ISSN: 2582 - 2942

LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- V

JUNE 2020

ISSN: 2582 - 2942

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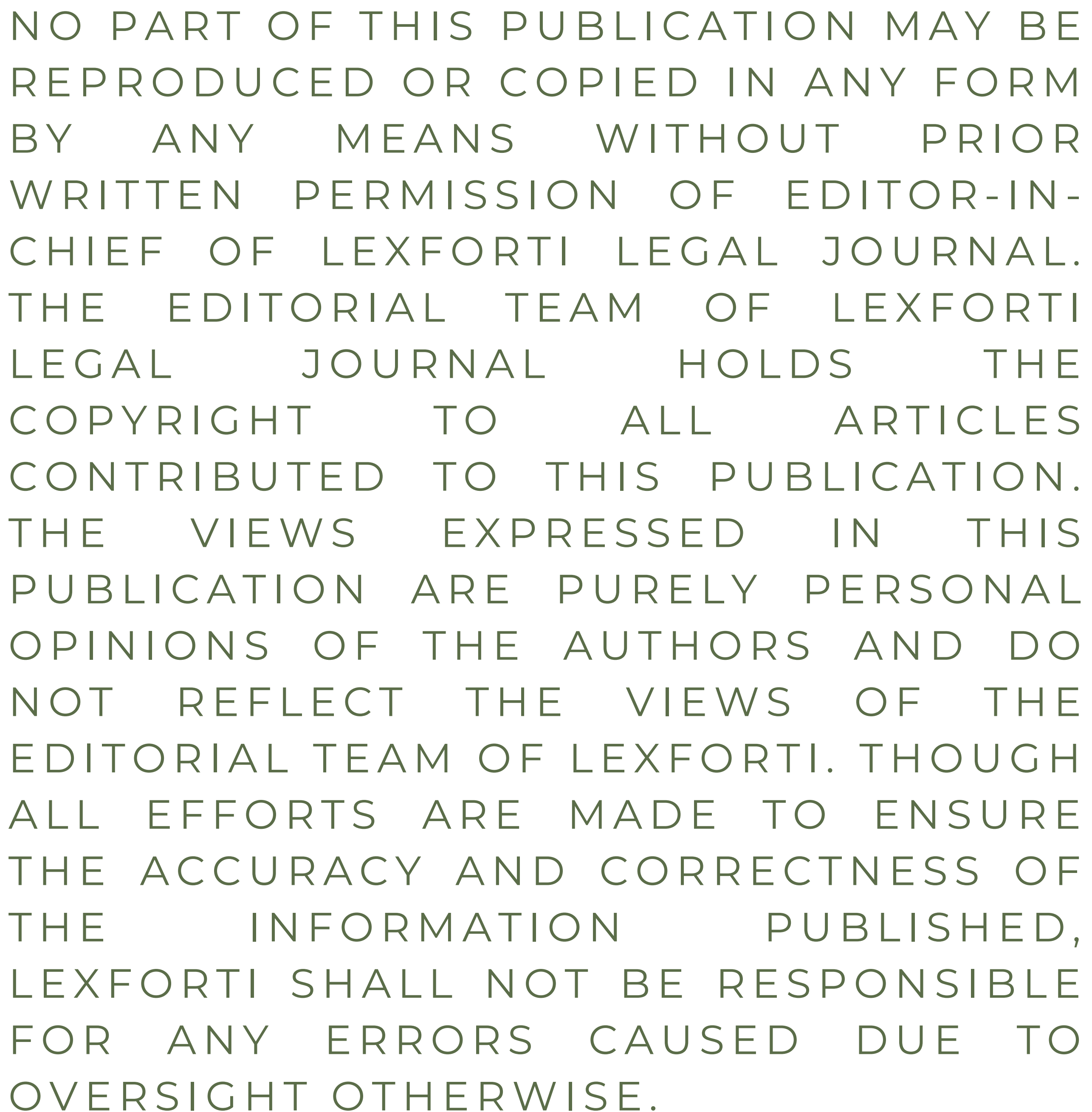

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The relevance of Caveat Emptor vis-à-vis Product Liability under the 2019 Consumer Protection Amendment

Pallav Bhargav

ABSTRACT

The need for consumer protection arises wherever the consumer-producer relationship exists. There are many historical evidences that prove to us that consumer welfare has been existing for as long as Kautilya's Arthashastra is found in our history. However, in our research paper we talk about how the idea of consumer protection and welfare has taken different shapes and melded itself into the current form, i.e. Consumer Protection Act, 2019. And while there are remarkable changes that took place the most eye catching one is the introduction of "Product Liability" which turned around the entire essence of the act from Caveat Emptor to Caveat Venditor.

The framework governing consumer protection should be fair, efficient and just with transparency of rules and there is the onus of accountability on the person responsible for it and not consumer only for not being careful in the first place. That is why in our research paper we emphasis on punishing the one responsible for any mishap and "Product Liability" ensures the same by holding the producers/sellers responsible. It in a way shifts some burden from the consumer to the producer.

INTRODUCTION

WHO IS A CONSUMER?

The definition of the term consumer has expanded over the years, with multiple disputes like ***Morgan Stanley Mutual Fund v. Kartick Pas***[1] along with ***S.P. Goel vs. Collector of Stamps Delhi***[2] having characterized the term. In simple words, a consumer is any person who acquires a commodity and uses the commodity. He or she is the entity that consumes the good or service being offered for sale by the seller. Section 2(1)(d) of the Consumer Protection Act, 1856 stresses on the nuances of the definition of a consumer of goods and services.

Section 2(d) of the CPA defines "consumer" as a person who:

"(a) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for a consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose;

Or

(b) Hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for a consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. It may, however, be noted that "commercial purpose" does not include use by a person of goods bought and services exclusively for the purposes of earning his livelihood by means of self-employment."[3]

[1] (1994) 4 SCC 225.
[2] (1996) 1 SCC 573
[3] Explanation.—For the purposes of this clause,—
(a) the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;
(b) the expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;

According to this clause, a consumer of a tangible product is the entity who buys the good from the seller for a considerable amount that he has:

- Paid or
- Promised or
- Partially paid and partially promised.

Any system of delayed or forthcoming reimbursement will also qualify the buyer to be a consumer. Any entity, which, with the buyer's permission, uses the good, is also considered a consumer (If the good is used without the buyer's permission, however, opens a different can of worms). However, those who purchase goods in order to sell them or use for another commercial purpose will be exempted from the definition of the term, consumer. ***Laxmi Engineering Works v. P.S.G. Industrial Institute***[4] both defines the economic purpose and separates it from self-employment endeavours. This is of immense importance.

Similarly, the definition of the consumer of a service that is intangible, where the buyer hires or avails of the service through the aforementioned methods of payment. Any other user of the service too, with the permission of the buyer, is a consumer. However, those who avail or hire such services for a commercial purpose are not consumers. Where the entity consumes for self-employment, he is still considered to be a consumer, as seen in ***Abhay Kumar Panda v. Bajaj Auto Limited***[5].

WHO IS A MANUFACTURER?

Section 2(j) of the CPA defines "manufacturer" as a person who:

(i) makes any goods or parts thereof; or

(ii) assembles any goods or parts thereof made by others; or

(iii) puts or causes to be put his own mark on any goods made by any

other person;

[4] (1995) AIR 1428

[5] (1991) 2 CPJ 644

RIGHTS OF CONSUMER

The definition of Consumer Right is 'the right to have information about the quality, potency, quantity, purity, price and standard of goods or services', as it may be the case, but the consumer is to be protected against any unfair practices of trade. It is absolutely essential for the consumers to be aware of these rights.

However, there are strong and clear laws in our country to protect consumer rights, the actual predicament of consumers of India can be declared as altogether bleak and to a certain extent, hopeless. Out of the various laws that have been enforced to protect the consumer rights in India, the most important is the Consumer Protection Act, 1986. According to this law, everybody, including individuals, a firm, a Hindu undivided family and a company, have the right to exercise their consumer rights for the purchase of goods and services made by them. It is significant to note, as consumer, one knows the basic rights as well as about the courts and procedures that follow with the infringement of one's rights.

1. In general, the consumer rights in India are listed below:
2. The right to be protected from all kind of hazardous goods and services
3. The right to be fully informed about the performance and quality of all goods and services
4. The right to free choice of goods and services
5. The right to be heard in all decision-making processes related to consumer interests
6. The right to seek redressal, whenever consumer rights have been infringed
7. The right to complete consumer education

NEED FOR CONSUMER PROTECTION LAW IN INDIA

The existing environment of business is chaotic, with the existence of cutthroat competition, where each seller is trying his best to survive and thrive, (they are also trying to do other rhyming words that we do not have time to discuss) by dominating the market. In order to maximise profits, sellers go to great extents, which can also end up being unethical and subsequently harmful (these are the same people who call lawyers immoral). Consumers are in dire need of protection for the following reasons:

- *Consumers are often uninformed.* They lack the knowledge of their rights and duties. They do not have effective means to differentiate between original and duplicate or

adulterated goods. Hence, these innocent consumers are oblivious since they are not informed of the possible hazards that can arise.

- *Consumers are often exploited by manufacturers, retailers and traders.* Goods are often duplicate, adulterated, spurious and defective. Defective goods have often been provided to the consumer, as seen in T.T. Private Ltd., v. Akhil Bhartiya Grahak Panchayat and Another[6]. Weights and measures used by retailers tend to be manipulated. Also, traders may unnecessarily hike prices. Hoarding and black marketing are rampant. Consumer Protection is hence needed to eliminate such untoward practices that exploit the consumer.
- *Consumers are also not grouped together to serve a common goal.* They are unorganised and haphazardly placed with no association or party uniting them and integrating their purpose. Without consumer protection, there will be no platform for the consumers to voice their grievances and seek the path of justice through redressal.

The need for consumer protection does not simply exist for consumers. Consumer Protection is necessary for companies or sellers as well, for reasons mentioned below:

- *Every seller seeks to survive in the market and dominate the economy for an indefinite period of time.* If the seller has no regard for the consumer's health and hygiene, there will be no trust developed between the buyer and the seller.The seller will soon be left with no customers since ample alternatives to each good and service is available in today's market. Hence, in order to survive competition and have a prolonged run in the market, the seller is in need of consumer protection.
- *Every seller benefits out of providing goods and services to the society. He himself is a part of society.* He is under a moral obligation to rightfully give back to the society by providing quality goods and services at good enough prices that satisfy the consumer. Hence, the seller needs to implement consumer protection to serve the society.
- After various cases of consumer exploitation, various consumers flocked together in order to create consumer movements and associations all across the globe. This served as a warning sign to all the sellers as their exploitation will be called out. A social boycott is the most feared possibility for a consumer who needs consumer protection in order to eliminate such a risk.
- *The Government too has begun to implement rules and regulations that are sellers are bound to follow in order to avoid penalties and disqualifications from the market.* Hence, if not voluntarily, consumers are forced to follow these rules that glorify protection of the consumer.

CONSUMER – PRODUCER RELATIONSHIP - EVOLUTION

The development of the law of products liability is historically related to industrial growth, business and economic expansion, and the overdue increase in demand over the years for consumer protection. As the industrial system has come of age and man has begun to make excursions into outer space, have started developing computers as smart as humans, it seems quite peculiar to follow the ancient principle of caveat emptor -"let the buyer beware"- that is why it has been significantly changed in favour of the consumer. As we emerged from the primitive mercantile society, where the consumer and buyer usually met and bargained (sounds crazy, doesn't it), to an impersonal market characterized by corporate organization, industrial and technological advancement and complexity, and sophisticated marketing and finance, the law changed in response to the new circumstances. Although the shift from caveat emptor to the promulgation of judicial and legislative rules, safeguards and standards, enlarging the legal rights of the buyer and consumer, came slowly and irregularly to a small country you have probably never heard of, the United States of America (It's the one below Canada), greater strides have been made in the evolution of products liability law in the last decade than were made in the entire preceding century. This greater advance can be accounted for by the scientific and economic explosion following The Second World War and by the greater concern and emphasis being placed on human loss and injury resulting from defective or intangible products rather than on commercial loss suffered by the buyer.

The constraints on the right of recovery by the injured consumer or user often were created from the constraints fixed in the law of sales and contracts. These constraints were considerably relaxed in the early stages of the common law by the creation of warranty devices and rules, which were in the nature of an express warranty given at the time of sale and a warranty of fitness for a particular purpose which the law implied as part of the bargain when goods were ordered in advance of manufacture and the buyer relied upon the seller. Later came the implied warranty of merchantability that the goods were fit for their general and ordinary purposes. Problems arising from the underlying sales contract, such as lack of privity, reliance and disclaimer, continued to confront the final consumer and user in his effort to seek compensation for his injuries and loss in negligence and warranty cases. Many of these constraints have been overcome by decisional and statutory rules, thus allowing recovery against remote vendors and manufacturers who were immune from direct action until recently.

Multiple exceptions have been created by the courts of India to overcome the binding rule of non-liability of the manufacturer to the remote vendee or user in both food and non-food products

liability cases based on negligence; warranty rules have been enlarged and the assault upon the privity wall has continued unabated. In very recent times, what Dean Prosser calls the most rapid and incredible overturn of an established rule in the entire history of the law of torts has taken place in the acceptance of the doctrine of strict liability in tort. This second doctrine eliminates privity as a requirement in actions for damages and severs the rules of sales and contracts from the tort aspects in the determination of the issues of the defectiveness of the product and the proximate cause of any injury or loss suffered by the consumer, user or person affected by such product. The law has progressed to the socio-economic consideration that the risk of loss from a defective product should be on the party who is in the best position to stand such a loss.

EVOLUTION OF CONSUMER PROTECTION ACT 1986

With the growing trade activities there has been a growth in exploitation of the consumers via numerous forms and even after substantive measures taken by the authorities the consumer still prevailed to be the victim of exploitative activities.

Even before Consumer Protection Act (1986) came into the scenario there were many other acts and legislations that in some way or the other did provide protection to the consumers to a limit.

2.1 Indian Contract Act (1872)[6]

Under this act the buyer-seller relationship was given the name of a contract where if there was any problem with the "contract" the buyer could approach the civil court or the consumer forum for the legal remedy. But since the violation of consumer rights would arise from the contractual relationship between the buyer and seller, the entire procedure of suing someone involved a lot of time and money cost and hence many were not very enthusiastic in complaining about the seller any other issues of such sort.

2.2 The Sale of Goods Act (1930)[7]

It first came into being during the British Raj known as The Sale of Goods Act (1930) and then later as The Sale of Goods Act (1930). It primarily granted protection to consumers. However it still referred the buyer-seller relationship as a "contract" wherein the seller would transfer the title of the goods to the buyer in exchange of some consideration and the remedies were also with

[6] Avatar Singh, Law of Contract.
[7] Sale of Goods Act 1930.

regards to the breach of contract. It was the first act which exclusively protected the consumers and for the next fifty-five years it was the exclusive source of consumer protection.

2.3 Drugs and Cosmetics Act (1940)[8]

This act did not directly protect the consumers unlike The Sale of Goods Act (1930) but prohibited the production and sale of certain goods along with licensing and rigorous rules and regulations for certain products.

For the next fifty years Sale of Goods Act was the only source of consumer protection in India, where the consumers are sufficiently protected. Along with SGA there was provisions in other legislations such as The Indian Penal Code of 1860 where false weight and measures, adulteration of food and sale of drugs was covered. However, after independence with need of more precise legislation much more detailed acts were enacted, namely:

- The Prevention of Food Adulteration Act, 1954
- Prevention of Black Marketing and Maintenance of Essential Commodities Act, 1980
- The Essential Commodities Act, 1981
- The Standard Of Weights and Measures (Enforcement Act), 1985

After independence the Indian Legal System experienced a revolutionary change in many of its legislations and a result of which the Consumer Protection Act was introduced in 1986. It gave new dimensions to the provisions already present in SGA which were sufficiently protecting the consumers but introduction of CPA led to its judicial populism[9] because, it was designed to provide justice which was less formal and required less paper work and was flexible in its working alongside minimum delay of the cases. It was an aid to the poor who could now afford to even consider going for judicial remedies in case their rights were violated as a consumer. Along with its cost effectiveness it also empowered the consumers to stand up for the wrong and make the sellers accountable for their actions.

Before CPA the legislation would ask the consumer to go to the civil courts where their complaints would get buried under many other cases pertaining to different agendas and also the civil courts were not able to keep up with these additional responsibilities, resulting in pilling up of thousands of cases for an enforceable future. All of which discouraged the consumers to go to courts or even initiate the process of getting justice.

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[8] Drugs and Cosmetics Act 1940, s 14.

[9] Dr. A. Rajendra Prasad, 'Historical Evolution of Consumer Protection and law in India', Journal of Texas Consumer Law

However, after independence CPA fulfilled the need of the hour beautifully by providing easy access to justice and opposing the idea of going to the traditional courts and challenging the orthodox way of litigation. CPA has been successful in disposing thousands of cases which were pending due to the traditional backlog with its flexible framework thus, commanding consumer support with its effective and cost friendliness.

SHIFT OF ONUS FROM CAVEAT EMPTOR TO CAVEAT VENDITOR

The *caveat emptor* principle, that means let the buyer beware, has been followed for many years by the Courts of England. These simple words (as simple as Latin can be) were a focus for judicial thought, a principle to be invoked when the going is difficult, and a guide to be followed.[10]

Many cases in feudal ages were resolved by the rulings of the *lex mercatoria* in special courts, but for other than the essential rights such as the right of the seller to payment and the right of the buyer to the good. As a matter of fact the criminal law and statutes that restricted the usage of deceitful measures and the contamination of food and alcohol, monitored the central part of claims about the sale of goods and there were regional guidelines administrating the trade fairs that changed from place to place. [11]

The convention of *caveat emptor* was the guideline for the courts and the point was that the buyer had the chance to use his awareness to be attentive or accept the cost of his carelessness. No warranties were implied to guarantee the quality of the goods he was going to buy and only a seller making a false statement could be sued in tort for deceit[3]. In such a case he was not simply assuming a fact but giving a clear warranty to the buyer he could be sued even though he did not know about the falseness of his affirmation.

In the case of false affirmation of the seller there was no need of a written warranty; it was enough that the buyer was convinced to buy by the false statements of the seller to imply this particular warranty and, even though a contract was required, there was no need that the guarantee was a part of the contract. However, it is very important to point out that all this concerned fraud and that was the only way for the buyer to sue the seller for dereliction of the contract: no implied terms emerged if the seller did not make any false statement. As we have said this situation was ideal if you try to imagine the scenario of the sales in feudal ages: there were minute fairs and minutes quantities of defined types of goods to be sold. The buyer often had the knowledge to

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[10] Walton H. Hamilton, The ancient maxim Caveat Emptor, 40 Yale LJ, 1931, at 1156.
[11] Royston Miles Goode, *Commercial Law*, Penguin Books, 1995, at 188.

recognize damaged goods and to negotiate the price with the seller who, instead of offering a written warranty, could accept and consequent reduction in price.

The case that clarifies the position up to seventeenth century is *Chandelor v. Lopus*[12] in which the plaintiff brought an action against the defendant for the selling of a Bezoar Stone. The majority of the court held that the evidence was insufficient to find the defendant liable because of the absence of any written warranty. The only possibility was an action for fraud.

This particular situation continued up to seventeenth century, however, by 1528 we have the proof that some courts started to consider the breach of the contract as an *assumpsit* instead of a tort for deceit[13]. This was a crucial step for the implication of non-written warranties but the situation was unclear until the end of the nineteenth century due to the influence of land law, which, dominated the English law of sale, where the principle of *caveat emptor* was still the only one considered.

This was the reason why the change was not rapid and why the courts continued to differentiate between the sale of specific goods, capable of being examined by the buyer and the sale of unascertained goods where the buyer was obliged to rely on the seller's description.

On the other hand, such an approach might be justifiable in an age where goods were generally normally traded at markets, where the buyers had the opportunity to examine goods before buying.[14]

The industrial revolution and the scale production of massive quantities of goods changed in some way the approach of courts. Sellers and buyers were no longer contracting at fairs but they were often in different places; moreover sellers started to realize that the condition of the products they were trading was crucial in order to be competing in a large market where the same product was sold by various producers[15].

Change was not quick and in 1802, in *Parkinson v. Lee*[16], the King's Bench Court denied the existence of an implied warranty. In this case the buyer decided to buy from the seller five pockets of hops that were supposed to be warranted by a sample that the buyer had had the possibility to examine. The further goods later delivered accommodated with the sample but had been treated

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12 *Chandelor v. Lopus* (1603) Cro Jac 4.
13 *Jordan's Case* (1528) YB 27 Hen VIII, f.24, pl.3.
14 Robert Bradgate, Commercial Law, Dublin: Butterworths, 2000, at 273.
15 Karl L. Llewellin, Cases and Materials on the Law of Sales, Callaghan &Co, 1930, at 204
16 *Parkinson v. Lee* (1802) 2 East 314.

with water to increase their mass. The jury stated that it was impossible for the buyer to discover that the goods had become worthless. Even though the verdict was for the buyer, Le Blanc J., who conducted the jury, expressly affirmed that the *ratio decidendi* did not involve the implication of any unwritten warranty. Grose J. expressed his thoughts about the warranty, assuming fault on the part of buyer as he did not ask for a written warranty in the contract.

These choices were influenced by the laws that applied to the sales of stallions where the possibility of any kind of implied warranty was unacceptable. However the judges refused the idea of implied warranties in horse-trading by considering that the background of the horse traders and the differences of these particular goods had created a coherent and effective scheme for quality obligations[17]. In fact the price of a horse was different with or without the written warranty: the acceptance of the risk gave the buyer the possibility to buy at a cheaper price. This approach worked very well for a kind of sale in which the danger to the seller of offering a longer warranty was seen as extravagant.

In any case, the analogy with horses was not considered enough to deny the existence of an implied warranty for other types of goods and, as a result of the great changes of the industrial revolution, and the consequent increase of international trade a new sale of goods law was gradually born[18].

Even though the industrial revolution was already started and great changes in the methods of production were made, the case law of the first part of the nineteenth century was not about the sale of complex machineries or goods derived from large-scale production as we mean it these days[19]. The case law was basically focussed on raw materials to be used in the process of manufacture such as bags of waste silk, quantities of worsted coatings, pockets of hops, Manilla hemp, etc.

However, as Karl Llewellyn has pointed out, in spite of the law reports, since the initial part of the nineteenth century things had changed: sellers begin to build good will, in wide markets, to feel their standing behind goods to be no hardship, to reduce the threat to their solvency from a thousand lurking claims, and to view it as the mark of business respectability and the road to future profit. The law of seller's obligation *had to* change, to suit these developments[20].

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[17] Paul Mitchell, The development of quality obligations in sale of goods, 117 LQR, 2001, at 650.
[18] ibid. at 651.
[19] Michael G. Bridge, The evolution of modern sales law, LMCLQ, 1991, at 53.
[20] Llewellin, Cases and Materials, at 204.

As a result of these changes the rules derived from the common law of the nineteenth century clearly described by Paul Mitchell[14] basically originated from the following cases involving the above-mentioned goods:

John v. Bright[21] the courts finally accepted a non-written warranty about the quality of the goods and the key concept of the merchantability of the goods was introduced. However it is very important to underline the fact that this rule was only about the contracts of sale for specific goods: no implied warranty was at the time introduced in common law for the protection of the buyer of unascertained goods.

Barr v. Gibson[22] This rule was indeed particular and constituted an exception to the rule stated in *John v. Bright*; in any event as will be seen later, it did not survive to the changes operated by the introduction of the Sale of Goods Act 1893.

Jones v. Just[23] The judgement was subjective;

Randall v. Newson[24] It means that if the contract of sale was by description there was an implied warranty that the goods was supposed to be not only in conformity with the description but also merchantable.

This was, in brief, the condition of the case law up to the latter part of the nineteenth century and this was the law that Sir Mackenzie Chalmers wanted to reproduce when he accepted, in 1889, the task of writing the draft of the Sale of Goods Act.

After four years of work and various attempts the Bill was ready and passed the House of Lords on 10 March 1893 - its integrity almost preserved. When the Bill reached the House of Commons a Select Committee proposed radical changes and, after five years, on 20 February 1894 received Royal Assent

Sadly, as will be seen later, Sir Mackenzie Chalmers failed[25] in his purpose because the Statute did not recreate the situation of the common law and started many concepts. Because of the many changes operated by the Select Committee the failure cannot be considered his responsibility.

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[21] *Jones v. Bright* (1829) 5 Bing. 533.
[22] *Barr Gibson* (1838) 3 M. & W. 390.
[23] *Jones v. Just* (1868) 3 Q.B. 197.
[24] *Randall v. Newson* (1877) 2 Q.B.D. 102.
[25] Bridge Evolution of modern sales law, at 52.

Despite of the fact that the Act did not recreate the situation, as it existed, many common law nations have adopted the Sale of Goods Act 1893 and even in recent times has been the reason for the codification of the law of sale for the international transactions[26].

The implied terms monitored in the Act and the final consideration for the merchantability of the goods represented a first step towards the death of the principle of *Caveat Emptor*.

In fact, with the Sale of Goods Act 1893 the protection of the implied terms relating to the contract was extended to contracts for the sale of specific goods as well as unascertained goods[27]. In spite of this revolution the goods were merely required to be merchantable until 1973[28] when the Supply of Goods (Implied terms) Act introduced the new concept of merchantable quality of the goods.

This is the historical view of the conditions from the seventeenth century until the latter part of the twentieth century because no important changes were introduced to the implied terms of the original Sale of Goods Act 1893 up until 1973.

Before 1973 the courts changed the concept of sale by description in order to try to give the buyer further protection and indeed anticipated the introduction of the concept of merchantable quality. In *Ashington Piggeries v. Christopher Hill Ltd.*[29] the litigant (feed-stuff compounders) contracted with the defendant (mink breeders) for the compound and the delivery of a particular animal foods specifically for mink nutrition. The central point of the matter was whether it was a sale by description; further, as though the seller was not a professional trader in mink food, was the latter liable for the breach of section 14 of the Sale of Goods Act 1893.

Lord Wilberforce stated: "I would have no difficulty in holding that a seller deals in goods of that description if he accepts orders to supply them in the way of business; and this whether or not he has previously or not accepted orders for goods of that description". This meant that the seller could be considered an expert for the sole reason that he was selling those goods and this is the reason why this was considered a sale by description[30]. It is hard to agree with the Lord's thoughts but it shows how the law was changed to guarantee protection to the buyer.

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[26] Supply of Goods (Implied Terms) Act 1973, § 13.
[27] Bradgate, *Commercial Law*, at 273.
[28] Supply of Goods (Implied Terms) Act 1973, § 13.

[29] *Ashington Piggeries Ltd. and Another Appelants v. Cristopher Hill* [1972] A.C. 441.
[30] The Sale of Goods Act 1893, § 14.

In the same case Lord Diplock, for the first time, assumed that the swing of the pendulum was going too far in favour of the new principle of *caveat venditor* and was alarmed about a confused situation arising[31].

The Sale of Goods Act 1979[32] did not solicit any modification to implied terms, however in 1987 the Law Commission published a report in which suggested some changes in implied terms and in the provisions for their breach. The Sale and Supply of Goods Act 1994[33] exchanged the concept of merchantable quality with the concept of satisfactory quality moving the pendulum further in favour of the buyer.

Moreover, a European Directive on Consumer Guarantees was passed in 1999.

The present scenario is therefore the following: section 13 of the Sale of Goods Act 1979 as amended provides that where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description. A very accurate description will assure the buyer with a greater protection. Notwithstanding, even goods, which correspond with their description, can be defective so Section 14 provides that the goods sold in a course of a business must be of acceptable quality. The goods are considered of acceptable quality when they are fit for their purposes, finished, free from minor defects and finished. Moreover if the buyer needs the goods for a particular purpose and makes it know to the seller, the goods must be fit for the particular buyer's purpose.

Three implied terms have been set out that basically require that the goods must be fit in accordance with the buyer's legitimate expectations[34] and sometimes, the buyer is able to sue the seller for more than one or all of the implied terms.

Section 14 applies only for contracts of sale in the course of the business. But what does "in the course of the business" mean?

Until recently the definition of a sale in the course of the business was not very clear notwithstanding the major parts of the interpretation of the courts seemed to be in favour of the

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31 *Ashington Piggeries Ltd. and Another Appelants v. Cristopher Hill* [1972] A.C. pp. 508-509.
32 Sale of Goods Act 1979, § 54.
33 Sale and Supply of Goods Act 1994,§ 35.
34 Bradgate, *Commercial Law*, at 275.

seller. A contract of sale was considered in the course of the business if the seller was selling goods conforming to his regular business[35]: *Caveat Emptor* still survived.

In *Slater v. Finning Ltd,* which was about the selling and replacing of a camshaft[36], Lord Steyn took a firm position in defence of the principle of *Caveat Emptor*. He assumed that the modern principle of *Caveat Venditor* was going too far and that the imposition of a strict culpability on the seller when the seller did not have a clue about the facts was against the facilitation of commerce. He pointed out that the seller would be put in a very liable position and that the expenses of examining and checking the every instance would be unaffordable.

In commenting on this judgement Tom Burns has assumed, and I have to agree, that implied in the judgement of Lord Steyn there was the concern that such an extension of *Caveat Venditor* would encourage litigation by making buyers feel more confident about suing the seller[37].

In spite of this view, the issues relating to the interpretation of whether a contract of sale can be considered in the course of the business of the seller have been studied and changed in favour of the principle of *Caveat Venditor* in *Stevenson v. Rogers.* Mr Stevenson sold a second hand fishing boat to Mr. Rogers for the price of 600.000 pounds. Mr Roger was not satisfied with the quality of this boat and brought a claim for the breach of Section 14 (2) of the Sale of Goods Act. Mr.Stevenson was a fisherman and the sale of the boat was just an occasional way to do business and, before this case, he would not have been considered as being in breach of an implied term.

In the Court of Appeal Potter L.J. stated that the words in the course of a business with reference to section 14 (2) of the Sale of Goods Act were supposed to be interpreted largely at their face value and if the seller was a business the aforementioned section applied. Interpreting the Act of 1893[38] and section 3 of the Act of 1979 L.J Potter stated, in clear words, that the requirement for regularity of dealing, or indeed any dealing, in the goods was removed

It is now obvious that any contract of sale made by a business will be caught by the provisions of section 14 (2) and (3) of the Sale of Goods Act and that a lot of companies involved, even infrequently, in the sale of goods will have to take it into consideration. Every businessman

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35 *Davies v. summer* [1984] 1 W.L.R. 1301.
36 *Slater v. Finning Ltd* [1997] A.C. 473.
37 *Slater v. Finning Ltd* [1997] A.C. pp. 484 ss.
38 *Stevenson v. Rogers* [1999] Q.B. p. 1039.

concerned in the sale of goods will be subject to the provisions even if the sale of goods is not his normal business.

The old age principle of *Caveat Emptor* may now disappear in favor of the modern principle of *Caveat Venditor* that is directed towards a new consumer protection system.

Prior to the Unfair Contract Terms Act 1977 the seller was able to eliminate the consequences of the implied conditions of the Sale of Goods Act with an exclusion clause. Post 1977 the seller can no longer avail himself of this possibility if the buyer is dealing as a consumer; however the goods purchased must be of a type ordinarily supplied for private use and consumption[39].

Further, as noted, this situation is going to be modified by the European Directive on Consumer Guarantees. At the moment the only remedies for the breach of an implied condition under the Sale of Goods Act 1979 are rejection and damages. Under the EC Directive on Consumer Guarantees, which the UK is obliged to implement as soon as possible, the chief remedy will be the right of the consumer to have the goods replaced or repaired (Article 3 (3)). A reduction of the price or the rejection of the contract will become the second choice (Article 3(5)).

Following the aim of the Directive, consumers often prefer the choice of replacement and repair and for the seller this can be considered a cheaper remedy[40].

Nevertheless, even before the Directive was born, the Law Commission[41] was considering the idea of adopting some kind of statutory remedies for slight breaches in consumer transactions. In the end the Law Commission asserted that these remedies would be too complex in practice and too adverse to consumers.

As we have seen consumer protection is, in some ways, better guaranteed by national law and it will very difficult to implement the Directive in a way which maintains the more stringent rights currently available to consumers (e.g. a right to reject for minor defects) and at the moment it is unclear what minimal changes will be required, or what additional changes the government intends to make[42].

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[39] Unfair Contract Terms Act 1977, § 50.
[40] The Sale of Goods Act 1979, § 54.
[41] Colin Scott and Julia Black, Cranston's Consumers and the Law, Butterworths, 2000, at 170.
[42] Scott and Black, *Cranston's Consumers*, at 171.

On the light of the historical point of view and analysing the current law, even though the Sale of Goods Act 1979 still assumes that the main principle of the law of sales is *Caveat Emptor*[43] I have to agree with the opinion that the major part of the doctrine affirming that such a statement is to be considered unrealistic.

"Unfortunately, I have to consider that modern legislation is probably going too far in the protection of the buyer even when the buyer is not a consumer and could bear the risk deriving from the normal way of doing business. Sometimes there is no fault and someone has to suffer the consequences of the bad luck. At the moment the seller suffers all the consequences of the bad luck, and this is indeed against the aim of the law to facilitate commercial transactions. The principle of *Caveat Venditor* can be justified when there is a disproportion of power between seller and buyer (e.g. the big companies contracting with a consumer) but it is totally against the principle of *laissez faire* when this disproportion is not present because the buyer is also contracting in the course of the business."

However, occasionally even when this disproportion exists there are reasons not to change the contractual power of the buyer. I agree in fact with the point of view of the European Community legislator: the consumer often prefers the simpler remedies of the replacement and reparation to the inconvenient of a claim for rejection or damages.

Commercial law, we must remember, has been created with the aim of facilitating!

PRODUCT LIABILITY

Theories of Liability

In most jurisdictions, a plaintiff's cause of action may be based on one or more of four different theories: negligence, breach of warranty, misrepresentation, and strict tort liability.

Negligence means the lack of, or failure to exercise, proper or normal care. It refers to a person who had a legal obligation either to do what should have been done or did something that should not have been done.

A manufacturer can be held liable for negligence if lack of acceptable or proper care in the production, design, or assembly of the manufacturer's product caused injury of any sort. For example, a manufacturing company might be found negligent if its members did not perform their

[43] Atiyah, Adams and MacQueen, The Sale of Goods, at 214.

duties properly or if management sanctioned improper methods and an unsafe or harmfully defective product was produced.

Breach of warranty means the failure of a seller to fulfill the terms of a promise, claim, or representation made concerning the quality or type of the product. The law presumes that a seller gives a certain warranty concerning goods that are sold and that he or she must stand behind these warranties.

Misrepresentation in the marketing of an item refers to the process of giving consumers false information about the safety of their particular product, often by drawing the consumer's attention away from the negative side-effects of the usage of the said product. An action lies in the intentional hiding of hazards or in negligent misrepresentation. The key to recovering on the basis of misrepresentation is the plaintiff's ability to show that he relied upon the representations that had been made by the seller or manufacterer. Misrepresentation can be argued under a theory of breach of express warranty or a theory of strict tort liability.

Strict liability involves extending the responsibility of the seller or manufacturer to all people who might be injured by the product, even when no mistake has been made. Injured guests, bystanders, or others with no direct relationship to the product may sue for damages caused by the product. An injured party must prove that the item was problematic, the problem proximately caused the injury, and the defect rendered the item unreasonably unsafe.

The rule of strict liability applied in product liability suits makes a seller responsible (and irresponsible) for all defective items that unreasonably threaten the safety of any consumer or the consumer's property. The seller is liable if he or she engaged in the business of selling such products frequently, which reach the consumer without any substantial changes having been made in their condition. The vendor is liable even if he or she exercised proper care in handling the product and if the consumer bought the product somewhere else and had no direct dealings with the vendor. Like in the case of internet transactions.

A critical issue in a product liability lawsuit is whether the product contains a defect or fault, which is an imperfection that renders a product unsafe or dangerous for its intended use. Design defects exist when a whole class of products is inadequately planned in such a way as to pose unreasonable hazards to consumers. For example, an automobile manufacturer's design of a vehicle with the fuel tank placed in such a position that it will explode upon low-speed impact is classified as defective. In that case, products manufactured in conformity with the intended design would be defective. A production defect arises when a product is badly assembled. For example, frames of

automobiles that are improperly welded to the body at the assembly plant would be classified as a production defect.

Something other than the product itself can cause it to be defective. For example, caustic chemicals should be packaged in appropriate containers. Improper labeling, incomplete instructions, or insufficient warnings on a product or its container also make a product defective. Dangerous or harmful products should carry warning labels that explain how they should be used, under what circumstances they are likely to cause harm, and what steps can be taken in an emergency involving the product.

The principle of correct labeling includes claims made in sales brochures, product displays, public advertising and other marketing endevours. It extends beyond warranty or negligence law, because a seller is strictly liable to users or buyers of the product who are not in privity with the seller.

A manufacturer who creates the demand for goods through media has the responsibility to determine that the product has the qualities represented to the public. Some courts allow injured consumers to sue even if they have not read a certain label or advertisement. The standard is that if the advertisement is directed toward the public at large and makes statements that an ordinary consumer would take into account when deciding to make a purchase, then the manufacturer must stand behind that claim for every member of the public.

Businesses have sought relief from state legislatures and Congress regarding product liability, contending that the shifting legal standards make them liable to even the most suspect claim. Some states have passed laws that provide manufacturers with the right to protect themselves by showing that their product met acceptable safety standards when made. This assertion is known as the state-of-the-art defense, which relieves manufacturers of the task of attempting to make a perfect product. An injured consumer cannot recover on the theory that the product would have been safe had the manufacturer incorporated safety features that were developed after the product was made. Consumer advocates have been against such laws because they allow manufacturers to avoid liability. The advocates argue that these laws discourage innovation because higher safety standards are set as improvements are made.

"Businesses have also attempted to set maximum amounts that persons can recover for punitive damages. Some states have capped awards for punitive damages. In 1996, President Bill Clinton vetoed a bill that would have limited punitive damage awards to $250,000, or two times the economic and non-economic damages, whichever amount was greater, stating that it would deprive U.S. families of the ability to fully recover for injuries caused by defective products."

In the same year, the Supreme Court imposed its own version of product liability reform with *BMW v. Gore*,[44] 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The case involved an automobile purchaser who brought action against a foreign car manufacturer, American distributor, and dealer based on the distributor's failure to disclose that the automobile had been repainted after being damaged prior to delivery. An Alabama circuit court entered a judgment in the case of compensatory damages of $4,000 and punitive damages of $2,000,000. The Supreme Court ruled the punitive damages award was excessive. In this case, the Court devised three factors to assist trial judges in deciding whether a jury's punitive damages award were excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. The *BMW* case showed that there were limits under the Constitution to the amount of punitive damages that could be imposed.

[44] *BMW v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

CONCLUSION

The principle of Caveat Emptor is now being slowly taken over by Caveat Venditor and this transformation is being recognised by a more consumer dominated markets where commercial transactions are being encouraged. This change has now balanced out the accountability and responsibility amongst the consumers and producers. The ancient rule of Caveat Emptor has now changed for the better and therefore this conceptual change would now centre around the balancing point of the necessity of disclosure of information by the seller on one side and implications of reasonable inspections done by the buyer on the other.

In all we could safely say that the shift from Emptor to Venditor is a good shift where it actually empowers the consumers on ground. We never denied the fact that consumers don't have a responsibility at all but also, they do not of all the responsibility also. The new amendments made in the CoPrA are for the better and would hopefully change how things are looked at and bought in a market or rather in a consumer- producer relationship.