



ICLG

The International Comparative Legal Guide to:

Product Liability 2017

15th Edition

A practical cross-border insight into product liability work

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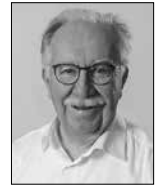
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Turkey

Didem Bengisu



Noyan Turunç



TURUNÇ

1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

The rules regarding product liability are regulated under the Turkish Code of Obligations No. 6098 (the “CoO”) and the Law of Consumer Protection No. 6502 (the “LCP”). Furthermore, the Law on the Preparation and Implementation of Technical Legislation Products (the “Technical Legislation Law”) can also be applied in a product liability case depending on the circumstances of the matter. Besides, the secondary legislation relating to product liability consists of regulations such as Regulation of Liability for Damages arising from Defective Goods (the “Product Liability Regulation”) and Market Surveillance Regulation.

Under the Turkish Law, it is a controversial issue as to whether there is a strict liability for product liability cases, since it is only regulated by an article of the Product Liability Regulation and not by law. The mentioned article states that in case the defective product causes a person’s death or injury or causes damage to a property, the manufacturer is obliged to indemnify such damage irrespective of the negligence of the manufacturer. The Supreme Courts state that there is no strict liability for the manufacturer; however, it is the party who must take every possible precaution to eliminate the risks.

Since the LCP defines the consumer as a real or legal person who acts for non-professional or non-commercial purposes, a potential dispute that arises between a trader and the seller because of a defective good shall be settled as per the provisions of the CoO. Claiming compensation for material or moral damage from the manufacturer or seller (or both) shall also be a matter of contractual liability under these general provisions.

As for criminal liability, the Turkish Criminal Law foresees the liabilities in cases of selling, supplying or keeping food materials or drugs that endanger human health, as well as producing or selling medical or other substances that endanger human life.

1.2 Does the state operate any schemes of compensation for particular products?

The State does not operate any schemes of compensation for particular products. A direct connection between the damage caused and the specific defect must be firstly proven in order to declare direct responsibility.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the “retail” supplier or all of these?

The LCP does not contain a special provision regarding the damages incurred due to the defective products, rather it refers to the Code of Obligations for the compensation claims listed in the Article 11 related to the defective products.

In accordance with the Product Liability Regulation, where two or more persons are liable for the damage, they shall be jointly liable. The LCP foresees that joint and several liabilities exist between the manufacturer, seller and importer for the optional rights of the consumer, in case a damage has occurred because of a defective product.

1.4 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

The products should have the requirements determined in the technical regulations. Producers, on the other hand, are obliged to investigate if there are any complaints related to the product and perform tests to resolve the current problems. During market surveillances, regulators conduct tests to ensure that such products have been produced in accordance with those regulations. If it is understood that the product is not safe, regulators have the power to require the manufacturer to recall a product. Besides, producers must notify the distributors of the products as well, and take every possible precaution, such as applying product recalls and destroying the affected products, if it is not possible to rectify the problem following the complaints.

1.5 Do criminal sanctions apply to the supply of defective products?

Criminal liability may arise under certain conditions in the event of injury or death due to the products or services. Article 186 of the Turkish Criminal Code sets forth that “selling, supplying or keeping food materials or drugs that endanger human health are sentenced to imprisonment of one year to five years and a judicial fine corresponding to up to 1,500 days is imposed”. Article 187 establishes that persons producing or selling medical products that endanger human life and health can be sentenced to imprisonment from one to five years and a judicial fine is also imposed. Finally, under Article 194, imprisonment of six months to one year has been foreseen for those who give or present substances for consumption which endanger human health.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

In principle, under Turkey’s legal framework, plaintiffs bear the burden of proof unless there is a specific provision by law.

As such, per Article 6/2 of the Product Liability Regulation, the plaintiff is required to prove the defect in the product, the damage it suffered, and the causal link between the defect and the damage. Therefore, the applied interpretation is that the general burden of proof rule applies in this fact as well.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

A direct connection between the damage caused and the specific defect must be established by the claimant. Expert and documentary evidences are admitted to prove causation. Testimonial evidence is not generally accepted by the manufacturer/distributor defendant party since the dispute is related on a technical issue and it is hard and legally not possible to prove controversial technical details based on an oral testimony.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

In principle, where more than one person is responsible for the same damage, their liability towards the person injured is joint and several. A party who is exposed to the claims of the consumer shall use its recourse right against the other liable persons as per their internal relationship *pro rata* to their contribution to the defect.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of “learned intermediary” under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

In case the manufacturers fail to provide adequate warnings for open and obvious risks, this can give rise to their liability. If the use of a product is not safe for the consumer, this fact is required to be submitted to attention. Turkish Law does not apply “learned intermediary” theory. The Product Liability Regulation provides that in the event that the defect of the product arises due to compliance with the technical regulations, the manufacturer will be released from liability.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The manufacturer shall not be liable if it proves any of the below:

- that the product was not launched onto the market by the manufacturer;
- that the product was not produced for selling, or was not manufactured during commercial or professional activities;
- that, having regard to the circumstances, the defect which caused the damage did not exist at the time when the product was supplied to the market;
- that the defect is caused due to the compliance of the product with the technical regulation; or
- that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of defect to be known.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

There is a state of the art defence, as noted above under question 3.1 (point e), and it is for the manufacturer to prove that the fault/defect was not discoverable.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Under Article 5/4 of the Technical Legislation Law, the manufacturer can be released from liability if it can prove that it did not supply the unsafe product to the market, or the unsafe product derived from following the relevant technical regulations, as is the case with the Product Liability Regulation Article 7.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Every court reviews each specific case within its own conviction. If a separate court has already tried on the same defect, such judgment would be persuasive, provided they share the similar facts. There is no issue of estoppel preventing a different claimant from bringing an action against a defendant in separate proceedings.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings, is there a time limit on commencing such proceedings?

Regardless of being a player in the product supply chain, indemnification can be claimed by the defendant in subsequent proceedings through the right of recourse. Consumers may file a case against all involved in the chain of production. Thus, if the responsible third party for the damage has relation to the product supply, indemnification can be required during the same proceedings.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

Per Article 6 of the Product Liability Regulation, the liability of the manufacturer may be reduced or removed, if it is proven that the damage is caused by the consumer or any person for whom the consumer is responsible.

4 Procedure

4.1 In the case of court proceedings, is the trial by a judge or a jury?

There is no jury system under Turkish procedural law. Disputes, including product liability claims, are tried by civil courts and decisions are made by only a judge.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

Yes, if the court finds that the issues to be proven require special

technical knowledge, technical expert assessors may carry out the work involved for pursuing these purposes. The court may appoint one or more experts.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

The LCP has some specific provisions related to class actions or representative proceedings. Consumer organisations, relevant public authorities and the Ministry of Customs and Trade have the right to file a lawsuit for the suspension of production and sale of the defective product and for the collection of these products from third parties which possess such products for sale.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

Yes (see above under question 4.3).

4.5 How long does it normally take to get to trial?

A complex product litigation takes approximately between 18 and 24 months following its filing, and the justified decision is issued one to three months after the final hearing. The above-mentioned periods generally depend on the location of the competent court and its workload. If the justified decision is appealed by one of the parties, the period may extend over four years, on average.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Yes, the court can try preliminary issues that relate to the law at the time of the main trial.

4.7 What appeal options are available?

A new appeal procedure was introduced a short while ago. There are two types of appeals in Turkey: a) examination of the Turkish Regional Court of Appeal; and b) examination of the Supreme Court. Thus, the Regional Court of Appeal will function as a "court of cassation". In principle, final decisions concerning material rights may be appealed; however, actions for amounts under TRY 3,110 are not included because of being definitive, in other words, they may not be appealed.

Decisions which are appealed before the Turkish Supreme Court hereinafter will firstly be subject to the examination of the Turkish Regional Court of Appeal. It will have the jurisdiction to examine the decision on procedural grounds and merits of the case, and will be able to repeat certain procedural steps, as opposed to the Supreme Court, which can only examine the case over the file. Under the current system, if the claim amount is lower than TRY 41,530, the decision of Turkish Regional Courts of Appeal is not appealable before the Supreme Court.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Both parties can rely on expert opinion evidence. The court is also entitled to rule for an expert opinion for technical matters that require specialist knowledge. The court may decide to listen to the expert, who prepared the written opinion. However, if the expert does not accept the invitation to come to the court, the report will not be taken into consideration. The Procedural Law states that the judge cannot decide to have an expert opinion on legal issues and the outcome of the expert report is not binding on the judge. In addition, the parties may submit expert/technical reports supporting their claims to the court.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

There is no pre-trial in the Turkish procedural system. Factual and expert witnesses may be required to present themselves at the hearing or trial.

4.10 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Pursuant to the current practice of the Law, each party submits two petitions to the court including their claims and arguments before the investigation phase of the case. In the preliminary investigation hearing, the court shall order the parties to submit their evidences that they have not yet submitted within two weeks. Any party failing to submit its evidences shall forfeit the right to submit additional evidence and the court shall immediately proceed to the “investigation” phase whereby it would evaluate the parties’ petitions/evidences collectively and subsequently make its judgment.

4.11 Are alternative methods of dispute resolution required to be pursued first or available as an alternative to litigation e.g. mediation, arbitration?

Arbitration has become a familiar method of alternative dispute resolution within the Turkish jurisdiction. Mediation was not recognised as a method in Turkey until the Law on Mediation for Civil Disputes came into force in 2007. Mediation has officially become another option for the resolution of legal disputes along with the arbitration. Thus, parties can choose mediation or arbitration as the means for resolving their disputes.

4.12 In what factual circumstances can persons that are not domiciled in your jurisdiction be brought within the jurisdiction of your courts either as a defendant or as a claimant?

In principle, the competent court is determined according to the residence of the defendant. However, the law sets out various alternatives for certain circumstances. According to the International Private and Procedural Law, parties may agree to determine a foreign competent court as long as the dispute has foreign facts. However, parties may not refer disputes relating to insurance, consumer agreements and employment to a foreign venue.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, please see under question 5.2.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

Unless a longer period is agreed between the parties, the claim should be brought before the courts within two years starting from the time of delivery of the goods to the consumer, and in any case, the claim would be time barred 10 years after the damage occurs.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

If the defect is hidden from the consumer due to the seller’s fault or negligence, the statute of limitations period does not apply.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

In case of a defect, the consumer is entitled to choose among the rights provided alternatively under the Article 11 of the LCP, which are: (1) the right to ask for free repair; (2) the right to ask for the replacement of the good with a defect-free one; (3) the right to terminate the contract; and (4) the right to demand a discount from the sale price in proportion to the defect. The plaintiff-consumer can also ask to be compensated both for material and immaterial damages.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Within the scope of the material damages, funeral costs, treatment costs, damages incurred, including those to be incurred, as a result of the loss or impairment of the injured party’s ability to work, and loss of earnings, can be claimed. Within the scope of immaterial damages, an appropriate compensation should be ruled by the court considering the circumstances of the matter for the plaintiff’s psychological/mental damages.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

If there exists a causal link between the defect and the damage, the costs may be recovered.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

No, they are not recoverable.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

According to Turkish Law, the compensation amount cannot exceed the plaintiff's actual damage.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

During the preliminary investigation, the court encourages parties to settle or mediate. If the parties choose not to exercise these options, the court will continue to try the case. Parties may partially or entirely settle the dispute before trial or during the litigation, up until the final judgment is rendered. Settlement is legally binding and equivalent to a final judgment.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

No such claim by government authorities is contemplated under Turkish Law.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

The successful party may recover litigation expenses from the losing party in proportion to the amount awarded. The legal fees to be reimbursed to the successful party shall be determined according to the minimum attorney fee tariff issued by the Turkish Bar Association. With regards to the attorney fees, the litigation expenses do not include attorney fees, so the successful party cannot recover such expenses from the losing party.

7.2 Is public funding, e.g. legal aid, available?

Yes, Turkish Procedural Law (Articles 334–340) sets out the provision regarding public funding by the State for people that experience financial difficulties.

7.3 If so, are there any restrictions on the availability of public funding?

Legal aid may be granted to low income citizens who are unable to afford required legal expenses.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Pure contingency fees are not acceptable in Turkey. It is possible to determine the amount of the legal fee, per a certain ratio up to 25% of the total amount to be ruled by the court.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Turkish Law does not provide any specific regulations regarding third-party funding; however, litigation funding by third parties is not forbidden in Turkey. Claimants who have a strong case but limited finance to pursue it, or simply prefer to seek external funding, can apply for litigation funding to finance their case.

7.6 In advance of the case proceeding to trial, does the court exercise any control over the costs to be incurred by the parties so that they are proportionate to the value of the claim?

No, it does not.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in your jurisdiction.

Previous Law no. 4703 was adopted with the purpose of implementing Council Directive 92/59/EC of European Union Legislation into Turkish Law. The LCP, which was published in the Official Gazette on November 28, 2013, introduces significant regulations and amendments aiming to protect consumers against sellers/suppliers. The LCP resembles European Union Directives and foresees advanced precautions for the protection of consumer rights. To a major extent, the LCP is similar to the European Union Directives and is a major step towards the harmonisation of Turkish Law with European Union Law which places significant emphasis on consumer protection. Levelling up the developing consumer rights under Turkish Law, the LCP responds the requirements of the market. Secondary legislation was also enforced to specify the details on the implementation of the LCP. The scope of the LCP covers all consumer transactions and all other consumer-related practices. It aims at specifically regulating certain acts and practices of private/public commercial or professional entities prior to or after their conclusion of any agreement with consumers.

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TURUNÇ

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