

Manufacturers' and Endorsers' Liability : 'Shifting the Onus' Approach

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Abstract

Endorsement being seen as a platform for presentation of traits and performances of a product, it draws an analogy with 'invitation to offer' with the product or service voicing their presence via celebrity personalities attracting attention. Though the case of *Donoghue v. Stevenson* remains the original precedent on manufacturer's negligence and absence of any contractual obligations to the consumer making him responsible towards the ultimate beneficiary, the ratio and obiter should be analysed in sharing a look-alike obligation on endorsers for injury ensuing from use of such product or service. Since the debate of Nestles' Maggi brand, there has been a look out at the existing liability regime for the celebrity endorsers of such products. In the wake of flooding consumables in the free competitive market, falsification of critical data, misleading and non-obvious statements and superficial promising results often prejudice consumers' choice as well as preference, thereby affecting their rights to claim for healthy, consumer friendly products and income justified and habit of consumerism. Moreover, being a 'ideal' 'God like' and 'larger than life' figure to common man, personalities from entertainment, sports and other popular industry invite a stricter interpretation on their 'responsibility quotient' because of the edge over other professional advertisements in terms of greater credibility and trust.

Keywords: Endorsement, Misleading advertisements, Due diligence, Consumerism, Customers, Celebrities.

Introduction

Endorsers bridge the gap between manufactures and the consumers and often create a strong and relatable emotional bond with consumers with their earned likeability, and ways of work and life and become arbiter of quality, taste and performance of products or services. With the growing effect of the social media in the purchase journey of every individual the companies too are evolving new manners of effective saleability and one of the effective methods adopted is through endorsement through different channels. And many big celebrities are associated with the giant companies to vouch for their products and brands. But where

brands are taking advantage of celebrities, by rampantly using the social median to reach the stakeholders and customers buying behaviours dependent on celebrity endorsement, the endorser possess some responsibility and have liability against their misleading products. Because the customer places a higher value on products endorsed by celebrities and it is as if they are receiving a short of advice from a brand regarding that product when the customer is a fan of the celebrity.

So the endorsers in a way increase awareness trust and familiarity of the products they are vouching for. People also believe that the products promoted by the celebrities will make them or allow them to get the traits of the particular celebrity. So the customer in a way shows greater recall of product those are endorsed by celebrities. And thus, through the endorsement of brands by celebrities and endorser, companies are taking undue advantage.

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Justification in favour of liability:

1. There is an undue influence on the “freedom to choose” of consumers.
2. A joint or vicarious liability on the celebrity is a justified step for any for any ensuing immediate damage or harm from the use of product or services by the consumers.
3. There is a shared malicious interest of the endorsers with manufacturers in money making.

Justification against Liability:

1. Endorsers are not the approval authority or testing authority and certainly lack the technical expertise on the same.
2. It is understood that the primary safety test has been done by the authority as because it has been stamped to be market ready.
3. Endorser being a mere medium of transmission of information should not be made a scapegoat.
4. There is an express and implied ‘Indemnity clause’ in the Contract between the manufacturers and endorsers justifying a compensatory
5. The age old revolutionary concept of ‘Caveat Emptor’ puts a responsibility on consumers’ shoulder to be informative.

Liability of the celebrities for the claims made by them in advertisements: The question of liability of the celeb-endorser for the lapses of a manufacturer is long been debated ever since Nestles Maggie brand of instant noodle had quality issues and the product falling the foul of food testing authorities was banned by the Food Safety and Standards Authority of India.¹

An extremely important legal debate has been raised concerning the liability of endorsers. Various legal experts opine that even if the celeb-endorsers are made liable under certain provisions of existing legal provisions, it becomes difficult to prove the presence of clear intent to harm anyone via the endorsements they are making in respect of the deficient product. The rights and obligations of the endorsers are very well looked after by the contract between the endorser and the company. But in cases where a particular endorser is engaged not directly by the company but by any advertising agency, the terms and conditions of the

contract in such cases would be different. Moreover, in some cases, there might be non- existence of any contractual relationship between endorser and company. In absence of any contract, how far a brand ambassador is liable for deficient products is a big question.

Civil Liability Regime in India: Endorsers cover up allegations of misleading promotion under their plea as mere expression of opinion and a freedom of speech guaranteed under Article 19 of the Constitution of India But that too comes certain exceptions with a reasonable restriction being imposed in the interests of general public. Health of citizens is thus, matter of paramount consideration and no person may be allowed to trade at the cost of public health.

False and misguided claims range from overrated results of fairness products (‘fair skin in four weeks’)², food supplements guarantying ‘taller stronger and sharper children, Easy Slim Tea, use of Yantras and Stone/Topaz for male child to magical cure of ailments (Dettol TVC’s super ‘protects from 100 Germs’, Patanjali’s Chawanprash’s³ claim on ‘51 herbs’) and many more making advertisements void of any rational logic or ethics.

a) Tortuous Liability

Under the Law of Torts, duty of care and negligence could be clubbed against the endorser with a burden of proof on consumer to prove ‘malice’ on the part of endorser which is difficult to prove. Moreover, the endorsers in a manner are acting as agents of the company and thus invite no liability under the tort law.

b) The Sales of Goods Act, 1930

Implied condition of merchantability befitting the description and ‘conditions and warranties’ clause under the law is a major safeguard for consumers’ interests. Also, occasionally making buyer rely on the skills and judgment of seller and informing seller of his ‘particular purpose’ makes the seller contractually responsible.

c) Consumer Protection Act, 1986

Of all the legislations dealing with misleading advertisements and liability parameters of endorsers, the Consumer Protection Act, 1986 evolves to be most efficacious whose sole purpose is to safeguard consumers’ interests and settlement of disputes. Under section 2(1)(r) the ‘Unfair Trade Practices’ include the misleading advertisements which falsely represent

that goods are of particular standard, quality or grade along with the representation that certain goods have performance, characteristics uses or benefits which such goods actually don't have.

The Consumer Protection Councils under the Act, thus, play a vital role in deciding the extent of liability of the celebrities in case of misleading advertisements but only if the role of celebs in endorsing the products of certain brands and attracting liability in case of misleading advertisements specifically provided in the Act as the existing Act does not provide clear guidelines around rights and liabilities of celeb-endorsers. Considering the impact of celebrity endorsement on the consumer choices and behaviour, situation is more damaging in case of misleading advertisements of various products and unrealistic claims. Also the intent behind the advertisements and promotional activities is not only in a view to put forth an artistic expression but to have a better impact of their product in a very short span of time so that a whole new bunch of consumers just extend their wish to buy it because a particular celebrity uses the same.

Keeping in view the current scenario of celeb endorsement and celeb behaviour, the Consumer Protection Bill, 2018 which was introduced in the Lok Sabha for the first time on January 5, 2018, seeks to replace the existing Consumer Protection Act of 1986 in order to address the emerging consumer vulnerabilities. Till now in India, no celebrity endorser has ever been prosecuted for a misleading and exaggerated claim in an advertisement. But once the proposed bill is passed, the responsibility of celeb endorsers to our society could be enforced by a legal backing and also the trend of celebrity endorsement will become more guarded.

Moreover, the Bill is obviously a welcome move towards taking the issue of misleading advertisement but there are certain loopholes in the said bill which has been attracting criticism over and over again since the bill was introduced in the Parliament for the first time in the year 2015.

a) The proposed Bill though seems to have attempted some modification in ensuring professional and ethical liability on the endorsers; it certainly tried to limit the consumer's freedom to enforce its sanctioning rights via some compromising clauses.⁴

b) Defence of Due Diligence:⁵ On the question of liability for "false or misleading endorsement prejudicial

to the interest of any consumers", endorsers have been given an opportunity to negate malice and prove their fair intention in not knowing about the veracity of the product by pleading "due diligence" and precaution.

c) No vicarious liability too could be ensued on the endorsers.

d) Empanelled Mediator: Filing of complaint through an executive agency who is an officer belonging to the Central Consumer Protection Authority and who is being duly authorised by the Chief Commissioner is violative of a person's 'right to sue' by limiting it through an unaffected intermediary.

e) Compounding of Offence: Compounding of offence by the brand ambassador for first offence is an easy escape with the brand ambassador or endorser shelling out monetary damages at the cost of consumer's physical and mental health.

Criminal Liability Regime in India:

a) Indian Penal Code:

Any person selling or offering for sale noxious or unfit food can be prosecuted according to the provisions of the "Indian Penal Code" if that person does the same knowingly. In the case involving the instant noodle Maggie, a case under Section 270 which incriminates the malignant act that is likely to spread infection of diseases that are dangerous to the life of the persons was filed against the endorsers. Also the criminal liability cases involving Section 273 dealing with the "sale of noxious drinks", Section 276 involving the "selling of drugs as a different drug or preparation" and Section 420 involving "cheating and dishonesty" was reportedly being filed against the celebrity endorsers.

But the liability cases made under Section 420 and Section 376 dealing with cheating with regard to property and the sale of different drugs or preparations respectively are falling apart as it was not the clear case here. On the other hand, in Sections 270 and Section 273 there is a specific requirement of the involvement of the accused directly with a clear intent which is missing in some cases and difficult to prove in some other.

b) Other Special Statutes:

The Food Safety and Standards Act, 2006 under Section 24, puts a restriction on advertisements that are misleading. The Act says "no person shall be allowed

to engage in misleading representation concerning the standard ‘quality, quantity, grade and composition’, and ‘need for, or the usefulness of a food product’. Moreover, it also restricts the endorser from making such statements that gives any guarantee to the consumers as to the efficacy of the product.

The penalty for false advertisement is provided under Section 53 of the said Act which can extend up to 10 lakhs (it is believed by some legal experts that the amount of penalties in such cases are typically picked up in the contractual indemnities provided by the manufacturers or the brand owners).

Regulatory Framework in India: “Advertising Standards Council of India”, (ASCI) is a non-statutory Tribunal established in the year 1985 also deals in regulating the mechanism for ensuring just and ethical advertisement practices and takes up complaints against any perceived misrepresentation in an advertisement.⁶

It has power to give direction for modification and withdrawal of any advertisements hereby assuring truthful representations of the product. ASCI works on its code of Advertising Practice and is applicable to advertisements read heard or viewed in India irrespective of their origin. According to Gowree Gokhale, a senior partner of an International Law Firm Nishith Desai Associates, basing on the principles of “decency, fairness, honesty and responsibility”⁷ the advertisements are evaluated by the ASCI. Although the orders of the ASCI’s are generally void of enforceability, the Ministry of Indo and Broadcasting has made the violation of “Advertising Code” a penalty restricting the Cable service providers and TV channels to promote.

International Norms: In the United States, the Federal Trade Commission has certain guidelines for endorsement by celebrities. The FTC made amendments in the year 2009 giving the consumers the liberty to even hold celebrities liable in cases of misleading advertisements. It has prescribed standards for the liability of endorsers. Advertisement are evaluated on the principle of “*good reason to believe that*” in order to examine whereas the endorser has sufficient reasons to believe that the said feature of a particular commodity he is endorsing and thus guidelines make the celebrities responsible enough to investigate products first and also requiring celebrity to be a *bona fide* user.⁸

In Europe, there is voluntary self-imposed code to be followed by the celebrities whereby they are refrained

from endorsing “medicines, medical treatments, tobacco and alcohol” which have harmful effect over the health of the people.

In China, there is equal and joint responsibility with food producers if food causes harm with an option to file claim either against enterprise manufacturer or celebrity recommending the same. Misleading testimonials too have same fate. The Food Safety law of China talks about endorsers’ liability in case of misleading testimonials and recommendations. In an endorsement of a shampoo, Jackie Chan faced a legal battle for the shampoo brand he was endorsing which was alleged to be containing cancer causing ingredients whereas the advertisement showed it chemical free. But the suit against the endorser failed on the ground of non-existence of any legal relationship between the endorser and the company. China does not have any procedure for determining liability of the celeb endorsers such as “false and misleading test” and is yet to evolve laws regarding celebrities by fixing joint responsibilities in all spheres of trade.⁹

Korea, on the other hand, has a “self- regulatory institution” responsible for issuing guidelines with respect to endorsements which also has the power to decide which products are to be expressly advertised and which are not, thereby making false advertisements a rarity. It can thus, be said that Korea has comparatively more stringent mechanism in controlling misleading advertisements.

Conclusion

In lights of the expanding economic horizons of the country, it is the need of the hour to establish an economy where none is taking advantage of and none is left bereft of resources. Endorsers certainly are creating target base and building markets for big multinational companies through their perceived influence on consumers’ mind, interpreting ‘innocent misrepresentation’ and ‘negligent misrepresentation’ would be a guidance for lawmaker to see through a better and sound enforceability and plea of privity of contract or defences against strict liability falling short of their rationality when endorsements involve recklessness and whimsical professional ethics. Before acting as a spokesperson to the brand’s voice or being a mere carrier of information there is certainly a ‘line of commitment’ to morality and ethics. Thus, while it is time to ensure strict regulations against people who sacrifice their integrity for money, celeb-endorsers and advertisers take joint responsibility to marketing and

promoting ‘truth’ and ‘veracity’ in products and services.

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