

INJURY AND DEATH OFFENCES IN TRAFFIC ACCIDENTS CAUSED BY CRIMINAL NEGLIGENCE*

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Abstract

Injury and death offences in traffic accident caused by criminal negligence which form the subject of this study are quite important at the present time. As a result of traffic accidents which happen because of drivers' behaviours contrary to attention and care liabilities, many people are injured or even killed. In this regard, elements of crime and problems faced in practice have been mentioned. On the other hand, how penal responsibilities of offenders will be settled has been evaluated within the framework of doctrine and court decisions by taking into account existing principles and special occasions for negligent offences in criminal law. Finally, statistical information concerning reckless injury and killing crimes experienced in traffic in Turkey have been included.

Key words: Injury, death offences, negligent offences, conscious negligence, road traffic law, traffic accidents.

* *Geliş Tarihi: 6.10.2016, Kabul Tarihi: 23.12.2016.*

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I. Introduction

Today, a lot of accidents happen as a result of careless behaviours of drivers. Therefore, we see that many people are injured or killed in consequences of these accidents. And we can say that crimes committed by negligence are as important as intentional crimes.

First of all, let us mention the articles in the Turkish Criminal Code regarding the negligent killing or injury. Under the subject of negligent killing in Article 85 of the Turkish Criminal Code, it is stated that any person who causes death of a person by negligent conduct is sentenced to imprisonment from two to six years. The protected legal interest with this crime is the right to life¹.

In Article 89 of the Turkish Criminal Code, there is a provision which states that any person who gives corporal or spiritual injury to a person or causes deterioration of one's health or consciousness by negligence, is sentenced to either imprisonment from three months to one year or judicial fine. The protected legal interest with this crime is corporal integrity and immunity².

II. Elements of the Criminal Offence and Culpability

Everybody can be the offender or victim of negligent killing crimes. The object of the crime is a living human³. Likewise everybody can be an offender or a victim of negligent injury crime. The object of this crime is the body of a person who is exposed to injury⁴.

In principle, crime is committed intentionally. On the other hand, crimes committed by negligence can also be punished under certain conditions which are clearly stipulated by law. The cognitive meaning of "negligence" is doing something incompletely⁵.

¹ Mahmut Koca/İlhan Üzülmöz, *Türk Ceza Hukuku Özel Hükümler*, 2. Ed., Ankara, Adalet Publ., 2015, p.128.

² Veli Özer Özbek/Mehmet Nihat Kanbur/Koray Doğan/Pınar Bacaksız/İlker Tepe, *Türk Ceza Hukuku Özel Hükümler*, 9. Ed., Ankara, Seçkin Publ., 2015, p.195.

³ Koca/Üzülmöz, *Özel Hükümler*, p.130.

⁴ Koca/Üzülmöz, *Özel Hükümler*, p.220.

⁵ Kayıhan İçel, *Ceza Hukukunda Taksirden Doğan Sübjektif Sorumluluk*, İstanbul, 1967, p.22; Mahmut Koca/İlhan Üzülmöz, *Türk Ceza Hukuku Genel Hükümler*, 8. Ed., Ankara, Seçkin Publ., 2015, p.173.

In the former Turkish Criminal Code (No. 765), negligence has not been defined and it was open to interpretation in the light of the doctrine and practice. The main controversy is about the types of negligence. Negligence has been defined in the 2. Paragraph of the Article 22 of the Turkish Criminal Code (No. 5237). According to this, negligence refers to failure to take proper care or precaution during performance of an act and not foreseeing the legal consequences of the crime defined in the laws.

In our system conscious negligence has been defined in the 3. Paragraph of the Article 22 of the Turkish Criminal Code. The realization of the legal consequence which is foreseen but not wanted is considered as conscious negligence; in such case the punishment imposed for negligent act is increased from one third to one half.

In both types of negligence, the consequence stemmed from the breach of duty of proper care is not wanted⁶. But the difference between both types is that in conscious negligence, the unintended consequence is actually foreseen. However, in negligence, it is not foreseen. In conscious negligence, the offender considers the possibility of consequence, but trusts that it will not happen⁷. The identification of the content of attention and care liability is based on principle of trust. This principle states that a person who behaves in line with traffic rules has to trust other people that also behave in line with attention and care liability. This principle plays an important role especially for crimes committed in traffic⁸. There is a tight relationship between the breach of attention and care liability, and foreseeing the consequence. Understanding the foreseeability of consequence requires an evaluation⁹.

⁶ Ayhan Önder, *Ceza Hukuku Dersleri*, İstanbul, Filiz Publ., 1992, p.320.

⁷ İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler*, 8. Ed., Ankara, Seçkin Publ., 2013, p.267; Hakan Hakeri, *Ceza Hukuku Genel Hükümler*, 12. Ed., Ankara, Adalet Publ., 2011, p.219; Mehmet Emin Artuk/ Ahmet Gökçen/A. Caner Yenidünya, *Ceza Hukuku Genel Hükümler*, 7. Ed., Ankara, Adalet Publ., 2013, p.349; Hamide Zafer, *Ceza Hukuku Genel Hükümler*, TCK Art.1-75, 4. Ed., İstanbul, Beta Publ., 2015, p.268; Berrin Akbulut, *Ceza Hukuku Genel Hükümler*, Ankara, Adalet Publ., 2015, p.336-338.

⁸ Bahri Öztürk/Mustafa Ruhan Erdem, *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 14. Ed., Ankara, Seçkin Publ., 2014, p.277.

⁹ Sulhi Dönmezer/Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku*, Genel Kısım, V:II, 10. Ed., İstanbul, Beta Publ., 1994, n.961.

Something that cannot be foreseen objectively cannot be placed on the offender as a typical injustice. Predictability is important in the consideration of the existence of any breach of objective care liability. For example, even if a person who drives through green light has an accident which could be foreseeable and preventable, this behaviour is not considered as contrary to objective care responsibility despite the predictability of the consequences¹⁰.

The Court of Cassation accepts the subjective criterion for the predictability of the result. The Court of Cassation grounds on its evaluations in this subject following on the criteria: offender's age, educational background, cultural level, profession, economic and social status, level of personal development and socioeconomic status¹¹.

Regarding this differentiation between different types of negligence, there is a judgment taken by the Assembly of Criminal Chambers¹². A public bus driver approaches the crossroad fast and passes the flashing red light and without slowing down he also passes the second red light while approaching the cross road. However according to the related articles of the Highway Traffic Law (No 2918), the driver was required to allow other vehicles which had the right to pass the road.

In the meantime, the bus driver crashes another car, which was passing the cross road through yellow light and kills the car driver. The related judgment has been established by the local court based on

¹⁰ Durmuş Tezcan/Mustafa Ruhan Erdem/Murat Önok, *Teorik ve Pratik Ceza Özel Hukuku*, 11. Ed., Ankara, Seçkin Publ., 2014, p.194.

¹¹ *"The acceptance that a passenger can predict that a motor vehicle would crash him while crossing a road and people in the vehicle would get hurt, is widely against the common idea in the society. It cannot be accepted that passengers must be aware of the fact that they would harm the drivers of the motor vehicles and therefore behave very prudently. The purpose of a person who jumps in front of a fast moving car in order to commit a suicide is to end his/her life and it cannot be claimed that he/she cannot foresee that the driver would be injured. For that reason the court has not considered "predictability of the result" as an aspect of negligence..."* CGK. 13.12.1993, 221-317" (Osman Yaşar/Hasan Tahsin Gökcan/Mustafa Artuç, *Yorumlu-Uygulamalı Türk Ceza Kanunu*, 2. Ed., V:II, Md. 45-85, Ankara, Adalet Publ., 2014, p.2849).

¹² CGK 25.3.2008, E.2008/9-43, K.2008/62 (www.kazancı.com).

conscious negligent killing. The Court of Appeal has reversed the judgment, but the local court has insisted on its judgment. Thereupon, the Assembly of Criminal Chambers has approved the judgment of the local court and decided that conscious negligence has existed in this case.

In this judgment, the relationship between negligence and conscious negligence has been analysed. The possibility of committing crime with probable intent (*dolus eventualis*) has not been considered. In the case, the result has come out beyond the will of the offender. The result in conscious negligence has been foreseen by the offender. However, the offender trusts his ability and knowledge. For that reason, it has been accepted that conscious negligence has existed in the case¹³.

If negligent injury results in; a) weakening of sensual or bodily functions of the victim, b) break of bones, c) continuous difficulty in speaking, d) distinct facial mark, e) risk of life, f) premature birth of a child, then the punishment imposed according to the first subsection is increased as much as one half.

If negligent injury results in; a) incurable illness or causes vegetative existence of the victim, b) loss of sensual or bodily functions, c) loss of ability to speak and to give birth to a child, d) distinct facial change, e) abortion, if the offence is committed against a pregnant woman, then the punishment imposed according to the first subsection is increased by one fold. There are aggravating circumstances of negligent injury.

The sentences applicable due to negligence are determined in accordance with the culpability of the offender¹⁴. This determination can be done by the judge with a normative evaluation rather than a mathematical one. For example, in accidents resulting in death or injury, an investigation by an expert can be performed in order to

¹³ Cüneyd Altıparmak, "Karar Tahli: Yargıtay Ceza Genel Kurulunun 25.3.2008 tarihli ve E.2008/9-43, K.2008/62 Sayılı Kararı Işığında Taksir-Bilinçli Taksir Ayırımı", *Terazi Hukuk Dergisi*, Y.5, N.41, 2010, p.94, 95.

¹⁴ İzzet Özgenç, *TCK Gazi Şerhi (Genel Hükümler)*, 3. Ed., Ankara, Ankara Açık Ceza İnfaz Kurumu Publ., 2006, p.317-319.

determine whether or not the drivers have obeyed the traffic rules, which traffic rule has been violated and the vehicle in the traffic had or not any technical problems¹⁵. However, the investigation of the expert should be restricted to technical matters. Apart from this, any evaluation which may come under the authority of the judge should not be made by the expert. Contrary it would mean to be extending the limits of expertise and replacing the judge¹⁶. When the judge determines the punishment within the limits specified in the Code, he must take into consideration collected information, document, judicial inspector and expert report, degree of culpability, the numbers of injured and death people and other reasons¹⁷.

¹⁵ Osman Yaşar/Hasan Tahsin Gökcan/Mustafa Artuç, *Yorumlu-Uygulamalı Türk Ceza Kanunu*, 2. Ed., V:I, Md. 1-44, Ankara, Adalet Publ., 2014, p.581.

¹⁶ Altıparmak, p.95 ff.

¹⁷ "...while the basic punishment within the limits is being indicated, it is essential to take into account the punishment amounts forming the lower and upper limits, the manner of committed offense has been committed, degree of fault, the severeness of damage and danger which took place. The defendant, born in 1986, who has no criminal record is accepted to have substantive fault in the event which is subject to the law case, by means of taking into account that the killed person has been collateral negligent, the severeness of the damage that took place, the way offense has been committed, the lower limit of the punishment prescribed in the article, disregarding the necessity that he/she should have been punished in conformity with justice and fairness rules as per Article 61/1 of Turkish Criminal Code, overpunishment and security measures have been assigned about the defendant by assigning basic punishment and security measures way over the minimum limit and being mistaken in the level of aggravation..." Y. 12. CD. 26.9.2012, 2012/1388-2012/19834; "Paying regard to the data in the accident report, in the event in which the victim has been killed when he/she was about to cross the road from right to left by the defendant who has driven in direction from İzmir to Uşak, in high speed and entered to Ürünköy crossroads, the place where the incident took place, crashed him/her on the right lane of the road and caused reckless killing, the event has been accepted by the court this way, and in the provision which is mentioned to be settled where defendant has been given equal fault by Highway Traffic Science Committee, disregarding the necessity that punishment should be assigned being far from minimum limit depending on the fault status of the defendant whilst indicating basic punishment, in case defendant's way of committing offense has been considered as positive and basic punishment has been assigned from lower limit, whilst deciding that no ground of applying the Article 50 of the Turkish Criminal Code, the same point has been considered is negative and thus, there appears a conflict..." has required a reversal of the judgment. Y. 12 CD. 3.10.2012, 2012/926-2012/20529 (Yaşar/Gökcan/Artaç, V:II, p.2854).

III. The Special Appearance Forms of the Criminal Offence and Other Special Points

The special appearance forms of crime is related with attempt, participation and joinder of the offences. Attempt to negligent crimes is not possible¹⁸. Article 35 stipulates that only intentional crimes can be attempted. Everyone who contributes to negligent crimes will be responsible as the offender since participation within the context of negligent crimes is impossible.

On the other hand in terms of participation to crime, there is a special provision related to negligent crimes in the 5. paragraph of the Article 22 of the Turkish Criminal Code. According to this, in negligent crimes committed by more than one person, every person is responsible for their own crime. The punishment of every offender is determined individually.

In terms of joinder of the crimes, there is a special provision in the 2. Paragraph of the Article 85 of the Turkish Criminal Code. If the result is either death or injury of more than one person, the offender would be imprisoned from two to fifteen years. For example if a person who has an accident kills his wife and causes injury of some people besides the death of his wife injuries another person, 2. Paragraph of the Article 85 of Turkish Criminal Code comes into force. However, in this case, will the provision on personal impunity which is regulated in 6. Paragraph of the Article 22 of Turkish Criminal Code be applied?¹⁹.

The reason for personal impunity related to negligent crimes is included in the 6. Paragraph of the Article 22 of the Turkish Criminal Code. According to this, punishment shall not be imposed if, as the result of a negligent act, the offender is victimized, by reference to his

¹⁸ Adem Sözüer, Suça Teşebbüs, İstanbul, Kazancı Hukuk Publ., 1994, s.157; Kayıhan İçel/Füsun Sokullu-Akıncı/İzzet Özgenc/Adem Sözüer/Fatih S. Mahmutoğlu/Yener Ünver, İçel Suç Teorisi, 2. Kitap, İstanbul, Beta Publ., 2000, s.314; Timur Demirbaş, Ceza Hukuku Genel Hükümler, 10. Ed., Ankara, Seçkin Publ., 2014, p.445; CGK. 18.12.1989, 5-314/399 (Yaşar/Gökcan/Artuç, V:I, p.583).

¹⁹ Murat Önok, "Criminal Law", in: Introduction to Turkish Law (eds. T. Ansay and D. Wallace, Jr.), 6. Ed., Kluwer International, 2011, p.195.

personal and family circumstances only, to such a degree that imposing a punishment becomes unnecessary²⁰. In case of conscious negligence the punishment imposed for negligent act can be reduced from one half to one-sixth.

For example, in case of a father driving a car and causing the death of his wife and child in an accident, he would be victimized by reference to personal and his family circumstances only although he is the offender. As a matter of fact, when we look at the justification for this article, as one of the reasons of enacting this provision into law, incidents which happen in traffic accidents and mostly result in painful and big damages by reference to offender himself/herself and family members are shown. In the example above, punishment of the father who killed his wife and child will heavily victimise all the family. For that reason, when heavy damage occurs with regard to offender's personal and family circumstances as a result of violation of attention and care liability, the offender will not be punished or the punishment will be reduced²¹.

It is obvious that, in terms of his wife's death, punishment shall not be imposed if, as the result of a negligent act, the offender is victimized, by reference to his personal and family circumstances only, to such a degree that imposing a punishment becomes unnecessary²².

However, in the case, he injured other people besides himself and his family and one of the sufferers made a complaint about him. According the Assembly of Criminal Chambers made a decision that 6. Paragraph of the Article 22 could not be applied²³.

²⁰ Önok, p.195.

²¹ Koca/Üzülmez, Genel Hükümler, p.227.

²² Murat Önok, "Criminal Law", in: Introduction to Turkish Law (eds. T. Ansary and D. Wallace, Jr.), 6. Ed., Kluwer International, 2011, p.195.

²³ "Although it is obvious that defendant who, as primary negligent, has caused death of his/her spouse and injury of six people one of whom is a complainant, is a victim with respect to personal and family status due to death of his/her spouse that imposition of a punishment is no more necessary, there is no opportunity to apply the reason of personal impunity for him/her provided in Article 22/6 of Turkish Criminal Law No. 5237, since it is seen that people other than himself/herself and his/her spouse have suffered, one of the

In another decision by the Court of Appeal, an offender committed crime of negligent killing and endangered the traffic safety in a single act. The offender who committed two crimes in a single act was punished for reckless killing which required heavier punishment, but he/she was not separately punished for endangering the traffic safety²⁴.

For example, when the offence of deliberately endangering the traffic safety and negligent injury are committed in a single act, and when the provision on formal aggregation from different type (TCC Art.44, farklı neviden fıkri içtima) is applied, the offender will be punished for the crime which requires heavier punishment²⁵. If multiplicity of related punishment norms and offences are apparent, and in fact only one norm can be applied to the incident, aggregation norms can be mentioned in appearance²⁶. If causing to specific dangers is provided as a crime, primary norm-secondary norm relationship comes into question, when there is a damage as a result of this danger²⁷. In regard to the primary norm the punishment shall be determined according to damage crime²⁸. When the context of primary norm-secondary norm or formal aggregation rules are considered, this decision is appropriate.

victims is a complainant and it is impossible for the imputed offence to be separated. On that account, resistance decision of the local court is not accurate.

In this regard, with the acceptance of appeal objections of attorney of intervener, local court's resistance judgment must be reversed due to inaccuracy of disregarding that Article 22/6 of the Turkish Criminal Law cannot be imposed to the defendant who has, as primary negligent, caused the death of his/her spouse and injury of the intervener as a result of his/her negligent action. Three members of the General Assembly who do not agree with the opinion of the majority have voted against with the thought "about the defendant whose spouse has been killed as a result of a traffic accident where six people, one of them a complainant, have been injured, there is no contradiction to law in imposing Article 22/6 of the Turkish Criminal Law and the judgment of the local court is accurate". CGK 29.04.2014, 2013/9-104, 2014/216 (www.kazancl.com).

²⁴ Y. 9. CD. 22.10.2010, 10462/3278 (www.kazancl.com).

²⁵ Koca/Üzülmez, Özel Hükümler, p.224.

²⁶ Kayıhan İçel, Suçların İçtiması, İstanbul, Sermet Publ., 1972, p.170.

²⁷ Ayhan Önder, Ceza Hukuku Genel Hükümler, V:II-III, İstanbul, Beta Publ., 1992, p.55.

²⁸ Hakeri, p.531.

Another aspect of negligent crimes is related to the deprivation of exercising certain rights. According to the 5. Paragraph of the Article 53 of Turkish Criminal Code, when someone is sentenced for negligent crimes due to lack of proper care for the requirement of a certain profession or art or traffic rules, it can be decided that the offender is prohibited from executing his/her profession or art or taking his/her driver license in a period no less than 3 months and no more than 3 years.

Moreover, even if only short term prison sentences can be converted to judicial fine, prison sentences for negligent crimes which are more than one year can also be converted to judicial fine, if other conditions apply. However, this provision cannot be imposed in case of conscious negligence (TCC Art.50/4).

Negligent killing does not depend on complaint. It requires direct prosecution. However, investigation and prosecution of negligent injury require complaint, but in cases of commitment of the aggravations of the crime with conscious negligence, complaint is not required.

IV. Conclusion

Negligent offences committed in traffic are frequently seen. The fact that it is seen frequently in practice reveals the importance of injury and death incidents arising from traffic accidents. The increase in the number of vehicles and accidents in modern countries draws attention of criminal lawyers, criminologists and law makers²⁹.

This study examined injury and death offences in traffic accidents caused by criminal negligence. The elements of crime, together with the problems faced in practice, have been mentioned. This study also evaluated the penal responsibility of the offender within the framework of doctrine and court decisions based on the existent principles and special occasions for negligent offences in criminal law.

²⁹ Sulhi Dönmezer, *Kişilere ve Mala Karşı Cürümler*, 14. Ed., İstanbul, Beta Publ., 1995, p.92.

When statistical data is examined, it can be seen that the number of traffic accidents in Turkey is increasing every day. However, that does not mean that injury and killing results shall increase accordingly. To sum up, we must say that when increase in the number of vehicles and the developing technology are taken into consideration, the number of injuries and deaths has decreased despite the increase in number of accidents within the last 10 years. The statistics related to the accidents in Turkey are as follows³⁰:

YEAR	NUMBER OF ACCIDENTS	NUMBER OF KILLED PEOPLE	NUMBER OF INJURED PEOPLE
2005	620.789	4.505	154.086
2006	728.755	4.633	169.080
2007	825.561	5.007	189.057
2008	950.120	4.236	184.468
2009	1.053.346	4.324	201.380
2010	1.104.388	4.045	211.496
2011	1.228.928	3.835	238.074
2012	1.296.634	3.750	268.079
2013	1.207.354	3.685	274.829
2014	1.199.010	3.524	285.059

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³⁰ <http://www.trafik.gov.tr/Sayfalar/Istatistikler/Genel-Kaza.aspx>

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