

Product Liability - Greece

Court rules on conditions to release producer from liability

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Introduction

A producer's liability for defective products is regulated by Article 6 of the Consumer Protection Law (2251/1994, as amended by Law 3587/2007).(1) This is a specific law, in contrast to the tortious liability provisions of the Civil Code. Under Article 6 of Law 2251/1994, the producer of a defective product is liable for any damage caused to the consumer from the use of such product, but may be released from such liability if it can prove that the defect did not exist when the product was launched on the market.

A general duty of care is imposed on the producer, meaning that it should take all necessary measures to protect third parties that reasonably trust the producer (the principle of trust). The producer must organise its production in such a way as to serve the general duty of care - mainly by proactively conducting the requisite checks before and during the production process, and by providing adequate information to consumers. Where that duty is violated and consumers risk sustaining damage, this conduct exceeds the limits of the producer's fair activity and destroys consumer trust in relation to the safety expectations of the product.

According to the general provisions of the law, the person harmed bears the burden of proving that:

- there was a defect in the product;
- the product was used following the instructions of use issued by the producer and the damage occurred after such use; and
- there was a causal link between the defect and the damage.

However, a consumer who suffers damage from the use of a defective product is not familiar with the producer's production procedures and methods, or the method of circulating the product, and therefore is in no position to prove the cause of the defect. Therefore, a consumer need prove only that:

- the defectiveness of the product was objectively harmful; and
- the damage occurred.

The producer must prove that the defect was not due to faulty construction or maintenance before the product left the production facility. The producer may even prove that the construction or maintenance failure was not its fault or its employees' fault (for which the producer is liable throughout the production process). This reversal of the burden of proof is based on the theory of spheres of influence or risk source.

Facts

The Greek courts have issued an interesting judgment dealing with whether and under what circumstances a producer would be held liable for a defect when the product has left the production facility and has been launched on the market.(2) In this case the plaintiff had purchased a yoghurt from a supermarket. She said she had taken the yoghurt from a fridge in the supermarket and after purchasing it, placed the yoghurt in her own fridge. Later that day she sat down to eat the yoghurt in front of the television with the lights switched off. After the first spoonfuls, the consumer felt that the yoghurt had a strange taste, so stopped eating it after having consumed a considerable quantity thereof. She switched on the lights and saw that the yoghurt had mould on its

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surface. Shortly afterwards, the consumer experienced acute abdominal pain and vomiting.

The consumer called a doctor, who examined her at home. The doctor diagnosed acute gastroenteritis and recommended bed rest and the relevant treatment. The medical opinion submitted by the doctor also mentioned that the consumer had shown the yoghurt to the doctor and that such product was possibly the cause of the acute gastroenteritis.

The next day the consumer reported the incident to the competent Market Police Department, bringing the remainder of the yoghurt. This was tested and it was found that a superficial green mould had been created. Therefore, the yoghurt was considered to be unsuitable for consumption and harmful to public health. The consumer filed a lawsuit against both the producer of the yoghurt and the supermarket seeking compensation, claiming that they were jointly liable.

According to the consumer's allegations, the most plausible reason for the yoghurt being rendered defective was a fault on the part of the producer when producing, storing and/or transferring the product, without excluding any storage fault on the part of the supermarket after the product had entered its sphere of influence and risk. The producer argued that its production was automatic and took place on a large scale, in conformity with EU and national regulations, and that the defect, if any, had appeared after the product left its production facility. It also stated that the same defect had been found in no other product of the same or any other batch of yoghurt.

After the case was heard at first instance it came before the Athens Court of Appeals.

Decision

After reviewing the case, the court ruled as follows:

"Taking into account that the production of yoghurts at the production facility of the first defendant is automatic and large-scale and that it meets the requirements of the European Union and Greek law, as well as the international standards for consumers' health and safety, the defect manifested in the yoghurt bought by the plaintiff should have also manifested in other yoghurts of the same batch, if such defect was indeed caused by a fault during the production of the product. However, no other defective yoghurts of the same batch were evidenced... A certificate issued by the competent Authority of the Ministry of Agriculture, which concerns yoghurts of always the same batch, confirmed that the whole batch was a regular one."

The court further ruled that:

"the existence of fault on the part of the first defendant during maintenance of the product and distribution thereof to the retailers should be excluded, as again any defect would not be manifested only in the yoghurt bought by the plaintiff, but also in other yoghurts which were maintained and distributed in the same way. More particularly, the yoghurts produced by the first defendant are packed in sterile plastic bowls, which are sealed, and should be consumed within 40 days of their production. In relation to this period of time, the products remain in the sphere of liability of the first defendant for only the first 2-3 days after production, during this period the products are maintained in fridges at a stable temperature of 2 degrees Celsius. Thereafter, the products are distributed to the retailers through special cooling trucks of the first defendant, wherein the temperature also remains stable at 2 degrees Celsius. The distribution and delivery of the yogurts is performed in packages made of paper, consisting of 20-30 pieces and consequently any fault regarding cooling conditions would also affect other yogurts of at least the same package. However, this did not happen, as no other yogurt of the whole batch was proven to be defective."

The court further considered that accidental damage to the yoghurt's packaging (eg, a hole) could not be excluded. In such a scenario, "any damage could have taken place after the product left the sphere of liability of the first defendant (producer), taking into account the extent of adulteration ascertained after the plaintiff bought the product". In the case at hand, it was evidenced that the yoghurt had been produced 35 days before its consumption and had been out of the business domain and sphere of liability of the producer for 32 days. In light of this, the court ruled that:

"if the cause of defectiveness of the product was located at the time the first defendant was still liable thereof, then the extent of mould should have been much greater (almost double) by the time the plaintiff bought the product, i.e. 32 days after the yoghurt remained in the supermarket of the second defendant."

However, "the mould was only superficial". Therefore, the court ruled that the defectiveness of the yoghurt was not due to the fault of the producer. In addition, the supermarket admitted to the court that the yoghurt was in perfect condition when it was supplied by the producer.

The appeal court annulled the first instance ruling, which held the producer liable for the

defectiveness of the yoghurt on the grounds that it had not taken appropriate care during the manufacture, packaging and distribution of the yoghurt. Therefore, the appeal court ruled that the consumer's lawsuit against the producer should be rejected on its merits.

In addition, the first instance court had considered that the yoghurt had not been spoiled when it was in the supermarket's fridge. The supermarket claimed that the defect in the product had been caused after the plaintiff bought it from the supermarket, and that it was possible that the defect had been caused by the incorrect transfer or storage of the yoghurt by the consumer. The appeal court ruled that the supermarket's allegations were wrong, since the extent of the defect led to the conclusion that the defectiveness of the product was not related to an action or omission on the part of the consumer, given that:

"the limited time between the purchase of the product by the plaintiff and partial consumption thereof on the same day does not justify the development of mould (to the extent that it was manifested in the product) to be attributed to her own fault. In other words, the mould of the product is disproportionately minor if it is attributed to fault of the first defendant (producer) and rather great if it is attributed to fault of the plaintiff herself. So, the cause of defectiveness of the yoghurt bought by the plaintiff from the second defendant (supermarket) is necessarily the existence of fault of the latter during maintenance of the product in its store. Such fault is not excluded by the fact that the second defendant generally takes appropriate measures for maintenance of the products and particularly it places dairy products in fridges at a stable temperature of 2 degrees Celsius and regularly checks the good operation of its fridges, because it is always possible that single faults may happen."

Therefore, having rejected all other possibilities, the court ruled that it was possible that the supermarket's cooling conditions were inappropriate, and that it could not be excluded that the yoghurt in question, while being stored by the supermarket, sustained damage to its packaging. Consumers often move products from their initial shelf and, during such movement, it is possible that damage could occur to the packaging, or the product could be placed outside the fridge or in another place where it is not cooled. Thus, the court accepted the tortious liability of the supermarket due to a failure in maintenance of the yoghurt.

Comment

In order to reach its conclusion on the issue of liability, the court applied the theory of spheres of influence or risk source. On the basis of the extent of defectiveness, the product at issue no longer fell within the sphere of the producer and consequently no liability could be established. This consideration of the court was supported by the facts that:

- the production method applied by the producer was automatic and large scale;
- no other defective products of the same or another batch were reported; and
- the supermarket admitted that the yoghurt had been supplied to it in perfect condition.

Therefore, the Athens Court of Appeals released the producer from liability.

Endnotes

(1) Law 2251/1994 incorporated EU Directive 85/374/EC into the national legislation regarding liability issues due to defective products.

(2) Athens Court of Appeals judgment 9079/2000, published in *Legal Tribune*, Volume 2002, pp1479-1485. The facts and court reasoning cited herein are based on the content of the judgment published in *Legal Tribune* magazine.

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