, and this naturally reacted on the law. Although the idea enjoining reasonable care developed lately but it is today the most important of all torts and for consumer torts in particular “Perhaps the fundamental social value of liability from being negligent is that this liability encourages the taking of care. Who can doubt that, in all walks of life, some people would be less careful if there were no sanctions visited on carelessness?. Thus the tort

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119 Consumer protection laws: Dr.Rakesh kanna central law agency: Allahabad pg.23
120 Per percy wind field quoted in consumers society & the law p.313
of negligence serves useful purposes in our society: we should be worse off if this liability did not exist."

From the consumer’s point of view actions can lie under tort of deceit, or upon breach of duty to take care for supplying irresponsible persons with dangerous articles. One cannot close his eyes towards the possibility of action for the tort of breach of statutory duty that too, where the consumer has been injured by a defective product covered by laws of the country meant for his safety and protection. But in all such actions in torts the liability of a defective product is primarily and broadly covered under the head of negligence whether it may be negligence of mind or of conduct or a negligent act itself.

Liability for defective product has been said to be not yet a coherent concept or our law. The present pattern of legal rules is an amalgam of contract and tort and also of strict liability and negligence. It furnishes ample protection to the consumer (buyer) against a vendor than to the victims of mishaps against the manufacturers. The present discussion will center around the tort principles on product liability of manufacturers and also of the distributors in the chain, installers of defective products and providers of defective and deficient services. As the law of product liability has yet to achieve its significance in India, so the main endeavor here will be to discuss the law of England and America. Law of tort of England forms the basis of law of torts in India and hence it deserves discussion and law of torts of America is worth discussing for there the recognition of consumer torts is at the most advanced stage.

It may be relevant to mention here that there has not been a common principle underlying the protection given to the consumers in United Kingdom, United States of America, and India for the losses suffered by them. The American Law has experimented with both contract and tort answers; whereas English law has adopted the tort reasoning. The German Law however has opted for contractual solutions. The Indian law is yet to accept any express formulation but since we follow English law of torts, perhaps the expansion of law of torts will be by and large acceptable to us.

It cannot be denied that difficulties associated with the restitution of the losses suffered by the consumers are more acute in English Law. This is because of the fact

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121 Ibid at pg.113-114
122 Waddams:product liability (Toronto 1974)
that some situations resulting in the economic losses defy rigid categorization, straddling the traditional boundaries of contract and tort. The problem is more complicated one as the English Law still operates on the basis of rigid demarcation between the two forms of law of obligations. This has not been the case with America or Germany where even the law of tort is more often seen as part of the wider and same category of obligations, and contract law. This is especially in Germany where historical reasons have provided least resistance, for expansion, when new problems called for the discovery of hitherto unknown remedies.\textsuperscript{123}

3.4. Grounds of Product Liability

Product liability can be traced under three heads i.e. under (i) Breach of warranty i.e. tort of deceit, (ii) Negligence and (iii) Strict Liability.

3.4.1 Breach of Warranty and Tort of Deceit

The rights given under civil law of the individual victims of a false statement depend upon the fact as to whether the statement was made innocently, negligently, recklessly or fraudulently. Since the decision of Pasley v. Freeman\textsuperscript{124} it has been a rule that ‘A’ is liable in tort to ‘B’ if he knowingly or recklessly (i.e. Not knowing about the truth) makes a false statement to “B” with intent that it shall be acted upon by ‘B’ who acts upon it and thereby suffers damage. It is necessary for the Tort of deceit or fraud that the defendant must have made the statement with knowledge of its falsely.

An analysis of judicial decisions on the point reveal that for quite a long time, the law prevailed that a person who is maker of a statement is not liable, if he gave a false statement honestly, although he might have been negligent. A careless man was not treated to be dishonest one, but after the case Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.\textsuperscript{125} The Court recognized the ‘duty to care’ to make statements and held that a person may also be held liable for a negligent statement. Hence the consumer will certainly have a remedy in negligence even when the fraudulent intention is not present. He will further not be required to prove intention for action of damages as he is not required to specify the specific tort, but only to prove the facts required for the fixing of liability under at least one tort.

\textsuperscript{123} B.S.Markensins: An expanding Tort law-law quarterly review 1987, vol.103 p.335
\textsuperscript{124} (1784)3 T. R.51
\textsuperscript{125} (1964) A. C. 465
To every sale of goods some implied warranties are attached, subject to the disclaimer clause. There may also be express warranties attached to the transaction. In case of breach of them no negligence shall be required to be proved for the fixation of the liability. It may be noted that originally an action on warranty was an action in tort. The buyer was thus entitled for compensation in case of false deception of goods. Later on in 1778 that the buyer might at his election, declare in assumpsit as a matter of procedural convenience. In 19th century this method of declaration became almost an universal phenomenon. The implied warranties came to warranties came to be codified in the Sale of goods Act. The earlier character of the of the warranty as representation was so far lost sight of, that it was eventually held that a representation made to induce a sale was nevertheless not a warranty in the absence of a ‘contractual intent’. It may be submitted that the fact that this tort origin of warranties made it easier, to break the shackles of privity in consumer transactions.

Express warranties play a minor role relatively in the field to product liability. The action by a consumer may arise upon a warranty given by the retailer, or by the manufacturer. Sections 2-313 and 2-318 of uniform commercial code of America regulate the effect of the breach of warranties, under which the seller can be held liable both towards the purchaser as well as the user. Similarly section 14 of English Sale of Goods Act 1969 and section 57 to 60 of Indian Sale of Goods Act provide for the remedy to the consumer. But where there is a breach of warranty by a manufacturer the consumer shall have to go for remedy under the law of torts. There are several states of U.S.A. whose laws provide that the statements, made by the manufacturer in their advertisements concerning the merits or qualities of their products to go constitute express warranties to consumers. In such situation the consumer may have a case against the manufacturer for breach of such a warranty, where the product purchased fails to qualify the qualities specified in the advertisement.\(^{126}\)

The triple requirements for a claim of breach of warranty recognized by the American Courts and to some extent by the English Courts are:

[a] There must have been a meaningful factual representation, with a view to induce the consumer, but ‘Puffs’ and ‘Flamboyant Sales’ talks are excluded.

The plaintiff must have relied on the defendant’s statements in purchasing the articles. However the proofs of reliance being a difficult question, the court willingly imply it even when it is not pleaded.

The plaintiff should have suffered physical or pecuniary damage.

Again in Randy Knitwear inc. V. American Cynamide Co. the New York court of appeals allowed recovery for economic loss, despite absence of privity of contract by a commercial buyer against the manufacturer. The loss was suffered relying upon the representation made by the manufacturer in his advertisement, mailings and labels. The court was constrained to observe;

“The word of merchants is in brief, no longer a world of advertisements (equally) sanguine representation on packages and labels frequently accompany the article throughout its journey to the ultimate consumer, and as intended, are relied upon by remote purchasers.”

Under the above circumstances Court felt it highly unrealistic to limit, the protection to a purchaser only with respect to warranties made directly to him by the immediate seller.

In Corporation of Presiding Bishop of church of Jesus Christ of Latter Day Saints v. Cavanaugh and Plastic Process Co. the plaintiffs were again allowed to plead successfully breach of express warranties contained in the sales literature, despite of the fact that the plaintiffs had not purchased the piping themselves but had only instructed the contractor to do so.

It may be observed that English Law also recognizes the liability of defendant in the above cases, even in the absence of privity, but English prefers to construct a contract of guarantee between the parties, collateral to the contract of sale. The manufacturer’s advertisement is treated as an ‘open’ offer which ripens into a contract under the rule which emanates from the decision of Carlill v. Carbolic smoke ball Co. This mode of solution appears not to be acceptable to the American courts. They have chosen the warranty with the character of liability not in contract but in tort. When this character of liability gets accepted, then there is no need to traverse

127 (11NY 2d 5, 181 VE 2d 399, 226 NYS 2D 363 1962).
128 217Cal App. 2d 492: 32 Cal Reprtr. 144 (1963)
129 (1893)2 Q.B. 484.
the arena of privity of contract. It has been claimed, “In rechristening warranty as tortious the American Courts have claimed, with some justice, to be doing no more than reasserting the true historical nature of warranty. Until about, 1800 breaches of warranty were in fact remedied by the action upon the case for ‘deceit’ – an action in tort.”¹³⁰ Dean Prosser has accordingly described warranty as “A freak hybrid born of the illicit intercourse of tort and contract. “And thus it is accepted that express warranty is really a representation, breach of which constitutes “deceit” and is a tort.

Majority of problems arise when the plaintiff is not in position to plead the reliance of any express warranty and instead wants to rely on an action for breach of warranty implied by law. Both under American and English Law implied warranties of merchantability and fitness for the purpose have statutory recognition. So is the case in India. After 1962 the U.S. courts started recognizing the pleading of implied warranty in tort as an alternative cause of action. It was referred to as manufacturer’s strict liability by the Courts. But the common factor in both the doctrines relating to the implied warranties can be traced to the recognition of strict liability independent of any fault.

In Greeman v. Yuba Power Products,¹³¹ the plaintiff was given as a present by his wife, a tool for use in carpentry and he was injured there from at work. Manufacturer of the tool (“Shop Smith”) was sued for the breach of implied warranty. The injured was precluded from suing in sales statute, because no notice of breach was given by him. The Supreme Court however held the manufacturer liable for damages in tort law stating.

“A manufacturer is strictly liable in tort when an article which he places in the market knowing it to be used without inspection for defects, proves to have defects which injures the human being.”

This view was adopted in S. 402 a Second Restatement of Torts by American Law Institute in 1965.

However, the supply of Goods and Services Act, 1982, along with Sale of Goods Act 1979 recognize the warranties attached to an agreement and any breach thereof, may also entail tortious as well as contractual liability. Consumer fraud is

also recognized under English law since the decision of Langridge v. Levy.\textsuperscript{132} Where
in the seller was held liable for supplying unsafe gun to the ultimate consumer.

Indian consumers have been reluctant to sue under the law of torts for breach of warranties in spite of the fact that remedies have also been available to them under law of torts. There is almost very little case law available in this regard. In section 40 of the Draft Civil Wrongs Bill, prepared by Pollock,\textsuperscript{133} the definition of deceit was given which was unfortunately not enacted. This section included cases of innocent and deliberate representations. Under the present enacted laws apart from the provisions of the Sale of Goods Act, Consumer Protection Act 1986 and MRTP Act after amendments of 1984, the unfair trade practices have also been covered (which include breach of warranties and consumer frauds.) The Consumer Protection Act 1987 of England also accepts strict liability, though new to the common law but only in personal injury cases.

The above review reveals that there has been complete shift towards the recognition of strict liability of manufacturers in America and in some specified areas in England in a quest to provide better protection to the consumers against misrepresentation. But Indian and English Law still continue to recognize negligence based liability to a greater extent for the losses and injurious caused to the consumers.

3.4.2 Negligence as the Basis of Liability.

The term negligence has three connotations (a) careless state of mind (b) a careless conduct and (c) a tort in itself (Donoghue v. Stevenson). For the careless state of mind the term negligence has again two connotations. In the first case it is a blameworthy inadvertence to the consequences of conduct to the extent a reasonable man would have adverted to them. The second subjective use of negligence occurs in cases where the defendant in fact decides to take the risk or ignores the consequences of his act. Thereby he may be guilty of ‘willful’ or ‘gross’ negligence or sometimes of ‘recklessness. While in the first case the proof of being only negligent being ignorant of the fact, shall operate as defense but it should not be so in the second case.

\textsuperscript{132} (1837) 2 M & W 519.
\textsuperscript{133} Complete text given by F. Pollock, The Law Of Torts 9th ed. Pg. 601.
Negligence as a tort is traditionally described as a damage caused by a breach of duty of care by the defendant to the plaintiff. Six ingredients for the liability under negligence which have come to be recognized are:

(a) A duty of care situation i.e. recognition by law that the careless infliction of the kind of damage in suit on the type of person to which the plaintiff belongs by the type of person to which the defendant belongs is actionable.

(b) Foreseeability that the defendant’s conduct would have inflicted on the Plaintiff the kind of damage in suit.

(c) Proof that the defendant’s conduct was careless that in there has been breach of duty committed by him as he failed to fulfill the standard fixed by law.

(d) Casual connection between defendant’s carelessness and damage.

(e) The extent of damage attributable to the defendant.

(f) The monetary estimate of the extent of damage.

Lord Atkin in Donoghue v. Stevenson\textsuperscript{134} laid down the following rule,

“Everyone must take reasonable care to avoid act or omissions which he can reasonably foresee would be likely to injure his neighbour who then in law is a neighbour? The answer is that this word refers to persons who are so closely and directly affected by his act that he ought reasonably to have them in contemplation as being so affected when he is directly his mind to acts or omissions which are called question.”

He went on to say:

“Proximity is not to be confined to physical proximity but extends to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know to be directly affected by his careless act.” The rules selforth in the above two cases have been subject to severe criticisms and have not been accepted by other judges as tenable. Ramaswamy Iyer\textsuperscript{135} criticized it as being too general and vague to be capable of practical application for ascertaining the existence of duty in any given set of facts. He admits that it will not

\textsuperscript{134}Consumer Protection Laws: Dr.Rakesh khanna: Central law Agency Allahabad 2nd ed.pg.25 to 30
\textsuperscript{135} 1932 A.c. 502
apply to negligent misrepresentations and in India there is not the same need for a
general rule as to duty.

Herein after we shall examine the scope of these rules set out above along with
the limits and modifications.

Duty of care as propounded by Lord Atkin:

The decision of Donoghue’s case is an authority for two district propositions
(a) that the negligence is a distinct tort and (b) that the absence of privity of contract
between plaintiff and defendant does not preclude liability in tort. From the beginning
of 1970’s 136 it came to be said that Donoghue’s case was an authority for opening
up of new categories of liability with a caution not disregarding existing categories or
treating the law of negligence as entirely, ‘open ended.’ But by the end of 1970137
the law lord moved much forward to hold that public policy required the imposition of
liability only when there was no other secondary or some other policy demanding a
total or partial immunity from the suit.

Thus a new head of tortious liability came to be recognized by the decisions
Donoghue’s case and Ann’s case referred above viz. liability for supplying defective
products by the former and liability for failure to perform the duty to inspect defective
goods by the latter. Both the cases recognized the general theory which justified the
creating of new tortious liability of neighbour. However, the decision of Donoghue’s
case was subjected to severe criticisms from all corners, but the decision given in the
Ann’s case was widely accepted with enthusiasm, particularly in field of economic
loss. However, this tendency of imposing liability for economic losses came to be
halted from 1984. The Court took the view that the judgment pronounced by Lord
Wilberforce did not prescribe a test which may be valid for all cases invariably. Later
on in the decision of Muirhead v. Industrial Tank specialties Ltd. this restricted
approach was also adopted in cases other than building contracts.

The Privy Council in two cases in 1985 also recognized the restrictive
approach. Most significantly in 1986 the restricted rule was affirmed by the House of
Lords in Leigh and Sillivian Ltd. v. Alikaman Shippling Co. Ltd.138

137 Dorset yacht co. ltd. V. Home office 1970 A.C.1004
1) **Standard of Duty of Care**

Normally a uniform standard of duty of the care is required to be exercised by a reasonable man. The degree is however variable which varies with different situations. For example in the case of an action against a professional person for negligence; the Court will have to consider as to whether on a balance of probabilities it has been established that the defendant failed to exercise the care required of a man possessing and professing special skill, in the circumstances which require the exercise of that special skill. The surgeon will also be expected to exercise care that is expected from a member of his class (he has been held liable for leaving swab inside the abdomen after operation) a jeweler who pierced the ear was held liable for not behaving like a surgeon. Therefore if a person holds himself ready to give medical advice and treatment is impliedly undertakes that he is possessing as much of skill a knowledge as it required for the purpose. A breach of such duty gives right to an action for negligence to the patient. In an Indian Case Laxman v. Trimbak, the death of a patient was due to shock resulting from reduction of fracture attempted by the doctor without taking the elementary precaution of giving anesthesia, the doctor was held guilty of negligence. He cannot look a case and assess the degree of care from an old established rule. It has to be seen with the modern eyes. Cases now are being brought before the consumer protection courts in India too against doctors and physicians; however there is much hue and cry against the covering of medical services under the newly enacted Consumer Protection Act. 1986.139

2) **Pecuniary and Economic Losses resulting from careless acts**

The general rule is that the common law duty to take care to avoid causing injury to others is confined to the physical injuries only. However, the financial and pecuniary interests are also protected under law of contract or under such torts as intimidation, deceit, injurious falsehood etc. A review of the English decisions given between 1875-1968 reveal that the established practice has been to show reluctance in granting remedy for careless invasion of financial or pecuniary interests. In these cases 140 courts have repeatedly held that economic losses, suffered by the plaintiffs did not constitute a kind of harm which the law ought to grant of remedy, hence to duty of care was owed by the defendants in that regard.

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139 Consumer protection Laws : Dr. Rakesh Khanna pg. 34 Central law agency. Allahabad.
140 Cattle v. Stockton Waterworks co. (1875) QB 453.
Economic losses can arise in several ways. After the case of Donoghue v. Stevenson physical harm caused by a negligent act can be said to be compensatable. In Spartan steel and Alloys Ltd. V. Martin and Co. (contractors) Ltd.\textsuperscript{141}

The decision of Ann’s case is important for it permitted the recovery of such kind of damage in tort which can be said to be pure pecuniary loss. The Court of Appeal applied the principle of this case in Batty v. Metropolitan Property Realizations. Ltd.\textsuperscript{142}

M/s. Aswan Engg. Co. v. Lupidine Ltd. and another\textsuperscript{143} was also decided upon the established principles. The liability for pure economic loss was denied upon the basis of the above decisions but the question revolved around the facts as to whether there was a physical loss to the product.

Courts have gone to the extent of imposing strict liability to recognize an economic loss. In Russell v. Ford Motor Co.\textsuperscript{144} The Court stressed that the defect was in fact a “man endangering one” of the sort for which strict liability was imposed upon the manufacturer. There exists a difference of opinion amongst the courts with regard to the damage of the nature of Russell’s case as to whether it should be treated as property damaged recoverable under Section 402-A of American (second) Restatement in Torts or as an economic loss covered only under the warranty provision of Uniform Commercial Code. In Midcontinent Air Craft Corporation v. Country Spraying Sen,\textsuperscript{145} the court held, “In transaction between a commercial buyer when no physical injury has occurred to person or other property, injury to the defective product it is an economic loss governed by the Uniform Commercial Code.

3) Liability of State for Negligence

In Jaya Lakshmi Salt Works (p) Ltd. v. State of Gujarat,\textsuperscript{146} The Supreme Court of India had an opportunity to examine the scope of state liability for negligence. The Court examined the meaning and scope of the term misfeasance, malfeasance & nonfeasance. It also reviewed the rule laid in Ryland v. Fletcher and scope of strict liability and absolute liability. But it held that even without bad faith or malice;

\textsuperscript{141} Spartan steel and Alloys Ltd. V. Martin and Co. (contractors) Ltd. (1973)Q.B.27
\textsuperscript{142} 1978 Q.B. 554
\textsuperscript{143} (1987) 1 All E R. 135 CA.
\textsuperscript{144} AIR 1978 pg. 575.
\textsuperscript{145} 1978 S.W. 572
\textsuperscript{146} (1994) 4 SCC 1.
tortious liability may arise not only under negligence but also in cases of mistake, defective planning or failure to discharge public duty resulting in loss or damage to common man that is consumers at large. The Court ordered the payment of compensation to appellant as water due to defective planning of Reclamation Bundh had entered his factory which was constructed by the State. In State of Haryana v. Santra, the Supreme Court recognized the vicarious liability of State for acts of negligence of its employees. In view of the earlier Supreme Court decisions State was held liable for the negligence of its officers in performing the sterilization operation of the lady. The basis upon which the damages were allowed was not strictly same as applied in other countries in view of the policy professed by the government regarding the control of the population, notably various programmes have been launched to implement the State sponsored family planning programmed and policies. Since the decision in Bayveet v. Enfield Borough Council it has come to be established in England too that blanket immunity to public authorities has been rejected in cases of negligence in England following Stovin V. Wise.

4) **Economic Losses resulting from Careless Statement**

It was an established rule in England which prevailed for a pretty long time that there was no duty of care to make true statements. Henceforth no action was to lie against a person for negligently making untrue statement, causing another person to suffer pecuniary loss. This view was subsequently supported by other decisions as well. The House of Lord in Derry’s case decided that careless statements resulting in pecuniary losses did not constitute deceit. But there was no observation as to whether it would be actionable on alternative ground of negligence. In Le Lievres case the court also decided this question and held it not actionable in negligence either. In Old gate Ertales Ltd. v. Toplis, it was stated that Donoghue’s Principle was confined to negligence which results in danger of life, limb, and health and in Heskell v. Continental express Ltd., the court went to the extent of saying, “negligent mis-statements can never give rise to a cause of action.”

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147 AIR 2000 SC 1888.
148 Dickson v. Router's Telegram co., (1817)3 CPD 1(CA)
149 Le Lievres v. Gould, (1893) 1 O. B. 491 (CA)
150 (1939) 3 All ER 209,216.
151 (1950)1 All ER 1033.
Much later modifications were introduced into an apparently wide principle of non-liability. In due course of time it came to be recognised that there existed a liability in case of damage caused, pecuniary or otherwise by means of careless statements. In Nocton v. Lord Ashburton\textsuperscript{152}, the House of Lords recognised the existence in equity a duty of care which came to be known as fiduciary relationship. Wherever such relationships existed liability was introduced under the umbrella of constructive fraud.

This liability was under this head widely recognised and assumed a settled and important basis after the decision of House of Lord in Hedley Bryne and Co. Ltd. V. Heller and partner’s Ltd. This case formed the basis upon which the future law upon the liability of pecuniary losses developed. The House of Lord categorically declared that the Le Lievre’s Case and Candler’s case were wrongly decided. A distinction was drawn between the liability for careless actions and careless words. The Court as a matter of principle accepted the existence of a duty situation whenever:

“The party seeking information of advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advise when he knew or ought to have known that the inquirer was relying on him”, but not when “a clear qualification that he (the giver) accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require.”

A number of cases are there where responsibilities and liabilities have been imposed upon public authorities for negligence in supplying information or advice as for e.g. when a prospective purchaser of a property is erroneously told that there are no planning proposals, affecting it, or that it complies with public health or safety requirements. The Indian Law is silent upon this aspect. In absence of any enactment as in England (Misrepresentation Act) the Indian cases will continue to be governed by the common law liability for tort of careless statements under the head of negligence. Both in England and India, consumer protection acts of 1987, 1986 respectively are now to regulate the liability of careless acts and statements both and to some extent the provisions of Indian Monopolies and Restrictive Practice Act, 1969 also recognize this liability.

\textsuperscript{152} (1914) A.C.
5) **Disclaimer of liability:**

As the possibility of intermediate examination hampers the claim of a consumer so the right of disclaimer comes in way to protect the seller instead of consumer. Under Hedley’s case the liability could be evaded if the seller made it clear at the outset that he was not accepting the responsibility of his statement.153

Professor Winfield154 analyzed the power of disclaimer irrespective of the fact as to Whether the Act applied to the situation or not in the following words:

(a) A person guilty of deceit will remain liable whatever he may have said by way of disclaimer.

(b) Words of exclusion should, following normal practice be interpreted contra proferentem the question in each case is whether the defendant has made it reasonable clear that the refuses to undertake responsibility for his statement.

(c) It is possible that the disclaimer must have been made before or at the time that the defendant supplies the information or advice, but in view of the fact that the liability is non-contractual, it is submitted that the better view, is that the defendant may withdraw his undertaking of responsibility before the plaintiff acts upon the information or advice.

3.5. **Breach of Duty in Special Cases:**

In fact the injured party has been moving the court of law for compensation under Law of Torts where there has been breach of duties. Some of the specific situations are being discussed here.

3.5.1 **Duty of owners of Land or Building**

The duty of lessor or vendor towards lessee or vendee in respect of defect existing at the time of deal or developing subsequently, deserve consideration. The duty of lessor to lessee arises either under the contract of lease or under the Transfer of Property Act. Under this duty the lessor has to disclose the defects which are known to him and the lessee is neither aware not could discover them ordinarily.155 However, he is not required to disclose patent defects and further the lessor does not warranty fitness of premises. In case of furnished premises under English law, the

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153 quoted in Dr. Rakesh Khanna –C P Laws pg.40
154 Winfield and Jolowiez on Tort, 17th Ed. At pg. 286.
155 Section 108 Transfer of property Act.
lessor warrants them to be fit for Habitation at the time of the commencement of tenancy. In other cases in absence of fraud of breach of express warranty the general rule is that a lessor is not liable for letting a tumble down house.\textsuperscript{156} The review of English cases reveals that in England a broad immunity is available to the land lords and vendors of real property. This immunity has been negated by various enactments like Housing and Town planning Act etc.

For the defects arising out afterwards, the lessor is not liable except in case of breach of a covenant to repair.\textsuperscript{157} The lessor is also liable ever if he did not know but could have known the defect by due care. He is also liable of the loss due to improper repair. So far as the liability or lessor to strangers, who are injured due to the defect, is concerned, the general rule is that the liability is of lessee and not of lessor. Under American Restatement of Torts the following exceptions have emerged with respect to the duty of care to be observed by the lessors.

(a) Where the lessor has entered into a covenant to repair and his failure to perform results in bodily harm to the user.

(b) Where the lessor conceals or fails to disclose to the lessee defect of which he is and his lessee is not aware and which involves risk of any harm to the user i.e. fraud is committed.

(c) Where the lessor can be held liable apart from his knowledge of danger for negligence.

Now this liability under English Law is converted under Occupier’s liability Act, 1957 and defective premises Act, 1972 and by Transfer of Property Act\textsuperscript{158} and to some extent by consumer protection Act, 1986 in India.

The position of the vendor is similar to that of a lessor with respect to defects existing at the time of sale. The Caveat Emptor’ rule applies. Unless there is an express contract there’ is no warranty of fitness or safety of the premises. The vendor is bound to disclose to the buyer and latent defect which he knew and the buyer did not or could not know or discover with reasonable care.\textsuperscript{159} Where the vendor knows

\textsuperscript{156} Robbins v. Jones (1863) 15 CBNS 221.
\textsuperscript{157} Sleathen and Lampreth BC (1960) 1 Q.B. 48 CA
\textsuperscript{158} Section 55 of the Indian Transfer of Property Act deal with the rights and liabilities of seller & buyer, whereas section 108 deals with the rights and liabilities of the lessor & lessee.
\textsuperscript{159} Indian Transfer of Property Act, Section 55 (1)(b).
the unfitness of premises’, he is liable for injury to vendee and even to third person like vendee’s wife, child or guest.\textsuperscript{160}

After the decision of Dutton v. Bangor Regis\textsuperscript{161} the application of Donoghue’s case came to be applied in reality. In this case the foundations of a house were examined through inspector and approved by local authority. When later on internal structure developed defects the defendants were held liable for negligence in approving the foundation. The extension of the liability makes the builder liable though he may not be the immediate vendor to the eventual purchaser or occupiers, as it was his duty to examine the site with reasonable care.\textsuperscript{162}

3.5.2 Duty of Person in Possession and management of Chattels\textsuperscript{163}

Chattels have been classified in two categories from the point of view of standard of care. Chattels which are themselves dangerous and Chattels which are not dangerous. Dangerous Chattels were described by Lord Dunedin as articles which are dangerous due to their character such as loaded fire arms, poisons, explosives and other things ejusdem generis. Wills J. described them as “goods which are liable under certain circumstances to spontaneous combustion, or which in the absence of extraordinary care are likely by escaping to damage other parts of the Cargo” The principles of negligence apply to Chattels of both the types due to the reason that (i) proof of negligence is essential, although ‘res ipsa loquitur’ may apply and (ii) proof of that the defendant has not been negligent is always a defense i.e. in both types of Chattels.

(i) Duty to purchaser - In spite of the ‘Caveat Emptor’ rule the seller owes to the purchaser the duty to furnish requisite information’s which fall under any of the following heads:

(a) The seller is liable under tort of deceit and negligence both the practicing deception upon the buyer.

(b) He also owes a duty to disclose to the buyer and give warning of defects and dangers which are known to him and are likely to result in physical injury.

\textsuperscript{160} Hill V Estate (1931)2 KB 1113.
\textsuperscript{161} (1972)1 All E R 462(CA)
\textsuperscript{162} Fatty V. Meter Operation Property , Realisation Ltd. 1978 RB 554.
\textsuperscript{163} Consumer protection laws. Dr. Rakesh Khanna. Central Law Agency. Allahabad.pg. 44.
(ii) Duty of Manufacturers, Suppliers to Third Party Beneficiaries:

A vendor of manufacturer of a dangerous chattel may be in certain circumstances become liable for injury to the other persons than the buyer. Prior to 1932 there was very much uncertainty regarding the scope of this duty. Doctrine of Privity of contract was being applied with two exceptions. The liability of the manufacturer and others supplying the goods to the public is based upon foresee ability which is of modern growth. Lord Atkin recognized such principle in the following words:

“A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer, in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take reasonable care”.

3.5.3 Duty of providers of services with regard to performance of work:

A person who agrees to perform the work is not required to do without possessing the requisite degree of skill and competence. Hence a duty is cast upon him to take reasonable care not to create danger to life or property while at work. This duty is owed towards the contracting party and third party as well. This includes services rendered with respect to dangerous and non-dangerous adventures. It includes buildings contracts, building repair contracts etc. It also includes taking of care to ensure that no one suffers injury as a result of fault in the design of construction of the premise. It also extends to the suppliers of electricity. Where the electricity Board passed a live wire over a tree and a girl was injured by climbing on it, the board was held liable.

In some cases special relationship is assumed by the parties. Such assumption gives rise to appropriate duties under law. These duties have to aspects. They are contractual and are also independent of contract and a breach thereof would give rise to liability in tort. Some specific instance of the assumption of such relationship vis-a-vis consumer and renderer of service are being discussed here.
1) **Professionals Physicians and Surgeons:**

Person who enters into a skilled profession undertakes to exercise a reasonable degree of care, expected from such a category of professional. Truly he is not to undertake that he will perform a care using highest possible degree of skill as there may be persons of higher education and may render greater advantage than himself, but he undertakes to bring a fair, reasonable, and competent degree of skill. In an action against a surgeon by a patient the question is whether the injury complained of must be referred to the want of a proper degree of care in the defendant or not.¹⁶⁴

In India members of medical profession are governed by a code of conduct prescribed for them. A doctor’s name may be struck off them register maintained by Medical Council of India constituted under Medical Council Act 1956 upon the ground, that the doctor has been immoral with respect to this professional conduct.

Certain duties of a doctor were recognized by the Supreme Court in Dr. Laxman v. Dr. Trimbak.¹⁶⁵ These are (a) a duty of care in deciding whether to undertake the case (b) a duty of care in deciding what treatment is to be given (c) a duty of care in the administration of that treatment.

In case of breach of any of these duties a right of action for negligence will arise to the patient. Mc Nair J, laid down a test which has also been approved later on by the House of Lords and our courts. The test covers the field of liability in respect of diagnosis, in respect of a doctor’s duty to warn his patient of risks inherent in the treatment & liability in respect of treatment. He observes:

“A man need not possess the highest expert skill, it is well established that it is sufficient if the exercises the ordinary skill or an ordinary competent man exercising that particular art. In case of medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards and if he conforms to one of these proper standards, then he is not negligent.”¹⁶⁶

¹⁶⁵ AIR 1969 SC 128.
¹⁶⁶ Bolon v. Friem Hospital Management Committee, (1957) 2 All ER 643.
One important case decided by the Supreme Court also deserves discussion. In A. S. Mittal V. State of U.P. 167 the Supreme Court went on to lay down certain principles regarding the liability of a doctor if he fails to conduct a test before use of ‘Saline’ on the patients. In an Eye relief Camp organized by Lions Club, eyes of 84 out of 88 patients operated upon for contract, were irreversibly damaged. The court did not pronounce any finding upon the culpable rashness or negligence of the doctor but pertinently observed.

“A mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is a negligence one.”

Upon humanitarian considerations the court directed the State Government to pay compensation to the victims. In fact the liability of state was recognized realizing its duties towards public in a welfare state.

An interesting case came up before the Supreme Court Poonam Verma v. Ashwani & others 168 where a doctor was registered as Medical Practitioner under Bombay Homeopathic Practitioners Act. He was under statutory duty not to enter the field of any other system of medicine His conduct of practicing in Allopathic System amounted to an actionable negligence. The above conclusion was arrived at by the Supreme Court as the doctor had given wide spectrum antibiotics in viral fever before a positively diagnosis was established, patient who was 35 year of age died and was getting 5700/- per month as salary. Hence plaintiff was awarded Rs. 3 lakhs as compensation. The court observed, “Negligence has many manifestations it may be active negligence collateral negligence, comparative negligence, concurrent negligence, gross negligence, hazardous negligence active and passive negligence willful reckless negligence or negligence perse, which is defined in Black’s Law dictionary as under “Negligence Perse, conduct, whether of action of omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal Ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty

167 (1989) 3 SCC 233
168 1996 (3) CPR 205 SC.
enjoined by law of the protection of person or propensity so constitutes. Hence the Court declared the doctors guilty of per se negligence.

The basis of tortious liability continues to exist with respect to health services due to the reason that the government hospitals and dispensaries continue to be exempted from the provisions of Indian Consumer Protection Act 1986.

2) **Solicitors:**

The responsibility of a solicitor is no less grave than that of a surgeon or doctor. Towards the client the liability also extends for the acts of the agent. In Ross v. Counters\textsuperscript{169} the solicitors were held liable for the negligence as they failed to notice the mistake in attestation of a will. He was engaged by a testator to draw a will, the discrepancy in which deprived the defendant of her legacy on the testator’s death. Under Indian law too an advocate is liable to an action for damages at the suit of his client, for malafied breach of duty or for a wrong independent of contact. However, under Advocates Act 1961 the legal practitioners are under the control of Bar Council of India. Bar Council of India is providing remedy to the consumer client through disciplinary committee which has jurisdiction for the cancellation of the certificate of practice. However, the effectiveness of the control mechanism referred above has been doubted as serious complaints have been reported against the functioning of these.\textsuperscript{170}

3) **Bankers**

Bankers too hold themselves as trustees of their customers for the money which has been placed in their hands and also persons of special skill. They therefore owe a duty to the customers in paying their cheques, to honour them to any amount not exceeding the credit balance due to the customer.

Any amount of negligence to make the payment amounts to negligence for the injury caused to the credit of the customer. They have been held liable for paying forged cheques without applying skill. In Bhagwan Das v. Creet\textsuperscript{171} the Calcutta High Court held that when a banker makes a payment on forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer.

\textsuperscript{169} (1979)3 All ER 580.

\textsuperscript{170} Views of Chinappa Reddy, Accountability of Professions pg. 623

\textsuperscript{171} (1903)ILR 31 Cal 249
However, the provisions of Negotiable Instruments Act, Reserve Bank of India Act 1934 and Banking Regulation Act 1949 also provide ample protection to the customer dealing with the banks.

3.6. Development of the Concept of Strict Liability in Relation to consumer Torts:

The Strict liability of the person production defective products or rendering deficient services to the consumers came to be recognized in America through cases as early as in 1962 as discussed in the former part of this chapter. It was in the interest of the consumer injured by a product, where the California court swept away the impediment of warranty action aside, along with the requirement of notice of breach. Other countries wishing to impose strict liability upon the seller of goods have examined the different theories set upon by the American Courts to ensure protection to the consumer.” If there is one general conclusion that may be drawn from the survey of products liability in America, it is that strict liability is best achieved not by tinkering with, and straining, the law of contract to fit situations which are outside its scope, but rather by creating liability in tort to provide compositions for plaintiffs having no contractual relationship with the defendant.

The legislations in England have also followed the suit and have recognized strict liability as the basis for defective products under Consumer protection Act of 1987. The law on the point will be examined in a comparative manner. An important step in the emergence of the strict tort doctrine came in 1965, when the American Law Institute adopted it in Section 402 A of the Second Restatement of Torts which was adopted by fourteen States by 1966: This Section reads:

(1) One who sells any product in a defective conditions unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the conditions in which it is sold.

(2) The rule stated in subsection (1) applies although.
(a) The seller has exercised all possible care in the preparation and sale of his product, and
(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.\footnote{172}

The comments to this section states, inter alia that:

(i) The rule is independent of the Uniform commercial code or its predecessor the Uniform Sales Act.
(ii) No reliance is necessary (in fact, the consumer need not even know who the seller is);
(iii) Disclaimers are irrelevant;
(iv) The product must have been defective when it left the hands of the seller, in a condition not contemplated by the consumer and unreasonably dangerous to him.
(v) The plaintiff must prove that he was injured by the defective product and,
(vi) The burden of proof is on the plaintiff.

After a quite long time the Parliament of England too passed legislation in 1987 on Product Liability in the form of Part I on the Consumer Protection Act 1987. The Act establishes a system of strict rather than fault based liability in respect of loss caused by defective products. However the existing remedies under law of tots and contact continue to be available, but now the focus is more on the conditions of the product rather than upon the conduct of the producer. Over the years four major sets of proposals were promulgated calling reform of the Law on Product liability, these proposals are-

(A) \textbf{Starsburg Convention,}\footnote{173} \textbf{Article 2 (c)} – A product has a defect when it does not provide the safety which a person is entitled to except, having regard to all the circumstances including the presentation of the product.

\footnote{172}{Quoted in Roberts Pasley: “Production of the purchaser & consumer under the law of USA (1969) (modern law review) at PP.252 – 253.}\footnote{173}{European Convention on Product Liability in Regard to personal injury and Death DIR 1 Jur.(76)5.}
(B) **Law Commission,**\(^{174}\) paragraph 48 – (a) a product should be regarded as defective if it does not comply with the standard of reasonable safety that a person is entitled to expect of it, and (b) the standard of safety should be determined objectively having regard to all the circumstances in which the product has been put into circulation, including in particular any instructions or warnings that accompany the product when it is put into circulation and the use or uses to which it would be reasonable for the product to be put in these circumstances.”

(C) **Person Commission,**\(^{175}\) **Paragraph 1237** – “A product has a defect when it does not provide safety which a person is entitled to except, having regard to all the circumstances including the presentation of the product.”

(D) **EEC Draft Directive,**\(^{176}\) Article 4 – “A product is defective, if being used for the purpose for which it was apparently intended it does not provide for persons or property the safety which a person is entitled to except, taking into account all the circumstances, including its presentation and the time at which it was put into circulation.”

The crux of each definition is undoubtedly the consumer expectation test, though the explanatory passages of the proposals make it clear that, the definition of defectiveness is based on the safety of the product, and that it is “irrelevant whether a product is defective in the sense that it cannot be used for its intended purpose.” The Law Commissions developed this aspect further by observing;

“In our consultative document we suggested that there were two possible approaches to the definition of defect. One was to make the definition turn on Safety; the other was to make it turn as merchantability. Having regarded to our general conclusion in this report that strict liability should be confined to personal injuries; the latter approach is less suitable.”

The Indian Consumer Protection Act 1986 defines the words ‘defect’ under Section 2(f) “defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or as in claimed by the trader in any manner whatsoever in relation to any goods, and the section 2 (g) defines ‘deficiency’ as

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\(^{174}\) 1977 Cmnd 6831.

\(^{175}\) 1978 Cmnd 7054

\(^{176}\) Com (79) 415
under “deficiency means any fault imperfection shortcoming or inadequacy in the quality nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.”

The above two definition are much ahead of those given under English and American Laws. It has no place for recognizing consumer expectation test. It is based upon the standard fixed by statutes or warranted by the trader selling the goods or rendering the services. It appears that Indian legislature was aware of the controversies faced by the American Courts in applying the consumer expectation test. But in spite of the intention of the legislature the English Courts cannot rule out the application of consumer expectation test in England because under section 3 of the English C.P. Act 1987, there is a defect in a product if the safety of the product is not such as persons generally are intended to expect. This section also recognizes that various factors and circumstances are also to be taken into account.

In United States, Section 402 A as seen above also rests the liability in tort upon this test as for liability the product must be in a defective condition reasonably dangerous. These words have caused much difficulty in United States. Some of the Courts have adopted cost benefit approach to defectiveness, involving a set of factors required to be weighted in a cost benefit or risk utility analysis. Since this approach is filled with difficulty, the other Courts have undermined the cost benefit approach in favor of more intuitive consumer expectation test. “The absence of judicial consensus as the proper conceptual basis of defectiveness is reflected by the diversity of views espoused by American commentators and has fostered a healthy literature on the subject.”

Montgomery and Owen assert that the “risk benefit approach is inherent in the phrase ‘unreasonably dangerous and is the traditional basis for determining negligence liability.” These call for balancing of the four factors as a strict tort decisional model. Wade Keeton, Fisher and number of other commentators have suggested alternative decisional models with variations. But the problem remains and persists in this field, where the courts are expected to make such computations.

177 It may be worthmentioning that the terms “adulterated misbranded” have been defined in Prevention of Food Adulteration Act and of spurious drugs in drugs and Cosmetics Act of India. These will help the court in fixing the scope of deficiency of products under the C. P. Act 1986.
3.7. Conclusion

In addition to the remedies under contract and criminal law, consumers have rights under tort law. Based on its numerous legal intricacies, however, tort law is not the ideal remedy for injured consumers in India. For example, the traditional doctrine of negligence imposes heavy responsibility on the plaintiff to prove each of its required elements. These traditional legal requirements naturally encourage injured consumers to pursue legal remedies under different laws not surprisingly, it is estimated that for about half a century from 1914 to 1965, only 613 tort cases came before the appellate courts.

It is clear from the above discussion that under English and American Laws the liability of producers and service providers is of the nature of strict liability, yet it is not of the nature of absolute liability. The reason is that in these countries several defenses are available to the producers resorting to which the producers can defeat the claim of the consumers successfully.

The Indian law of torts apart being less developed is also based upon English law of torts and upon the decisions given by the English courts. Hence the Indian Consumers will also have to take recourse to the decisions given by the English courts on the product liability domain in order to base their claims under law of torts. But under English Consumer Protection Act 1987 the liability has been based upon strict liability. As a result of this product liability under law of torts has been made more consumers oriented as the strict liability has been supported in place of negligence based liability in England. It is relevant to mention here that the Indian law under C.P. Act 1986 bases the product upon the negligence of the trader and the service provider. Therefore the Indian courts while dealing with the product liability under law of torts will either follow the Common Law principles of negligence based liability or the strict liability as propounded in the case Ryland v. Fletcher and under C.P. Act 1987.

Thus it may be submitted that the Indian courts are not bound to accept any of the above principles laid down by the English courts. It has come to be established in India through the decision given by the Supreme Court in M.C. Mehta v. Union of India and Bhopal Gas Tragedy cases that the Indian Courts have gone much ahead with respect to product liability by not applying the exceptions to the strict liability
laid down in Ryland v. Fletcher by the English Courts. Thus the Indian Courts have
recognized absolute liability in such cases wherein voluntary consumers were
involved as suffers. It will therefore be right to say that the aforesaid approach of the
Supreme Court deserves to be applied to the cases of voluntary consumers also under
Law of Torts. Indian Courts can therefore provide for better protection and remedies
to the Consumers by applying absolute liability concept and strict liability where the
facts of the case demand it. This approach will be required especially in such cases
where the consumer will not get proper relief under the C.P. Act 1986 due to
negligence based liability recognized there. Then only the consumer’s interest will get
proper recognition and protection but it shall be very difficult for the consumers to
move to the ordinary courts under law of torts due to the requirement of court fees.

The orthodox legal requirements under the law of torts and contracts forced
the policy makers to craft specific legislation to protect consumers. As a result, the
Consumer Protection Act of 1986 was enacted with the objective of providing “cheap,
simple and quick” justice to Indian consumers.