

## Liability without Fault: A New Era for Product Liability

*The Law no. 7223 is a big step towards harmonisation with the Directive of 85/374/EEC concerning liability for defective products. Yet, Turkish courts have already long adopted the rationale behind the Directive and accordingly filled the gap in Turkish legislation to some extent.*

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The Law no. 7223 on Product Safety and Technical Regulations ("Law no. 7223") entered into force as of 12.03.2021 and introduced long awaited liability regime concerning the damage to third parties and their properties caused due to the products placed on the market.<sup>1</sup>

The concept of product liability is indeed not a new phenomenon. Both scholars and the courts have long recognized that those involved in production process should be held accountable towards the third parties as well as the customers for their product. In the absence of any legal provision to this purpose, the courts have been mostly evaluating the matter within the framework of non-contractual liability where the injured party, principally, is under duty to prove the counterpart's fault (unlawful act by negligence or intent), damage and the causal nexus in between.<sup>2</sup> Yet, the courts were always mindful of the fact that conventional liability regimes as such do not always adequately respond to the best interests of the injured, especially in our age of increasing technicality. This was why, the courts had a tendency to navigate between liability with fault and liability without fault in view of the particularities of the case.<sup>3</sup> Criticizing the legislator for lagging behind the modern production technologies, the courts had found a middle course by conventionally categorizing the

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<sup>1</sup> The Law no. 7223 spares the bigger part to provisions concerning product safety which is a completely different issue governed by administrative law principles whereas product liability falls within the ambit of private law. This paper will deal with product liability.

<sup>2</sup> Turkish Code of Obligations, Art. 49: Any person who unlawfully causes damage to another, whether willfully or negligently, is obliged to provide compensation.

<sup>3</sup> Court of Cassation, 4<sup>th</sup> Division, 1997/4787 E., 1997/8679 K., 25.09.1997.

producers' liability under liability with fault, but relieving the injured from the burden to prove the counterpart's fault. Accordingly, it would not be fair to expect the injured, especially if it had no contractual relationship with the producer, to prove the producers' fault, given the highly complicated nature of production process. Hence the injured should be deemed to prevail in its claim based on certain presumptions instead of proofs.<sup>4</sup> The opposite way around, it should be the producer who is expected to prove that it had no fault in the production process.<sup>5</sup>

Whilst the courts endeavoured to fill the gap in the legislation, the legislator had vaguely introduced the product liability in 2003 by amending the law no. 4077 on Consumer Protection Law. This introduction, however, did not yield the intended effect given that it only aimed at protecting the consumer rights and more importantly it did not give any legal ground to deviate from what the courts had already established so far.<sup>6</sup> Hence, the legislator, in 2014, revoked this provision entirely by enacting a brand new consumer protection law (the Law no. 6502) which makes no mention of product liability. So, the court's long lasting practice has triumphed over the legislators' futile efforts.

Now, with the enactment of the Law no. 7223, the legislator covered a significant ground for the purposes of approximation with the EU Directives, in particular, the Directive of 85/374/EEC concerning liability for defective products as amended in 1999 ("EU Directive").

Some of key points of the Law no. 7223 with respect to new product liability regime are as follows:

- **Liable Parties**

Producer and importer of the product are liable for damage caused by their product to a person or a property.

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<sup>4</sup> General Chambers of Court of Cassation, , 1996/4-588 E., 1996/831 K., 27.11.1996.

<sup>5</sup> The term 'presumption' is far from ensuring any certainty; however, the General Chambers of Court of Cassation has once attempted to provide a definition (General Chambers of Court of Cassation, 2002/4-114 E., 2002/84 K., 13.02.2002): "...If a production is susceptible to cause damage under normal circumstance and during normal usage, the fault (error) should be deemed to exist. The producer, by placing such a product, causes a danger. If the producer did not take necessary preventive measures to eliminate the danger, it should be held liable for compensation in case of a damage."

<sup>6</sup> Although Ministry of Industry and Commerce back then had introduced the Regulation on Liability for Defective Product relying on this amendment for the purposes of approximation to EU Directives, it was stillborn as it had gone against the hierarchy of norms by adopting liability without fault.

For the purpose of the Law no. 7223,

- The term 'Producer' also means importers and distributors who place the product on the market under their own brand or tradename.
- Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs, within 10 working days following the administrative authority's or the injured party's enquiry, of the identity of the producer, local representative or the importer or the prior entity located in the supply chain.

Where two or more persons are liable for the same damage, they shall be liable jointly and severally.

The liability of the producer or importer arising from the Law no. 7223 may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

- **Burden of Proof and Exemptions from Liability**

The injured person carries the burden of proving the actual damage and the causal link between the non-conformity in product and the damage. However, the injured does not have to prove the negligence of the producer or importer.

The liability under the Law no. 7223 requires non-conformity with the technical standards and general product safety rules. The EU Directive, on the other hand, allows liability in case of defect, i.e. failure to provide the safety which a person is entitled to expect. The scholars aptly criticize the legislator's choice of wording and recommend to use the term "unsafe product" or "defective product" instead.<sup>7</sup> This recommendation makes perfect sense given that the legislator, in its reasoning underlying the enactment, emphasized its pursuit for conformity with the EU Directive and provided no explanation indicating that this was a conscious deviation from the EU Directive.

This recommendation would not only sustain the desired approximation with the EU practice, but also ensure the consistency within the legal text itself. This is not least because that

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<sup>7</sup> Başak Baysal/Selim Yavuz/Murat Uyanık; "The Law no 7223 on Product Safety and Technical Regulations and Product Liability Compensation", 26.03.2021 (<https://law.khas.edu.tr/tr/7223-sayili-urun-guvenligi-ve-teknik-duzenlemeler-kanunu-ve-urun-sorumlulugu-tazminati>)

- The law considers the products which are compliant with the technical regulations concerning human health and safety are deemed to be safe, unless otherwise proven; and
- The law concordantly disallows the producer's liability in case he proves that *"non-conformity [which should read as defect] is due to compliance of the product with the applicable technical regulations or other mandatory regulations issued by the public authorities"*.

- **Expiry of Liability**

A limitation period of three years shall apply to proceedings for the recovery of damages beginning from the day on which the plaintiff became aware of the damage and the identity of the producer or importer. The rights conferred upon the injured person pursuant to the Law no. 7223 shall be extinguished upon the expiry of a period of 10 years from the date of damage. The EU Directive, however, commences the 10 years of limitation period from the date on which the producer put into circulation the actual product which caused the damage.

In view of the court's established practice, the Law no. 7223 does not introduce any solid novelty except for extending the prescription period to three years.<sup>8</sup> It is true that the Law no. 7223, for the first time, established the producers' liability without fault; however, the courts had already deserted the strict application of tortious liability, and instead imposed the burden to the producer to prove that it had no fault in the production process. Given that the Law no. 7223 still expects the producers to prove that the product in question is safe as per the applicable technical standards to avoid liability, this new regime of product liability may not have a revolutionary impact on the courts' ongoing practice.

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<sup>8</sup> The limitation period stipulated for tortious acts is normally two years beginning from the the day on which the plaintiff became aware of the damage and the identity of the liable party (Art. 72 of Turkish Code of Obligations).