

Criminal Offence of »Causing a Traffic Accident through Negligence« in Slovenian Criminal Code*

Vid JAKULIN**

Abstract:

A criminal offence of Causing a Traffic Accident through Negligence is one of the four negligent offences in the Criminal Code of the Republic of Slovenia.

Negligent offences have certain characteristics, which should be specially pointed out. The act of accomplishment in negligent offences is manifested as a breach of due care (breach of duty of care) and it is in these criminal offences of crucial importance, because it constitutes the ethical ground for the punishability of these offences. The next characteristic of negligent offences is a harm inflicting consequence (a harm done to the protected good), which is considered as an essential element in the structure of these offences. What is further specific for these offences is a causal relationship, because a causal relationship between a breach of due care and the resulting prohibited consequence is treated in different way than in typical intentional offences. Culpability in negligent offences is assessed by the rules applied to prove the ordinary negligence.

Key words: Slovenia, Traffic accident, negligent offences, breach of duty of care

* Geliş Tarihi: 18.01.2016, Kabul Tarihi: 17.11.2016.

** *Prof. Dr., Full Professor at the Faculty of Law, University of Ljubljana, Slovenia.*

I. Introduction

A criminal offence of Causing a Traffic Accident through Negligence (Article 323 of the Criminal Code) is one of the four negligent offences in the Criminal Code (hereinafter CC-1). Until the enactment of the Criminal Code of the Republic of Slovenia which came into force on the 1st January 1995¹, this criminal offence under the title »Endangering Public Traffic« was defined as an intentional endangerment offence in the Article 251 of the Criminal Code of the Socialist Republic of Slovenia.² Due to difficulties caused by a classical formulation of endangerment offence to judicial practice – according to this formulation there must be between a perpetrator's conduct and a harm inflicting consequence some concrete danger as a prohibited consequence - this criminal offence was reformulated in a way as it is provided for in the current criminal code. This change was not aimed only at facilitating a judicial practice, but also at contributing to a fair trial.³ The intention was certainly good, but there is nevertheless a question whether the provision reformulated in this way actually facilitated a work of courts and contributed to a more fair trial. A number of questions raised by this provision indicate that the answer to this question is not so unambiguous.

It seems reasonable before making an analysis of Article 323 of the CC-1 to see first what is in fact the object of the criminal law protection in criminal offences against the safety of public traffic. Is it the safety of public traffic itself as it could be deduced from the title of this chapter of the CC-1 or the object of protection is rather a safety

¹ Official Gazette of the Republic of Slovenia 63/94 and 70/94 (Amendment). With the Amendment to the Criminal Code of the Republic of Slovenia (Official Gazette of the Republic of Slovenia 23/99) several changes were adopted, among them a name of this statute which has been called since then only a Criminal Code. The Criminal Code was amended also in 2004 (Official Gazette of the Republic of Slovenia 40/2004). A new Criminal Code was enacted in 2008 (CC-1) (Official Gazette of the Republic of Slovenia 55/2008 and 66/2008) and entered into force on the 1st November 2008. The CC-1 was amended three times (Official Gazette of the Republic of Slovenia 39/2009 CC-1A, 91/2011 CC-1B and 54/15 CC-1C).

² Official Gazette of the Socialist Republic of Slovenia 12/77, 3/78, 19/84, 47/87, 33/89 in 5/90.

³ Baycon L.: Uvodna pojasnila h Kazenskemu zakoniku RS, pp. 31-32.

of people and property in the public traffic? The analysis of offences from the chapter of Criminal Offences against the Safety of Public Traffic shows that the object of the criminal law protection is actually the safety of people and property in all types of public traffic. This poses the question what is the difference between criminal offences against the safety of public traffic and criminal offences against the general safety of people and property; in both cases we namely have the same object of criminal law protection, i.e. the safety of people and property. There is another open question on how to make a clear distinction between the offences from one and other chapter. How to define for example a traffic accident in which a person suffered only a light bodily injury or the accident resulted only in property damage? It is obvious that it is not a question of the criminal offence under Article 323 of the CC-1, because the traffic accident did not result in a serious bodily injury of a person. On the other hand, it is against one's conviction to consider this act merely as a petty offence against the safety of public traffic, if a perpetrator fulfilled with his conducts all elements of the criminal offence against the general safety of people and property under Article 314 of the CC-1. Criminal offences against the safety of public traffic constitute a special form of criminal offences against the general safety. These criminal offences were until the adoption of the Criminal Code of the Socialist Republic of Slovenia, which entered into force on the 1st July 1977, incorporated in the chapter of Criminal Offences against the General Safety of People and Property. By enacting the mentioned code in 1977, these offences were ranged in a special chapter of the Criminal Code of the Socialist Republic of Slovenia.⁴ The exclusion of a group of criminal offences from one chapter and their inclusion in a special chapter of the criminal statute or code would not be questionable in itself. Yet, in the further development it turned out that the same object of criminal law protection – i.e. the safety of people and property – did not enjoy the same degree of criminal law protection as it did when all these offences were grouped in the same chapter. A criminal offence of Causing Public Danger under the Article 314 of the CC-1 is

⁴ Kosterca M.: Uvodna pojasnila h Kazenskemu zakoniku RS, p. 90.

formulated as an endangerment offence. For the existence of this criminal offence it suffices that a perpetrator causes with a conduct, described in the criminal code, a danger to life or to property of large value (this is a concrete danger). That means that it is sufficient to pose only a threat to the protected good (safety of people and property) in order to require a criminal law intervention and that it is even not necessary to do any harm to the protected good. A criminal offence of Causing a Traffic Accident through Negligence under Article 323 of the CC-1 is in the opinion of the majority formulated as a harm-based offence; it means that a criminal law intervention is possible only when the protected good has already been harmed. It is nevertheless unusual that the same good enjoys in one chapter of the CC-1 a criminal law protection when it is only endangered, while in the other chapter of the same code the protected good must be harmed in order to require its criminal law protection.

II. Analysis of the criminal offence⁵

In the introduction it has been already mentioned that a criminal offence of Causing a Traffic Accident through Negligence falls within negligent offences. It is a special type of criminal offences that differ by their construction and structure from the typically intentional offences in which negligence can be only a special form of culpability, punishable only if it is specifically provided so by the code.

⁵ Causing a Traffic Accident through Negligence - Article 323 of the CC-1

(1) A person participating in public traffic who, by negligent violation of the regulations on road safety, causes a traffic accident whereby another person is seriously injured, shall be punished by a fine or sentenced to imprisonment for not more than three years.

(2) If the offence under the preceding paragraph entails the death of one or more persons, the perpetrator shall be sentenced to imprisonment for not more than eight years and banned from driving a motor vehicle.

(3) To a person who has not been entitled to drive a motor vehicle by which a criminal offence under the first or the second paragraph of this Article was committed, the motor vehicle shall be seized. A motor vehicle which is a property of another person shall be seized if this person enabled, permitted or allowed to a perpetrator to drive a car, although he knew or should have known that he is not entitled to drive.

Negligent offences have certain characteristics, which should be specially pointed out. The act of accomplishment in negligent offences is manifested as a breach of due care (breach of duty of care) and it is in these criminal offences of crucial importance, because it constitutes the ethical ground for the punishability of these offences. The next characteristic of negligent offences is a harm inflicting consequence (a harm done to the protected good), which is considered as an essential element in the structure of these offences. What is further specific for these offences is a causal relationship, because a causal relationship between a breach of due care and the resulting prohibited consequence is treated in different way than in typical intentional offences. Culpability in negligent offences is assessed by the rules applied to prove the ordinary negligence.⁶ The mentioned characteristics will help us in the analysis of the provision of Article 323 of the CC-1.

A perpetrator of a criminal offence can only be a traffic participant. It is a person who is in whatever way involved in the road traffic.⁷

Due care or a breach of due care is the central notion in negligent offences, because it is possible only by a breach of due care to establish the existence of causal connection between a conduct of a perpetrator and the resulting prohibited consequence as well as a culpability for the committed offence.

Criminal offence can be committed only by the violation of regulations on road traffic safety which constitutes in this case a duty of care. Without a breach of duty of care (in this case a violation of regulations on road traffic safety) there is no criminal offence, regardless of how serious harm inflicting consequence might arise from it. A breach of duty of care is a condition sine qua non for the

⁶ Bavcon L.: Malomarnostna kazniva dejanja v cestnem prometu: zamisel, struktura in problemi: pp. 152-154; Bavcon-Šelih et al.: Kazensko pravo, splošni del, pp. 305-306.

⁷ See Point 43, Article 3 of the Road Traffic Safety Act. More detail about a perpetrator see in Deisinger M.: Kazenski zakonik s komentarjem, posebni del, pp. 817-818.

establishment of a causal connection between the conduct of a traffic participant and the resulting harm inflicting consequence; however, the established breach does not yet mean that a causal connection exists automatically. The question whether a breach of duty of care is the cause of the ensuing consequence or not, should be carefully examined in each particular case. Any jumping to conclusions that a given breach of due care is also the cause of the resulting consequence can lead to the wrong conclusion and consequently to the punishment of a person who has not been at all a perpetrator of a criminal offence in spite of his breach of due care. Let me illustrate this with the following example. Let us suppose that a traffic accident involving two cars happens and a passenger in one of the cars suffered a serious bodily injury. The police who would come to the scene of accident, would find out that one of the driver was driving under the influence (for example with blood alcohol concentration level at 0.8 mg/ml), while the other driver, who was anyway completely sober, overlooked a road sign indicating a crossroad with a priority road. By establishing the given state of facts, there is no doubt that both drivers committed a breach of due care, yet it can turn out that the cause for the ensuing consequence is actually a conduct of a sober driver who overlooked a road sign. In such a case the conclusion »he is drunk - he is guilty« (what actually happens in practice)⁸ would turn out to be wrong, because it would lead to a punishment of a person who would not be at all a perpetrator of a criminal offence.

In criminal offences we have often situations when two (or more) traffic participants violate traffic safety regulations – that is a duty of care. In such cases it can turn out that the violations of both drivers contributed to the causation of prohibited consequence, what means that the conduct of both drivers is in causal connection with the ensuing consequence. In the cases when a causal connection between a person's conduct and the resulting prohibited consequence has been established, it only remains to establish his culpability (*mens rea*) and decide about his sentencing. At this point we are nevertheless

⁸ Sedej-Grčar A.: Analiza sodne prakse Okrajnega sodišča v Ljubljani, p. 198.

confronted with certain problem, because a concept of shared culpability is not known in criminal law.

In criminal law there is a prevailing principle according to which a perpetrator shall not be in general exculpated for the violation of rules on the part of other people, if he himself also violates rules. In the cases when the prohibited consequence arises as a result of the violation of regulations by several participants in traffic, the persons who shall be held responsible for a criminal offence will be all those whose acts are in direct causal connection with the resulting consequences. It means that a driving against regulations of one participant does not exclude the responsibility of the other.⁹

The mentioned view could not be contradicted, if both violations led to the same prohibited consequence, but it is nevertheless questionable whether it is correct to consider as a perpetrator of criminal offence the person who contributed only a part to the resulting prohibited consequence. If we define a perpetrator of criminal offence as a person who brought about by his commission or omission a prohibited consequence and whose criminal responsibility was established by a final judgement,¹⁰ then it is not possible to accept without reserve the affirmation that a perpetrator of a criminal offence was a person who participated only a part (perhaps even a minor part) to the resulting prohibited consequence. In the case when a person does not produce himself a prohibited consequence and it is neither a question of complicity, it would be in my opinion more correct to not deem a person in breach of duty of care as a perpetrator of a criminal offence but rather as a perpetrator of a petty offence; consequently, each of the traffic participants who breached his duty of care would be held liable for his own violation (for his own petty offence). This appears so more evident in the case when a victim of serious bodily injury has been a traffic participant who violated also himself road traffic regulations. Let us presume the following state of facts: a traffic accident in which one of the participants suffered a serious bodily injury happened because a driver of a motor vehicle A overtook at

⁹ Deisinger M.: Kazenski zakonik s komentarjem, posebni del, p. 820.

¹⁰ Such a definition is found in the law dictionary *Leksikon pravo*, p. 357.

the speed of 20 km/h a horse-drawn vehicle by crossing a solid white centre line and crashed into a vehicle B which came correctly from the opposite direction, yet a driver of this car has not been fastened by a seat belt. A driver of the vehicle B, who was not fastened, hit in a crash his head against the windshield and suffered a serious bodily injury. By engaging a road traffic expert, it would be established that a driver of the vehicle B would not be injured at all if he were fastened with a seat belt and the only damage resulting from this accident would be a property damage on both cars. It is clear from this description that both drivers were in breach of duty of care and the consequence, which is required by law for the existence of a criminal offence, would not arise without the violation of a driver of the car B, who suffered himself a serious bodily injury. A driver of the car B cannot be deemed a perpetrator, because a serious bodily injury must be suffered by the other person and not the perpetrator himself.¹¹ In this situation, a perpetrator remains only a driver of the car A, but in consideration of the given state of facts, it seems nevertheless incorrect to make him responsible for the act and to consider a contribution of a driver B only as a circumstance which would have an impact on the milder sentencing. I am convinced that it should be established in such cases that it is not a question of a criminal offence but rather of a petty offence and that each of the participants should be treated for his breach of duty of care (i.e. for a petty offence he committed).

The majority of problems and different views arising from this criminal offence are connected with the concept of prohibited consequence. To begin with, it is already a mere definition of a traffic accident which is controversial, because it is considered to be either an element or a consequence of a criminal offence. Since it is precisely this definition upon which it depends whether the act will be regarded as a harm-based offence, as it is considered by the majority of theorists, or only as a concealed endangerment offence as it is thought by some theorists¹². Before examining some of these views, it would be wise to expose one of the characteristics of harm

¹¹ Deisinger M.: Kazenski zakonik s komentarjem, posebni del, p. 821.

¹² Novoselec P.: Uveljavitev novega kaznivega dejanja povzročitve prometne nesreče iz malomarnosti, pp. 167-176.

inflicting consequences in traffic offences which can have an impact on the estimation what is or what should be a prohibited consequence in a criminal offence of Causing a Traffic Accident through Negligence. A characteristic of consequences in violations of road traffic safety regulations is that they are to a great extent aleatory. It means that a completely same violation towards which a traffic participant has the same attitude may result in a completely different consequence. On the one hand, it can happen nothing and the act constitutes only a violation of regulation (an abstract risk or danger) and on the other hand, it can come to a serious harm inflicting consequence resulting in a death of one or even several persons. The mentioned can be illustrated by the example of a driver of personal motor vehicle who drives with unreduced speed toward the marked pedestrian crossing. Let us see some of the possible situations. A driver crosses with unreduced speed a pedestrian crossing, but nothing happens, because there were no pedestrian who would like to cross the road. In this case it is only a violation of regulation (abstract risk or danger) and it was only a petty offence that was committed. In other situation, a driver with unreduced speed drives toward a pedestrian crossing; a pedestrian who has just started crossing the road notes a danger and makes in time a step back, so a car does not hit him. In such a case we speak of a concrete or actual danger, but such a violation of road traffic regulations constitutes only a petty offence. However it can also happen that a driver in given circumstance hits a pedestrian and the latter suffers a light or serious bodily injury. In both cases a traffic accident occurred and resulted in an injury of pedestrian; yet in the first case it is a question of a mere petty offence, while in second case it is already a criminal offence. What is then a meaning and legal nature of a *traffic accident* and *serious bodily injury*, since it is evident that the elements of a criminal offence under the first paragraph of Article 323 of the CC-1 have not been fulfilled without a traffic accident resulting in a serious bodily injury. The analysis of this case reveals that a legal nature of the mentioned elements is quite questionable in this criminal offence.¹³ A notion of *traffic*

¹³ Novoselec P.: Uveljavitev novega kaznivega dejanja povzročitve prometne nesreče iz malomarnosti, p. 175.

accident is defined in the Road Traffic Safety Act,¹⁴ but different authors attribute to this act different meanings in connection with the criminal offence of Causing a Traffic Accident through Negligence. M. Deisinger, LL.D. and Professor Bavcon advocate the view that a traffic accident is actually a *prohibited consequence*. On the other hand, Professor Novoselec thinks that a traffic accident is in fact a synonym for endangerment and raises a question whether it should be mentioned at all in the statutory text. A similar view is held by Professor Dežman.¹⁵ There are also different opinions regarding serious bodily injury. Deisinger considers it to be the objective condition of punishability towards which a perpetrator's guilty mind (*mens rea*) is not required. Professor Bavcon supports the view that a serious bodily injury has two legal natures. It is first an objective condition of punishability which serves to make a distinction between a petty offence and criminal offence. When it has been established that a violation constitutes a criminal offence, then changes also a legal nature of serious or very serious bodily injury. If a traffic accident constitutes a basic prohibited consequence, then a serious and very serious bodily injury represent a more serious consequences that should be treated in accordance

¹⁴ The first paragraph of Article 109 of the Road Traffic Safety Act: " a traffic accident is an accident on the public road or on an uncategorised road used for the public road traffic in which at least one moving vehicle has been involved and at least one person died in this vehicle or suffered a bodily injury or a material damage was caused;

With regard to consequences, traffic accidents are divided to:

1. Traffic accident of the 1st category – traffic accident in which only a material damage was caused;
2. Traffic accident of the 2nd category – traffic accident in which at least one person suffered a light bodily injury;
3. Traffic accident of the 3rd category – traffic accident in which at least one person suffered a serious bodily injury;
4. Traffic accident of the 4th category – traffic accident in which one person died or died as a consequence of accident within 30 days after accident. "

¹⁵ Cf: Deisinger M.: Kazenski zakonik s komentarjem, posebni del, p. 821; Bavcon L.: Malomarnostna kazniva dejanja v cestnem prometu: zamisel, struktura in problemi: p.153; Novoselec P.: Uveljavitev novega kaznivega dejanja povzročitve prometne nesreče iz malomarnosti, p. 172; Dežman Z.: Kazenskopravno varstvo cestnega prometa in temeljne predpostavke kaznivosti: p. 96.

with Article 19 of the CC (Article 28 of the CC-1); it means that a court has to establish whether a perpetrator acted negligently with regard to a more serious consequence that arose. Professor Novoselec offers some well-founded arguments against the view that a serious bodily injury constitutes an objective condition of punishability and clearly takes a position according to which a serious bodily injury in this criminal offence is a more serious consequence that must be included in a perpetrator's negligence. Professor Dežman supports a view that serious bodily injury is in fact a prohibited consequence in a criminal offence of Causing a Traffic Accident through Negligence for which it is necessary to establish a perpetrator's culpability.¹⁶

In Slovene doctrine it prevailed for some time a view that a serious bodily injury in a criminal offence of Causing a Traffic Accident through Negligence constitutes the objective condition of punishability for which it is not needed to establish a perpetrator's culpability. If this hold true and the existence of criminal offence is determined more by the resulting serious bodily injury (which is from a perpetrator's point of view aleatory) than by a perpetrator's attitude towards the breach of duty of care, then one can legitimately think that such views are the rest of strict liability or at least present a great danger for the intrusion of strict liability.¹⁷ The mentioned statement can be illustrated by two examples. Let us take a driver of a personal motor vehicle who intentionally breaches a duty of care (by cutting in, that is moving suddenly in front of another vehicle, leaving little space between the two vehicles), but due to lucky circumstances the dangerous manoeuvre ended by a property damage only. In spite of intentional serious breach of duty of care, such a driver would be held responsible only for a petty offence, because it is necessary for the existence of criminal offence to come to a serious bodily injury. On the other hand, a driver of a motor vehicle who would breach a duty of care by negligence (perhaps even by an

¹⁶ Compare the contributions mentioned in the preceding note with: Deisinger M.: p. 821; Bavcon L.: p. 154 in 157; Novoselec P.: p. 169-170; Dežman Z.: p. 96.

¹⁷ Prof. Dežman even wrote that: »The objective condition of punishability is, to say it truly, a rest of the strict liability« See Dežman Z.: op.cit, p. 96.

ordinary negligence) and caused a traffic accident in which some person suffered a serious bodily injury, would be subjected to a quite different treatment. This driver would be held responsible for a criminal offence because all the elements of a criminal offence of Causing a Traffic Accident through Negligence have been fulfilled. Such an outcome opposes to one's conviction and legitimately raises concern that it is rather the rest of strict liability than a responsibility for the resulting consequence. At the same time there is an actual danger, namely to address in a criminal procedure to a perpetrator, whose road traffic violation constitutes a cause of the ensuing consequence, a general reproach that he did not meet the requirements arising from the duty of care, although he could do this with regard to circumstances and his personal characteristics and to hold him liable for something that it is not actually included in his culpability.

I think that a notion of traffic accident in the description of the criminal offence of Causing a Traffic Accident through Negligence has been causing more difficulties than benefits and there would be no harm if it were omitted from the description. It would be better to define a serious bodily injury as a prohibited consequence for which it is always necessary to establish and prove a perpetrator's culpability. In this way it would be logically deduced that a death of one or several persons as it is defined in the second paragraph of Article 323 of the CC-1 should be treated as a more serious consequence arising from the basic offence.

III. Conclusion

Duty of care or a breach of duty of care is a central notion of offences committed by negligence. A breach of duty of care is the ethical ground of punishability in these conducts, while the attitude towards a breach of duty of care constitutes a ground for the blame addressed to a perpetrator. Due to the aleatory nature of a harm inflicting consequence arising from a breach of duty of care, it would

be necessary to give more importance to the attitude towards the violation, because it indicates a perpetrator's attitude towards a protected good and gives in this way a ground for the blame, i.e. for the justification of culpability. I am persuaded that the attitude towards a breach of duty of care is so important that it should be taken into consideration not in sentencing only but also in the formulation of the statutory state of facts. It is namely not at all the same if a traffic participant violates road traffic regulations intentionally (for example by cutting in or by the intentional driving through red light) or by negligence. It is a question of difference which is so crucial that it would be necessary to formulate a special state of facts and different frame of punishment, i.e. different penalties for intentional and negligent violations. On the basis of the mentioned views, a statutory description of the criminal offence which is the object of this analysis would sound as follows:

Causing a serious bodily injury in road traffic

- (1) A person participating in public traffic who, by intentional violation of the regulations on road safety, inflicts to another person a serious bodily injury by negligence, shall be punished by a fine or sentenced to imprisonment for not more than...years*
- (2) A person participating in public traffic who, by negligent violation of the regulations on road safety, inflicts to another person a serious bodily injury by negligence, shall be punished by a fine or sentenced to imprisonment for not more than...years*
- (3) If the offence under the first or second paragraph of this Article entails a death of one or more persons, the perpetrator shall be sentenced to imprisonment for the offence under the first paragraph for not more than ...years and for the offence under the second paragraph for not more than ...years.¹⁸*

¹⁸ Penalties have been here intentionally omitted, because the point is to present only a model and not a definitive formulation of the article. Compare this proposal with that of Professor Dežman, See: Dežman Z.: cit, p. 241.

- (4) *To a person who has not been entitled to drive a motor vehicle by which a criminal offence under the first or the second paragraph of this Article was committed, the motor vehicle shall be seized. A motor vehicle which is a property of another person shall be seized if this person enabled, permitted or allowed to a perpetrator to drive a car, although he knew or should have known that he is not entitled to drive.*

I am aware that I have raised more questions than I have given answers, but it is even not possible to consider in a so short contribution all questions concerning criminal offences committed by negligence, let alone provide adequate answers to these questions. If this paper may at least encourage a consideration of and a debate about the discussed problems, its aim will be already achieved.