

Consumer Protection via Products Liability; is transformation needed?³⁶

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Extended Abstract

Background:

The issue of consumer protection is at the centre of the discussion in the present scenario in which economies are open and a wide variety of goods and services available in the marketplace for human consumption.

Primarily, consumers are vulnerable since the legal protection given to consumers against manufacturers is not strong enough. Particularly, fatal and physical injuries such as deaths, deformities, permanent disabilities and illnesses caused by defective products involve a policy issue to be considered by a jurisdiction.³⁷ Secondly, it is very difficult to prove the nexus between the manufacturer of the product and the consumer at all times. Thirdly, modern rules of world trade monopolize evolving liability regimes. This is evident when analyzing the legal work of the international community on consumer rights. Still, it has only guide lines on consumer rights which have no legal effect, but merely provide an internationally recognized set of basic objectives.

However, in general, many jurisdictions have taken steps to regularize internal trade and transactions of goods and services at the domestic level by the enactment of strict laws. Parliaments have approached the debated issue from two different angles. Firstly, recognizing offences which derive from command and control theory. Imposing 'products liability' for defective products on the part of the manufacturer is the second approach. The tendency of the modern jurisdictions is to incorporate both aspects into their regimes. Sri Lanka too has a major statute to regularize internal trade, consumer protection and other concerns that are consequential to this issue.³⁸ At the same time several corresponding statutes are available.³⁹ The objective of latter statutes are not *per se* consumer protection, however, these can be used as supplemental to the intended purpose. The intention of Parliament when introducing the CAAA was to focus only on issues that impact society at large, but not individual consumers. For this purpose, the CAAA has

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³⁷ See, *Soft drink kills 11-year-old girl* (18th February 2011) visit, print.dailymirror.lk/news/provincial-news/35974.html, visited on 08.03.2011

³⁸ Consumer Affairs Authority Act No. 09 of 2003(CAAA)

³⁹ i.e. Food Act No.26 of 1980, Sale of Goods Ordinance No. 11 of 1896, Telecommunication Regulatory Commissions Act No.27 of 1996, Cosmetic Devices and Drugs Act No. 27 of 1980, National Environmental Act No. 47 of 1980.

repealed several corresponding Acts which were in place and established a powerful Authority to deal with the debated issue. Also, it has recognized several offences relating to unfair trade practices. The doer will be punished in violation of these provisions of the CAAA.⁴⁰ In line with this, the Authority can impose a fine and if he is proved guilty in a court he may be imprisoned for a period of time.⁴¹ Fines are collected to a fund that is used for the functions of the Authority. However, there is no provision to deal with product liability towards the damage caused to an ultimate victim although the damage is extremely significant.⁴² Other than making a complaint to the Authority, there is no remedy available to individual victims against manufacturers. The only remedy that is available to them is the delictual action in Sri Lanka.⁴³ In this, products can be held liable only if the element of ‘fault’ is proved on the part of the defendant manufacturer who has no connection with the consumer.⁴⁴ In fact, the burden of proof of fault of the manufacturer does not help the victim to redress the damage caused to him, but rather it only suppress and discourage litigation. This issue of damage is totally victim oriented and personalized. Therefore, in Sri Lanka the consumer is not protected in the real sense because there is no statutory law for the ‘recovery of damage’ caused by a defective product. Hence, in this research it is intended to analyze firstly whether this burden could be averted and encourage consumers who suffered loss/damage by introducing a new legal criteria and secondly how it could be done.

Methodology:

This is a comparative analysis of the Sri Lankan law with international guidelines and selected jurisdictions; namely, the UK, USA and South Africa. Statutes, Books, Journal Articles and relevant case law are analyzed where it is necessary.

Results:

When compared to above-mentioned selected jurisdictions, it is observed that they are equipped with liability regimes that apply strict liability against ‘defective products’.⁴⁵ In this, strict liability is imposed on manufacturers either by statutes or case law. Significantly, they apply strict liability through statutes to compensate physical injuries

⁴⁰ Sections 15,16,17,18 of the CAAA

⁴¹ Section 60

⁴² At least the trader can be questioned under the contract of sale alternatively, but no such relationship is persisting between the manufacturer and the consumer.

⁴³ This action arises under the common law regime which is based on the concept of ‘duty of care’.

⁴⁴ *Chinta Devi v Glacio Limited* 1985 SLR 1V 265

⁴⁵ These jurisdictions have defined the ‘defect’ by means of a defect in manufacturing, design, warnings or failure to recall by the Act.

and punitive damages.⁴⁶ These regimes have removed the hurdle of proving negligence on the part of the manufacturer and consequently made product liability claims much easier.

Conclusion:

Based on the comparative study of selected jurisdictions, it is recommended that strict product liability should be introduced against physical damage caused by ‘defective’ products. This approach will ease the process of litigation against manufacturers and contribute to provide a better legal remedy for consumers in Sri Lanka.

Protection of Traditional Knowledge - a polycentric issue; A Sri Lankan perspective

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Background and Nature of the Issue

The South Asian region has been blessed with a rich heritage of Traditional Knowledge (TK). TK is generated by societies in the ‘laboratory of life’ and is continuously tested, evaluated and used over a period of time. As per the WIPO definition “TK refers to the content or the substance of knowledge resulting from intellectual activity in a traditional context”. TK in a broad sense can include knowledge related to agriculture, ecology, medicine and expression of folklore. The protection of TK has become a ‘hot topic’ though there is not much knowledge about it and there is no sound protecting mechanism in Sri Lanka. In recent years, the incidents of misappropriation of TK and patenting of TK-based inventions in Western countries such as the *Kothalahimbutu case* have directed our attention to this issue. In this context, this study intends to identify the reason why such knowledge does not receive appropriate protection under the existing legal system and

⁴⁶ For instance, Part I of the Consumer Protection Act of 1987 of the UK allows product liability claims against the manufacturer of a faulty product for personal injuries. Similarly, section 402A of the Restatement of (Second) of Torts of 1977 and Restatement of (Third) of Torts of 1999 (USA) and The Consumer Protection Act of 2008(South Africa) are significant. Further, cases such as *Abouzaid v. Mothercare (UK) Ltd.* 2000 All ER (D) 2436, *Ceiba-Geigy(Pty) Ltd v Lushof Farms(Pty) Ltd* [2002] 2 SA 447 (SCA) and *Wagener & Cuttings v Pharmacare Ltd & Others*, [2002] 1 All SA 66 will be analyzed in this regard.