Criminal sanctions and civil liabilities are imposed on traders as social responses towards abusive trade practices. The former punishes the offender by imposing corporeal punishment whereas the latter compensates the aggrieved by allowing the recovery of damages for the loss suffered. The fundamental law of the land, namely the Constitution, enables citizens to compel traders to follow quality standards by invoking fundamental rights. The instrumentalities of public interest litigation and class actions are often used for this purpose. In the modern world, promotion of market competition is regarded as the ideal method for quality control. In spite of its inadequacies in achieving all its desired results, free competition certainly evokes quality consciousness among traders and consumers alike. It is necessary to examine the constitutional dimension of consumer protection and the competition law of the country to assess its efficacy in the new economic scenario.

In spite of the enactment of various statutes on quality control, the common law principles of tort and contract are also increasingly used even today. In fact most of the modern statutes are embodiments of the principles evolved by courts under common law. For example, the product liability laws of today are extensions of the common law principles of the tort of negligence. The laws relating to representations, implied terms, exclusion of contractual liability and advertising controls are extensions of contract law principles. The relevance of these common-law remedies is probed for a better understanding of modern statutes.
The Consumer Protection Act, 1986, apart from providing an alternative mechanism for dispute settlement, has given a useful legal framework for quality control measures. The working of the Consumer Protection Councils and Consumer forums show that they can also be used as effective tools for quality control. Similarly the trademark law, essentially designed to promote traders' interest, is also used to advance consumer interest as well. The modalities and methods adopted for this purpose also deserve close scrutiny.

**Common Law Principles on Quality**

In the past, the judiciary contributed considerably in specifying the basic obligations of the traders dealing in consumer goods. Accordingly, the goods sold are insisted to be of merchantable quality and reasonably fit for their purpose. The basic obligation on traders who provided services was that they must carry out their work in a proper and workmanlike manner. But traders frequently sought to exempt themselves from these basic obligations by the incorporation of appropriate exclusion clauses in their contracts. The courts, relying on the principle of 'freedom of contract' allowed such exemption clauses even when there was an obvious imbalance of bargaining power. The common law could not adequately cope with this problem. This is evident from the remark made by Lord Devlin. He said:

"The courts could not relieve in cases of hardship and oppression because the basic principle of freedom of contract included freedom to oppress."  

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Attempts by certain judges to combat exemption clauses had led to a good deal of judicial conflicts, which resulted in bringing down the image of common law. But the courts' rulings on ‘reasonable notice’ of exemption clauses together with construction of ambiguity in the wording of exemption clauses against the traders were sources of immense relief for the consumers. Moreover, the judicial inertia to exemption clauses when there was fundamental breach of a contract also accorded positive advantage to consumers.

The notable contribution of the common law to consumer protection was the landmark decision of the House of Lords in Donoghue v. Stevenson. It was decided by their Lordships that a manufacturer could be made liable in damages for the tort of negligence to anyone who is killed or injured or whose property is damaged by a defective product. For this purpose it is to be established that there was lack of care on the part of the manufacturer or his employees. This decision led to a series of judgments establishing a duty of care to the consumer on the part of manufacturers of different types of goods such as hair-dye, underpants, cars, elevators and many others. The ‘duty of care’ has been extended from manufacturers to cover repairers, assemblers and retail...
dealers. A mere distributor or supplier may not actively create a danger in the same way as a manufacturer can have, but he too may be under a duty to make enquiries or carry out an inspection of the product. If it is found dangerous for some reason, which he should have known, his failure to warn about it will amount to negligence.

The duty of reasonable care has been extended to any container, package or pipe in which it is distributed and also to the labels, directions or instructions for use that accompany it.

A study of the common law contribution towards consumer protection in the latter part of the 20th century shows many observations concerning the quantification of damages for defective products. The courts started allowing damages for tort or breach of contract not only in respect of physical injury, damage or financial loss but also for distress and disappointment. The Court of Appeal decision in Jarvis v. Swan Tours, can be cited as an example. The appellant, an English solicitor, booked a holiday in Switzerland on the basis of a brochure issued by the respondent tour operators. The brochure had promised a welcome party on arrival, afternoon tea and cakes, a bar that would open on several evenings a week and a charming owner who spoke fluent English. To the dismay of the

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13 Watson v. Buckley, supra n. 7, where the distributors of dangerous hair dye was held liable since they advertised it as positively harmless and requiring no tests.
14 See for example Chaudhury v. Prabhakar, [1989] 1 W.L.R. 29. In this case the court held a gratuitous agent inspecting the property liable to the principal.
15 Donoghue v. Stevenson, supra n. 6 at p.595 per L.J.
solicitor there was no welcome party. He was not served with the nice swiss cakes that he was hoping for. For tea, there were only potato chips and dry nut cakes. The bar was an unoccupied annex kept open only one evening a week and the swiss owner could not speak English. The Court of Appeal held that the solicitor was entitled to be compensated for the distress and disappointment and awarded twice the cost of the holiday as damages.

It can be seen that the common law courts succeeded in extending liability of producers for defective goods. However, in dealing with the sweeping exclusion clauses, the common law courts were not successful. This lacunae was filled by legislative intervention

The Law of Torts and Quality in Goods

The modern principles of product liability law were originated in the common law principle of the tort of negligence. The landmark decision of the House of Lords in Donoghue v. Stevenson is an obvious example of the adaptation of the tort of negligence in determining the liability of manufacturers and producers of defective products. In that case their lordships held that a manufacturer owes a duty of care to consumers in respect of the safety of his product.

Lord Atkin has enunciated the manufacturer's duty of care 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

19 For a detailed discussion on this point, see supra Ch.4.
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 that reasonable care.\textsuperscript{21}

Later cases have raised the question whether a manufacturer owes duty of care to a consumer who suffers economic loss including diminution in value of the defective product itself. The English law seems to be reluctant to such a duty except in most extreme cases. In other situations a producer owe no duty of care in respect of pure economic loss. The consumer in such cases will be confined to an action for breach of contract, if such a contract exists.\textsuperscript{22}

In \textit{Muirhead v. Industrial Tank Specialities Ltd.},\textsuperscript{23} the plaintiff conceived a scheme to supply lobsters at times of high demand by keeping them in tanks. He purchased the tanks from the defendants. Due to the improper functioning of the pumps attached to the tank, large number of lobsters died and the plaintiff suffered loss. There was a good claim for breach of contract against the defendants, but they were insolvent. Hence, the plaintiff sued the French manufacturers of the pumps with whom he had no contract alleging that they were negligent in supplying the equipment, which was not suitable for use in English voltage conditions. The court allowed damages to be recovered for dead lobsters but the plaintiff failed in his claim to recover the cost of pumps and profits that could have been made in the business had the pumps functioned properly. Their Lordships opined that the manufacturers duty to take care to the ultimate consumers, who are not in

\textsuperscript{21}11032\textsuperscript{.}\textsuperscript{w.c. 562.}
contractual relationship with him, is confined to not causing damage to persons or property. The damages occurred due to loss of business because the pumps were unsuitable for their purpose occurs in a claim in contract but not in tort against the manufacturers.

The Extent of Manufacturers' Duty to Take Care

The extent of the duty of care to be taken by the manufacturers was also considered by courts in various cases. The consensus appears to impose a duty to take reasonable care. However, what amounts to reasonable care is determined by a standard framed by the Court. Manufacturer's negligence, as it developed in the nineteenth century, meant that businesses were not responsible for industrial accidents or for injuries from defective products unless it could be established that they were at fault. The courts were justified in adopting this approach since liability without fault may ruin infant industries. The anxiety of the courts to save new industries though justified is not conducive to the notion of consumerism, as it exists in the present day.

Gradually there was a visible change in the judicial philosophy towards negligence liability particularly in the industrial sphere. This was partially due to societal apathy against the miseries caused due to failure of the law in not compensating injured persons and partly due to the feeling that industry no longer require the same degree of protection as before. The complex and sophisticated

nature of the products and parliamentary efforts to compensate parties for defects in products encouraged manufacturers to take steps to prevent defective products getting into the market.

In the United States also similar development occurred. In McPherson v. Buick Motor Co., the New York Court of Appeal held that the car manufacturer must compensate the consumer who had been injured when one of the car wheels collapsed because of a defect. The court expressed the view that the manufacturer had been negligent because he could have discovered the defect by a reasonable inspection. It is to be noted that in Britain, this principle was adopted by the House of Lords in Donoghue v. Stevenson only after many years. Subsequent cases clarified the position. Accordingly, the duty of care that the manufacturers entail includes the duty to see that products are designed to ensure reasonable safety to consumers. It was further held that manufacturers must have an adequate system of quality control to prevent the occasional defects in a product. Moreover, manufacturers have a duty, while marketing products, to attach instructions or warnings when it is not clear to consumers that there can be a danger. Manufacturers may be held negligent if they fail to warn about, recall or stop marketing a product once it is discovered by them to be dangerous.

30 Watson v. British Leyland (U.K.) Ltd. Product Liability International, (1980), pp. 156-160, as quoted in David Oughton & John Lowry, Text Book on Consumer Law, Blackstone Press Limited, London (1997), p. 186 & 187. In this case it was held that the manufacturer's failure to take reasonable remedial steps even after discovering that a range of its cars suffered from an axle defect due to which the wheels might be detached during use, amounted to failure to take reasonable care and hence also liable for not providing sufficient warning to the consumers.
A more recent exposition of law concerning the manufacturer’s duty after putting the product into circulation came out from the case *Carrol v. Dunlop Ltd.* Dunlop disputed their liability for tyre defects in a range of their tyres, which were in use since 1981. They or their agents had received over 300 complaints from worried motorists about the safety of this brand of tyres. But nothing had been done to alert the public to the danger and no report had been made to the Ministry of Transport. The Court concluded that a responsible manufacturer ought to have kept an eye on the number of complaints received and warned the users of the product if there exists any substantial risk of injury in normal or unforeseeable conditions. In all the above circumstances the manufacturers should at least adhere to current standards of practice in their particular industry. The adherence by itself is not conclusive evidence that the duty of reasonable care is satisfied. Compliance with the standards prescribed by voluntary bodies might also be necessary to satisfy the duty of reasonable care. However, manufacturers are not liable for design defects, which they could not have foreseen, given the state of scientific knowledge existing at the time.

In order to establish that a manufacturer has broken the duty of reasonable care, consumers can in many cases seek assistance from the doctrine of *res ipsa loquitur*. Under the doctrine, the very fact that the defect has occurred raises a rebuttable presumption of negligence on the manufacturer.

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33 *ibid*
34 *ibid* This is called the ‘state of art’ defense.
Grant v. Australian Knitting Mills\textsuperscript{35} may probably be the best example to illustrate this point. Here the consumer contracted dermatitis due to the presence of excess chemicals, which remained in the woolen underclothes manufactured by the defendant. The House of Lords opined that it did not suffice for the manufacturer to show that he had a system of eliminating excess chemical or that it had produced millions of similar garments without being complained by anybody. According to their Lordships:

"Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances even if the manufacturers could by apt evidence have rebutted that inference they have not done so."\textsuperscript{36}

Similar was the case in Lockhart v. Barr.\textsuperscript{37} Here, a consumer bought a bottle of soft drink and was injured by drinking its contents since it was contaminated by phenol. Without any hesitation the House of Lords held that they could draw the inference of negligence. It was not necessary for the consumer to prove exactly how the presence of phenol had come about. The inference can be drawn in clear cases like those involving foreign matter in sealed containers or foreign substances in clothing.

In spite of the res ipsa loquitur doctrine coming to the rescue of consumers in certain instances, issues may become complex and complicated if the defect can be attributable to a faulty component supplied by another. The consumer’s discovery of the defect might have occurred very late. Still the manufacturer of the

\textsuperscript{35} [1936] A.C. 85.

\textsuperscript{36} Id. at p.101.

\textsuperscript{37} [1943] S.C. (H.L.) 1, as quoted in Ross Cranston, supra n. 32., at p.150.
finished product is liable if the consumer succeed in proving that he failed to take reasonable care by not checking the reputation of the supplier or by failing to carryout random tests on the components supplied.  

**Inadequacy of the Law of Negligence to Protect Consumers.**

Consumers often confront practical problems in making successful claims in negligence. In order to establish negligence regarding complex products, consumers may require knowledge of the manufacturing process, means and measures of quality control and the system of distribution. Manufacturers will not make available those informations freely. The circumstances in which a consumer can obtain recovery of the information are also limited. Therefore, consumers may often find their claims defeated or their damages reduced. This is because of certain standard defenses to an action for negligence available to the manufacturers.

The inadequacy of the law of negligence to take care of product quality and safety can best be explained in the context of the *Thalidomide* tragedy. *Thalidomide* was promoted widely as a safe tranquilizer without side effects. It was produced by Chemise Gruenenthal, a German Company. It was manufactured in several countries under licence. Its marketing resulted in nearly ten thousand children being born deformed. This tragedy demonstrated the total inadequacy of the law of most countries either to prevent the marketing of an unsafe drug or to compensate those injured. The first difficulty that came up was the absence of clear authority as to whether the common law provided a remedy for those suffering from a pre-natal injury caused by use of a product. Another question was whether the company had

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39 The standard defenses are: (i) that they voluntarily assumed the risk and (ii) that their claim is brought too late and falls outside the limitation period.
fallen below the standard of care in marketing the drug or withdrawing it once evidence of its effects became apparent. The company had subjected the drug only to a limited number of unsystematic clinical tests. Most of these tests were conducted by doctors who were in regular commercial relationship with the company. They lacked special training for this purpose. Early reports of adverse side effects were suppressed by the company who misrepresented when doctors enquired whether such side effects had been previously encountered. They also tried to suppress unfavourable reports and promoted favourable publicity by dishonest means.\textsuperscript{49} The British distributors through their advertisements claimed that the drug could be given with complete safety to pregnant women and nursing mothers. They carried out no scientific tests themselves before marketing the drugs to establish this claim. The fundamental question was whether the distributors were negligent in not doing so. They argued that tests for teratogenic effects were not customary at that time. Scientific opinion prevalent at that time did not conceive that drugs would damage the developing foetus. It was really doubtful for all concerned that negligence in the circumstance would be established. The court approved a settlement for some of the children.\textsuperscript{41} The spread of social discontentment and threat to boycott other products of the distributors persuaded them to come to a far more favourable settlement.\textsuperscript{42}

\textsuperscript{49} For the Thalidomide episode, see Harvey Teff and Colin Munro, Thalidomide - The Legal Aftermath, Saxon House (1976); Insight Team of Sunday Times, Suffer the Children, Future, London, (1979); Robert Nilsson, Thalidomide and the Power of the Drug Companies, Penguin, Harmondsworth (1972).


The common law remains unreformed regarding compensation for persons suffering injury when a drug unexpectedly proves to be unsafe. Still compensation depends largely on proof of negligence.

The Fault Principle

It is seen that the law of tortious liability is mainly built upon the fault of another, which takes the form of the intention to injure or negligence. Fault generally is considered to be the natural standard of liability. Morally, it seems to be right when a person who injures another through his fault should pay compensation. The reason for the 'fault principle' taking hold in tort law has been attributed to the pressure from newly formed industrial concerns of the 18th and 19th Centuries to save itself from the threat of strict liability in respect of many inevitable accidents. The moral and legal basis of the fault principle has been disputed by academics for more than one reason and has pointed out the issues and problems. The inadequacies of the fault principle to compensate the victims have accounted for the evolution of the rule of strict liability.

The Rules of Strict and Absolute Liability

Under the regime of strict liability, it is not necessary for the plaintiff to prove that the injury was attributable to the defendant's fault. It is enough that the defendant has caused the plaintiff's injury. The modern law has adopted strict liability only in exceptional cases. Recognition of the rule of strict liability in the classic case of

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44 See generally, Peter Cane, *Atiyah's Accidents, Compensation and the Law*, Butterworths, London (1999). Prof. Atiyah, in this book has attacked the fault principle on many counts. He argues that (i) the compensation payable and the degree of fault bears no relation; (ii) the compensation payable and the means of the defendant are not related; (iii) the defendant may be liable without being morally culpable and vice-versa; (iv) fault principle pays scanty attention to the conduct and needs of the plaintiff; (v) justice may require more often than not compensation without fault and (vi) it is difficult to adjudicate allegations of fault.
Rylands v. Fletcher was followed sooner by efforts to restrict its scope and application to a large extent even though the case itself had provided for many exceptions. The inability of the common law to develop any significant breakthrough has resulted in the enactment of a number of statutes imposing liabilities of this nature in England.

The Pearson Commission had in its report in 1978 recommended for introduction of strict liability regimes in areas of rail transport, defective products and drugs. It had also recommended that strict liability in respect of personal injury caused by dangerous things and activities should be made on a statutory basis. In making such a recommendation, the commission has taken out two guiding concerns. The first is the insurability of the risk in question by the person liable, cheaply and easily than those who are likely to be injured. The commission further concluded that in cases of defects in products, the victims often experience difficulty in proving fault.

The decision rendered by the Supreme Court of California in Greenman v. Yuba Power Products, following and approving its own decision pronounced in 1994 by Justice Traynor in Escola v. Coca Cola Bottling Co. can be cited as an

45 (1868) L.R. 1 (H.L.) 300.
46 See Mark Lunney, supra. at pp.569-578.
47 The strict liability rule in this case was held to be inapplicable in cases of: (i) natural user of land, (ii) act of god, (iii) act of stranger or the act of the plaintiff himself, (iv) the thing escaped due to the consent of the person injured and (v) statutory authority for causing the injury.
50 id., para. 1642.
51 ibid.
52 id., para. 316.
53 377 P 2d 897 (1963) as quoted in Mark Lunney, supra. at p.794.
54 150 P 2d 436 (1944).
obvious argument in favour of imposing strict liability in cases of defective products.

His Lordship said:

"I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one .... Even if there is no negligence .... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products to life and health inherent in defective products that reach the market .... The cost of an injury and the loss of life or health may be an overwhelming misfortune to the person injured and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business".

The Council Directive 85 of the European Economic Community55 has also emphasized the 'deterrence' basis of the strict liability doctrine. It states that liability without fault on the part of the producer is the sole means of solving the problem of damage caused to consumers by the defectiveness of his product, which is peculiar to the modern age of increasing technicality. Strict liability according to the Directive reduces the flow of defective products to the market and increases its overall economic efficiency.

The necessity of making the manufacturer absolutely liable for dangerous industrial activities has also been propounded by Chief Justice P.N. Bhagwati of the Supreme Court of India in M.C.Mehta v. Union of India.56 It was opined that the rule of strict liability and its exceptions that we find in Rylands v. Fletcher was evolved at a time when the developments of science and technology has not taken place as at

present. Therefore, it cannot afford any useful guidance⁵⁷ in fixing the standard of liability of the present market, which is highly complex. Moreover, the rule is not in tune with the constitutional norms and the needs and desires of the present day economy and social structure. Commenting on the need to formulate new rules of liability for inherently dangerous industries, the court said:

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of ... the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the ... activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."⁵⁸

The liability of the enterprise in such situations has to be strict and absolute.⁵⁹ This liability in the opinion of the court shall not be subjected to the exceptions provided to the rule of strict liability in Rylands v. Fletcher.⁶⁰

The Supreme Court's enunciation of a rule of absolute liability devoid of any exception no doubt is a significant contribution to the law of tortuous liability in India. However, it is very pertinent to note that the court in this

⁵⁷ *Id.* at p.420.
⁵⁸ *Id.* at p. 420-421.
⁵⁹ *Id.* at p.421.
⁶⁰ *Ibid*.
case was addressing itself to a mass disaster where the judicial mind of the judges got disturbed. Such an overwhelming response cannot be expected of from courts in normal isolated cases of hazards caused by industrial products. This is evident from the fact that ever since this decision in 1987, no significant breakthrough has taken place in cases of products liability in India. What is required is the enactment of a law stipulating strict liability on manufacturers for defects in products.

**Strict Liability: Recent Trends**

The Thalidomide tragedy discussed above pointed towards the need for reforms in negligence law concerning defective products. Strict liability on manufacturers has been suggested as the alternative. The US courts have adopted strict liability for defective products. The US courts developed this principle from the English law of warranty action. The U.S. courts adopted the idea of implied warranty undertaken by manufacturers of products that their products are free from defects. Now it is accepted by law that manufacturers and distributors are liable to any person who is injured by a defective product even if the business has exercised all possible care.

The British law had strict liability provisions at least in two legislations. But the defenses permitted by these statutes made them virtually ineffective.
There were pressures for legislation to introduce absolute liability for manufacturers of defective products that cause personal injury and property damage. The European Economic Community, a Convention of the Council of Europe, the Law Commission of England and the Royal Commission recommended to effect changes in the law.

The British Law Commission has given many reasons for imposition of strict liability on producers of defective goods. The first argument is that losses associated with any defective product should be borne by the manufacturer who creates the risk by putting it into circulation for commercial gain. Secondly, the easiest way of spreading the loss fairly is to place it on the manufacturer who can recover the cost of insuring against the risk in the price charged for a product. Thirdly, it is desirable to impose liability on manufacturers because they are in the best position to exercise control over the quality and safety of products and they can conveniently insure against the risk. Finally, it is desirable to bring the law in line with consumers' expectations created by advertising and other promotional techniques adopted by manufacturers and sellers.

The most serious objection to strict liability is the cost. It has been stated that imposition of strict liability on manufacturers would give rise to price increase since


70 Law Commission, Liability for Defective Products (supra), pp.6-7 and 11-12.
they will transfer their burden to the consumers. However, in view of the United States experience, it has been stated that insurance expenses to cover the risk adds only a small amount to the manufacturing costs.71

Common Law Principles of Contract and Quality Assurance

Product quality issues are regarded as a matter falling largely within the province of the law of contract. If a product is not qualitatively sound, it will defeat consumer expectation. The consumer's loss is largely economic and is different from personal injury or damage to property arising out of a defective product. This does not mean that the physical damage such as personal injury suffered as a result of eating a substandard article of food or damage to property other than the defective product itself are not recoverable in an action for breach of contract. It has long been accepted that such physical losses are actionable since they may be regarded as consequential upon the defectiveness of the product itself, provided the damage is foreseeable.

Where a product suffers from defect in quality, the consumer's principal remedies will be against the retailer rather than the manufacturer or producer of the goods. The retailer of goods becomes a guarantor of the quality and safety of the goods he sells.72 The reason in most cases is the absence of privity of contract between the consumers and the manufacturer.73

72 See for example, Godley v. Perry, [1960] 1 All E.R. 36 (Q.B.). In this case the retailer was held liable for eye injuries caused to the child purchaser of a defective catapult. Similarly, in Wilson v. Rickett Cockrell & Co. Ltd., [1954] 1 Q.B. 598, the seller of a brand name domestic fuel was held liable for damages caused to the plaintiff.
73 The requirement of privity of contract is abandoned in England.
Since the predominant means by which a consumer may obtain redressal for defects in the quality of goods, he or she acquires, will be under the law of contract, it may be necessary to consider the different varieties of contract based on which goods are generally supplied. In many instances, the contract will be one of sale within the meaning of the Sale of Goods Act.

It is the sale of goods legislation that implies many terms into a contract for the sale of goods, which favour the consumers considerably. As seen earlier, some of these implied terms would not translate directly to all contracts for the supply of goods since all such contracts may not involve in the transfer of property. But a consumer of goods, supplied under a contract of hire or a contract for work and materials, is likely to expect the goods supplied to satisfy reasonable standards of quality as in the case of an outright purchase.

The Sale of Goods Act, 1930 defines a contract for sale of goods as one under which 'the seller transfers or agrees to transfer the property in goods to the buyer for a price'. Because of this definition, any contract for the supply of goods, which does not have as its principal object the transfer of property in goods, will not fall within the Act. Similarly, if a contract involves the transfer of possession, but not the property in goods, as in the case of contracts of bailment, the contract fall outside the scope of the Sale of Goods Act. Since the very purpose of a contract for the sale of goods is to facilitate the transfer of property in those goods, if a contract serves some other predominant purpose, it is likely that the contract falls outside the scope of the Sale of Goods Act. For instance, a contract for hire purchase, which

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74 See, The Sale of Goods Act, 1930, s.4 (i). For corresponding English law see, the Sale of Goods Act, 1979, s. 2(1).
confers on the consumer an option to purchase as opposed to an obligation to purchase, is not a contract for the sale of goods. But in England, terms identical to those, which apply to sale of goods contracts, are implied in hire purchase contracts. Restitutionary Remedies and Quality Control

The remedy of restitution is based on a reversal of an unjust enrichment by the defendant at the expense of the plaintiff. A restitutionary remedy may arise quite independently of any contract. Such a situation may arise where there has been an induced mistake of fact caused by a deliberate misrepresentation, which results in a transfer of wealth, by the plaintiff to the misrepresented. In those circumstances, the enrichment of the defendant can be reversed through a court order for rescission of the contract entered into by the consumer and return of the benefit received. In the context of restitution within the contract, the main reasons why enrichment may be regarded as unjust are that the benefit has been conferred by mistake or due to a misrepresentation or by compulsion of some sort.

Generally, if there is breach of a valid contract, the appropriate remedy is an award of damages to protect the plaintiffs' expectation. Hence, what matters much is the loss suffered by the plaintiff. However, in case of a serious breach of contract, one of the options open to the plaintiff is to terminate his performance obligations. In these circumstances the plaintiff may seek to recover any payment he has made on the ground that there has been a total failure of consideration. This remedy is

76 For a brief discussion on the restitutionary remedies available to consumers, See David Oughton and John Iawry supra n. 30 at. pp.138-144.
restitutionary in nature since the contract has come to an end with the result that the plaintiffs' expectation interest is no longer protected.\(^7\)

**Protection of Trademarks and Quality Control**

Trademarks,\(^7\) property mark\(^9\) and brand names\(^8\) occupy a unique position in the market. Many products are identified through their trademarks and brand names. Manufacturers are quite often distinguished through the different trade marks applied to their goods. Consumers use the trademark as the shortcut to know the manufacturers. The quality standards of many products can be easily discernible by the consumers solely by looking at the trademarks. The trademarks in this sense might have established a good will among the consuming public and the consumers see the invisible manufacturer through the trademark. The good will and reputation that the manufacturer acquired in the market over the years by producing quality goods has in common law, taken the form of an incorporeal property capable of legal protection.

The thrust of common law and statute law while protecting trademarks was to protect the owner of the trade mark from invasion by another into the property rights. Therefore, against violation of the property rights in trademarks only the owner of the trademark or his assignee could complain and no others. Right over trade marks, being a private right, was not enforceable by consumers. Hence,

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\(^7\) *Ibid.*

\(^8\) The Trade and Merchandise Marks Act, 1958, S.2(1)(j) defines a trade mark to include any device, brand, heading, label, ticket, name, signature, word, letter or numerical or any combination thereof.

\(^9\) A property mark is used for denoting that a moveable property belongs to a particular person. While trademark denote the quality of goods the property mark devotes the ownership in them. For a detailed discussion on the difference between the two, See Salil K. Roy Chowdhary & H.K. Saharay, *Law of Trade Marks, Copy Right, Patents and Designs*, Kaimal Law House, Calcutta (1999), p.446.
trademark protection was entirely within the domain of the owners of the trademarks.

In the present day global market, protection of trademarks and brand names is not the exclusive concern of its owners. Trademarks and trade names provide many advantages to the consuming public too. The trust and confidence which the public repose on a product identified through a brand name or a trade mark will be jeopardized when the goods supplied through that trade mark is entirely different from the one produced by the original manufacturer. Hence the law allows both traders and consumers to initiate action to protect trademark and trade name. The traders exercise this right through infringement action and passing off action. These protections ensures quality and genuineness of consumer products.

A trademark can be described as a sign that individualises the goods or services of an establishment and distinguishes them from the goods or services provided by its competitors. A definition of this type attributes two main functions to the trademark viz. (i) it indicates the source or origin of the product from where it comes and (ii) it gives the product a unique personality of its own. In the market-driven economies of the modern world, trademarks operate as an important source for product differentiation especially in consumer goods. A consumer normally attributes certain qualities with the products available in the market sold under different trademarks. A trademark thus helps the consumers to attach certain characteristics such as quality, durability, performance, and efficiency and after sales services. The

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80 Brand names are letters or words or numerical by which a product is identified and asked for. Also see for details Salil K. Roy et. al., ibid.
consumer, while making a choice, assumes about the quality of the product sold under a trademark. He expects the manufacturers to maintain certain standards irrespective of who makes the product or where it is made. Therefore, a trademark creates a phantom manufacturer, who through the distinct production processes ensures that goods of uniform quality are made available to the consumers always.\textsuperscript{82}

However, this perception is only notional. The trademark laws all over the world do not require the proprietor to maintain any declared quality or performance. The issue of standards to be maintained is entirely at the discretion of the enterprise. If it feels that the benefits from lowering quality outweigh the loss in market share it may confront, it may proceed with selling goods of inferior quality. The stake for the proprietor of the trademark is the goodwill he has been able to create for the particular brand. Thus, the consumer goodwill is the measure of the success of a trademark and therefore, a source of its economic value. Building up of goodwill requires heavy investments and adoption of fair and prolonged marketing techniques. The actual domain of goodwill lies partly with the consumers' psychology and partly with the quality, consistency and performance of the goods the trademarks represent.\textsuperscript{83}

The enormous amount of economic value a successful trademark has in the market called for their protection in law. From the consumers' perspective, trademarks play a key role in facilitating their choices. However, trademarks law essentially functions in favour of the proprietors for their profit maximisation.


\textsuperscript{82} \textit{Id}. at p.7.

\textsuperscript{83} \textit{Ibid}. 
Trademarks in fact establish a monopoly of its use and application on its proprietor, who strives for its non-use by others even on different goods or services. The trademark owners, through advertising campaigns, create brand loyalty and establish product differentiation. The end result would be the creation of an enviable goodwill and market power, which may nip competition from others and can also place an entry barrier for new firms producing same or similar goods into the market.

Property in a Trademark

Trademarks confer on its owners two types of property rights. All rights attached to the trademark primarily are in a form of intangible property. Secondly, as stated earlier, a right of goodwill as distinct from property is created which can be sold or even shared by licensing. These two forms of rights enjoyed by owners of trademarks play an important role in the business.

Modern Role of Trade Marks

In general, trademarks perform four main functions:

(i) to identify the sellers' goods or services and to distinguish them from goods or services sold by others;

(ii) to signify that all goods or services bearing the trade mark come from a single source;

(iii) to signify that all goods bearing the trade mark are of equal level of quality, and
In its purest form, the trademarks law has two primary objectives viz. (i) to protect the consumers from confusion and (ii) to protect the investment of the owner of the trademark. Trade marks cause consumers to associate the mark with the trademark owners' product. This form of identification prevents customer confusion, mistake and deception about the source and quality of the products purchased. A consumer buying a product bearing a particular trademark is assured that another product purchased with the same mark is of the same quality. Moreover, a trademark tells a consumer that the product comes from one particular source, and it distinguishes that product from other similar products bearing different trademarks. By recognising the source of goods in this way, the consumers' search costs are also reduced. In this way, the trademarks become an easy method to identify and distinguish different products.

Trademarks law also protects the investment of the trademark owner. As stated above, consumers rely on trademarks as a means to identify the source of the goods they are buying or using. Customers repeatedly buy from the same source because of the consistency in quality of the goods coming from that source. By restricting others from exploiting the recognition and consumer goodwill, another's mark has earned the owner's efforts in developing his product stands protected. If the producer fails to maintain a consistent level in quality or reduces the quality below what consumers expect from earlier experiences, the value of the trademark to that

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84 See J.T.McCarthy, Trade Marks and Unfair Competition, Rochester, New York (1973), and Vol.1, p.86.
86 Id. at p.1853.
extent is reduced. Hence, trademark protection tends to encourage expenditures in investments on quality because improvements in quality will be recognised as coming from the trademark owners' goods and none other.

Stated briefly, the essential function of a trademark in law and economics is to indicate the origin of goods or services and to distinguish them from those of other undertakings. In other words, the role of a trademark is to act as a badge of origin distinctive in nature perceived as trademarks by consumers and those in the production and distribution chain. So long as this function is performed, the trademark will be an asset for its owner.

The Origin Function of Trademarks

The role of trademark as an indicator towards the origin of a product has been deteriorated considerably during modern times through brand proliferation. However, since consumers can trace the origin of their purchase through trademarks, it would help them substantially in their purchasing decisions. Once a product is identified through a certain trademark, it is possible for consumers to purchase it again if they are satisfied about it or to desist from its repeated purchase if they feel dissatisfied.

The Quality Function of Trade Marks

It has been stated earlier that trademarks contribute in protecting consumers against confusion in the market place. Trademarks facilitate quality checking carried out by consumers themselves through their own experience. In this sense, trademarks give a guarantee of consistency than quality. Opinions differ as to whether trade

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87 Ibid.
marked goods or services are of same level of quality or they give consistency in
quality at all.90

Quality identification function indirectly serves the consumer's interest in
providing him with better information. An unprecedented high quality is generally
expected from goods marked with reputed trademarks. However, no law expressly or
impliedly imposes an obligation on the trademark owner to maintain any specific
quality for products bearing his mark. The trademark owner is thus free to improve or
deteriorate the quality of his goods or services at any time without running the risk of
loosing his trademark rights. Normally, the trademark owner would not desire to
diminish the quality of his branded goods. Nevertheless, legally there is no obstacle
whatsoever in the lowering of quality.

Trademarks operate as the basic element in building up a reputation for the
products or services to which they are attached and to the firm providing them. Thus,
the fundamental function of trademarks is the creation of good will. Goodwill is
created by influencing the behaviour of the buyer in purchases and building brand
loyalty. This is possible only through customer satisfaction based on parameters like
price, quality, performance etc. Trademark protection in this sense would accord
indirect benefits to consumers, as they are assured of the origin of the product though
not always its quality. However, it is possible to attach liability on the manufacturer
of trade marked goods if some associated literature, leaflets or brochures or

90 See E.W.Hanak, "The Quality Assurance Function of Trade Marks", 65 T.M.R. 318 (1975) and
S.A.Diamond, "The Historical Development of Trade Marks", 65 T.M.R. 289 (1975), as quoted in
advertisements makes certain representations as to quality or performance of the product.91

Coercing the User of Trade Marks to Ensure Quality

The trademarks perform another useful function of far reaching advantage to the consumers. In the process of trademark licensing, the trademark owners not only acquire money, but also exercise a right of quality control over the licensees. In this process, the consumer is assured of the quality expected of from the product originally manufactured and marketed by the trademark owner himself. However, if the proprietor allowed his trademark to be placed on the goods on payment of royalty or for a specified price without any supervision as to the consistency or quality of the product, it may give rise to cheating the consumers.

Non-supervision as to quality requirement of licensed products can be a ground for cancellation of registration as registered user of trademarks.92 When a trademark is used without supervision of quality, under the Trade and Merchandise Marks Act 1958, it could be treated also as trafficking in trademarks.93 However, this Act had not provided for any punitive sanction against a trademark owner indulging in trademark trafficking. The recent Trade Marks Act of 1999 has withdrawn from the issue of trafficking in trademarks on the ground that such practices are minimal and it will get self-regulated by market forces.94 However, we cannot always presume that market forces by itself would work out miracles. In the interest of the consumers

91 The law in this respect is uniform for trade marked goods and others provided the producer can be traced in any way. The Consumer Protection Act, 1986 considers representation of this kind as an unfair trade practice. See s.2 (1)(r) with its explanation given in the 1986 Act.
92 The Trade and Merchandise Marks Act, 1958, s.52 (1)(d).
93 Id. s.48 (1).
94 See A.K. Bansal, supra at p.216.
in India, majority of whom are illiterate, supervision of quality of goods produced by licensees of trademarks by the proprietors of the trademarks would have been a matter of great interest. If we understand the role that trademarks perform in the market and the advantages that they confer on consumers properly, legal insistence on supervision by the proprietors on quality of goods on which their trademarks are affixed would go a long way in protecting the consumers. Law should make it obligatory for the proprietors to do so and dispel them from trafficking in trademarks by prescribing proper punishments.

Implied Warranty on Sale of Marked Goods

In spite of its obvious advantages to consumers and proprietors, the notion about the quality function of trademarks in India is often misconceived. It has been stated that even educated people do not know that a trademark by itself is not a guarantee of any quality. However, the new Trade Mark Act of 1999 has implied into the sales contract a warranty by the seller or provider of services that the goods or services marked with a trademark is genuinely applied. This provision would enable a consumer who has been misled by a falsely applied trademark or trade description – which is so rampant in the market – to be compensated by the seller or provider of services as the case may be. Consumers and consumer associations are to be sensitised about this salutary provision in the Act. Consumer vigilance depicted in this manner would certainly help in the better administration of the trademark law.

95 A.K. Bansal, supra at p.22.
96 The Trade Marks Act, 1999 s.126. See also the Trade and Merchandise Marks Act, 1958, s. 96. It is also to be noted that (i) applying false trade marks or trade descriptions, and (ii) selling goods or providing services with false trade marks or false trade descriptions have been made cognizable offences. See id. s.115.
The trademark law prescribes for two types of remedies for protection of trademarks. The civil and criminal law machineries can be put into motion to safeguard the interests of those concerned. For trademarks registered under the Act, the normal remedy is infringement action. Trademarks, which are not thus registered, the appropriate remedy would be the common law action for passing off.

The trademark law in India has been thoroughly remodelled by the recent Trade Marks Act, 1999. This enactment has divided registered trademarks into two types for actions on infringement viz. (i) registered and (ii) registered and reputed in India. In the case of ordinary registered trademarks, if a mark confusingly similar to a registered trademark is used on same or similar goods or services, it would constitute infringement if such use is likely to cause confusion in the mind of the public. In the case of registered trade marks having reputation in India, if a similar mark is used in relation to even dissimilar goods or services and it is found that an unfair advantage is being taken without due cause or the use of the offending mark is detrimental to the distinctive character or repute of the reputed registered trade mark, it would constitute an infringement. To prove infringement in relation to use of trademark on differential goods or services, it is enough if reputation of the trademark is established.

The changes made by the new Act by enlarging infringement action even to dissimilar goods or services are positively advantageous to consumers. It is known that a reputed trademark, even if applied to dissimilar goods, would persuade consumers to think that its origin is from the owner of the trademark whom they know.

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97 See the Trade Marks Act, 1999, s.29.
98 Id., s. 29(2).
99 Id., s. 29(1).
from their previous experiences of purchase. This belief in all probability would lead them to go for a wrong purchase. Extension of the infringement action to dissimilar goods and services for reputed registered trade marks would certainly save consumers from confusion since it would dispel others from using reputed trademarks to their goods or services.

The new Act also enlarged the incidences of infringement by incorporating more actions constituting infringement.\textsuperscript{100} Instances of infringement thus cover the use of trademarks or trade names even in business papers or in advertisements.\textsuperscript{101}

**The Infringement Action**

Infringement action is essentially a civil law remedy available under the law of torts. Later it is recognised statutorily by the Trade and Merchandise Marks Act, 1956. Under the Act, this remedy is made available to the proprietor of a trademark in addition to the criminal sanctions enshrined for falsifying\textsuperscript{102} or falsely applying\textsuperscript{103} trademarks. But criminal actions under the Act are confined to registered trademarks. However, civil action for damages is available for unregistered marks

\textsuperscript{100} See s. 29(2) to (10).

\textsuperscript{101} Ibid.

\textsuperscript{102} The Trade and Merchandise Marks Act 1958, s.77 defines falsification of trademark as "A person is deemed to falsify a trade mark, if either –
(a) without the assent of the proprietor of the trade mark, makes that trade mark or a deceptively similar trade mark;
(b) falsifies any genuine trademark, by alteration, addition, effacement or otherwise."

\textsuperscript{103} Id., s.77 Relevant portion of the section reads: "A person shall be deemed to falsely apply to goods a trade mark, if without the assent of the proprietor of the trade mark –
(a) applies such trade mark or a deceptively similar trade mark, to goods or any package containing goods;
(b) uses a package bearing a mark, which is identical with or deceptively similar to the trademark of such proprietor, for the purpose of packing, filing, or wrapping therein any goods other than the genuine goods of the proprietor of the trademark."
also. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trademark for the vindication of the exclusive right.\textsuperscript{104}

Infringement occurs when a person, other than the registered proprietor or a licensed user, uses an identical or deceptively similar trademark, in relation to any goods in respect of which the trademark is registered.\textsuperscript{105} In respect of some trademark\textsuperscript{106} a relief for infringement will not be granted if the use of the trademark is not likely to deceive or cause confusion.

In deciding whether there is an infringement, the following questions will be considered:

(i) Whether the defendants' trademark is identical with the plaintiffs' trademark?

(ii) Whether the defendants' trade mark contains or consists of the whole or any essential or leading features of the plaintiffs' mark combined with other matters, and

(iii) Whether the defendants' mark is deceptively similar to and is a colourable imitation of the plaintiffs' mark?

In an action for infringement it is essential that the plaintiff must make out that the use of the defendants mark is likely to deceive visually, phonetically or otherwise. Therefore, if the defendant has adopted the essential features of the

\textsuperscript{104} Trade and Merchandise Marks Act, 1958 s.28: Rights Conferred by Registration – (1) Subject to other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trademark in the manner provided by this Act.

\textsuperscript{105} The Trade and Merchandise Marks Act, 1958, s.29.

\textsuperscript{106} Trademark registered under Part B of the Trademark register. For a detailed discussion on the point see. Salil K. Roy Chowdhary and H.K. Saharay, supra n. 79.
trademark of the plaintiff, any difference in the get up and packing is immaterial. Similar is the case regarding indications relating to a trade origin different from that of the registered proprietor of the mark. In order to come to this conclusion, the broad and essential features of the two marks are to be considered. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with the product.\textsuperscript{107} The totality of the impression produced by the trademark should be such as to cause confusion or deception in the mind of the consuming public. Comparison of the marks side by side is not a sound test since a purchaser will seldom have the two marks actually before him when he makes his purchase.\textsuperscript{108}

Even though phonetic and or visual similarity in the trademarks is considered as the distinctive feature to determine whether an infringement has taken place, it may occur in case of similarity in the wholesome appearance of the two products. In \textit{Camlin Pvt. Ltd. v. National Pencil Industries}\textsuperscript{109}, the plaintiff's pencil was marked with the trademark “Camlin flora”. The defendants' pencil was marked with “Tiger flora” but in appearance both were similar. It was held that there was no similarity or resemblance phonetically or visually between the two marks. However in view of the similarity in appearance of both the pencils, which were purchased by children who would be confused, interim injunction prayed for was granted by court. However, where the plaintiffs’ registered trademark and the defendants’ trademark were dissimilar and a reasonable prudent buyer was not likely to be

\textsuperscript{109} A.I.R. 1988 Del. 393.
misled no injunction shall be granted. But when the plaintiff used the name 'Fevicol' for the adhesive manufactured and marketed by it and the defendant used "Treviscol" for similar adhesive, the court opined that the suffix "vicol" is found common in the two marks even though there is a difference in the prefix. In an overall comparison, a visual similarity in the writing style is also seen. The court held that the two marks were deceptively similar both phonetically and visually. In Bombay Oil Industries Pvt. Ltd. v. Ballarpur Industries Ltd., the plaintiffs complained that their registered trade mark 'saffola' is infringed by the defendants mark 'shapola'. Viewing the mark as a whole the court opined that there is every likelihood that the two marks may give rise to confusion to the consumers, as they are phonetically similar.

**Passing off Action**

The underlying principle in passing off action is that no man shall be permitted to sell his goods under the pretence that they are the goods of another man. It is immaterial whether the misrepresentation or deception has proceeded from a registered or unregistered user of trademark. One shall not be permitted to represent his own wares as that of somebody else.

It has long been considered an actionable wrong for a person to represent for trading purposes that his goods or his business is that of the plaintiff. It is of no consequence whether the representations are effected by direct statements or by

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using some of the badges by which the goods of the plaintiff are known. Same is
the case where colourable resemblance calculated to cause the goods to be taken by
ordinary purchasers for the goods of the plaintiff.\footnote{T.A. Blanco White, Kerly's Law of Trade Marks and Trade Names, Sweet & Maxwell, London (1966), p.361.} The concept of passing off in
brief is that the goods in question are telling a lie about themselves which is
calculated to mislead the public.\footnote{R.F.V. Houston, Salmond on the Law of Torts, Sweet & Maxwell, London (1973), p.408.} The law of passing off is designed to protect
traders against that form of competition which consists in acquiring for oneself by
gales or misleading devices the benefit of the reputation already achieved by rival

Judicial attempts to identify the ingredients that constitute the basic characteristics of passing off gave rise to substantial enrichment to the legal literature on the subject. A juristic travel into few of them will provide us with a good idea about what constitutes a passing off. The High Court of Andhra Pradesh in \textit{Teju Singh v. Shanta Devi}\footnote{Ibid.} has laid down the test to decide whether a passing off has taken place. According to the Court an answer to the question whether the words used in the trade names of the plaintiff are mere descriptive words of common use or they have come to acquire a distinctive or secondary meaning in connection with the plaintiffs' business is material. If the use of those words in the trade names adopted by another is likely to deceive the public, it is a case of passing.
off. In the opinion of the Allahabad High Court\textsuperscript{119} a passing off action would lie even if the defendants were not manufacturing or producing any goods similar to that of the plaintiff. A passing off action would lie where a misrepresentation is likely to be caused\textsuperscript{120} or a wrong impression created, as if the product was of someone else.\textsuperscript{121}

Lord Diplock\textsuperscript{122} has classified the essential characteristics of a passing off action. According to him it includes (i) misrepresentation, (ii) made by a person in the course of trade, (iii) to prospective customers or ultimate consumers of his goods or services supplied by him, (iv) which is calculated to injure the business or goodwill of another trader (in the sense that it is a reasonably foreseeable consequence), and (v) which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so.

The Delhi High Court in \textit{Hindustan Radiators Co. v. Hindustan Radiators Ltd.}\textsuperscript{123} has listed out eight distinctive features that must be established by the plaintiff for a successful action of passing off. They are:

(i) The plaintiff has been using its trading style and trade mark for quite a long period and continuously, whereas the defendant has entered into the said field only recently.

(ii) There has not been much delay in the filing of the suit for injunction by the plaintiff.

\textsuperscript{119} \textit{Bata India Ltd. v. Pyare Lal & Co.}, A.I.R. 1985 All. 242.
\textsuperscript{120} \textit{Id.} at p. 251.
\textsuperscript{121} See also, \textit{Ranga Watch Co. v. N.V. Philips}, A.I.R. 1983 P&H 418.
\textsuperscript{122} \textit{Erven Warnink etc. v. J.Townend & Sons (Hill) Ltd.}, [1979] 2 All E.R. 927 (H.L.).
\textsuperscript{123} A.I.R.1987 Del. 355.
(iii) The goods of the plaintiff have acquired distinctiveness and are associated in the minds of the general public as goods of the plaintiff.

(iv) The nature of activity of the plaintiff and that of the defendant are the same or similar.

(v) The goods of the parties, with which the trademark of the plaintiff is associated are the same or similar.

(vi) The user of the same trade mark or trade name by the defendant is likely to deceive and cause confusion in the public mind and injury to the business reputation of the plaintiff.

(vii) The sphere of activity and the market of consumption of goods of the parties are the same.

(viii) The customers of the plaintiff inter alia include uneducated, illiterate and unwary customers, who are capable of being deceived, confused or misled. 124

A more recent view on passing off can be seen in the decision of the Kerala High Court in National Garments Kaloor v. National Apparels. 125 The Court held that the plaintiff, in an action for passing off, has to establish that his products have derived a distinctive character recognised by the market. The principle of law, according to the court is that nobody has any right to represent his goods as the

124 Also see Charter Extractions Ltd. v. Kochar Oil Mills Ltd. A.I.R. 1996 Del. 144. Where the court held that it is not necessary to prove that all persons or substantial number of persons in the market are aware of the mark. It is enough that a good number of them identify the goods as that of the plaintiff. In Malhotra Tyre Service Co. v. Malhotra Tyres Pvt. Ltd., A.I.R. 1991 Del. 94, the court held that the plaintiff has to prove that the name has acquired a distinctive meaning in connection with his business. Even though the trade name adopted by the defendant is similar to that of the plaintiff, he was dealing only in tyre recharging and the defendant in manufacturing, sale and purchase of tyres and tubes. As such it cannot be held that the defendant passed off his goods as that of the plaintiff. In Khemrai Shrikrishandas v. Garg & Co., A.I.R. 1975 Del. 130, the court held that actual deception is not required to be proved but reasonable ground of apprehension of deception must exist.

125 A.I.R. 1990 Ker. 119.
goods of somebody else and to sell it in the market for his own advantage. In
general, any misrepresentation calculated to injure another in his trade or business
can be regarded as passing off.

The Supreme Court of India had the occasion to determine the concept of
passing off in *Wander Ltd. v. Antox India (P) Ltd.* The court has held that
passing off is a species of unfair trade competition or an actionable unfair trading by
which one person, through deception attempts to obtain an economic benefit of the
reputation which another person has established for himself in a particular trade or
business. The action on the tort of passing off according to the court includes a
misrepresentation made by a trader to his prospective customers calculated to injure,
as a reasonable foreseeable consequence, the business or goodwill of the other
trader.127

**Trademark Law and Consumers: a Critical Appraisal**

The law relating to trade mark protection is, essentially attuned to confer
monopoly rights on the proprietor. The goodwill and reputation that a trader has
acquired through the long and continuous use of the trademark shall remain
infallible. This intangible property is tried to be protected by the law relating to
trade marks. The epicenter of this branch of law is not consumer protection but
protection of the private property having a public flavour. However, as a result of
the protection afforded to the proprietor of the trademark, consumers also get
collateral advantage in the sense that they are saved from deception.

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127 In *Cadbury Schweppes (P) Ltd v. Pub Squash Co. (P) Ltd*, [1981] 1 All E.R. 213 (P.C), the Privy
Council opined that the respondent deliberately taking advantage of the appellants' advertising
campaign will not amount to the tort of passing off since the public are not deceived or mislead by it.
The traders go for imitation of trademarks to reap its economic advantage consequent to representing his goods as that of another trader who has established himself in the market with a trade mark which the public value most due to its inherent virtues and quality standards. The defendant lack all these and hence he wants to sell his goods as that of the plaintiff. Safeguarding the economic interest of the proprietor of the trademark thus affords protection to the consumers. Consumers are thus assured of the genuiness of their choice in their purchasing decisions, which was mainly based on its qualities.

However, the Act provisions do have some inherent weaknesses. The offences of (i) falsely representing a trade mark as registered,\textsuperscript{128} (ii) improperly describing his place of business,\textsuperscript{129} and (iii) falsifying entries in the register of trade marks\textsuperscript{130} have been made cognizable only if lodged by the Registrars of Trade Marks or any officer authorized by him in writing.\textsuperscript{131} It is true that a sustainable prosecution of the offences said above is possible only by the above said officials who are the custodians of the relevant official records. However, normal investigating agencies of the state like the police officers, consumers and consumer organizations would have been permitted to associate with the process with a view to encourage better administration of the Act. Even the 1999 Trade Marks Act has not changed the position.\textsuperscript{132} However, this recent enactment has made offences of (i) applying false trademarks and trade descriptions,\textsuperscript{133} (ii) selling goods or services with false trade

\textsuperscript{128} The Trade and Merchandise Marks Act, 1958, s.81.
\textsuperscript{129} Id., s.82.
\textsuperscript{130} Id., s.83.
\textsuperscript{131} Id., s.89.
\textsuperscript{132} The Trade Marks Act, 1999, s.115.
\textsuperscript{133} Id., s.107.
descriptions and (iii) falsification of entries in the Register of Trade Marks expressly cognizable.

Competence to lodge a complaint for trademark violation came for consideration of the Supreme Court of India in Vishwa Mitter v. O.P. Poddar. The complainant in this case was a dealer who was habitually selling the goods marked with the registered trademark. Lower court dismissed the complaint on the ground that the complainant is not the registered owner of the trademark. The High Court also dismissed the appeal on the same ground. In this appeal, their lordships of the Supreme Court held that Section 190 of the Code of Criminal Procedure, which deals with the issue of taking cognizance, does not speak of any particular qualification for the complainant. Therefore, generally speaking, any one can put the criminal law in motion unless there is a specific provision to the contrary provided for in the statute. Therefore, if the person complaining has a subsisting interest in the protection of the registered trademark, his complaint cannot be rejected on the ground that he had no cause of action or sufficient subsisting interest to file the complaint.

In State of U.P. v. Ram Nath, the Inspector of Trade Marks reported a trademark infringement to the nearest judicial magistrate. He ordered the police to investigate into the offence. The Supreme Court turned down the argument of the respondent that the Trade Marks Inspector had no right to make a complaint and

134 Id., s.108.
135 Id., s.109.
136 Id., s.115. These offences were not expressly made cognizable under the 1958 Act.
138 Id. at p.8, per D.A. Desai, J.
therefore the prosecution was invalid.\textsuperscript{140} It can be seen that the judicial decisions permit launching of prosecution for infringement of trademark, registered or not registered,\textsuperscript{141} by any person interested in the protection of that mark. It can also be argued that the consuming public also has a subsisting interest in the protection of the trademarks and trade names. Therefore, consumers can also be complainants against trademark violations. However, it is better to clarify the law by making suitable amendments made in the Trade and Merchandise Marks Act.

Enforcement of remedies is another area in which the trademarks law needs change. Trademark violations are actionable only at the instance of the proprietors or licenced users. The consumers who are deceived by the falsified trademarks find no remedy under the Act. Consumers and consumer associations are permitted to initiate civil action only under the Consumer Protection Act, 1986. Consumer associations can effectively check injustices perpetuated to the consuming public if they are permitted to approach the court under the Trade and Merchandise mark Act, 1958. Law of trademark protection must necessarily recognise this perspective.

Statutory Liability for Defective Products

In England, and in other countries in the European Union, supplementing the common law rules,\textsuperscript{142} the law imposes on the producer strict liability and obligation to compensate the consumer wherever damages are caused by a defect in the

\textsuperscript{140} It was also held in this case that the contention of abandonment of the trademark for some years by the company would not absolve the respondents from criminal liability. Abandonment operates as a ground for application to remove the trademark from the Register of Trade Marks. It does not entitle the respondents to use the trademark whether it is current or has been removed from the register. \textit{Id} at p.235 \textit{per} P. Jagamohan Reddy, J.

\textsuperscript{141} A criminal action for trademark violation can be initiated for registered as well as unregistered trademarks. See \textit{State of U.P. v. Ramnath, supra} n. 92 at p.235.
product.\textsuperscript{143} Primary liability in respect of defective products rests with the producer rather than the retail supplier. In order to make a person liable under the British Consumer Protection Act, 1987, it must be established that he has supplied a defective product\textsuperscript{144} and that the supply was in the course of his business\textsuperscript{145}. It is recognised as a defence for the producer to show that the product was not supplied\textsuperscript{146} to make profit\textsuperscript{147}.

Liability under the Act is not confined to those who manufacture a finished product. The liability extends to those who have won or abstracted a raw material and to those who have processed a natural product where the essential characteristics of the product are due to that process.\textsuperscript{148} Similarly, a person who puts his own name on a product thereby holding himself out as the producer will also be treated as a producer\textsuperscript{149}. Any person who in the course of his business imports any product from outside for supply to another is also a producer.\textsuperscript{150} If it is not possible to identify the producer or importer of a product, the Act provides for secondary liability on the part of another supplier of the product.\textsuperscript{151} For the purpose of making the supplier liable for the harm suffered by the consumer, the following requirements must be satisfied:

\begin{itemize}
\item \textsuperscript{142} The Consumer Protection Act, 1987, s.2. This section says that the liability created by this part shall be without prejudice to any liability arising otherwise.
\item \textsuperscript{143} Id. s.2(1).
\item \textsuperscript{144} Id. s. 4(1)(b).
\item \textsuperscript{145} Id. s. 46(5).
\item \textsuperscript{146} Id. s. 4(1)(b). ‘Supply’ for the purpose of the Act includes selling, hiring, lending, supply pursuant to hire purchase agreement and a contract for work and materials, exchange for any consideration. provision pursuant to a statutory function, voluntary transfer by way of gift and the provision of a source by which gas or water is made available.
\item \textsuperscript{147} Id. s.46(1).
\item \textsuperscript{148} Id., s.1 (2).
\item \textsuperscript{149} Id., s.2 (2) (b).
\item \textsuperscript{150} Id., s. 2(2)(c).
\item \textsuperscript{151} Id., s.2 (3).
\end{itemize}
(i) The consumer must have asked the supplier to identify the producer. ¹⁵²

(ii) The request by the consumer must be made within a reasonable time after the occurrence of the damage. ¹⁵³

(iii) It must have become impracticable for the consumer to identify the actual producer. ¹⁵⁴

(iv) The supplier must have failed, within a reasonable time of the request to comply with it or to identify the person who supplied him with the product. ¹⁵⁵

These provisions make it important for retailers to keep records of purchases for some more time after initial supply to the consumer, so that they can identify their own supplier, the producer or importer so as to avoid liability on themselves. If the supplier does identify the producer of the product or the person who supplied him the product, he has satisfied the requirements with the result that he will no longer be liable to the consumer.

The fundamental basis of the producer's liability is that the product is defective. A product is defective if it is not as safe as persons generally are entitled to expect. ¹⁵⁶ The consumer must prove damage, defectiveness and a causal link between the two. ¹⁵⁷ The Act identifies few factors that can be considered in order to determine the safety of a product. These include the marketing ¹⁵⁸ of the product, its

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¹⁵² Id. s.2 (3)(a).
¹⁵³ Id. s.2 (3)(b).
¹⁵⁴ Ibid.
¹⁵⁵ Id. s.2 (3)(c).
¹⁵⁶ Id. s.3 (1).
¹⁵⁸ The Consumer Protections Act, 1987, s.3 (2)(a).
get up and the provision of instructions or warning about use, expectations about use of the product\textsuperscript{159} and the time of supply.\textsuperscript{160}

The significance of identifying the 'producers intended market' lies in the safety considerations affected by the group of people targeted by him. For instance, if the product is intended for use by children, or intended for consumption by infirm or aged, it might be expected to reach higher standards of safety than food aimed at ordinary adult population. The Act also allows the court to consider the purpose for which the product has been marketed. This would enable the court to engage in a cost benefit analysis based on the objective of the producer in putting the product into circulation balanced against the risk it creates.\textsuperscript{161} It is also relevant to consider whether or not it has been supplied along with adequate instructions for use and appropriate warnings in respect of known dangers.\textsuperscript{162} If the producer provides suitable instructions for use or appropriate warnings, this may prevent the product from being defective. Therefore, the fact that a producer supplies an inherently dangerous product does not automatically subject him to the strict liability regime. He can negative the danger created by his product by warning the consumers in a suitable manner. The time of supply is considered relevant particularly in relation to the shelf-life of certain products. It is possible that certain products will remain unsold for a considerable period of time. In such circumstances, the product is judged according to the standards of safety, which prevailed at the time when he put the product into circulation.

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\textsuperscript{159} Id., s.3 (2)(b).

\textsuperscript{160} Id., s.3 (2)(e).

\textsuperscript{161} Hence the court may treat as sufficiently safe a beneficial pharmaceutical product, which contains certain inherent safety defects, provided the risks to the users are not substantial.

circulation, and not when the product is supplied to the consumer.\textsuperscript{163} It is for the consumer to prove that the defect in the product has caused him damage.\textsuperscript{164} The damage recoverable includes that for death or personal injury and for any loss or damage to property.\textsuperscript{165}

Even though product quality and safety are different, they are in fact so closely interlinked. A product, which is qualitatively poor, cannot be a safe one even though it may not cause severe safety hazards. But goods that are of high quality standards would certainly ensure safety to its consumers. Hence measures adopted to ensure safety of goods are bound to improve the standards of quality of those commodities.

In India there is no general statute dealing with product safety. However, Consumer Protection Act, 1986 provides that sale of unsafe or hazardous product can be a subject matter for lodging and compliant under it.\textsuperscript{166} But it is not made clear what products are hazardous and under what circumstance products are to be considered as unsafe. Special statutes enacted for dangerous products like insecticides, pesticides and poisons are dealing with the precautionary measures that are to be taken concerning those products. The absence of an umbrella legislation dealing with the liability of all defective products places the Indian consumers in a very disadvantageous position.

\textsuperscript{163} See The Consumer Protection Act, 1987 s.4 (1)(d) and 4(2)(a). Compliance with the mandatory requirements of a community obligation or a domestic statutory provision can also be taken up by the producer as a defence. (See s. 4(1)(a). Change in the Scientific and Technological development is also recognised as a defence under the Act. (See S.4(1)(e).
\textsuperscript{164} Id., s.2 (1).
\textsuperscript{165} Id., s. 5(1).
\textsuperscript{166} The Consumer Protection Act, 1986, s.2(1)( c ) (v). Under this section a 'complaint' means any allegation in writing made by a complainant that –
Public Interest Litigation and Quality Control

Latter part of the twentieth century India witnessed the remarkable phenomenon of judicial activism that facilitated increased access to justice for citizens belonging to different income brackets, especially those from the lower strata of the society. Through the new strategy of public interest litigation\textsuperscript{167}, courts started admitting the right of social action groups and public-spirited men to approach them when legal rights of an individual or class of persons are alleged to have been violated. This added a totally new dimension to the concept of locus standing and encouraged public-spirited citizens to litigate on behalf of the poor, illiterate and the oppressed. The public interest litigation that has proved to be an effective tool in checking administrative excesses and governmental lawlessness soon expanded its wings to issues concerning consumers among others\textsuperscript{168}.

In \textit{Vincent Panikulangara v. Union of India}\textsuperscript{169}, the petitioner was an Advocate by Profession and the General Secretary of the Public Interest Law Service Society, a voluntary organisation. He filed the present petition under Article 32 of the Constitution\textsuperscript{170} seeking an order from the court banning the import, manufacture and distribution of drugs recommended for ban by the Drugs Consultative Committee of the Central Government. The petitioner also sought the assistance of the court in asking the Government to constitute a high-powered committee to go into the hazards

\textsuperscript{167} It is otherwise called as 'social action' litigation.

\textsuperscript{168} Various environmental issues are taken up by way of public interest litigation even before consumer forums. For a detailed discussion on certain cases that has been thus agitated See Gurjeet Singh, “Consumer Organizations and Environmental Issues: The Indian Perspective”, (1994) 1 C.P.J. p. 1.

\textsuperscript{169} A. I. R. 1987 S.C. 990.
suffered by people of the country because of such drugs being in circulation and to suggest remedial measures including compensation. Even though the court expressed its view that court is not a fit forum to determine to impose a ban when experts differ, the necessity of a total elimination of all injurious drugs from the market was emphasized. The court also opined that drugs that are found necessary should be manufactured in plenty to satisfy the demand\textsuperscript{171}. However, it warned against undue competition by allowing too many substitutes, as it may tend to affect quality\textsuperscript{172}. The court expressed its view that consumer representation in the Drugs Consultative Committee must also be ensured\textsuperscript{173}. As a token of appreciation towards the petitioner’s enthusiasm in bringing before the court such an important issue he was ordered to pay compensation by the Central Government\textsuperscript{174}.

In \textit{A.S. Mittal v. State of U. P.},\textsuperscript{175} the issue of irreversible damage to the eyes of patients operated upon in an eye camp was taken up by a social organisation. Many of the patients lost their eye sight permanently due to infection of the intraocular cavity caused by the use of contaminated ‘normal saline’ to clean up the eyes at the time of surgery. It was alleged that the agencies responsible for the camp had virtually disregarded the guidelines issued by government in this regard. The court while awarding compensation to the victims of the tragedy emphasized the need for professional commitment towards proper enforcement of the guidelines. It was found that even though the guidelines insisted that the medicines used should be of standard

\textsuperscript{170} This article provides for a fundamental right to constitutional remedies through Supreme Court of India.

\textsuperscript{171} \textit{Id.} at p.996.

\textsuperscript{172} \textit{Ibid.}

\textsuperscript{173} \textit{Id.}, p.997.

\textsuperscript{174} \textit{Id.}, p.998.

\textsuperscript{175} A.I.R. 1989 S.C. 1570.
quality and verified to be so by the doctor in charge of the camp, proper verification was not done and hence the tragedy. The court also awarded costs to the petitioner organisation for espousing the cause of the victims.

*Common Cause v. Union of India* was a public interest litigation highlighting serious deficiencies and shortcomings in the matter of collection, storage and supply of blood though blood centers operating in the country. Considering the gravity of the issue involved, the court issued number of directions to the central and state governments. Among others it was ordered to establish National Council for Blood Transfusion as well as State Councils. Since 'blood' being a drug under the Drugs and Cosmetics Act, 1940, it was ordered that the machinery under the Act be strengthened and the frequency of inspection by Drug Inspectors be increased. It was also directed that a separate legislation for regulating collection, processing, storage, distribution and transportation of blood and operation of blood banks be made.

Inadvertence and disregard shown by the local administration in keeping the city premises neat and clean was brought before the Supreme Court through a public interest litigation in *Dr. B L Wadhera v. Union of India*. Holding that the residents have a constitutional as well as statutory right to live in a clean city, the court issued many directions. The court reminded the authority of their mandatory duties and directed to clean the city every day. Directions were also issued to install enough number of incinerators in hospitals to contain hospital wastes. So as to

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177 Id., pp. 764-765.
178 Id., p.766.
179 Ibid.
improve the quality of public life in the civic society, the court directed the visual media to educate the residents to their civic duties. Local authorities were directed to increase the periodicity of inspections and to wind up the rigour of law to the maximum.

Administrative disregard towards the quality of drinking water supplied in the city of Agra was brought to the notice of the Supreme Court by a public-spirited litigant in D K Joshi v. Chief Secretary, State of U.P.\textsuperscript{181} Agra being a city of international importance both for tourists inside and abroad, the pathetic condition of the sewage and drainage systems was also brought to the notice of the court in this petition. The court has issued directions to the state Government to appoint a Monitoring Committee\textsuperscript{182} headed by the Commissioner of Agra, which in its view must look into the effective functioning of all machineries responsible for the supply of drinking water, disposal of solid waste and sewage.

Public Interest Litigation in the area of consumer protection obviously sub serve wider public good and consumer justice. The Supreme Court while exercising its powers under Art.32 of the Constitution can issue any direction to any public authority through out the territory of India. Since these directions are binding on them better justice is ensured and it also avoids the possibility of filing large number

\textsuperscript{181} A.I.R. 2000 S.C. 384.

of litigations by individuals and organisations. It is also possible to invoke by way of public interest litigation in order to ensure Consumer Justice.

**Competition and Quality Control**

Ever since the evolution of the notion of free market economy, it has been suggested that free and fair competition among producers and sellers would be the best tool that will take care of trading abuses. The invisible regulatory mechanism present in a competitive market is said to produce better results than those realized by executive or legislative intervention. However, for bringing in a level playing ground for the entire market operators, some kind of legislative measures are required. This is generally being done by the law of competition. Competition law, while recognizing the rights of businessmen to conduct their own affairs, strives to ensure a fair and reasonable commercial environment. Many countries have their own competition law to sub serve this purpose. Even though competition law is not directly addressing itself towards consumer protection and business standards that are its ultimate purpose. The development of competition law can be traced back to the common law doctrine of restraint of trade. The essence of this doctrine is that it is contrary to public policy to enforce contracts that are in unreasonable restraint of trade. It is therefore considered that a contract in restraint of trade as void unless it has been shown to be reasonable. The issue of reasonableness is to be judged both in relation to the parties and also as to the public interest involved. Due to the

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184 The judicial trend was one of reluctance. This is evident from the view expressed by Fry L.J. in *Mogul Steamship v. McGregor*, (1889) 28 Q.B.D. 598. His Lordship has expressed the view that to draw a line between fair and unfair competition is beyond the power of the court. *Id* at p.625.


186 See Mark Furse, *supra* n. 135. at p.284.
presence of the element of public policy in the doctrine of restraint of trade, changing ideas in public policy provided room for enough flexibility to it.\(^{187}\)

In modern commercial contracts, the doctrine of restraint of trade arises only in exceptional circumstances. However, it is possible to consider it as a part of the wider class of illegal or unenforceable contracts. It can also be raised in cases where there are inequalities of bargaining power\(^{188}\).

Even though the mere act of competition that might have harmful effects for others could not be classified as tortuous, deliberate acts to harm another's economic interests were considered tortuous. Therefore severe acts of dishonesty, intimidation, molestation and other illegalities were regarded as anti-competitive\(^{189}\). In spite of the fact that the courts were not well equipped to regulate competition, civil actions on the tort of 'conspiracy to injure'\(^{190}\) and unlawful interference with the economic interests of others\(^{191}\) had provided some relief\(^{92}\).

Even though the principles aforesaid remain good law, they have been fallen into disuse by the enabling provisions found in the competition law enacted in many countries\(^{193}\). Variety of reasons\(^{194}\) prompted the abandonment of state ownership.


\(^{188}\) Mark Furse, *supra* n. 135 at p.291.

\(^{189}\) See *Margul Steamship* v. *McGregor*, (1889) 28 Q.B.D. 598 (C.A.)


\(^{192}\) For a brief account on the concepts of ‘conspiracy to injure’ and unlawful interference with the economic interests of others’, see Mark Furse, *supra* n. 135 at pp. 292-294.

\(^{193}\) The U.S. enactment in question is the Sherman Act, 1890. The British law, which introduced radical reforms to the domestic structure, is the Competition Act, 1998 that succeeded the Competition Act, 1980.

\(^{194}\) Reasons for privatization have been said as (i) market failures in the utility industries of states, (ii) reasons such as ideological, budgetary and some grounded on economics. See Dieter Helm and Tim Jenkinson (Ed.), *Competition in Regulated Industries*, Oxford University Press, Oxford (1998), p.1.
States’ assets have been transferred to private sector in the course of a policy of liberalization and privatization. State monopoly in many areas has been done away with to allow free and fair competition in the market. Regulators were entrusted with the general duties to promote, facilitate or secure competition.

Indian response towards globalisation and privatization was in a slow pace. The Monopolies and Restrictive Trade Practices Act, 1969, which was enacted to curb monopoly, was found obsolete in many respects. It was felt that there must be a shift in the focus from curbing monopolies to the promotion of competition. With a view to achieve this object the Central Government constituted a high level committee on competition policy and law. Based on the report of this committee it was decided to enact a law on competition. The Competition Bill 2001 therefore seeks to ensure fair competition in India by curtailing trade practices that is likely to have adverse effect on competition. It also provides for the establishment of a quasi-judicial agency called the Competition Commission. The Commission is empowered to pass orders granting interim or any other appropriate relief. It can also pass orders granting compensation and impose such other penalties. In addition to the aforesaid powers, the Competition Commission shall also undertake

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195 Public assets thus transferred to the private sector in Britain during 1980’s have been estimated in excess of 100 billion pounds. ibid.
196 Id. at p.16. For a detailed exposition about U.K. experience in regulated industries see Dieter Helm and Tim Jenkinson, supra n. 146 pp.77-192
197 See the Competition Bill 2001, Statement of Objects and Reasons.
198 ibid
200 Id., clauses 27,33,42-46.
201 Id., clause 34.
202 Id., clauses 42-46.
of competition advocacy and the imparting of training programmes on competition.

In order to ensure fair competition, the Competition Commission is empowered to prohibit agreements that are anti-competitive in nature. It can also interfere when there is abuse of the dominant position by a firm. The Commission can by order regulate business combinations to create a climate conducive for free competition.

When a level playing ground is created for the enterprises to compete on an equal footing, free and fair competition is ensured. In a fairly competitive market, manufacturers and sellers give utmost concern to the needs and desires of consumers. Businessmen know that consumer satisfaction largely rests on quality of the goods and services they provide. Competitive climate thus indirectly takes care of products quality to the best advantage of its consumers.

Consumer Class Actions

Law generally prescribes that the consumer of poor quality goods may seek his remedy under the private law where he can be compensated for the loss or injury suffered. If this compensatory regime is to exert significant influence on the manufacturers and sellers to improve the quality of the goods they produce or sell,

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203 id., clause 47.
204 Ibid
205 Id., clause 3.
206 Id., clause 4.
207 Id., clause 5. However, it is criticised that creation of such a ‘bureaucratic leviathan’ would impede competition than facilitating it. It is also pointed out that the power given to Central Government to supercede the Competition Commission would be destructive to the autonomy of the Commission and hence to be repealed. See “Trade Bodies Seek Changes”, The Hindu (Cochin), February 12, 2002, p.13.
there must be considerable amount of consumers who will complain if things go wrong. Among the multitude of victims if only very few complain, the manufacturers may opt for compensating those who complain and to continue to get along with the marketing of the shoddy products. But they cannot thrive in the market for long by compensating large number of consumers. In this context, the best option for the producers will be to change their production practices by introducing a system to improve the quality of the products.

Even in the most enlightened consumer societies, the response of the consumers may be marginal if the stake involved is negligible or the loss or injury suffered is too little to warrant a formal complaint. Imprudent businessmen will thrive on the inertia expressed by the consumers in not complaining to the authorities established for that purpose. What is required in these instances is the willingness by consumers to treat the little injustices into a collective harm. Class actions by consumers can play a significant role in disciplining the manufacturers and sellers who profit out of the little injuries inflicted. Large number of insignificant individual claims can be aggregated into a single large claim. Class actions have the obvious advantage of saving time and money over separate proceedings. Action of this kind can also attract wide publicity since large number of people are involved. The businessmen may also feel deterred from class actions when they find that their trade abuses no longer remain unchallenged.

Consumer class actions can also provide an incentive to the consuming public to form and remain in consumer associations. Class actions have been provided for by
the civil\textsuperscript{208} and consumer law\textsuperscript{209} jurisdictions. Normally, class actions are allowed to be instituted when the classes are so numerous and therefore jointer of all members is impracticable. It is also necessary that the question of law and fact involved is common to the class and the claims or defenses of the representatives are typical\textsuperscript{210}. It must also be established that the representatives are able to fairly and adequately to protect the interests of the class\textsuperscript{211}.

The class action suits undoubtedly go a long way in overcoming the weaknesses of private law. Threat of consumer class actions operates as a deterrent to businessmen enabling them to improve the quality of the goods and services they provide. This ultimately will prove advantageous to consumers, manufacturers and the society at large. However, in order to see that sufficient number of class actions come up, it is essential to encourage the formation of vibrant and sensitive consumer associations. The presence of many such associations would by itself be a stumbling block to erring businessmen.

\textbf{Quality Control under the Consumer Protection Act, 1986}

The Consumer Protection Act, 1986, apart from providing a mechanism for enforcement of quality control laws, widens significantly the scope and amplitude of

\textsuperscript{208} Class actions in the form of representative suits are allowed in civil matters. See order 1 rule 8 of the Code of Civil Procedure, 1908.

\textsuperscript{209} The Consumer Protection Act 1986, enables consumer associations to lodge consumer complaints in its representative capacity. Similarly, one or more consumers, where there are numerous consumers, having the same interest can be a complainant. See the Consumer Protection Act, 1986. s. 2(1)(b). Also see, Upbhokta Snarakshan Manch v. Winsor Foods Ltd., (1993) 2 C.P.R.608 (Raj); Consumer Protection Council v. Lohia Machines Ltd., (1992) 1.C.P.R. 127 (Guj.) and Pushpa Builders Flat Buyers Association v. Pushpa Builders Ltd., (1996) 2 C.P.J. 212 (N.C.).


\textsuperscript{211} Two major class recovery procedures recognized in the U.S. are (i) 'fluid' class recovery and the 'yellow cab'. In the former, the damages ordered goes primarily into a fund against which individual consumers can make claims. In the latter, the scheme apply for a period of time like lowering the taxi charges as against overcharging made earlier. \textit{Ibid.}
quality control. This is done by giving a wide meaning to the term 'defect' while defining the term. It is defined as follows:

"Defect means any fault, imperfection or shortcoming in the quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods."

From the definition it can be seen that any fault, imperfection or shortcoming in quality required to be maintained by or under any law is a defect. Along with that, breach of any express or implied promise made by the trader relating to the quality of goods, is also treated as defect in quality. The first part of the definition covers all the existing quality control enactments like the food quality laws, drug control laws and other similar legislation. Goods under these enactments are considered as defective if they do not fulfill any of the legal requirements applicable to them or are not in accordance with the claims made by the trader with reference to them. A complaint would lie if the goods supplied do not meet the requirements of any of the whole range of marketing legislation. For instance, if any food item supplied fails to satisfy the standard required to be maintained under Prevention of Food Adulteration Act, 1954 it would be a defect in the goods. Drugs generally are marketed according to their power or potency. Some of the requirements of drugs are prescribed by law and manufacturers declare some others, voluntarily or otherwise. In either case, if the standards prescribed or promised are not met, it would be a defect.

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212 The Consumer Protection Act, 1986, s.2(1)(f).
But the second part creates a new concept of quality control. Giving of assurances and promises about the quality etc. of goods without intending to perform or without testing the veracity of the claim made can become an actionable wrong. In *Malaprabha Neerwari Balakadara Irrigation Consumer Co-Operative Sangha v. State of Karnataka Department of Agriculture*[^214^], the farmers while purchasing cottonseeds were told that the particular seed had a better yield. But it turned out to be of low resistance and poor germination capacity. The National Commission held that the heavy loss suffered by the farmers was clearly due to the defective quality of seeds supplied by the opposite party and hence liable to compensate the complainant.

Another instance where the Consumer Protection Act, 1986 provides additional measures for quality control is to be found in the reluctance of the courts in consumer issues to recognize exclusion clauses in sale contracts. The exclusion clauses if permitted to prevail over the main purpose of the contract, in many instances would perpetuate consumer injustice. By reading down the exclusionary clauses, courts in many cases paved the way for improvement of the quality of business and service standards[^215^]. In cases where terms are seen incorporated subsequent to the formation of the contract, courts even refused to read those terms

[^213^]: The Prevention of Food Adulteration Act, 1954 s.2(i-a), (l) and (m).
[^214^]: (1994) 1 C.P.J 80 (N.C.). Also see, *Maharashtra Hybrid Seeds Co. Ltd. v. Alavulpati Chandra Reddy*. (1998)3 C.P.J.8 (S.C). In this case, the complainants purchased sunflower seeds from the opposite parties which when sown was found lacking germination and the crop failed. Even though the Agricultural officer reported the matter to the opposite parties they took no care to the letter. The court held that since the opposite parties had not taken any measure to get their seeds analysed nor to conduct any study about the complaint, it is reasonable to presume a defect in their seeds.
into the contract when it found that those terms negated the very purpose of the contract.\(^{216}\)

Judicial construction by elucidation, explanation and illustration of the term ‘defect’ has contributed substantially to the legal literature. The requirement as to particular quality, quantity, potency, purity or standard for the goods bought may stem from the sale of Goods Act or any other law, or by a contract between the buyer and seller. These requirements may be expressed in the contract or implied from the circumstances or from a claim made by the trader.

In *Abhayakumar Panda v. M/s. Bajaj Auto Ltd.*,\(^{217}\) the complainant purchased a chassis of a trailer auto from the respondents. It was found to be defective inspite of repeated repairs from time to time. It was held by the National Commission that the vehicle suffered from a structural manufacturing defect that the manufacturers instead of being sold to any customer should have condemned it. The Commission has expressed severe doubt as to the testing and quality control system in operation in the manufacturing company and ordered replacement of the vehicle. Similarly, in *Wheels World v. Tejinder Singh Grewal and Another*,\(^{218}\) where the Montana diesel car had to be taken for repairs a couple of times soon after its purchase and lastly to the manufacturers for removal of the engine block, the National Commission endorsed the view of the State commission that the car was...

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\(^{217}\) *(1992) 1 C.P.J. 88 (N.C.)*. Also see, *Byford Leasing Ltd. v. S.V.R. Rao* (1995) 2 C.P.J. 232 (N.C.), where it was held that the necessity to sent the vehicle frequently to the workshop for repair soon after purchase gives an irresistible inference about its quality to be defective.
defective which warranted its return to the manufacturers. However defect in title to goods and delay in supply was held not 'defects' under the Act. 219

Interesting but complex was the issue raised before the National Commission in *Sahithya Pravardhaka Co-operative Society Ltd. v. K.N.Narayan Pillai.*220 The complainant in this case pointed out many mistakes in the subject matter of the 'Encyclopaedia' published by the opposite party. Books being goods, it is alleged as defective in the sense that it contains incorrect information in many places and hence the respondents are to be held liable. The National Commission after a thorough perusal of the definition of the term 'defect' held that though books published by the opposite parties are goods, there is no defect in the printing and binding of the books. It opined that there is no law by or under which it can be said that the alleged mistakes in an Encyclopaedia published by the opposite party will amount to a defect. In the absence of an express or implied contract in that respect, it was held that a publisher who publishes informations collected from large number of scholars cannot be held liable.

**Consumer Grievance Redressal Agencies: How far an Improvement over Civil Courts?**

It has been mentioned earlier that the consumer grievances redressal agencies established under the Consumer Protection Act 1986 are entirely different from ordinary civil courts in style, functioning and procedure. A brief examination of the structure and functioning of these agencies would throw much light on its usefulness from the perspective of the consuming public.

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The Act has established three type of grievance redressal agencies viz. at the
district, state and national levels. The State as well as the National Commission
exercises original as well as appellate powers whereas the District Forums have only
original jurisdiction.

**District Forum: The District Dispensary of Consumer Grievances**

Consumer Dispute Redressal Forum to be known as the 'District Forum' is
established by the State Government in each district by official notification.\(^221\) State
Governments may establish more than one forum in any district if it deems fit.\(^222\)
Each District Forum shall consist of a president and two other members.\(^223\) The
President shall be a person who is or has been or qualified to be a District Judge and
the members shall be of persons of ability, integrity and standing and one of them
shall be a woman\(^224\). Their specialized knowledge in the respective fields is
intended to be made use of by the forum in its decision making process. So, unlike a
legal expert deciding the issue in ordinary civil cases, consumer forum gets
assistance from the diverse but specialized faculty possessed by its members.
Consumer and related issues mostly affect women and housewives; the perceptions
of a female member in the forum would be an added advantage.

**Jurisdiction and Procedure of District Forum, State and National Commissions**

The District forum shall have the jurisdiction to entertain complaints
instituted within the territorial limits, where the value of the goods or services or the

\(^{221}\) The Consumer Protection Act, 1986, s. 9(a).
\(^{222}\) *Ibid.* (Proviso)
\(^{223}\) *Id.,* s.10.
\(^{224}\) *Id.,* s.10 (b). The members have to possess adequate knowledge or experience of or have shown
capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry,
public affairs or administration. *Ibid.*
compensation if any claimed does not exceed rupees five lakhs. A complaint can be filed either at the place where each or whole number of the opposite parties reside or carry on business or at the place where the cause of action arises. In the case of manufactured goods, apart from the place of manufacture, the cause of action arises also at the place where the product is marketed. Therefore, it was held in *Avniben Nihil Kumar Shah v. Khaitan Hostombe Spinels Ltd.*, that the place where shares were applied for and the place to which share certificates were dispatched, but not received have jurisdiction to entertain the complaint. If the complaint is against a corporation, it has been held by the National Commission that jurisdiction to entertain the complaint does not exist at each and every place where the corporation might be having its offices or branches. Jurisdiction would exist only at the place where the cause of action arose or the corporation had its head office.

It is to be noted that the legislature in its collective wisdom has provided an extensive meaning to the terms 'complaint' and 'complainant'. A complaint is

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225 *Id.* s.11.
228 *Ibid.* (1995) 3 C.P.J. 565 (Guj.). Also see, *Hitendra Raman Lal Shah v. Jagson Airlines*, (1995) 2 C.P.J. 90 (Guj.), where an air ticket was purchased through an agent from Ahmedabad for a travel to Delhi to Kulu and back. It was held that as the money was paid at Ahmedabad, a part of the cause of action arose there. (The ticket showed a wrong time of departure and hence the petitioner missed the flight.)
230 Section 2(1)(c) of the Consumer Protection Act 1986 gives the meaning of the term complaint as under:

"Complaint" means any allegation in writing made by a complainant that –

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader
(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;
(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods;
(v) good which will be hazardous to life and safety when used are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring
not confined to an allegation of defect in goods and deficiency in services of the opposite party, but extends to allegations about violations of safety requirements, charging of excessive price, non providing of required information and the practice of unfair and/or restrictive trade practices by him. Similarly, the term 'consumer' has taken into account in addition to the aggrieved consumer, registered voluntary consumer associations, the Central or any State government which can take up any consumer cause and one or more consumers acting for and on behalf of all those who are interested in the cause.

Any consumer, and others who are fit to be designated as complainants aforesaid can lodge a complaint to the District Forum.232 The procedure that the District Forum has to observe has been detailed in section 13 of the Act. The first step on receipt of a complaint is to refer a copy of the complaint to the opposite party with a direction to give his version of the case within a period of thirty days. 233 It is possible for the forum to give an extension of time for fifteen days but not further.234 When the opposite party denies or disputes the allegations made in the complaint, a dispute arises which is to be settled by the Forum following the procedure mentioned in that section.235 The forum can obtain a sample of the goods from the complainant and cause it to be tested or analysed by such laboratory as it

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232 *Id*, s.12.
233 *Id*. s.13 (1)(a).
234 *Ibid*.
235 *Ibid*.
The expenses for testing shall be born by the complainant. On receipt of the test report, the Forum shall cause a copy of the test report to be served on either parties and direct them to submit their objections if any. After hearing their objection the forum shall pass appropriate orders on the issue. But if the case does not require laboratory or other tests, the forum shall settle the dispute on the basis of the evidence brought in by the complainant and the opposite party. If the opposite party fails to submit objections and/or evidence, it shall be decided on the basis of the evidence adduced by the complainant. In exercise of its powers under the Act, the District Forum shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908. Every proceeding before the District Forum shall be deemed to be a judicial proceeding and it shall be deemed to be a civil court.

A complaint concerning defective goods can be made against those who manufacture or market goods. A trader, therefore means a person who sells or distributes any goods for sale and includes the manufacturer of those goods.

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236 The procedures to be followed are detailed in s.13 (e) to (g) of the Act.
237 Id. s.13 (1)(c).
238 Id. s.13 (1)(d).
239 Id. s.13 (1)(f).
240 Id. s.13 (1)(g).
241 See s.13 (2)(b)(i).
242 Id. s.13 (2)(b)(ii).
243 See s. 13 (4). The powers of the Civil court conferred by this section are:
(i) summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
(ii) the discovery and production of any document or other material object producible as evidence;
(iii) the reception of evidence on affidavits;
(iv) the requisitioning of the report of the analysis or test concerned from the appropriate laboratory or from any other relevant source;
(v) issuing of any commission for the examination of any witness; and
(vi) any other matter which may be prescribed.
244 Id. s. 13 (5).
245 S. 2(1)(q).
Where the goods sold are in packages the word ‘trader’ would include the packer also. Manufacturer under the Act means a person who makes or manufactures goods or parts thereof including a person though not in fact the manufacturer but claims to be the manufacturer of the end product by reason of the fact that he assembles the parts into the end product. A person will also be considered as manufacturer when he puts or causes to be put his own mark on the goods so as to claim that they are manufactured by him though they are in fact manufactured by another person.

Since the consumer Protection Act seeks to provide for better protection of the interests of the consumers and to provide speedy and simple redressal of consumer disputes, the consumer protection rules made under the Act by various state governments have prescribed a time limit for deciding a complaint by the District forum. Generally it is 90 days where the complaint does not require analysis or testing of goods. If testing or analysis is required, the time limit shall be 150 days. The time limit prescribed for decisions by State and National Commissions are also the same. Appeals are to be disposed of within a period of three months. The procedure to be followed by the State Commissions and the National Commission while deciding a complaint originally filed before it is the same as in the case of District Forum.

245 Ibid.
246 S.2 (1)(j).
247 Ibid.
249 Id. rule 7(9).
If the forum is convinced that the goods complained of are defective it shall issue any one or more of the following orders against the opposite party:

(i) to remove the defects from the goods that has been pointed out by the appropriate laboratory;

(ii) to replace the goods of similar description which is free from any defect; \(^2\)

(iii) to return to the complainant the purchase price or the charges of the services; \(^3\)

(iv) to pay to the complainant a sum of money as compensation for loss or injury suffered by the consumer due to the negligence of the opposite party; \(^4\)

(v) to remove the defects or deficiencies in the services in question;

(vi) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(vii) not to offer hazardous goods for sale;

(viii) to withdraw the hazardous goods from being offered for sale; and

(ix) to provide adequate costs to parties.

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251 Id., s.14.

252 In Issac Mathew v. Maruti Udyog & Ltd. (1991) 2 C.P.J. 75 (Ker.), the complainant was supplied with a car which was damaged and repaired as new. It was ordered to replace with a new car along with compensation for inconvenience. Also see, Kaalash Kumari v. Narendra Electronics (1991) 2 C.P.J. 276 (N.C.) (defective T.V. set was ordered to be replaced with compensation.)

253 In Bhamy v. Shenoy v. Karnataka Road Transport Corporation (1991) 1 C.P.J. 133 (Kart.), the passenger was allowed to recover from the KSRTC the ticket money when he could not be conveyed to his destination.

254 In M. Meenakshisundaram v. General Manager, Southern Railway (1991) 1 C.P.J. 131 (T.N.), the Railways were directed to pay Rs. 1000/- as compensation to the complainant who was superseded in favour of another in the waiting list.

255 Pushpa Pathania v. Rajasthan Housing Board, Kota (1995) 1 C.P.J. 150 (N.C.), when the construction of the house was found to be deficient an order for removal of the deficiencies was granted.
In the remedies enumerated above compensation for loss injury can only be considered if the complainant is successful in proving negligence of the opposite party. This has been cited as one of the disquietening features of the Act. In this era of industrialization, complicated nature of the products make it virtually impossible for a consumer to establish it is negligence that resulted in loss or damage to him. Consumerism demands a change in policy and perspective in this area to the effect that instead of an onus to establish fault on the manufacturer or seller, it would have been ideal, if it is considered adequate to show that loss or damage can be attributable to the fault of the product, and the damage suffered is due to no fault of his own. But the National Commission in many cases has strictly applied the principle of negligence in cases of deficiency in service. For instance, in Federal Bank, Bistupar v. Bijon Misra the National Commission concluded by holding as under:

"a claim for compensation against a Banking company cannot be sustained under the Act if the failure to render service was occasioned by reasons wholly beyond the control of the Bank and was not attributable to any negligence on the part of the Bank."

Quantum of Compensation

How is that the Fora quantify compensation or damages under the Act? It is undisputed that award of compensation by the Fora have to be made on well-

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256 Ibid.
259 Id at p.22. This view of the National Commission is seen endorsed by the Supreme Court of India in Consumer Unity and Trust Society, Jaipur v. The Chairman and Managing Director, Bank of Baroda. (1995) 1 C.P.J. 1 (S.C.).
recognised legal principles governing the quantification of damages. The National Commission through a catena of decisions has expounded the principles to be followed while awarding compensation. The compensation to be awarded has to be quantified on a rational basis giving due consideration of the material produced before the Fora showing the extent of injury suffered and the manner in which and the extent to which monetary loss has been caused to the complainant. Under section 14(1)(d) of the Consumer Protection Act, compensation is payable to the consumer for loss or injury suffered by the consumer 'due to the negligence of the opposite party'. It has been held that where there is no evidence of negligence of the opposite party, the Consumer Forum was not entitled to grant any compensation. However, while quantifying compensation, the failure of the complainant to show the exact extent of loss suffered by him due to the defect need not be considered a material fact.

In Jaidev Prasad Singh v. Auto Tractor Ltd., it has been held by the National Commission that when it is abundantly clear that tangible loss must have resulted to the complainant by reason of the defective condition of the tractor supplied to him and the failure on the part of the opposite party to rectify those defects which rendered the tractor unfit for use, it is just and proper that the Consumer Redressal Forum constituted under the Act should quantify to the best of its judgement the loss that can reasonably be estimated as reasonable compensation.

263 (1991) 1 C.P.J. 34 (N.C.)
Quantification of damage in consumer disputes and ordinary commercial transactions like contracts may widely vary. A doctors’ practice would be seriously affected if he cannot readily communicate with his patents due to disconnection of his telephone facilities. The subscriber and his family may also suffer from personal inconvenience for frequent and prolonged faults in the functioning of the telephone and its disconnection. In these circumstances, it was opined by the National Commission\(^{265}\) that the granting of Rs.2000/- as compensation by the State Commission is quite conservative which can be described as a token compensation.

In *Kailash Kumari v. Proprietor, Shankar & Co.*\(^{266}\), the complainant had purchased a T.V. set from the opposite parties. On account of a defect in the set, the complainant was put to a great deal of inconvenience, expense and mental suffering. There was also failure on the part of the opposite party to set right the defects in spite of the fact that the complainant having repeatedly made representations to the dealer on many occasions. The National commission had expressed the view that it is not right to insist that the aggrieved party should adduce more concrete and specific evidence regarding the inconvenience etc., suffered. In its opinion, when a person invests a substantial sum and purchases a T.V. or any other goods, he does so under a reasonable expectation that he would be able to have the effective beneficial use of the article from the date of its purchase. In these circumstances where it is practically impossible to adduce tangible evidence regarding the actual monetary equivalent of the inconvenience, mental suffering etc., caused to the petitioner, it is

\(^{264}\) *Id.* at p.36.

\(^{265}\) District Manager, Telephones, Patna v. Dr. Tarun Bharrhuar, (1992) 1 C.P.J. 47 at p.50 (N.C.).

\(^{266}\) (1992) 2 C.P.J. 443 (N.C.)
the duty of the concerned Redressal Forum to assess and determine in the light of all evidence available in the case what amount would reasonably compensate the petitioner for the inconvenience, mental agony etc., caused on account of the negligence of the opposite party. However, payment of compensation is confined to the loss or damage actually suffered and hence it is not to be given for any equitable indulgence or for any remote or indirect loss.

A comparison of the ordinary civil court remedy and that under the Consumer Protection Act 1986 for defects in goods, it is obvious that the latter is far ahead than the former. The Act remedies are speedy and inexpensive. The procedure followed in filing a complaint is informal. Trial procedures are summary in nature and remedies granted are diverse. The Consumer Protection Act in this way is a real blessing to the consumers of this country.

Liability to compensate the aggrieved consumer who suffered defect or injury due to defect in goods no doubt will persuade the manufacturer or supplier, at least indirectly, to make provisions for improvement of the performance of the product against which consumers frequently lodge complaints. Manufacturers cannot thrive for long compensating large number of consumers. Compensatory regime in this sense compels the manufacturers and sellers to improve the quality of the products. But if this method is to yield the intended result it is necessary that consumers are made very much sensitive and are willing to complain when things

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they purchase go wrong. Larger the complaints from consumers more rapid and positive will be the attitude of the traders.

Need for Strengthening Civil Remedies for Quality Control

The forgoing discussion reveals that the civil remedies available to consumers who have been the buyers of defective products are limited in scope. The major hurdle appears to be the lack of a comprehensive law for all commodities. Civil liability to compensate for defective standards are so scattered and thereby lack clarity and consistency. The principles in the tort and contract law seems to be of very little help to the consumers of the present day world mainly due to the presence of many bottlenecks contained therein. The law relating to trademarks, though a consumer friendly enactment is so framed to be a property law and therefore its violations are placed in the domain of private law. Trademarks law even today is considered as one that protects the intangible private property rights of its owners and therefore it lacks the public interest element in approach and outlook. The consumers are also very much interested in trademark protection. The positive impact of trademark protection through public authorities by itself or through public participation through consumer and consumer organizations or through public interest litigation has not been properly understood or implemented. The need for trade mark protection as a consumer protection measure is to be given recognition and amendments are to be made accordingly. The Trade Marks Act, 1999 which repealed the Trade and Merchandise Marks Act, 1958 and introduced many new provisions also failed to give the Act this directional thrust and orientation and hence allow its inherent weaknesses to galore. However, through an intelligent use of the provisions enabling a consumer to sue for deceptive trademarks, the desired result can be attained. Consumers’
concern on products that raises issues of health and safety are given predominance in all developed countries. However, India has yet to take it seriously. As in the case of Britain, the health and safety requirements of consumers must find a place in the Consumer Protection Act itself. Violations of the prescribed quality standards must invite heavy liability for the producers and sellers.

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