

Tortious Liability of a Driver in Road Traffic*

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Abstract

The tortious liability of the driver of a motor vehicle under the Slovene Code of Obligations is regulated by various provisions, depending on the role in which the driver appears as a participant in a road accident. If the driver of the motor vehicle causes a traffic accident and damage to a person who is not a participant in the traffic accident as the driver of a motor vehicle, his tortious liability is judged according to the rules of strict tortious liability. If at least two motor vehicles are participants in the traffic accident and mutual causation of damage occurs, the rules of strict tortious liability are not used. The Code of Obligations, therefore, regulates in special provisions the tortious liability of the drivers of the motor vehicles if the damage was caused by the exclusive fault of one of the drivers of the motor vehicles, if the fault for the traffic accident is two-sided and if none of the drivers of motor vehicles is culpable for causing the accident. The Code of Obligations also regulates in a special provision the tortious liability of drivers of motor vehicles for damage caused to a third person by at least two drivers of motor vehicles. The Author analyses all the various situations by which a driver of a motor vehicle can appear as a participant in a road accident and presents Slovene case law on this topic.

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1. General Introduction

In dealing with the tortious liability of a driver it is necessary to distinguish a number of different situations by which a driver of a motor vehicle can appear as a participant in a road accident. A driver can be involved in a traffic accident with a person who is not a participant as a driver of a motor vehicle (e.g., a pedestrian or cyclist). A vehicle driver can additionally appear in the role of participant of a traffic accident with another motor vehicle. A third situation is when at least two drivers of motor vehicles cause damage to a third person, who can be either the driver of a motor vehicle who is not culpable for the traffic accident or a person who is not a participant in traffic as a driver of a motor vehicle.

The various situations in which a driver of a motor vehicle can appear as participant in a traffic accident also result in various legal treatment of her or his tortious liability. Even before treatment of the cited legal situations in which the driver of a motor vehicle can appear, it is necessary to provide basic information on tortious liability in Slovenian law of obligations.

2. Introduction to Tortious Liability in the Slovenian Law of Obligations

Tortious liability is the duty of the causer of damage to compensate the injured party for damage for which she or he is responsible.¹ This duty is based on the general principle of civil law on the prohibition of causing damage. In accordance with this, everyone is obliged to refrain from behaviour that could cause harm to others (i.e., the general clause of unlawfulness, art 10 of the Code of Obligations²).

¹ Cigoj, *Teorija obligacij, Splošni del obligacijskega prava* (Theory of Obligations, General Part of Tort Law), 1989, p. 165.

² Uradni list RS (Official Journal) No 97/2007.

The general preconditions of tortious liability are the occurrence of damage, unlawfulness, a causal link between the behaviour of the causer of the damage and the damage and tortious liability on the basis of the culpability of the causer of the damage.³ If even one of these preconditions is lacking, the damage is no longer damage for which compensation is justified.⁴

Damage is deprivation that occurs because of an encroachment into the rights or legally recognised interests of another. The Code of Obligations recognises two types of damage, to wit, pecuniary and non-pecuniary damage. Pecuniary damage is the diminution of property (*damnum emergens*) or prevention of the appreciation of property (*lucrum cessans*). The basic principle of restitution of pecuniary damage is re-establishing the former state in nature. When re-establishing the former material state in nature is not possible, damage is compensated in monetary form (para 1 and 3 art 164 of the Code of Obligations). Damage is also normally compensated in monetary form if this is demanded by the injured party, which is in practice also most frequent (para 4 art 164 of the Code of Obligations). Non-pecuniary damages are physical pain, certain types of mental distress,⁵ fear and violation of personal rights. Non-pecuniary damages may be claimed in pecuniary form for physical pain, certain types of mental pain and for fear. In the case of non-pecuniary damage because of violation of personal rights, non-pecuniary damages may be claimed in non-pecuniary form, to wit in the form of publication of a judgement or correction, recall of a statement by which the violation was committed, or in some other

³ Novak, *Pravni subjekti, Fizična oseba in njene sposobnosti* (Legal subjects, natural persons and their capacities), in: Juhart, Možina, Novak, Polajnar-Pavčnik, Žnidaršič Skubic, *Uvod v civilno pravo* (Introduction to Civil Law), 2011, p. 271ff; Novak, *Vzročna zveza, protipravnost in krivda pri odškodninski odgovornosti* (Causal link, unlawfulness and fault in tortious liability), *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997*, p. 271, 272 ff.

⁴ Novak, *Osnove neposlovne odškodninske obveznosti*, in: Juhart (fn 3), p. 235; Novak, *Vzročna zveza* (fn 3), p. 271, 272 ff.

⁵ Foundations of mental suffering because of reduced life activities, deformation, insult to good name and honour, derogation of freedom, serious invalidity or death of a close relative – see art 179 and 180 of the Code of Obligations.

services by which it is possible to achieve the purpose that is intended to be achieved by compensation (art 178 of the Code of Obligations).

The next stage in investigating tortious liability is establishing a causal link between the behaviour and the damage. Slovene court practice and theory, in studying the causal link between unlawful behaviour and damage, rely on the theory of adequate causality and the theory of ratio legis causality.⁶ According to the theory of adequate causality, cause shall be considered that which is typical for the occurrence of specific damage, thus that which generally leads to such damage.⁷ According to the theory of ratio legis causality, causes are taken into account that are simultaneously violations of legal standards, and legal standards considered to be causes in view of their purpose.⁸

In dealing at all with specific cases, the unlawfulness of the behaviour and the damage must be established. Any behaviour that violates a legal ban or order is unlawful behaviour. It makes no difference for tortious liability whether this ban or order is contained in the legal norms of civil law or the norm belongs to some other branch of law (for example, criminal, administrative or labour law). It is only important that this norm is also intended to prevent the occurrence of harm.⁹

Finally, the question of culpability or fault is addressed. Fault is shown when the damage is caused intentionally or by negligence (art 135 of the Code of Obligations). The level of fault is not important for the existence of tortious liability. In principle, the level of fault also

⁶ Pravno mnenje občne seje Vrhovnega sodišča RS (Legal opinion of a plenary meeting of the Supreme Court RS), *Pravnik* 1992, p. 570; judgement and decision of the Supreme Court RS II Ips 178/2007, 16.9.2010; Polajnar Pavčnik, Vzročnost kot pravnorednostni pojem (Causality as a legally valuable concept), *Zbornik znanstvenih razprav* 1993, p. 187; Jadek Pensa, Uvodni komentar (Introductory commentary), in: Juhart, Plavšak, *Obligacijski zakonik s komentarjem, splošni del* (Code of Obligations with commentary, general part), Volume 1, 2003, p. 676, 677.

⁷ Novak, *Vzročna zveza* (fn 3), p. 280.

⁸ Novak, *Vzročna zveza* (fn 3), p. 281.

⁹ Novak, in: Juhart (fn 3), p. 238.

does not affect the fixing of the level of compensation but it could be important when the damage derives from a criminal act. In tort law, we are then bound to the level of fault in relation to the existence of a criminal act, established by a criminal conviction.¹⁰

Intention (*dolus*) is shown when the perpetrator is aware of the consequence and wishes it (direct intention, *dolus directus*) or allows it (is aware of the likely outcome, *dolus eventualis*). Distinguishing the two forms of intent does not have practical importance in civil law since, with “*pretium affectionis*” (sentimental value), it suffices for allocating the level of damages that the object was destroyed intentionally (thus irrespective of the level of intent, para 4 of art 168 of the Code of Obligations¹¹). The different kinds of intent are also not important in other cases when the law speaks of intentionally caused harm (e.g., para 1 of art 170 and para 3 of art 147 of the Code of Obligations).

Slovenian law in principle adheres to the concept of full compensation irrespective of the degree of fault. In relation to the level of (or lack of) due care in behaviour, the following concepts have been developed: gross negligence (*culpa lata*), which means neglecting the care that one would expect from any (average) person; ordinary (slight) negligence (*culpa levis*), which means neglecting the care that is required of a particularly careful attentive person¹² and negligence that neglects the standard of care normally exercised by a person in the conduct of his or her own affairs (*diligentia quam in suis*). In contrast to the two previous forms of negligence, in which the criterion for the judgement of care is abstract (*culpa in abstracto*) and is assessed in an objective way, the care normally exercised by a person in the conduct of his or her own affairs is based on a specific person (*culpa in concreto*¹³). In this case are the individual (physical and intellectual) abilities of the concrete tortfeasor also relevant.

¹⁰ Berden, *Vežanost civilnega sodišča na sodbe kazenskega sodišča* (How civil courts are bound to the judgements of criminal courts), *Pravnik* 1975, p. 83, 87.

¹¹ If an object was destroyed or damaged intentionally the court may levy compensation with regard to the value the object had for the injured party.

¹² *Cigoj* (fn 1), p. 185.

¹³ In this case the individual (physical and intellectual) abilities of the concrete tortfeasor are also relevant.

In a tort claim, the plaintiff must show damage, unlawfulness and a causal link, but not also the fault of the injurer, because fault is presumed.¹⁴ To the benefit of the injured party, for whom it may in practice be difficult to prove fault, only ordinary (slight) negligence is presumed. The presumption of fault means a deviation from the principle that those who assert something must also prove it, since in this case it is the defendant who must prove that she or he is not to blame if they wish to avoid tortious liability (*exculpatio*). Because in this case the defendant must show that she or he is not to blame and not the plaintiff that the defendant is to blame, the burden of proof is said to be inverted.

The Slovene Code of Obligations deviates from the general principle on culpable responsibility with objects and activities that are particularly dangerous and determines strict liability (art 149 of the Code of Obligations). This form of responsibility, because it is not based on fault, can also be shown even if a person is not at fault in their behaviour. Such strict liability in law must be an exception and not the rule, so such liability may only be prescribed by law. Strict liability established by law for damage from dangerous objects and dangerous activities thus demands a restrictive interpretation of the concepts of dangerous object and dangerous activity in court practice. It follows from court practice that strict liability must only be retained for those cases of danger that, despite sufficient care, it is not always possible to have under control and by which, despite such great care, it is not possible to prevent the occurrence of harm. The use of rules on strict liability is thus not appropriate for normal dangers to which we are exposed every day.¹⁵

Thus, when law envisages strict liability for a specific individual dangerous object or activity, it wishes to protect as much as possible the person who suffers damage. For the purpose of protecting an injured party, with strict liability the law also presumes that any

¹⁴ Whoever causes harm to another is bound to recompense for it if he does not prove that the damage occurred without his fault (presumed fault, para 2 art 131 of the Code of Obligations).

¹⁵ Judgement of the Supreme Court RS II Ips 310/2009, in: Sodnikov informator 2/2011, p. 9.

damage that occurs in connection with a dangerous object or dangerous activity also derives from it (art 149 of the Code of Obligations). This means that the causal link in strict liability is presumed (presumed causality, para 2 art 131 of the Code of Obligations). Presumed causality has as a consequence that the holder of a dangerous object or a person who operates a dangerous activity must already be liable because she or he is the holder of a dangerous object or the operator of a dangerous activity, irrespective of whether she or he was also at fault for the damage that occurred.¹⁶

The responsible person can be released from strict liability if he shows that the damage originated from a cause that was external and its effect could not be anticipated, avoided or averted (para 1 art 153 of the Code of Obligations), or if he shows that the damage occurred exclusively because of the actions of the injured party or a third party, which could not be anticipated nor its consequences be avoided or averted (para 2 art 153 of the Code of Obligations). The holder of a dangerous object can be partially released from strict liability if the injured party contributed to the occurrence of the injury (para 3 art 153 of the Code of Obligations).

3. Tortious Liability of a Driver to a Third Person

Damage caused to a third person is damage caused by the driver of a motor vehicle to persons who are not drivers of other motor vehicles.¹⁷ It is not therefore a mutual traffic accident of two or more motor vehicles but a traffic accident of the driver of a motor vehicle with a person who is not a participant in traffic as the driver of another motor vehicle, e.g., a pedestrian, cyclist or car passenger.

In Slovene theory and court practice, there is no doubt that a motor vehicle is a dangerous object and that the use of a motor vehicle is a dangerous activity.¹⁸ The liability of a driver for damage caused to a third person is strict liability. With this form of tortious liability,

¹⁶ Novak, in: Juhart (fn 3), p. 242.

¹⁷ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 879.

¹⁸ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 877; judgement of the Supreme Court RS II Ips 32/2009, 14.7.2011.

culpability is not a presumption for the occurrence of tortious liability (para 2 art 131 of the Code of Obligations) and it is assumed that the damage occurred because of the activity of the motor vehicle (art 149 of the Code of Obligations).

The Code of Obligations does not define a motor vehicle. Theory believes that it is necessary for the needs of tort law for a motor vehicle to be considered any vehicle the movement of which is enabled by a motor. Objects driven by a motor are dangerous objects because the operation of the motor can cause damage independently of human behaviour.¹⁹ A motor vehicle, in addition to an automobile, can also be a motor bike²⁰ or functional machinery.²¹

With damage that a driver of a motor vehicle causes to third persons, court practice deals mainly with the reasons for complete or partial exemption of strict tortious liability of the driver because of the behaviour of the injured party.²² In deciding on complete or partial exemption of strict liability, court practice first takes into account the level of danger that the motor vehicle in itself represents for the occurrence of damage; it is also important assessing the weight of the injured party's incorrect behaviour as co-causer of the accident, in addition to which it is necessary in this judgement, as additional circumstances, also to take into account the carefulness of the driver of the motor vehicle and the carefulness of the behaviour of the injured party. If together with the risk that the motor vehicle represents for the occurrence of damage in itself, the careless behaviour of the driver also contributes to the occurrence of damage, this additionally causes a reduction of the contribution of the injured party.²³ The opposite also applies: if the injured party, in addition to her or his improper behaviour being a significant cause for the

¹⁹ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 879;

²⁰ Pravno mnenje občne seje Vrhovnega sodišča RS 18. and 19.6.1996, Poročilo Vrhovnega sodišča RS 1/96, p. 6; judgement of the Supreme Court II Ips 616/2000, 20.6.2001.

²¹ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 879.

²² See para 2 and 3 art 153 of the Code of Obligations.

²³ Pravno mnenje občne seje Vrhovnega sodišča RS 22.6.1993, Poročilo Vrhovnega sodišča RS 1/93, p. 18.

occurrence of damage also behaved carelessly, this additionally influences her or his contribution to the occurrence of the damage and thus to partial disburdening of the tortious liability of the driver of the motor vehicle.

According to court practice, there is only rarely complete exemption of the strict liability of the driver because of the behaviour of the injured party, to wit when the injured party behaves completely unreasonably. For complete exemption of the strict liability of the driver of the motor vehicle, it is not sufficient that the behaviour of the injured party is unexpected but the damage must occur exclusively because of the actions of the injured party and the driver of the motor vehicle could not as a result of this action avoid or avert them.²⁴ The criterion of whether the behaviour of the injured party was unexpected is objective and abstract. This means that it is not a judgement of whether the injured party's action was unexpected for the specific driver and specific circumstances but whether it would be unexpected for a particularly careful driver.²⁵ According to court practice in the sphere of risk, the strict liability of a driver of a motor vehicle also belongs among unexpected, unconsidered and even some incomprehensible behaviour of the injured party. The Supreme Court, for example, decided that the strict liability of a driver is entirely exempted if a pedestrian, after already having crossed the first driving lane and being already in the second, suddenly turns and runs back. In the opinion of the Supreme Court, a driver is not responsible for expecting such incomprehensible behaviour of a pedestrian.²⁶

The court has decided on the partial exemption of the strict liability of a driver in a case in which the defendant in a car ran over

²⁴ Pravno mnenje občne seje Vrhovnega sodišča RS 29.6.1987, Poročilo Vrhovnega sodišča RS 1/87, str. 21.

²⁵ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 868; judgement of the Supreme Court RS II Ips 700/2007, 25.11.2010; judgement of the Supreme Court RS II Ips 515/2003, 16.9.2004; judgement of the Supreme Court RS II Ips 556/2006, 29.1.2009; decision of the Supreme Court RS II Ips 700/2007, 25.11.2010.

²⁶ Judgement of the Supreme Court RS II Ips 62/2002, 21.11.2002. See also judgement of the Supreme Court RS II Ips 616/2000, 20.6.2001.

the plaintiff in a settlement, when the latter crossed the road outside a pedestrian crossing. The plaintiff stepped onto the road from the driver's right side, having reached an opening in the hedge on his own land, stepped onto the pavement through the opening and then started to cross the road without making sure that it was safe to do so. The defendant was driving at a speed of 52.5 km/h, while the maximum allowed speed on that part of the road was 50 km/h. The plaintiff could have prevented the accident if he had been driving less than 40 km/h. The collision occurred in the afternoon and visibility was good. The opening in the hedge through which the plaintiff came was not visible from the direction from which the defendant was driving. There were no other pedestrians on the pavement at the time of the accident. Immediately when the defendant saw the plaintiff on the road, he began to brake and move to the left but he could not prevent the collision. The Supreme Court agreed with the judgement of the lower court that the defendant's behaviour could not be reproached for lack of care nor that he should or could have avoided the consequences of the plaintiff's behaviour. However, it stressed that the fact that a pedestrian crossing the road outside a pedestrian crossing is not at all unusual or unforeseeable in a settlement. Such an act was not unforeseeable in the specific case, when the plaintiff stepped from the pavement almost directly in front of the defendant's car. The Supreme Court stressed that with strict liability it is not important whether the causer of the damage is to blame for the occurrence of the damage event, since culpability is not a premise of strict tortious liability. The fact that the damage event was unavoidable is not enough for complete exclusion of strict liability; the behaviour of the injured party must also be unavoidable. Because in the specific case the behaviour of the plaintiff was not unforeseeable for the defendant, the defendant can only be partially relieved of strict tortious liability. The Supreme Court therefore decided, taking into account all the circumstances of the specific case, that the plaintiff contributed 80% and the defendant 20% to the occurrence of the damage.²⁷

²⁷ Judgement of the Supreme Court RS II Ips 32/2009, 14.7.2011.

There are often cases in court practice in which children are the injured party in traffic accidents. In cases in which children can appear in traffic, court practice demands special care of a driver. The driver of a motor vehicle must count on children of all ages in a settlement and also that children can remain in the vicinity of a road. A driver of a motor vehicle is thus obliged to adapt the speed of driving through a settlement, irrespective of whether the land beside the road can be clearly seen or is obscured by a fence or shrubs. In driving through a settlement, a driver must respect the characteristics of the settlement and be especially careful when there are houses near the road.²⁸ A driver must also count on unreasonable behaviour with children, so when he sees a child by the road he must behave with additional care and adapt driving to this circumstance.²⁹

A passenger in a vehicle is also among third persons to whom the driver of a motor vehicle can cause damage. There is an interesting case from court practice in which the court judged the tortious liability of an intoxicated driver for injury caused to a passenger. The plaintiff was involved as a passenger in a traffic accident caused by the driver of the car in a state of intoxication. The plaintiff suffered serious physical injury in the accident, because of which he claimed compensation for pecuniary and non-pecuniary loss. The defendant referred in the civil case for compensation to the plaintiff's 50% contribution to the damages; to wit, 25% because the plaintiff travelled with an intoxicated driver and 25% because the plaintiff was not wearing a seatbelt in the car. The plaintiff was also himself seriously intoxicated and therefore put forward the defence in the civil case for compensation that he was unable to judge whether the defendant was intoxicated or whether driving with him was safe. The courts of first and second instance assessed the plaintiff's contribution at 35%, namely 25% because of driving with an intoxicated driver and 10% for not

²⁸ Pravno mnenje občne seje Vrhovnega sodišča RS 29.6.1987, Poročilo Vrhovnega sodišča RS 1/87, p. 21.

²⁹ Končina Peternel, Deljena odgovornost (Divided Liability), *Pravosodni bilten*, 2/2012, p. 114.

wearing a seatbelt. The Supreme Court confirmed the judgement of the first and second instance courts by which the plaintiff shared responsibility for the injuries that occurred because he was travelling with a seriously intoxicated driver. The decision of an injured party to travel with an intoxicated driver is among behaviour of an injured party that under para 3 art 153 of the Code of Obligations has as a consequence partial exemption of liability of the driver of the motor vehicle. The Supreme Court found that the plaintiff had himself become intoxicated and, similarly, his judgement capacity when he was not intoxicated did not deviate to a major extent from the judgement capacity of a normal sober adult. It is possible to expect an averagely careful person to judge whether travelling with another driver is safe. If she or he himself reduces, or even entirely deprives her or himself of the capacity for such a judgement (eg he becomes so intoxicated that he cannot judge whether the driver with whom he intends to travel is so seriously intoxicated that travelling with him would be unsafe), the use of para 3 art 153 of the Code of Obligations is not excluded. Similarly, it is not important that the plaintiff was not in the company of the driver on the day that the accident occurred, or that they were not together up to the moment when the defendant offered him transport home. The essential fact is that the plaintiff was not in a state in which he could soberly consider whether to travel with an intoxicated driver and that he put himself in such a state. The Supreme Court therefore confirmed the first and second instance judgement that the plaintiff's contribution to the injuries amounted to 25%. The Supreme Court did not deal in the judgement with the plaintiff's 10% contribution because he was not wearing a seatbelt since the plaintiff admitted that contribution.³⁰

The Supreme Court also dealt with the contribution of an injured party because of travelling with an intoxicated driver in another case.³¹ In this case, in addition to agreeing to travel with an intoxicated driver, at the time of the accident he was holding his

³⁰ Judgement of the Supreme Court RS II Ips 244/2011, 28.10.2014.

³¹ Judgement of the Supreme Court RS II Ips 149/2012, 18.9.2014.

head out of an open window so that at the moment of the car skidding from the road he hit his head on the column of the car's bodywork. The Supreme Court assessed the injured party's contribution at 20%.

4. Tortious liability of drivers of motor vehicles in a traffic accident involving at least two motor vehicles

In a case in which, because of a traffic accident involving at least two motor vehicles, injury to both drivers of the motor vehicles occurs, the rules on strict liability do not apply since, under these rules, both drivers are exclusively responsible for the damage to both vehicles, which is illogical. In this case, namely, both drivers are at the same time causers of the damage and injured parties (mutually inflicted damage).³² The Code of Obligations therefore regulates in special provisions the tortious liability of drivers for damage that drivers of motor vehicles cause mutually (art 154 of the Code of Obligations). It thus regulates cases in which one of the drivers is exclusively to blame for causing the traffic accident (para 1 art 154 of the Code of Obligations), in which both drivers are to blame for causing the traffic accident (para 2 art 154 of the Code of Obligations) and in which neither of the drivers is to blame for causing the accident (para 3 art 154 of the Code of Obligations).

For use of art 154 of the Code of Obligations interpretation of the concept of an accident of a moving vehicle is of essential importance. It is characteristic of the concept of an accident of moving vehicles that is a combination of the dangerous activity of motor vehicles and human behaviour. In defining the activity of a motor vehicle, there is no doubt that it relates to the activity of a motor vehicle whenever the vehicle is moving, even without the driving force of an engine (e.g., downwards on a slope).³³ The dangerous activity of a motor vehicle also includes the time when the motor vehicle is at rest, although it is

³² Betetto, *Odgovornost imetnikov motornih vozil pri nesreči, ki jo povzročijo premikajoča se motorna vozila* (Liability of holders of motor vehicles in accidents caused by moving motor vehicles), *Pravosodni bilten*, 2/2003, p. 35.

³³ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 881.

participant in a traffic situation (e.g., the vehicle is at rest because it is standing in a queue of traffic). Even in such cases, a motor vehicle represents a source of increased danger.³⁴ However, it is not damage caused because of the activity of a motor vehicle, for example, in a case in which a parked motorcycle overturns onto another motorcycle parked next to it and thus causes damage. Theory in connection with defining the concept of the activity of a motor vehicle believes that it must not be interpreted too broadly but in accordance with the sense of strict liability.³⁵ It is therefore necessary to consider that a vehicle is in operation whenever it signifies increased danger for the environment.³⁶ In line with this position, for example, a court decided that damage that occurred in a parking place when unloading glass from a parked cargo vehicle because of glass falling on a car that was parked next to the cargo vehicle, did not occur in connection with the activity of a motor vehicle.³⁷

In theory and court practice, there is a uniform standpoint that the concept of an accident does not embrace only the collision of two motor vehicles. It is essential that the damage occurred because of the activity of the motor vehicles. So the provisions of art 154 of the Code of obligations also deal with cases in which collision occurs because of activity under pressure, when one vehicle is damaged because it was avoiding collision with another³⁸ and cases in which damage occurs because of an oily driving surface because oil from an engine or cargo ran onto it.³⁹

4.1. Exclusive blame of one of the drivers of motor vehicles

If one of the drivers is exclusively to blame for an accident of two motor vehicles, the rules on culpable liability are used (para 1 art 154

³⁴ Judgement of the Supreme Court RS II Ips 66/2011, 20.3.2014.

³⁵ Cigoj, *Avtomobilist (Driver)*, 1982, p. 32.

³⁶ Cigoj (fn 35), p. 28.

³⁷ Judgement of the Higher Court in Ljubljana I Cpg 1010/2000, 11. 9. 2002.

³⁸ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 881.

³⁹ Judgement of the Higher Court in Koper Cp 109/1979, 13.3.1979, *Informator* 39, 2837/1981.

of the Code of Obligations). The exclusive blame of one of the drivers must be proved by the party that refers to this. Only if one of the drivers succeeds in showing that the other driver was exclusively to blame for the traffic accident are the rules of the Code of Obligations on culpable liability used. If it is shown that both parties are to blame for the accident, para 2 art 154 of the Code of Obligations is used.⁴⁰

Court practice decided, for example, in a case in which a driver, driving at an unreasonably high speed (which was 1.5 times more than the permitted speed), collided at a cross roads with a vehicle driven in the opposite direction, although it had right of way over him.⁴¹ The driver of a motorcycle, for example, which joined a road with priority from a road without priority and thus collided with the driver of a car, was exclusively to blame. The car driver was at the time driving in accordance with the speed limit and was also not violating any other road regulations.⁴² It is worth mentioning a further case, in which the defendant turned at a road junction from a road without priority onto a road with priority. A collision occurred because, at the road junction, the plaintiff was overtaking a vehicle that had stopped in front of him in order to allow pedestrians across a pedestrian crossing. The plaintiff overtook the vehicle on the driving lane intended for driving in the opposite direction. The plaintiff violated the absolute ban on overtaking in such a situation, so the court decided that he was exclusively liable for the damage caused.⁴³

4.2. Both drivers of motor vehicles are to blame for causing an accident

If both parties are to blame for the occurrence of a traffic accident, each driver is liable for all the damage in proportion to the

⁴⁰ More on compensation of mutual damage when both drivers are culpable for a traffic accident, in section 4.2.

⁴¹ Judgement of the Supreme Court RS II Ips 432/1999, 17.2.2000, Zbirka odločb VS RS-C-2000-14, 2001, p. 104. See also judgement of the Supreme Court RS II Ips 597/2000, 20.06.2001, and judgement of the Supreme Court RS II Ips 245/2000, 6.12.2000.

⁴² Judgement of the Supreme Court RS II Ips 71/1994, 13.9.1995.

⁴³ Judgement of the Supreme Court RS II Ips 485/1994, 24.1.1996.

level of his fault (para 2 art 154 of the Code of Obligations). In this case is fault not a premise for establishing the tortious liability of the drivers but only a criterion for dividing the damage between them.⁴⁴

Court practice on the division of liability between causers of a traffic accident has decided in various cases. In cases in which the rule on suitable speed and the rule on priority roads clash, the driver who violates the rule on priority roads according to court practice generally bears a greater share of liability unless special circumstances exist.⁴⁵ In one case, the plaintiff came from a side street, drove through stop sign and drove onto the priority road. The defendant was driving along the priority road through a crossroads at a speed of approximately 80 km/h, although a speed restriction of 60 km/h applied at this part of the crossroads. The court found that the plaintiff could have prevented the accident if she had stopped at the stop sign or if she had braked in time and the defendant could have prevented the collision if he had been driving at the permitted speed of 60 km/h. Given such material circumstances, the court decided that the plaintiff was 75% responsible for the accident and the defendant 25%.⁴⁶ It is worth mentioning another case, in which a car driver overtook a motorcycle and then immediately turned right and thus obstructed the path of the motorcycle. The motorcycle rider could have prevented the accident if he had started to brake in time but he did not do this because he was driving under the influence of alcohol. The court decided that the car driver's responsibility was the greater because he created a dangerous situation when, by his way of driving, he forced the motorcycle rider to brake. The car driver

⁴⁴ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 879; Betetto (fn 32), p. 35; Cigoj, Komentar obligacijskih razmerij (Commentary of the Law of Obligations), Volume 1, 1984, p. 675; judgement of the Supreme Court RS II Ips 128/2013, 23.4.2015.

⁴⁵ Judgement of the Supreme Court RS II Ips 563/2005, 13.12.2007; judgement of the Supreme Court RS II Ips 565/2005, 29.11.2007; judgement of the Supreme Court RS II Ips 366/2003, 25.2.2004; judgement of the Supreme Court RS II Ips 101/2006, 10.4.2008; judgement of the Supreme Court RS II Ips 639/2004, 24.8.2006; judgement of the Supreme Court RS II Ips 238/2009, 14.3.2013.

⁴⁶ Judgement of the Supreme Court RS II Ips 444/2007, 11.2.2010.

was thus two thirds to blame for the accident and the motorcycle rider one third because he was driving under the influence of alcohol.

In deciding on the division of responsibility of the causers of a traffic accident, theory stresses that para 2 art 154 of the Code of Obligations determines fault only as a starting point for determining the level of share of liability of drivers for the damage caused, but does not mention the weight of consequences that occurred because of the behaviour of one or the other driver. In the opinion of theory and court practice, it is necessary in judgement of the level of a driver's responsibility for causing the damage, also to take into account other causes that contributed to the level of damage.⁴⁷ Theory mentions a case in which a car, because of slightly exceeding the speed limit drove a little over the centre line onto the left side of the road and struck a road tanker with flammable fuel, which caught fire and caused catastrophic damage. In this case, the mere weighing of fault would not give a suitable result. In the judgement of the contributions to the occurrence of the damage it is therefore also necessary to take into account that the road tanker with flammable fuel contributed to the level of the catastrophic damage, by virtue of introducing into traffic a much greater danger than does a car.⁴⁸ The court argued *mutatis mutandis* the same in a case of a traffic accident of a motorised bicycle with a cargo vehicle, for which both participants were to blame. The court stressed that, in the distribution of responsibility for the occurrence of the damage, in addition to culpability for the occurrence of the accident it is also necessary to take into account the fact the a motorised bicycle is in a subordinate position to a heavy and dangerous cargo vehicle.⁴⁹

⁴⁷ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 883; judgement of the Supreme Court RS II Ips 128/2013, 23.4.2015.

⁴⁸ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 883.

⁴⁹ Judgement of the Supreme Court RS II Ips 244/1994, 28.10.1995.

4.3. None of the drivers of motor vehicles is to blame for a traffic accident

For a case in which none of the drivers of motor vehicles is to blame, the Code of Obligations determines in para 3 art 154 that the drivers are responsible by equal share, unless justice requires something else. Theory stresses that in the use of these provisions, it is necessary to take into account the level of danger of the activity of the motor vehicles. Justice, in other words, requires a different division of damages, above all when vehicles are concerned that signify various dangers because of their weight and durability, speed and solidity of construction.⁵⁰

A court relied on para 3 Art. 154 of the Code of Obligations, for example, for its decision in a case in which the defendant joined traffic from a non-priority road to a priority one and thus blocked the path of the plaintiff. The defendant checked for possible traffic in both directions and then drove from the parking lot onto the priority road. The court established that the plaintiff, in entering the priority road could not see the defendant since the defendant was hidden behind a steep grassy slope. The court considered that the traffic signalisation in that part of the road was inadequate, since there was no road mirror that would have enabled the defendant to perceive the vehicle on the priority road in good time. The defendant therefore, in the opinion of the court, was not to blame for the traffic accident. Similarly, the plaintiff was not to blame for the traffic accident, having been driving on the priority road in compliance with the speed limit. The court therefore decided that both drivers were to blame for causing the accident in equal shares.⁵¹ The court decided similarly in a case of collision between drivers of snowmobiles. The drivers collided at night when driving in opposite directions, both upwards each on his own side of a rise. They could not see each other because of the steep slope and the forest. Neither of the drivers was exceeding a suitable speed for driving a snowmobile. Because of the

⁵⁰ Cigoj (fn 35), p. 295; Cigoj (fn 44), p. 675.

⁵¹ Judgement of the Higher Court in Ljubljana VSL II Cp 147/2011, 20.4.2011.

rise the drivers did not see the lights of each other's snowmobiles and, similarly, they could not hear each other since both were wearing helmets. In view of the material circumstances so established, the court concluded that neither of the drivers was even partially to blame for the occurrence of damage and decided that the two were liable for the damage in equal shares.⁵²

5. Liability of a number of drivers of motor vehicles for damage caused to a third person

In addition to the regulation of tortious liability of drivers with mutually caused damage, the Code of Obligations also regulates in art 154 the tortious liability for damage caused to a third person by at least two drivers of motor vehicles (para 4 art 154 of the Code of Obligations). The Code of Obligations regulates in para 4 art 154, a case in which at least two drivers of motor vehicles cause damage to a third person and are both partially or entirely responsible for this damage. The Code of Obligations in this case prescribes solidary liability of the drivers of the motor vehicles, which means that the third person or injured party can claim compensation of damages from either of the responsible drivers of the motor vehicles.

In the use of para 4 art 154 of the Code of Obligations, the definition of third persons is of crucial importance. These are persons who are not burdened with the risk of the danger of operating a motor vehicle and thus are not in charge of motor vehicles that are participant in a traffic accident. In view of the definition of third persons, *mutatis mutandis* it applies the same as in a case in which only one driver of a motor vehicle causes damage to a person who is not the driver of a motor vehicle.⁵³ In connection with the provision of para 4 art 154 of the Code of Obligations, it is necessary to add that a third person can also be a driver of a third motor vehicle who is not to blame for the traffic accident.⁵⁴

⁵² Judgement of the Higher Court in Celje VSC Cp 25/2012, 30.5.2012.

⁵³ See chapter 2.

⁵⁴ Pravno mnenje občne seje Vrhovnega sodišča RS 16.12.1997, Poročilo VSS 2/97, p. 4.

The provision of para 4 art 154 of the Code of Obligations only regulates relations between the causer of the damage and the injured party. The provision prescribes solidary liability of causers of a traffic accident, irrespective of whether the drivers of the motor vehicles are partially or wholly responsible. This means that none of the responsible causers of the traffic accident in relation to the injured party can object under tort law that she or he is not to blame for causing the damage or that she or he did not contribute a specific share.⁵⁵ It is worth mentioning a case in which the passenger of a motorcyclist was injured in a traffic accident that occurred because she was struck by a car mirror on the driving lane on which the car was driving. The injured party, on the basis of para 4 art 154 of the Code of Obligations, claimed compensation of damages from the driver of the car and the motorcyclist, as solidary debtors. In the procedure, the driver of the car objected that the accident occurred through the exclusive culpability of the motorcyclist and that he himself did everything possible to prevent the collision with the motorcyclist, on his own side of the road. The car driver therefore believed that he is not tortious liable because of the exclusive culpability of the motorcyclist for causing the accident. The court decided that such an objection cannot be successful in relation to the passenger of the motorcyclist. The fault of only one of the drivers for a traffic accident in which several motor vehicles are participant cannot exclude their solidary liability in relation to third persons.⁵⁶ In relation to the injured party, namely, it is not important whether any of the holders of a motor vehicle is perhaps exclusively to blame for the occurrence of damage, since without the dangerous operation of both motor vehicles, the traffic accident would not have occurred.⁵⁷ In relation to the injured party who is not the holder of a motor vehicle, each driver of a motor vehicle that is participant in a traffic accident, is at least partially liable for the damage.⁵⁸ However, the objection of

⁵⁵ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 884; judgement of the Supreme Court RS II Ips 137/2009, 19.7.2012.

⁵⁶ Judgement of the Supreme Court RS II Ips 983/1994, 28.6.1995.

⁵⁷ Jadek Pensa, in: Juhart, Plavšak (fn 6), p. 884, 885.

⁵⁸ Judgement of the Supreme Court RS II Ips 137/2009, 19.6.2012.

exclusive or partial fault of one of the drivers who caused the traffic accident can have legal consequences in any recourse lawsuit.⁵⁹ A solidary debtor who pays more than his share of the damage, namely, under the general rules of the Code of Obligations on solidary liability may claim from any of the other solidary debtors that the latter refund what he paid for him.⁶⁰ The court determines the share of each of the individual solidary debtors in relation to the weight of her or his culpability and the weight of the consequences that followed from her or his activity.⁶¹

6. Conclusion

The tortious liability of the driver of a motor vehicle under the Slovene Code of Obligations is regulated by various provisions, depending the role in which the driver appears as participant in a road accident. If the driver of the motor vehicle causes a traffic accident and damage to a person who is not participant in the traffic accident as the driver of a motor vehicle, his tortious liability is judged according to the rules of strict tortious liability. A driver has tortious liability irrespective of culpability and it is presumed that the damage occurred because of the activity of the motor vehicle. If at least two motor vehicles are participant in the traffic accident and mutual causation of damage occurs, the rules of strict tortious liability are not used, since under those rules both drivers would be exclusively liable for the damage to both vehicles, which is not logical. The Code of Obligations, therefore, regulates in special provisions the tortious liability of the drivers of the motor vehicles. If the damage was caused by the exclusive fault of one of the drivers of the motor vehicles, the rules on culpable liability are used. If the fault for the traffic accident is two-sided, the drivers of the motor vehicles are liable for the damage in proportion to the degree of their culpability. If none of the drivers of motor vehicles are culpable for causing the accident, the drivers are liable by equal shares, unless

⁵⁹ Judgement of the Supreme Court RS II Ips 137/2009, 19.6.2012.

⁶⁰ Para 1 art 188 of the Code of Obligations.

⁶¹ Para 2 Art. 188 of the Code of Obligations.

justice in the specific case requires a different division of liability between them. The Code of Obligations also regulates in a special provision the tortious liability of drivers of motor vehicles for damage caused to a third person by at least two drivers of motor vehicles. In this case, the Code of Obligations determines that the drivers of motor vehicles have solidarity liability for damage in relation to third person injured parties.

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