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EWA BAGIŃSKA, PAULINA WYSZYŃSKA-ŚLUFIŃSKA
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The development of Polish Supreme Court case law in the area of motor third party liability insurance – selected judgments in 2013–2021

The authors present selected cases of Polish Supreme Court decisions in the area of motor third-party liability insurance. The review can be divided into two sections: 1) the scope of pecuniary damage, especially the costs incurred by the injured party and 2) the contributory negligence of a victim of the event causing the damage.

Keywords: motor third-party liability insurance, insurer's liability, scope of damage, pecuniary damage, contributory negligence

I. Compulsory motor third-party liability insurance – introductory remarks

In Polish law all possessors of cars are obliged to take out civil liability insurance for damage to third parties arising from traffic. Compulsory motor third-party liability insurance is regulated by the Act on Compulsory Insurance, Guarantee Fund and Polish Motor Insurers' Bureau.[1] When damage occurs, an insurer pays compensation to any injured person each time an insured bears civil liability for the damage, within the limits of this liability and subject to the contractual limit of coverage. The above-mentioned Act defines the terms and conditions of the insurance, hence they are uniform for all possessors of vehicles, irrespective of their choice of provider of motor third-party cover.[2] Polish law has adopted the "car possessor" instead of the "car owner" legislation

1. The law of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund and Polish Bureau of Traffic Insurers (*Compulsory Insurance Act*.), (i.e. Dz. U. of 2022, item 621 with later amendments).
2. See more: M. Nesterowicz, E. Bagińska, *Civil Liability for Automobile Accidents in Polish law,* [in:] *Essays on Tort, Insurance, law and society in honour of Bill W. Dufwa,* vol. II/ 2006, p. 839 ff, Bagińska E., *Compensation for property damage in motor third-party liability insurance*, "Wiadomości Ubezpieczeniowe" 4/2014, pp. 86–87.

model, hence the insurance, technically speaking, should be taken out by the possessor.[3] However, typically, the possessor will be the car's owner. Each new registration of the car (the first one or each that follows a transfer of the car's title) will not proceed without a proof of motor third-party liability insurance.

Compulsory motor third-party liabilitu insurance policies provide civil liability coverage for all persons – both possessors of motor vehicles and non-possessor drivers – who, while driving the car during the policy period (in principle, 12 months), caused personal injury or damage to property (subject to certain restrictions[4]) to anyone, including a passenger who possesses the vehicle jointly with the driver.[5] The courts have clarified that compulsory third-party liability insurance applies also to cases where the negligent driver is not the vehicle's possessor while the injured passenger is a co-possessor of the car.[6]

It should also be noted that the injured person may bring his claim directly to an insurer (*actio directa*[7]) or – where a loss was caused by an uninsured tortfeasor or by an unidentified vehicle – to the Insurance Guarantee Fund. The legal basis for a claim against an insurer is Article 822 (4) of the Polish Civil Code [Kodeks Cywilny, KC] and Article 19 of the Compulsory Insurance Act. The action may be instigated before a court of general jurisdiction, or a court of the claimant's domicile.

Finally, the insurer who compensated the claimant for his loss may either file a regular (general) recourse action against the perpetrator of the damage (under Article 828 KC) or a *sui generis* recourse action based on Article 43 of the Compulsory Insurance Act. The second type of recourse is available exclusively in compulsory motor third-party liability insurance. A third-party insurer is entitled to file a recourse claim against the driver of the car in any of the following situations: (a) the driver has no valid driving license, (b) the driver intentionally causes the accident intoxicated or under the influence of illegal drugs or other substances, (c) the driver operates a stolen vehicle, or (d) the driver flees from the scene of the accident.[8]

Below the authors present the most significant cases in the area of motor third-party liability insurance, especially these relating to the scope of pecuniary damage and the contributory negligence of a victim of the event causing the damage. It can be observed that commented judgements broaden the scope of insurer's liability and provide a proper protection for the victims.

3. See: article 23 of the Compulsory Insurance Act.
4. In accordance with Article 38 (1) of the Compulsory Insurance Act provides the insurer is not obliged to pay for: 1) any damage to property sustained by the possessor of a vehicle because of the driver's negligent conduct; 2) any damage to property where the same person possesses both vehicles involved in the collision, 3) damage to cargo, baggage or parcels carried for a fee, unless the possessor of another vehicle is liable for the damage; 4) loss of money, jewelry, securities documents or collections of postmarks and other similar collections; 5) damage to the environment.
5. Supreme Court (Sąd Najwyższy, SN) of 7 February 2008, III CZP 115/07, OSN 9/2008, item 96.
6. SN 19 January 2007, III CZP 146/06, OSN 11/2007, item 161.
7. SN 13 May 1996, II CZP 184/95, OSN 7–8/1996, item 91.
8. SN 10 September 2009, V CSK 85/09, OSNC-ZD B/2010, item 63.

II. Insurer's liability and the scope of pecuniary damage

1. Supreme Court (Sąd Najwyższy, SN) of 22 November 2013, III CZP 76/13, OSNC[9] 9/2014, item 85: Costs of Hire of a Replacement Car[10]

The plaintiff hired a replacement car after a road accident. Since the repair of the car was considered uneconomical, the insurer paid compensation for 'total loss' (the difference between the car's value before the accident and its damaged value). The compensation included the rental costs in the period from the date of the accident and the date of the payment of compensation, although the injured party hired the car until few days after the payment of compensation was made. One week later the plaintiff bought a new car. The car rental company – an assignee of the victim's claims – demanded compensation for the car rental in the period after the compensation was paid. The insurer refused to award damages for the further period of using a replacement car.

In the first instance the court's view of the rental costs were in an adequate causal link with the accident. It was underlined that a victim acquires a real possibility to buy a new car or to have the damaged one repaired on the day when the compensation is actually paid by the insurer. After the payment made by the insurer, the victim needs a few 'organizational' days during which they can look for a replacement car. The second instance court referred a preliminary question to the Supreme Court regarding the extent of the insurer's liability under the motor third-party liability insurance.

The Supreme Court held that a compulsory motor third-party liability insurance covers purposeful and economically justified rental expenses for a replacement car incurred by the injured party during the time needed for buying a new vehicle if damages were recognized as a 'total loss'.

The Supreme Court referred to two of its previous judgments: from 17 November 2011[11] and 13 March 2012[12]. In the first judgment the Court stated that the insurer's liability covers purposeful and economically justified costs to hire a replacement car. Although the Supreme Court rejected the idea that the sole loss of use of vehicle constituted damage, the highest instance allowed a compensation for costs already incurred as a result of an accident (e.g. costs of a hiring a replacement car) as property damage (Art. 361 § 2 KC). In the second judgement, it was confirmed that under motor third-party liability insurance, the insurer bears full liability, which is determined by an adequate causal link. The causal link does not restrict compensation to certain claims arising from direct consequences of a damaging event. The only limit of the insurer liability is the guarantee sum.

The Supreme Court underlined that the scope of liability was limited by the adequate causation theory (Art. 361 § 1 KC)[13]. In the case of a total loss, the scope of damage covers the costs

9. Orzecznictwo Sądu Najwyższego Izba Cywilna (Decisions of the Supreme Court, Civil Chamber, OSNC).
10. The judgment was commented by E. Bagińska, K. Krupa – Lipińska, *Poland*, [in:] E. Karner, B.C. Steiniger (eds), *European Tort Law Yearbook 2014*, De Gruyter 2015, pp. 478–480. It was commented by M. P. Ziemiak, *Kompensacja kosztów najmu pojazdu zastępczego w przypadku wystąpienia tzw. szkody całkowitej. Glosa do uchwały SN z dnia 22 listopada 2013 r., III CZP 76/13*, „Państwo i Prawo" 8/2015, pp.123–128.
11. III CZP 5/11, OSP 1/2013, item 2, reported in English by E. Bagińska. K. Krupa-Lipińska, *Poland*, [in:] Oliphant K., Steininger B.C. (eds), *European Tort Law 2012*, De Gruyter 2013, p. 519.
12. Reported in English [in:] E. Bagińska. K. Krupa-Lipińska, op. cit. pp. 524–527.
13. According to Art. 361 §1 KC: A person obligated to pay damages is liable only for the normal consequences of the act or omission from which the damage resulted.

of hiring a replacement vehicle for the time needed to purchase a new vehicle. The need of some organizational activities which must be undertaken in order to buy a new car should be recognized as a normal consequence of the accident. Nevertheless, the victim has a duty to mitigate their loss. The basic measurement is the normal duration of the period of hire, provided that no fault of the victim extended that period. Once the insurer has communicated to the victim its decision on having qualified the claim as a 'total loss', the victim's damage resulting from a loss of use will last until a new car is purchased. The time needed to buy a new vehicle should be assessed objectively and independently of the insurer's payment of indemnity or the financial situation of the victim. If the victim has taken action to buy a new car and to dispose of the damaged vehicle immediately after the notice of the insurer's decision, these steps in the light of life experience are made to mitigate the loss. Hence, the adequate causal link between the notice and the purchase is not interrupted by the insurer's payment of compensation.

What is interesting, the Polish Supreme Court referred to the German theory of *Kommerzialisierungsschaden.* Accordingly, compensation should cover expenses incurred during the time when an injured party was unable to use their own car. A victim suffering a 'total loss' of their vehicle cannot be put in a worse position than an injured party whose vehicle could be repaired. According to the case law, the latter can claim the refund of the total cost of hire for the length of time necessary to undertake repairs.

Taking into consideration the Court's arguments it must be said, that this approach works in favor of the victims. However, the time needed to purchase a new vehicle should be neither too short nor too long. Only such costs of car rental that have an adequate causal connection with the accident can be incurred by the insurer. Nevertheless, it is the role of the court to estimate whether the costs were purposeful and economically justified and the situation of the victim should be assessed on a case-by-case basis. When evaluating the economic justification of such expenses, one has to take into account the victim's duty to prevent (or mitigate) the loss, their contribution to the loss and the *compensatio lucri cum damno* principle. [14]

2. SN of 24 August 2017, III CZP 20/17, OSNC 6/2018, item 56: Reimbursement of Car Rental Cost as Damage[15]

The judgment concerns two joined cases which involved a Spanish motor third party liability insurer. In both cases the defendant insurer refused to pay compensation for the damage consisting of the actual amount paid for the hire of a replacement vehicle. It was argued by the insurance company that there was no duty to pay above the amount of the price of car hire which it had offered to the plaintiffs. The assignees of the claims (rental companies) sued the insurer.

The case was brought to the Supreme Court via a preliminary question by the regional court which asked whether the injured party, who has a duty to mitigate the damage, can claim actual

14. E. Bagińska, *Compensation for property damage in motor third-party liability insurance*, „Wiadomości Ubezpieczeniowe" 4/2014, pp. 86–87.

15. Commented by E. Bagińska, I. Adrych Brzezińska, *Poland*, [in:] E. Karner,B.C. Steininger (eds), *European Tort Law 2018*, De Gruyter 2019, pp. 479–482; Cf. See: E. Kowalewski, M. P. Ziemiak, *Glosa do uchwały SN z dnia 24 sierpnia 2017 r., III CZP 20/17*, „Orzecznictwo Sądów Polskich" 7–8/2018, p. 69.

expenses of a car rental after they had refused to accept an offer of a 'free' rental (a rental for fees lower than actually paid), coming from the insurer under a motor third-party liability insurance.

The Supreme Court referred to the groundbreaking judgment of 17 November 2011 (III CZP 5/11), in which it was held that claims for reimbursement of car rental costs were admissible also in cases involving private vehicles, provided that the situation of the victim should be assessed on a case-by-case basis and that the rental costs are economically reasonable and necessary. It was clearly stipulated that not all heads of expenses can be considered to be causally linked to the accident and thus refundable. The injured party has a duty to prevent and mitigate the loss (Arts. 354 § 2, 362 and 826 § 1 KC). The tortfeasor (or the insurer) is obliged to reimburse the injured party only for those expenses that were purposeful and economically justified, that is, incurred with a view to eliminate (otherwise irremediable) negative outcomes of the loss. However, the insurer's liability should not be unreasonably extended as it might lead to an increase in insurance premiums.

The latter argument was developed by the Court who said that there must be a right balance between the victim's benefits and the tortfeasor's burdens. If a negative material outcome of damage to a vehicle can be eliminated in a manner less burdensome to the debtor, then those expenses which were not necessary to eliminate such an outcome cannot be considered as purposeful and economically justified. If the injured party refuses to accept the offer of a replacement car made by the insurer (which is equivalent as to its standard and state of the damaged car) and decides to pay higher costs for the rental of another car, then they have the burden of proving that the costs were purposeful and economically justified. The injured party should take into consideration not only the features of a replacement car, but also the terms of a rental agreement, such as the time and place of making the car available, the time and place of returning the vehicle, the amount of the deposit, etc. Minor inconveniences (e.g. the need for an additional contact with an insurer regarding the way the client should proceed with rental etc.) should be irrelevant as long as the said terms provide sufficient protection of the victim's interests. The victim should cooperate with the insurer and mitigate the damage and the insurer is obliged to exercise professional due diligence. It is not decisive whether the offer is the cheapest on the market, but whether it is accepted by the liable insurer. The protection of the victim's interests and the general need for economically reasonable solution must be proportional.

According to the Supreme Court a loss of use of a thing cannot be recognized as a damage, but only a pecuniary consequence of the existing material damage (destruction of a car). Actual material damage calls for greater protection. Therefore, as far as the cost of repair is concerned, the injured party is entitled to select a service garage, and there is no duty to seek the cheapest one or the acceptance of an insurer. Referring to the cost of rental, the aggrieved party has a limited right to choose the provider of a replacement car, because the exercise of the choice, if it leads to increased costs, will have to be justified *in concreto*.

It must be noted that the commented judgment clarifies the scope of compensation under a compulsory motor third-party liability insurance. In principle the insurer has got an obligation to reimburse the costs which were purposeful and economically justified and related to the rental of a replacement car. The fact that the injured party is able to use means of public transport is irrespective for the claim. When evaluating the economic justification of such expenses, he victim's duty to prevent (or mitigate) the loss and their contribution to the loss must be taken into consideration.

The decision of the Supreme Court follows the opinion expressed in the earlier judgment No. III CZP 5/11. The Court confirmed that a loss of use might be considered as damage only under special

conditions. In the case of damage or destruction of a car, such a loss of use might be equated with the cost of renting a car only when such costs were purposeful and economically justified, otherwise the damage cannot be refundable.

We can agree that a loss of use of a vehicle is not an independent pecuniary loss. However, a question arises as to the nature of such a loss if a substitute property not been hired. The answer to this question seems different if we consider a situation when the cost of car rental has been borne because of an accident and would not have been incurred but for the accident. A loss is the decrease in victim's assets caused by the payment of rental costs, namely the necessary expenses associated with the event that caused damage. These include expenses that restrict negative pecuniary outcomes in the injured party's assets, such as the inability to use the vehicle. In such a situation, the victim can claim a refund of expenses incurred by renting a replacement car. According to the court, a refund may only be obtained if the expenses have actually been incurred.

The Supreme Court took a reasonable approach to the problem of redressing a loss of a use of a car, however, theoretically speaking, confusion has been created as to the nature (whether damage or not) of 'loss of use'. The Supreme Court has taken a generally reasonable approach to the problem of redressing a loss of use of a car, however, it has not clarified the nature (whether damage or not) of 'loss of use'.

3. SN of 13 March 2020, III CZP 63/19, OSNC 11/2020, item 96: Obligation to Pay Rent for a Lease of a Replacement Vehicle as Damage[16]

Under the facts, Y caused a traffic accident and damaged X's car. X rented a replacement vehicle and she simultaneously assigned her claim against the tortfeasor to the lessor of the rental car. The lessor then assigned the claim to a third party who demanded the payment under Y's motor third-party liability insurance policy. The court of first instance dismissed the claim for payment as the plaintiff failed to prove that she actually incurred the costs of a replacement vehicle. The court of second instance raised serious doubts as to the time when the damage would arise (at the time when the cost for a rental car became due and payable or at the moment the costs were incurred).

The District Court asked a preliminary question whether the obligation to pay the rental costs for a replacement vehicle, which is due and payable by the injured party, who, as a result of a motor vehicle accident, was unable to use her own vehicle, constitutes damage, and whether the injured party has a claim for reimbursement of rental costs incurred against the tortfeasor and their civil liability insurer?

In response the Supreme Court stated that the assets of the injured party decrease at the time of conclusion of a car rental contract. According to the 'theory of difference', the damage arises at the time when the costs for a rental car become due and payable. The scope of actual damage is determined by the amount of those costs.[17] A loss of use of a vehicle *per se* is not damage, but as a reparable damage shall be recognize only the incurred costs. The Court referred to the Resolution

16. See also: E. Bagińska, P. Wyszyńska-Ślufińska, *Poland*, [in:] E. Karner, B.C. Steiniger (eds), *European Tort Law 2020*, De Gruyter 2021, pp. 498–501.

17. The court referred to the judgment of SN of 10 July 2008, III CZP 62/08 (OSNC 7–8/2009, item 106). In that judgment, considering a claim *ex contractu*, the court adhered to the view that the accrued claims of third parties against the injured are a compensable element of *damnum emergens*.

of the Supreme Court of 24 August 2017,[18] according to which the expenses for the replacement vehicle must be paid by the injured party; however, it was not specified how the payment should be made. According to the Supreme Court, the injured party can choose the method of settling the claim and may decide to assign the claim against the tortfeasor to another person. In the Supreme Court's view, an assignment has got the same effect as a direct payment by the injured party. The assignment is equated with the traditional payment for the cost of rental, because the assignment took place on the date of conclusion of the contract for the rental of a replacement vehicle, and at that moment the assets of the injured party decreased what shall be recognized as *damnum emergens*. If the circumstances were different, e.g. had the assignment occurred after the conclusion of the vehicle rental contract, then it would not be possible to classify the assignment as a payment. The aggrieved party's obligation to pay the rent for rental of a replacement vehicle constitutes a damage within the meaning of Article 361 § 2 KC remaining in a causal link with the traffic accident. The norms of civil liability are intended to protect the injured party and to put them in the financial situation they would have been in had the damage not been caused. This interpretation is not contradictory to the previous cases emphasizing that a loss of use is not reparable damage because the question relates to a clear and real increase in the victim's expenses and not to seeking compensation for not being able to use the damaged car.

Similarly to the judgment of 2017 the Supreme Court again openly admitted that a loss of use of a vehicle is not an independent, stand-alone loss. However, in the case at hand it was problematic whether 'the cost of the loss' was actually incurred, as it was not paid in the traditional sense. The plaintiff concluded a new contract (a car rental) to restrict negative pecuniary outcomes in her assets, such as the inability to use the vehicle. Hence, in order to cover necessary expenses associated with the event that caused damage, she immediately assigned her claim for reimbursement of the expenses to the contracting party with the aim of settling the contractual fee (*cessio in solutum*). In our opinion, such necessary expenses constitute an element of reparable loss.[19] There is an adequate causal link between the damage (expenditure for a replacement vehicle) and the event causing the damage (motor vehicle collision). Thus, the damage is subject to compensation by the third-party liability insurer. Overall, the decision has had a great practical impact. Thousands of cases related to the costs of car replacement are heard by courts, most of the plaintiffs being the assignees of the claims, it is a standard contractual market practice. Assignments of claims facilitate mutual settlements between the lessor and the lessee.

4. SN of 7 December 2018, III CZP 51/18, OSNC 2019/9, item 94: Reimbursement of The Car Repair Costs Incurred Before the Payment of Compensation[20]

The driver of a car caused an accident with a motorcycle. The driver had the compulsory motor third-party liability insurance. The insurer assessed the repair costs of the motorcycle at the amount of PLN 7,911 (approximately € 1,883) and paid it out. It was assessed by an independent expert

18. Ref. No. III CZP 20/17, commented above.
19. E. Bagińska, I. Adrych-Brzezińska, *Poland*, [in:] E. Karner, B.C. Steininger (eds), *European Tort Law 2018,* De Gruyter 2019, p. 474, nos. 24–35.
20. See also: E. Bagińska, P. Wyszyńska-Ślufińska, *Poland*, [in:] E. Karner, B.C. Steiniger, *European Tort Law 2019*, De Gruyter 2020, pp. 472–473.

that the repair costs should have been estimated at the amount of PLN 16,154 (approximately € 3,846). As the plaintiff did not prove that he incurred such costs, the insurer refused to pay any further costs. The plaintiff sued the insurance company for the outstanding amount. The first instance court dismissed the claim, pointing out that in a case when the repair was already made, it is possible to demand reimbursement of the cost actually incurred for the repair. If the costs were only hypothetically determined by an expert the claim must be dismissed. The plaintiff appealed.

The case was brought to the Supreme Court via a preliminary question by the second instance court which asked whether: 1) the compensation payable to the injured party under the third-party liability insurance is limited to the equivalent of the expenses actually incurred to repair the vehicle, or whether 2) it should be determined as an equivalent to the hypothetically evaluated costs of restoring the vehicle to its previous condition, if the repair was made before the amount of compensation was estimated?

In the Supreme Court's view the presented issue does not raise doubts in case law, which has repeatedly stated that compensation payable under the third-party liability insurance includes the repair costs which are necessary and economically justified. If the repair costs are incurred before the repair, the compensation may be determined as the equivalent of the hypothetically determined costs of restoring the vehicle to its previous condition. If the insurer demonstrates that such a calculation exceeds the value of the damage, then the compensation may be reduced.

Interestingly, the Supreme Court underlined that a claim for compensation arises at the moment when the obligation to repair the damage occurs, and not after the repair costs have been incurred. What determines the insurer's liability is the mere fact of the damage, and not the fact that the injured party repaired the car and incurred the expenses. If the aggrieved party who did not repair the damage is entitled to compensation, even more so is the aggrieved party who repaired it before the evaluation of compensation. The hypothetical cost of the repair is a yardstick of the amount of compensation payable to the victim since, irrespective of the repair of the vehicle, it should correspond to the cost of restoring the value of the vehicle before the accident.

The Supreme Court's view is in line with the established case law and deserves full approval. The repair costs are a part of the damage caused by a tortfeasor as there is a causal link between the cost of the repair and the tortfeasor's act. It cannot be argued that the damage is reduced when the plaintiff has repaired the vehicle himself. If the injured party cannot provide any proof of the cost of the repair (e.g. invoices) the cost of the repair should be determined on the basis of an expert opinion.

Quite surprisingly, the line of existing case law was questioned by the recent judgment of the Supreme Court[21] in which the Court clearly indicated that the injured party cannot demand the compensation for the repair cost, if the repair is not possible e.g. if the vehicle was sold before its restoration. The latter judgement seems to stand in opposition to the predominant view held by the Supreme Court, according to which the hypothetical repair costs can be indemnified. In the Court's opinion, if the injured party sold the vehicle in a damaged condition, the scope of damage will equate to the difference between the price actually obtained and the price the injured party would have been able to obtain had they sold the vehicle in an undamaged condition. Although this argument seems to sound pretty logical there might be a risk, that an injured party

21. Judgement of 10 June 2021, IV CNPP 1/21, OSNC 3/2022, item 33.

in order not to "lose" the claim for compensation for repair cost may withhold the sale until the insurer has paid the claim despite the lack of car restoration.

5. SN of 2 September 2019, III CZP 99/18, Monitor Prawniczy 19/2019, item 101: Assignments of Claims and the Reimbursement of the Cost of Private Expertise Referring to the Scope of the Insurer Liability

The resolution was adopted as a result of the Financial Ombudsman's motion for a preliminary ruling, in which he asked two questions:

1. (...) is the cost of a private expertise incurred by an injured party in order to determine the amount of the loss or insurer's liability in the course of (pre-)judicial winding-up proceedings refundable by the insurer within the compulsory third-party liability motor insurance?
2. Is the cost of a private expertise incurred by an assignee who purchased a claim for compensation from an injured party also a subject of a similar compensation?

The Financial Ombudsman reported on two different views regarding the possibility of reimbursement of costs of private expertise. According to the predominant view, if the costs of a private expert's opinion were necessary and justified, they shall be indemnified by the insurer. According to the second view – these costs shall not be covered by the insurer as there is no adequate causal link with the loss.

The Supreme Court stated that there is a uniform view presented in the case law of the Supreme Court.

The Court referred extensively to its Resolution of 29 May 2019[22] where it was upheld that the assignee who obtained a claim for compensation is entitled to demand indemnification of the reasonable costs of an expert's opinion if the expertise was necessary to claim compensation under the third-party liability insurance. The insurer has got a duty to estimate and pay compensation within the limits of the civil liability of the possessor of the vehicle, up to a maximum amount of cover, which is set up in Art. 36 sec. 1 of the Act on Compulsory Liability Insurance. In the light of the principle of full compensation, the insurer's liability for the damage is restricted by causal link. There is an adequate causal link between procurement of an expertise regarding the scope of repairment and its cost and a traffic accident. As a consequence, the cost of such an expert opinion falls within the scope of the loss which should be covered by the liable tortfeasor.

Furthermore, if the costs of an expert opinion were incurred by the injured party themselves before the assignment of the claim for compensation, the claim for reimbursement of these costs shall be recognized as an integral part of the entire damage. In Court's opinion, in the case when the assignee later incurred the costs of the expertise, they have got their own claim for reimbursement, which 'is based on the acquired claim and its dynamics'. It was specified that in order to pursue a claim against an insurer it should be assessed whether the costs were necessary, reasonable, and sufficiently justified.

It was also upheld that if the victim (or the assignee) operates a business and therefore has got the knowledge, equipment or personnel required and that is why is able to evaluate the damage, then the costs of private expertise shall not be recognized as justified. The costs shall be reimbursed only if the expertise serves directly to pursue the claim for damages and is not solely

22. III CZP 68/18, OSNC 10/2019, item 98.

related to the assignment agreement, e.g. it was made in order to assess the risk associated with the claim.

Although the resolution as well as the mentioned Resolution of the Supreme Court of 29 May 2019 reiterate the established interpretation[23], both of them are of a great practical value for the insurance market. It must be reiterated that the insurer's liability is determined by the limits of the insured's liability as the scope of damage is determined by Art. 361 KC. That is why if the expertise was reasonable and necessary to determine the loss or to estimate the insurer's liability (especially when the circumstances of an accident require professional knowledge or in a situation when the insurer denies its liability), it falls within the scope of a damage. However, it was not clear whether the indemnification can be demanded by an assignee if such costs were incurred by them after the assignment date; in a situation like this, despite the arguments provided by the court, one may notice that the causal link can be broken. The Court indicated that the assignee has got her own claim, which derives from the 'dynamics of the injured party's claim'. This part of the loss would, however, not be reimbursed if the expertise was made in order to determine the profitability of the purchase of the claim in question, as well as if the assignee herself, being a professional, could determine the amount of damage. In such a case the costs will not be considered necessary and reasonable, so no reimbursement will be made.

II. The contribution of an injured party to the damage

6. SN of 16 March 2018, IV CSK 114/17, OSNC – ZD 1/2019, item 13: Failure to Wear Seat Belts as a Contributory Negligence[24]

Due to an intentional violation of safety traffic rules, the driver of a car caused a collision with another vehicle. He was sentenced for the accident by a criminal court. During the accident, the plaintiff was sitting in the middle of the back seat and did not have his seat belt fastened. As a result of the accident, the plaintiff suffered numerous, serious head injuries. In the driver's insurer's view the plaintiff contributed to the damage in 30 %. This argument was shared by the court of first instance and as a consequence the compensation was reduced by 30 %. It was held that the plaintiff could and should have foreseen the possible consequences of the failure to wear seat belts and thus – the consequences of the accident. Both the plaintiff and the insurer appealed. The Court of Appeals changed the judgment by raising the degree of contributory negligence to 50%. The plaintiff filed a cassation.

The Supreme Court emphasized that a trial court must establish whether the victim has contributed to the damage and then consider whether the compensation should be reduced on the basis of the victim's contribution, taking into account all circumstances (especially the fault of the tortfeasor and of the injured party). In the Court's view the mere fact that the seat belt was not fastened does not justify the plaintiff's contribution to the damage in 50%. A detailed comparison between the degrees of fault of both parties must be made. An intentional breach of safety rules by the tortfeasor is a circumstance remaining highly disproportionate to the plaintiff's failure

23. See: SN 18 May 2004, III CZP 24/04, OSNC 7-8/2005, item 117.

24. See: E. Bagińska, P. Wyszyńska-Ślufińska, *Poland* [in:] E. Karner, B.C. Steiniger, *European Tort Law 2019*, De Gruyter 2020 pp. 476–478.

to fasten the seat belt. However, as the plaintiff could and should have foreseen the consequences of a possible accident and the consequences of his actions, his conduct shall be recognized as grossly negligent. That is why the expert opinions presented in the first and second instance justify the 30% contribution.

In the commented case, the victim's contribution was obvious, but the doubts referred to the extent of contribution. The criteria for the reduction of compensation are provided in Art. 362 KC[25]. One of them is the degree of fault of both parties, that is why it is necessary to compare the fault of the driver (the tortfeasor) and the injured party.[26] The tortfeasor caused the damage intentionally. The injured party's misconduct was qualified as gross negligence, which is a degree of unintentional fault. Gross negligence is understood as a failure to exercise a minimum level of care. An adult person sitting in the middle of the back seat without fastening a seat belt is especially exposed to severe injuries in the event of a traffic accident. The prevailing view in case law is that the consent to drive with a drunk driver justifies a significant contribution to damage. In the judgment of 6 June 1997 r. (II CKN 213/97, OSNC 1/1998, item 5) the court held that riding a car with a drunk driver justifies the reduction of compensation in 25%, and in the judgement of 3 March 2017 (I CSK 213/16) the Court established a 50% contribution to the damage due to the consumption of alcohol with a driver, and then riding a car with the drunk driver. The failure to wear a seat belt, although should be deemed as gross negligence, cannot be regarded as a particularly reprehensible action (as in the case of riding with a drunk driver) and therefore does not justify a 50% reduction of damages.

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25. Art. 362 KC: If the injured person contributed to the occurrence or increase of the damage, the obligation to redress it shall be correspondingly reduced according to the circumstances, and in particular the degree of fault of both parties.

26. M. Nesterowicz, N. Karczewska-Kamińska, „Przyczynienie się do szkody w prawie porównawczym ze szczególnym uwzględnieniem prawa polskiego i prawa francuskiego „w procesach lekarskich", [in:] E Bagińska, W.W. Mogilski, M. Wałachowska (eds), *Księga Jubileuszowa Profesora Eugeniusza Kowalewskiego*, TNOIK Toruń 2019, p. 432.

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Przegląd orzecznictwa polskiego Sądu Najwyższego w zakresie ubezpieczeń odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych – wybrane orzeczenia za lata 2013–2021

Autorki prezentują wybrane orzeczenia polskiego Sądu Najwyższego zapadłe w kontekście ubezpieczeń odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych. W opracowaniu przedstawiono zagadnienia dotyczące 1) zakresu naprawienia szkody majątkowej, a w szczególności kosztów poniesionych przez poszkodowanego oraz 2) przyczynienia się poszkodowanego do wyrządzonej szkody.

Słowa kluczowe: ubezpieczenie odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych, odpowiedzialność ubezpieczyciela, zakres szkody, szkoda majątkowa, przyczynienie się poszkodowanego

PROF. EWA BAGIŃSKA – head of Department of Civil Law, Gdansk University, member of the Euro – pean Group on Tort Law.
ORCID: 0000-0003-2950-8484
e-mail: baginska@prawo.ug.edu.pl

PAULINA WYSZYŃSKA-ŚLUFIŃSKA, PhD – assistant Professor, Department of Civil Law, Gdansk University, attorney at law.
ORCID: 0000-0002-7468-3639
e-mail: paulina.wyszynska-slufinska@ug.edu.pl