CEZA HUKUKU VE KRİMİNOLOJİ DERGİSİ

Journal of Penal Law and Criminology
Zeitschrift für Strafrecht und Kriminologie

Cilt: 4 **Yıl: 2016** **Sayı: 1**

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ISSN: 2148-6646
Yıl: 2016
Cilt: 4
Sayı: 1
Matbaanın Adı: Ay-bay Kırtasiye İnş. Gıda Paz. ve Tic. Ltd.Şti.
Basıldığı Yer: Ankara
Basıldığı Tarih: 2017
Yayın Türü: Yerel, Süreli, Altı Aylık İlmî Dergi

Ceza Hukuku ve Kriminoloji Dergisi
CHKD Hakemli Bir Dergidir.

Cilt: 4 Sayı: 1 Yıl: 2016

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Cilt: 4 **Yıl: 2016** **Sayı: 1**

The Institute, Called Liability for Graver Consequences in Slovenian Criminal Law on Road Traffic*

Damjan KOROŠEC**

Abstract

There are not many provisions of the general part of substantive criminal law, as interesting from the point of view of logical coherence as well as crime-policy, as the institute of liability for graver consequence (in German: *erfolgsqualifizierte Delikte).* In Slovenian criminal law one can find some anomalies in the criminal law in theory, legislation and judicial practice, regarding this institute. Firstly (1.), there are cases, where the institute of liability for graver consequence clearly should be used in the special part of Slovenian Criminal Code because of the obvious statistical appearance of mediate, indirect consequences in certain criminal acts, but the Slovenian legislator missed to use this technique without any declared and reasonable cause. For instance, there are several severe cases of sexual offences, where bodily harm of victims is almost a rule or at least very foreseeable in practice. Further there is armed robbery and similar violent crimes, where the institute of liability for bodily harm as a liability for graver offence in Slovenia is not used by the legislator (see Art. 206, 207, 170, 171, 172, 173 of the Slovenian CC). In other cases (2.) this institute is used in the special part of Slovenian Criminal Code,

* Geliş Tarihi: 18.01.2016, Kabul Tarihi: 17.11.2016.

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but without any clear distinction in effect of general punishment in concurrent offences or the effect of the use of the institute of liability for graver consequence is even opposite. At least from the ethical point of view the probably worst such case are road traffic offences, dealing with several killed persons in one traffic accident.

Key words: Substantive Criminal Law, Slovenia, Liability for Graver Consequence, Road Traffic

Liability for Graver Consequence in General

There are not many provisions of the general part of substantive criminal law, as interesting from the point of view of logical coherence as well as crime-policy, as the institute of liability for graver consequence (in German: *erfolgsqualifizierte Delikte).* In comparative criminal law, it is a rather common legal institute, considered traditional and found in many modern laws and criminal codes[1]. The legislator's attempt of formulating it in the best possible way in the present Criminal Code of Slovenia[2] looks as follows (Art. 19): *"If a graver consequence has resulted from the committing of a criminal offence for which there is a heavier sentence provided under the statute, such a sentence may be imposed on the perpetrator on condition that he has acted negligently with respect to the occurrence of such a consequence."*

The wording is rather clear but the purpose, the reason of the provision, of the sheer existence of this institute looks far from simple. After some more thorough studying it turns out rather quickly, that many states are not able or willing to use this institute precisely and systematically. Slovenia is one of them and it should act as an example, a typical case in this short paper.

We can understand the institute of liability of graver consequence inside the special part of the criminal law as legislator's friendly warnings, that cumulations of threatening and injuring of the

[1] See for instance § 18 of the present German Criminal Code (StGB) with the exact wording as follows: ***"Schwerere Strafe bei besonderen Tatfolgen.*** *Knüpft das Gesetz an eine besondere Folge der Tat eine schwerere Strafe, so trifft sie den Täter oder den Teilnehmer nur, wenn ihm hinsichtlich dieser Folge wenigstens Fahrlässigkeit zur Last fällt."*

[2] *Official Journal of the Republic of Slovenia, Nr. 55/08, 66/08, 39/09; 91/11.*

same criminal legal goods, deriving from the same act of perpetrator can occur. We also can understand the same institute as legislator's friendly warnings that cumulations of threats to and injuries of several legal goods, deriving from the same act of perpetrator can occur. In both those cases, it is in fact a warning of the legislator to the users of the legal text that we have to deal with potential concurrence of offences. It is obvious, that in such an understanding of the role and goals of the institute of liability for graver consequence, we have a clear case of silly wasting of energy and space in the general part of the criminal legislation. One can even say that from this point of view this is one of the roughest forms of redundancy in law.

It seems clear, that the institute of liability for graver consequence, if understood as a crutch for users of the criminal code, who are not able and willing to learn and use the theory of concurrence of offences and deal intellectually with the theory of criminal legal goods and the consequence, is a very strange phenomenon. As such, it should be abolished as redundant long ago.

If we understand the institute of liability for graver consequence as a legislator's warning, that from certain perpetrator's acts typically, that is founded on empirical, statistical evidence certain mediate, indirect consequences derive, the situation is not much different. The legislator mentions these consequences in the incrimination next to immediate, direct consequences for reasons of technical simplicity and economization of the general part of the criminal code to make the intellectual work of criminal investigation police officers, public prosecutors and criminal judges somehow quicker and easier. In this scenario we are dealing with a variation of the before mentioned form of legislator's playing up to the dogmatically insufficiently educated user of the criminal code with very questionable practical effects.

Only, if we perceive the institute of liability for graver consequence inside the special part of a given criminal legislation as a legislator's possibility to prescribe - for whatever reason -different margins of punishment in comparison with those, achieved with the use of general rules for punishing concurrent offences, in that only scenario the institute seems to be acceptable as a crime-policy tool

(but because of that not necessarily an obligatory institute of substantive criminal law).

In this context, we are dealing with a crime-policy instrument for more precise dealing with empirical typical combinations of consequences, deriving from forbidden acts.[3] If for instance a grievous bodily harm of a raped person is an empirically typical consequence of a rape with an object, of an armed rape, of a simultaneous or consecutive rape by a group of perpetrators or perhaps even of every rape, the legislator could be tempted to use the instrument of liability of graver consequence in the incrimination of rape in the form of grievous bodily harm of the raped victim inside the incrimination of rape. The prescribed margins of punishment must be higher, then foreseen with general rules of concurrence between the crime of rape and the crime of grievous bodily harm (in negligent or even intentional guilt). One cannot stress enough, that such an approach is rational only, if the special part of the criminal legislation concretizes the general idea of the institute in the general part in a systematic, empirically, statistically transparent way.

The whole (long) history of the institute of liability for graver consequence is very eloquent and shows clearly the following. This institute was born of the canonic legal rule *versari in re illicita* as a reflection of a special aversion of the legislator to the act of the perpetrator from which next to main, direct immediate forbidden consequences additional foreseeable typical forms of mediate, indirect forbidden consequences derive. In history, it occurs very typically in restaurant fights, often ending with heavily injured, crippled and killed fighters. The legislator knew, that fighting (often drunk fighting) in restaurants is especially dangerous because it so often ends in killings, although unintentional; that is why he incriminated deadly strikes in restaurant fights even more repressive then deadly strikes among humans in other conditions. The institute

[3] In the region of former common Yugoslavia see a very clear picture of this topic by the famous Croatian criminal legal theoretician *Petar Novoselec* in his textbook of the general part of substantive criminal law (of Croatia): *Novoselec P. Opći dio kaznenog prava [Criminal Law – General Part]. Zagreb: Sveučilište u Zagrebu 2004, pp. 242-246.* Slovenian legal theoreticians do not deal with this problem thoroughly.

of liability for graver consequence was born and developed through centuries as a form of hardening the punishment - elevating the lower, upper or both margins of punishment in comparison with general rules for margins of punishment in cases of concurrent offences. In history, but also nowadays it seems to make sense as an exclusively repressive institute, a hardener of punishment.

General Paradoxes of the Institute of Liability for Graver Consequence in Slovenian Criminal Law

However, there are strange anomalies in the system in Slovenia and its criminal law in theory, legislation and judicial practice. Firstly (1.), there are cases, where the institute of liability for graver consequence clearly should be used in the special part because of the obvious statistical appearance of mediate, indirect consequences in certain criminal acts, but the Slovenian legislator missed to use this technique without any declared and reasonable cause. I am thinking for instance of severe cases of sexual offences, where bodily harm of victims is almost a rule or at least very foreseeable in practice. Further, there is armed robbery and similar violent crimes, where the legislator does not use the institute of liability for bodily harm as a liability for graver offence in Slovenia (see Art. 206, 207, 170, 171, 172, 173 of the Slovenian CC).

In other cases (2.) this institute is used in the special part, but without any clear distinction in effect of general punishment in concurrent offences or the effect of the use of the institute of liability for graver consequence is even opposite. One of especially ethically most interesting cases can be found in several killed persons in a traffic accident under Art. 323 of the Slovenian CC, under which *"(§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"* and *"(§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 less than one and not more than eight years."* If you kill 10 persons at once negligently by for instance driving a car under influence of alcoholic drinks, far too fast

and at the same time without any driving licence (because it has been revoked by the authorities), the margins of punishment in Slovenia are several times(!) lower in comparison with killing them negligently under general provisions of the incrimination of killing a person in negligence (Art. 118 of the Slovenian CC, Negligent Causing of Death), although the institute of liability for graver consequence is used by the legislator in §2 of Art. 323 where the death of a person is dealt with as a mediate, indirect consequence of a breach of regulations on road safety and a traffic accident is considered to be the immediate, direct consequence (§1 of Art. 323). It is obvious, that the Slovenian institute of liability for graver consequence urgently needs dogmatic improvement (let alone the ethical and philosophical problems of legal equalling of one or several deaths in criminal law inside the first element of the general notion of crime).

Liability for Graver Consequence in Road Traffic or what do we want to protect with Road Traffic Incriminations

The nature and structure of legal goods is one of the most central and important prerequisites to understand properly every possible incrimination. It is nothing less than the key to proper application of almost every possible institute of the general part of substantive criminal law to a certain incrimination and most clearly to the proper use of the institute of concurrence of offences. At the same time the nature and structure of legal goods are among the most theoretically underrated and almost scandalously neglected instruments of criminal law in history and in present time. Moreover, among all groups of incriminations of the general parts of criminal laws of the world, read traffic incriminations are very dominant in this regard. Inside the personal traffic through public space, because of the sheer statistical occurrence especially on the roads, the colliding legal goods and ethical and political interests in these incriminations are specially worth studying. Very different goods and interest meet here: the very prominent criminal legal good of human life with all the symbolic political weight as a good of limited disponibility[4] meets obviously

[4] In German: *»Güter mit begrenzter Disponibilität«, »begrenzt disponible Güter«, »begrenzt verfügbare Güter«, »beschränkt verfügbare Güter«.*

non-disponible[5] goods, like for instance public safety (safety on public roads as a public, general accessible space). The conglomerates of these different goods are legally complex and open many questions, which are typically neglected in criminal legal doctrine (at least) in Slovenia and even more in criminal jurisprudence. What is and what should be the role of forbidden consequence in the unlawfulness of the criminal act? Is the stress in determining unlawfulness of the criminal act in the unlawfulness of the acting and the unlawfulness of the forbidden consequence because of the aleatority of it should be at best minimal? On the other hand: should the unlawfulness of the forbidden consequence be crucial in the judging of the unlawfulness of the criminal act in all cases of crimes, like we are long used as self-evident in murders and other intentional, but also negligent killings of humans? We accept as culturally, almost anthropologically normal, that taking a life of ten people is a very different ethical category, that taking one single life, although in both cases through one single acting. Why should road traffic be different? Do we really want, are we ethically allowed to look at human lives as appendices of public safety on roads and push them in legal wordings like "one or more lost lives", covered with the same margins of punishments in the law? Or the same problem from another viewpoint: should we built and maintain a so called vitacentrical (life-centered) criminal law on road traffic, where the uniqueness of every human individual and its life is central for criminal law? Or are we willing and used to reduce human lives to secondary, subsidiary goods next to the safety of public spaces in the form of shamelessly cumulating numbers of dead persons under hoods of same margins of punishments and even worse: under much lower margins of punishments than in "non-road-mass-killings" of people (inside a non-vitacentrical approach to unlawfulness in road traffic law)?

Taking a life of a person in a road traffic accident, that is negligently, is without doubt a form, a variant of taking a life of another human. There are typical special circumstances: the road traffic as the special activity, where the accident happens, the road as a special public space, where the accident happens and usually a

[5] In German: *»nicht disponible Güter«, »nicht (frei) verfügbare Güter«.*

motorized vehicle as an especially dangerous machine, involved in the accident (where the perpetrator is responsible for safe manoeuvring). It seems that there is no special need to form specialized incriminations of negligent killings in road traffic accidents; there are enough general incriminative provisions of causing a death of another human negligently. Using an especially dangerous machine while killing seems to make the crime more severe, taking part in a very complex and hard to manage activity (necessary for modern economies), like public transport, seems to make the crime less severe at the same time. However, these too phenomena act mutual neutralizing, so there seems to be no real need to form specialized crimes in law texts, at least politically speaking. Still, many states feel the political need for special incriminations and in some of them, like in Slovenia, they even neutralize the number of killed persons as a factor of unlawfulness of the criminal act by the use of the institute of liability for graver consequence, as shown before. In these legal systems, it looks politically, like there are no lives of humans in the mind of legislators, but mainly the fear from repression in road traffic. With more criminal scientific words: the use of the institute of liability for graver consequence is perverted into the opposite of its original functions, from a repressive hardener into a softener in cases of deadly attacks on masses – by nature crimes, the legislators around the world should be very much feared off.

Comparative Legal View

The use of the institute of liability for graver consequence inside the road traffic law differs strongly among states. In Austria for instance, there is a very general approach to causing public danger and injuries and deaths of other humans and roads are perceived as a form of public space and subsumed under general provisions of crimes against public safety, human body and human life. The fact, that those goods are endangered or hurt with motorized vehicles, makes the crimes in principle higher punishable, but not worth special incriminations.

The Scandinavian states typically do not use the institute of liability for graver consequence in their road traffic criminal law but use general provisions of concurrence of offences in such cases.

Germany has a very tight net of incriminations, covering road traffic misbehaviours, especially for punishing intoxicated dangerous drivers, even when no killings occurred. Also in Germany all general provisions on concurrence of offences are applicable, there seems to be no need to use the institute of liability for graver consequence for covering deaths of persons in traffic accidents.

The institute of liability for graver consequence is vividly traditionally used in so-called socialistic countries of the European east, nowadays-called new European democracies or sometimes alternatively "post-transition countries". At least in Slovenia this institute is not used in a transparent, systematic way in the special part of the criminal law and shows severe dogmatic and ethical problems and inconsistencies when dealing with several injured or death victims of road traffic crimes under one hood of margins of punishment.

Conclusion

In Slovenia, the use of the institute of liability for graver consequence is dogmatically not used by the legislator in a satisfactory way. Especially it is not clear, why in several incriminations of the Slovenian Criminal Code (like Rape or Robbery) this institute is not used at all, while in other incriminations it covers several deaths of persons, that is several killed persons the same way as one killed person and in that way aggressively milder than the institute of proper concurrence of crimes would. A very prominent such case in Slovenian criminal law are special road traffic incriminations.

After thorough comparative criminal legal analysis, one can question if there is really such an important need for the institute of liability for graver consequence in Slovenian criminal law on road traffic. Even more, there seems to be no special need to form specialized incriminations of negligent killings in road traffic

accidents; there are enough general incriminative provisions of causing a death of another human negligently. Using an especially dangerous machine while killing seems to make the crime more severe, taking part in a very complex and hard to manage activity (necessary for modern economies), like public transport, seems to make the crime less severe at the same time. However, these too phenomena act mutual neutralizing, so there seems to be no real need to form specialized crimes in law texts, at least politically speaking.

On the legislative level, it differs strongly from developed criminal legal systems in Europe. It cries for a thorough rethinking and remodelling at least in the special part of Slovenian substantive criminal law. Even a full abolishment of this institute from the general and special part of the criminal law in Slovenia is presently not unimaginable.

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Official Journal of the Republic of Slovenia, Nr. 55/08, 66/08, 39/09; 91/11.

Driving under the Influence of Alcohol and Drugs*

Ömer Metehan AYNURAL**

Abstract

Because of the importance of providing the danger which occurs from driving under the influance of alcohol, drugs or other reasons the turkish lawmaker has regulated this act as an offence. In this article we tried to analyse this offence and emphasise the problamatic views such as the limit of blood alcohol content, participation or aggregation. We hope to at least give an idea about the discussions about this certain offence.

Keywords: Endangering the traffic safety, endangerment offence, damage offence, drunk driving, traffic law, alcohol, drugs.

I. In General

Every year in Turkey many injuries and deaths occur because of traffic accidents. The researches show that in year 2015 %2.48 of these accidents are due to driving under the influence of alcohol[1]. In order to prevent these kinds of accidents which occur because of drunk driving, the turkish lawmaker has choosen, under certain circumstances, to regulate driving under the influence of alcohol and drugs as an offence.

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* Geliş Tarihi: 18.10.2016, Kabul Tarihi: 23.12.2016.

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[1] http://www.kgm.gov.tr/SiteCollectionDocuments/KGMdocuments/Trafik/ Trafik KazalariOzeti2015. pdf, Tablo 12. Online (14.10.2016).

The offence of "driving under the influence of alcohol and drugs" is regulated in Article 179 Paragraph 3 under the title of Endangering the Traffic Safety in the Turkish Penal Code (TPC). According to the paragraph:

> ***(3)*** *"Any person who uses a vehicle who is unable to direct or control such safely due to the influance of alcohol or drugs or other reasons, shall be sentenced in accordance with the provisions of the above section."*[2]

According to the above section:

> ***(2)*** *"Any person who directs and controls a land, sea, air or railway transportation vehicle such to risk the life, health or property of others shall be sentenced to a penalty of imprisonment for a term of up to two years."*[3]

So the two year imprisonment will also be valid for paragraph 3.

II. The Protected Legal Interest

The purpose of this offence is to protect the public order and safety by preventing the acts which endanger the traffic safety. And with the public and traffic safety we can say that the right to live, corporal integrity and the right of property are also protected[4].

Another matter which should be examined under this title is that this offence is an endangerment offence. We can seperate the offences as endangerment and damage offences. The offences which require a damage to occur on the protected legal interest[5] of the

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[2] Edward Grieves/Vahit Bıçak, **The Turkish Penal Code**, September 2007, s. 108.

[3] Grieves/Bıçak, s. 108.

[4] Murat Önok, "Trafik Güvenliğini Tehlikeye Sokma Suçu (TCK m. 179)", **Türkiye Barolar Birliği Dergisi**, S. 121, Kasım-Aralık, 2015, s. 161; Özlem Yenerer Çakmut, "5237 Sayılı Türk Ceza Kanunu'nda Trafik Güvenliğini Tehlikeye Sokma Suçları (TCK m. 179-180)", **Alman – Türk Karşılaştırmalı Ceza Hukuku**, C. III, İstanbul, Yeditepe Üniversitesi, s. 775. Sibel Kılıçarslan İsfen, **Alman ve Türk Ceza Hukukunda Trafik Güvenliğini Kasten Tehlikeye Sokma Suçları**, Ankara, Seçkin, 2013, s. 71.

[5] Most authors make this differetiation between damage and danger crimes based on the object of the crime. Mahmut Koca/İlhan Üzülmez, **Türk Ceza Hukuku Genel Hükümler**, 9. Baskı, Ankara, Seçkin, 2016, s. 113.

offence are called damage offences. And the offences which require only an endangerment to the protected legal interest of the offence are called endangerment offences[6]. For an endangerment offence a damage is not quested because the risk of a danger itself is found punishable. The endangerment offences are also divided into two as the concrete and abstact endangerment offences. To talk about a concrete endangerment offence the act against the norm should put the protected legal interest of the offence into a conctrete endangerment. And the judge has to research if the act really caused a danger. For example article 179 paragraph 1 and 2 are concrete endangerment offences. For the abstact endangerment offences the judge does not have to research if the act caused a danger or not, the execution of the legally described act itself is enough to be responsible of this offence. Because there is an acceptance that the legally described act forms an endangerment against the protected legal interest of the offence. Due to these explanations we can say that the offence in art. 179 prg. 3 is an abstract endangerment offence.

III. The Material Elements

A. The Offender-Victim

This is an offence which demands a special status of the offender. Only a person who uses a vehicle who is unable to direct or control such safely due to the influance of alcohol or drugs or other reasons can be the offender[7]. Anyone else who does not provide this special status connot be the offender.

The victim is generally the public. It does not have to be a spesific person.

B. The Object of the Offence

The object of an offence is what or whom the legal act was taken on[8]. The legal act, driving is taken on the traffic. So we can say that

[6] Koray Doğan, "Tehlike Suçları ile Zarar Suçları Arasındaki Suçların İçtimaı Sorunu", **Türkiye Adalet Akademisi Dergisi**, S. 16, Ocak 2014, s. 181 vd.

[7] Önok, s. 162; vs. Mahmut Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), **Kazancı Hakemli Hukuk Dergisi**, Sayı 11, Temmuz 2005, s. 107.

[8] Koca/Üzülmez, s. 111.

the traffic is the object of the offence[9]. On the other and, a vehicle is not the object of the crime, but the object for commiting the crime. The definition of vehicle according to the Highway Traffic Code (HTC) is: "Vehicle is the common name of engined, non- engined and special purposed transportations, construction vehicles and tractors which can be used on the highway". By the term of vehicle we should understand all sorts of engined and non-engined vehicles which are suitable for transportation[10]. So it should be stated that the act is not only taken on road vehicles. Railroad, sea and air vehicles are also the objects of the offence. Because this offence is mostly committed on the highways, we will focus on highway vehicles.

It does not matter if the vehicle works with an engine or not. The engined vehicles can work with electricity, gasoline or any other fuel. For example, trucks, automobiles, busses, motorcycles, electrical scooters, quad bikes, tractors, golf carts are qualified as vehicles. There is even a decision of the Bayerische Oberste Landesgericht (BayObLG) which recognises an electrical wheelchair as a vehicle[11].

The non-engined vehicles are vehicles which work by human or animal power like bicycles or carriages. Scooters, sledges and inline skates are also considered as vehicles[12].

Vehicles should be used on the highway. In the HTC, highway is defined as: "Terrain strips, bridges and areas which are open to the use of the public for the traffic". According to the HTC, traffic is the states and actions of pedestrians, animals and vehicles on the

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[9] Önok says that the object is the traffic order and safety, Trafik Güvenliğini Tehlikeye Sokma Suçu, s. 163.

[10] Urs Kindhäuser, **Strafrecht Besonderer Teil I**, 4. Auflage, Baden- Baden, Nomos, 2009, s. 384, kn. 5.

[11] Bay ObLG v. 13.7.2000 – 2 St RR 118/2000, NstZ- RR 2001.

[12] Karl Lackner/Kristian Kühl, **StGB Strafgesetzbuch Kommentar**, 27. Auflage, C.H. Beck, München, 2011, § 315c, kn. 3; Ali Rıza Çınar, "Trafik Güvenliğini Tehlikeye Sokma Suçlarından Türk Ceza Yasasının 179/3. Maddesindeki Alkollü Araç Kullanma Suçu", **Fasikül Aylık Hukuk Dergisi**, S. 2, Eylül, 2010, s. 10.

highway. So to commit this offence, there has to be an area which is open to the use of the public[13]. This offence cannot be commited in special areas which only certain people are allowed (The parking lot for employees of a company)[14].

C. Act

Using a vehicle when unable to direct or control such safely due to the influance of alcohol or drugs or other reasons is the typical act of this offence. As it can be understood from the text, driving under the influence of alcohol or drugs itself isn't an offence. The person should also not be able to direct or control the vehicle safely. Not being able to drive safely should be determined for each incident. It can be because of alcohol, drugs or another reason.

One of the reasons for driving unsafely is the influence of alcohol. Infact it is the most common case in the practice. It is known that alcohol has negative influences on the human body, but how does this effect driving safely?

First of all alcohol effects individuals mentally. It weakens the feeling of responsibility and directs them to reckless acts[15]. Individuals who are under the influence of alcohol are more prone to take risks[16].

There are also many physical negative effects of alcohol. A decrease of concentration and difficulty of understanding is one of the first indications[17]. The vision turns blurry[18] and the perception of

[13] İsfen, s. 79.; Ali Rıza Çınar, s. 10.

[14] İsfen, s. 79

[15] Klaus Peter Becker, **Alkohol im Straβenverkehr**, Deutscher Anwalt Verlag, Bonn, 2004, s. 76, kn. 119.

[16] Ersin Budak/İbrahim Taymur, "Alkol ve Madde Etkisi Altında Araç Kullanımı ile İlişkili Psikolojik Faktörler", (Online) http://www.cappsy.org/archives/vol7/ no3/ cap_07_03_10.pdf, 21.09.2016.

[17] Alexander Reineke, **Der wegen Trunkenheit vermindert schuldfähige Täter**, Verlag Dr. Kovač, Hamburg, 2010, s. 74-75.

[18] Faruk Aşıcıoğlu, **Trafikte Güvenli Sürüş Açısından Alkol**, İstanbul, Beta, 2009, s. 19.

colors get damaged[19]. The automatism which develops with driving experience is lost, so the automatic reactions of the driver could be managed only with a special effort[20].

It is clear that these effects will effect any persons ability to drive safely. But the influence of alcohol can be different on each person. For that reason the legislation did not put a general limit to the ratio of alcohol, but limited it by saying not being able to drive safely. That's why a person with a ratio of 0.2 promile can be punished because he lost his ability to drive safely but a person with a ratio of 0.9 promile may not be punished because he did not lose that ability. But it should also be stated that the Institution of Forensic Medicine[21] has decided that almost everyone with the ratio above 1.0 promiles loses their ability to drive safely[22]. And the High Court (Yargıtay) has also such decisions[23]. The legislator legislated these decisions in 2013. According to the HTC article 48 paragraf 6: "Article 179 paragraf three of the Turkish Penal Code will also be implemented on the drivers who were caught and determined that they were under the influence of more than 1.0 promile alcohol". This means it is accepted that the drivers under the influance of alcohol above 1.0 promilles have lost their ability to drive safely[24]. So the drivers above 1.0 promilles without any need for further researches will be punished. For the drivers under 1.0 promilles there is a need of expressive indications which indicate the loss of the ability of driving safely. The lower the ratio of alcohol the more and certain should the indications be[25]. The Instution of Forensic

[19] Peter König, § 316, **Leipziger Kommentar**, 12. Auflage, Band 11, De Gruyter Recht, Berlin, 2008, kn. 16a.

[20] "Türk Ceza Yasasına Göre Alkollü Araç Kullanmanın Güvenli Sürüş Yeteneğine Etkileri Çalıştay Sonuç Bildirgesi", **Adli Bilimler Dergisi**, s. 74.

[21] Adli Tıp Kurumu

[22] Faruk Aşıcıoğlu/Belkıs Yapar/Aliye Tütüncüler/Ahmet Belce, "Trafik Güvenliğini Tehlikeye Sokma Suçu Açısından Alkol", **Adli Tıp Dergisi**, C. 23, S. 3, s. 15.

[23] 12. Ceza Dairesi E. 2011/5656 K. 2011/3668 from İsfen, s. 112, dn. 213.

[24] Also İsfen, s. 109, 110, 112; Cengiz Apaydın, **Trafik Güvenliğini Tehlikeye Sokma Suçları ve Trafik Ceza Hukuku**, İstanbul, Ege, 2015, s. 77.

[25] Sesim Soyer Güleç, "Yeni Türk Ceza Kanununda Trafik Güvenliğine Karşı İşlenen Suçlar", **HPD**, S.9, Aralık, 2006, s. 177; Önok, s. 177, 178.

Medicine agrees that the drivers which have a ratio of 0.30 promille blood alcohol content do not lose their ability of driving safely. For the ones between 0.30 and 1.00 promilles the loss of this ability can be detected with an urgent doctor examination[26]. Even if an alcohol measurement is not made it is still possible to be sentenced by this offence. For example we have to accept that this offence is the matter when the driver falls asleep while driving or if he is not able to stand up. These indications must be due to the influence of alcohol. Or else everyday mistakes that all drivers can make will not indicate that the driver cannot direct or control safely.

Drugs are defined as substances which cause a narcotise effect, an unstoppable desire and need and a physical and spiritual addiction[27]. Cocaine, morphine, marihuana, heroin could be given as examples. A person who drives a vehicle who is unable to drive safely under the influence of these substances will also be sentenced with this offence.(179/3)

Another matter which brings up this offence is when a person uses a vehicle who is unable to direct or control such safely due to other reasons. What should be understood by "other reasons" is, every situation which arises from the driver[28] that prevents the driver from directing or controling the vehicle safely. In the preamble of the article, driving while very tired and sleepy is given as an example. Another example could be a person who got his licence but in time who lost an important level of his senses and drives a vehicle. Such a person can be also the offender of this offence.

IV. The Moral Element

This offence can be committed only with intent. Because for a certain offence to be committed with negligance should be regulated in the legislation.

[26] Aşıcıoğlu/ Yapar/ Tütüncüler/ Belce, s. 15.

[27] Fatma Karakaş Doğan, **Türk Ceza Hukukunda Uyuşturucu Veya Uyarıcı Madde Suçları**, İstanbul, Legal, 2015, s. 9.

[28] Güleç, s. 173.

V. Unlawfulness

From the justifications like self defence, consent of the person concerned, exercise of a right can come in mind. But because the protected legal interest is the public safety and the victim is the public, we can not speak of a consent of a certain person. Thatswhy consent of the person concerned will not be a juristification.

VI. Culpability

From the grounds precluding culpability we can speak of the state of necessity. But to accept the existance of the state of necessity the offender must prove that he had no other way to act. For example it is not a state of necessity when a group of friends get out of a bar and the only one who knows how to drive drives even he is unable to drive safely. Because they can always go home with a taxi. But if there is a need of an urgent medical attention then we can speak of the state of necessity[29].

When the offender is under the influance of alcohol or drugs which was taken involintarily the culpability will be precluded and he will not be punished. But if the offender took these substances voluntarily then he will be punished as his culpability was complete[30].

VII. Types of Manifestation of the Offence

A. Attempt

In turkish law to talk about an attempt a person should directly begin the execution of an offence he intends to commit through suitable conduct, but should be unable to complete such due to circumstances beyond his control.

It is mostly agreed that attempt is not possible in offences which the result is attached to the act because we can not seperate the act

[29] Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), s. 104.
[30] Önok, s. 182, 183.

and result spatial and temporal[31] or in offences which only require an act and don't have a result. In other words, as soon as the act is done the offence is committed, so there is no phase for an attempt. Insult[32] and theft[33] are one of the most given examples. Driving under the influence of alcohol and drugs is also an offence which does not have a result. Because the act cannot be seperated and the offence occurs as soon as the act is done. So an attempt cannot be possible[34]. According to İsfen if a person who is not able to direct or control a vehicle safely gets into a car and starts the engine but fails to run the car because the engine breaks, an attempt is possible because all conditions of an attempt has realised[35].

B. Participation

Because this is an offence which demands the offenders special status, it is mostly agreed in the turkish doctrine that only instigation and assistance is possible for these offences, a joint offendence is not possible[36]. Koca is in the opinion that a joint offendence is possible only if the vehicle is used together[37]. We must state that we are also in the same opinion. When more than one individuals have the special status which this offence demands and they all play an active role as an offender why shouldn't we speak about a joint offendence? If we are to give an example; when two persons who are unable to direct or control a vehicle safely, get into a car and one controlls the steering wheel, the other who is sitting in the other seat controls the gas pedal then there are two persons who fulfil the special status of the

[31] Hakan Hakeri, **Ceza Hukuku Genel Hükümler**, 16. Baskı, Ankara, Adalet, 2013, s. 471; Timur Demirbaş, **Ceza Hukuku Genel Hükümler**, 10. Baskı, Ankara, Seçkin, 2014, s. 471, 472.

[32] Koca/Üzülmez, s. 416.

[33] Adem Sözüer, **Suça Teşebbüs**, İstanbul, Kazancı, 1994, s. 230.

[34] Also: Emine Eylem Aksoy Retornaz, "Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu", **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi**, 2012, S. 1, s. 59; Çakmut, s. 788; Apaydın, s. 101.

[35] İsfen, s. 147, 148; Önok also agrees on this example, Önok, s. 184, dn. 127.

[36] İsfen, s. 148; Önok, s. 188; Güleç, s. 182.

[37] Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), s. 110.

offender, so there is a joint offendence. Another good example would be a tandem bicycle. A tandem bicycle usually has two seats and to pedals for each person. The person in the front seat controls the hand bar but they both can pedal. So as long as they both pedal in the condition which they are unable to direct or control a vehicle safely due to the influance of alcohol or drugs or any other reason, they both will commit this offence and there will be a joint offendence[38].

C. Aggregation of Offences

The first thing we should consider in the aggregation of offences is when paragraph 2 and 3 of article 179 both occur at the same time. That means a person who uses a vehicle who is unable to direct or control such safely due to the influance of alcohol or drugs or other reasons causes a concrete danger of risking the life, health or property of others. In this situation according to the majority of the doctrine there is a formal aggregation[39].

When a damage occurs as a result of an endangerment offence, in other words when death or injury occurs as a result of this offence, again formal aggregation will be the matter according to the majority[40]. Some authors are in the opinion that this is a case of an irreal aggrevation[41] [42]. The High Court (Yargıtay) used to decide that there is a formal aggregation because there is more than one offence with a single act, so the offender should be sentenced for the offence which requires the heaviest punishment[43]. But in its newest desicions the High Court (Yargıtay) decides that if both an endangerment and a damage offence was commited with a single act, the offender must be sentenced with the punishment of the damage offence[44].

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[38] Cf. König, **LK**, §315c, kn. 38.

[39] Güleç, s. 183; Önok, s. 187; İsfen, s. 149.

[40] Güleç, s. 183; Çakmut, s. 789, İsfen, s. 150.

[41] Görünüşte içtima

[42] Muhammed Demirel, "Karar Analizi: Tehlike Suçları- Zarar Suçları Arasındaki İlişkinin İçtima Kuralları Kapsamında Değerlendirilmesi", **İstanbul Üniversitesi Hukuk Fakültesi Mecmuası**, C. LXXI, S. 1, 2013, s. 1484; Hakeri, s. 595, 596.

[43] 17.1.2012, 15930/177 from Önok, s. 185, dn. 133.

[44] 12. Ceza Dairesi E. 2014/5384 K. 2015/1493, 12. Ceza Dairesi E. 2014/8555 K. 2015/1717, 12. Ceza Dairesi E. 2014/13189 K. 2015/5934 from Apaydın, s. 186 vd.

Another matter that should be considered is the relation between TPC 179/3 and HTC 48. According to the Misdemeanour Code Article 15/3 if an act is described both as an offence and misdemeanour, sanctions will be imposed only for offences. But in 2013 some changes were made in the HTC. According to these changes if it is determined that a driver is under the influence of alcohol with a ratio more than 0.50 promilles even if his act is an offence he will also have to pay 700 Turkish Liras. This means an exeption of the aggregation practice was made. So for example if a driver was caught driving under the influance of 1,21 promille alcohol, he or she will be sentenced with imprisonment according to the Turkish Penal Code and will have to pay 700 Turkish Liras.

If a driver is caught driving under the influance of drugs, he or she will pay 3600 Turkish Liras and if the conditions of TPC 179/3 is accepted he or she will be sentenced with prison according to the HTC 48/8. This imprisonment will be between three months and two years.

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Tortious Liability of a Driver in Road Traffic*

Gregor DUGAR**

Abstract

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. 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. 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.

* Geliş Tarihi: 18.01.2016, Kabul Tarihi: 17.11.2016.

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Key words: tortious liability, strict liability, road traffic law, traffic accident, motor vehicles, law of obligations

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 lability. 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 Obligations[2]).

[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 pravnovrednostni 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 Obligations[11]). 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 person[12] 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, Vezanost 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 bike[20] 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 another[38] 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] Jugdement of the Higher Court in Ljubljana I Cpg 1010/2000, 11. 9. 2002.

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

[39] Jugdement 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 drives 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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Liability & Compensation for Personal Injury and Death Resulting from Road Traffic Accidents in Turkey*

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Abstract

Liability and compensation for personal injury and death resulting from road traffic accidents is one of the great issues on the liability and compensation agenda of our time. Applicable liability regulations of Turkish Law in road traffic accident cases are of importance because once a road traffic accident occurs in Turkey; Turkish law applies to the dispute.

It is also significant to mention about the Turkish compensation system based on the distinction of personal injury compensation and compensation in the event of death as a result of a road traffic accident. In light of this distinction, we examine basic issues in codified legal system as well as the policy approaches behind in order to focus on how someone can get damages.

Key words: Strict liability, road traffic accidents, motor vehicle, compensation, pecuniary damages, non-pecuniary damages.

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* Geliş Tarihi: 23.06.2016, Kabul Tarihi: 17.11.2016.

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I. Introduction

Road traffic injuries became a major public health burden in the 21th century. According to the official data supplied by the Turkish National Police Head of Traffic Services Department, 3524 people were killed and 285.059 were injured or disabled in reported 1.199.010 road traffic accidents on Turkish roads in 2014 *(Table below provides the statistical data for the last ten years)* .

Road Traffic Accident Statistics[1]

YEAR	Number of Accidents	Number of Deceased	Number of Injured
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

There is a significant increase in the number of accidents as well as the number of injured. Despite this trend the number of deceased decreased, but would still be considered high. When facing this striking data, two questions arise for determination: Is there a way to achieve ''ideal compensation'' for personal injuries caused by a road traffic accident? Is it possible to figure an amount that would fully compensate the death caused by a road traffic accident? Both questions would be answered in negative without any doubt, not only in respect

[1] General Directorate of Security Department of Traffic Services http://www.trafik.gov.tr/Sayfalar/Istatistikler.aspx (Last Visited: November 12, 2015). It should be noted that the data of the year 2014 has been highlighted as the latest official data supplied by the Turkish National Police Head of Traffic Services Department.

of the injuries and death resulting from road traffic accidents but in respect of all other possible sources of personal injury and death.

Although there is no way to achieve an ideal compensation for personal injuries and death; there is also no doubt that the victims of the road traffic accidents should be better protected by law and judiciary. The question then has to be structured as "How is it possible to protect a road traffic accident victim's best interests and achieve a positive outcome for them and their families under Turkish Law?"

Here we shall only outline the Turkish approach and the paper is structured on two basic pillars in this regard. First, applicable liability regulations of Turkish Law in road traffic accident cases will be analyzed, considering the fact that when a road traffic accident occurs in Turkey, Turkish law is applicable. Then, we will focus on the Turkish compensation system based on the distinction of personal injury compensation and compensation in the event of death as a result of a road traffic accident.

II. Liability & Sources of Liability

A. General View

Turkish Code of Obligations (Law No: 6098) (hereinafter ''TCO'')[2] has regulated three main sources of obligations: contracts, torts and unjust enrichment under General Provisions/Section I. The foundations of tort liability in Turkey are contained in TCO Art. 49. This article lays down the basic principle of liability for fault: "*Whoever causes damage unlawfully to another, whether intentionally or due to negligence is obliged to indemnify this other person"*. As stated in the provision, fault is generally considered as an intentional or negligent conduct and tort liability is established on the aforesaid conduct of the tortfeasor[3]. There are five requirements for fault

[2] Official Gazette, 4 Feb. 2011 No: 27836, Enacted: 11 Jan. 2011.

[3] For detailed analysis of tort liability in Turkish Law see Kemal Oğuzman / M. Turgut Öz, Borçlar Hukuku Genel Hükümler, V.2, 10th ed. (amended and updated), İstanbul, 2013, p.11; Selahattin S. Tekinay / Sermet Akman / Haluk Burcuoğlu /

liability in this sense: the violation of a codified normative rule, unlawfulness, fault (intention or negligence), causation and damage.

There are also special liability laws provide for liability independent of fault for certain situations and activities. We name them as strict liability or causal liability provisions and the liability here is to be established independent from the tortfeasor's conduct[4].

A full discussion of these provisions is beyond the ambit of this paper, and therefore, we will focus primarily on special strict liability provisions in respect of road traffic accidents. But it shall be emphasized that in strict liability regimes, dangerous devices and installations or dangerous activities are generally constitute the basis for liability[5] [6]. The specific risks of the activity of operating a motor vehicle has resulted the statutory strict liability rules in this sense[7]. Turkish strict liability regime for damage caused by motor vehicles is embodied in Road Traffic Act (Law No: 2918) (hereinafter "RTA")[8], which has been enacted under the influence of Swiss Road Traffic Act[9].

Atilla Altop, Borçlar Hukuku Genel Hükümler, 7th ed. (amended), İstanbul, 1993, p. 663; Haluk N. Nomer, Borçlar Hukuku Genel Hükümler, 14th ed. (amended), İstanbul, 2015, p.137; Fikret Eren, Borçlar Hukuku Genel Hükümler, 18th ed., Ankara, 2015, p.516; Ahmet M. Kılıçoğlu, Borçlar Hukuku Genel Hükümler, 17th ed. (updated), Ankara, 2014, p.274; Hüseyin Hatemi/ Emre Gökyayla, Borçlar Hukuku Genel Bölüm, 3rd. ed., İstanbul, 2015, p.116.

[4] See Haluk Tandoğan, Türk Mesuliyet Hukuku, Ankara, 1961, p. 89 ff. Also see Oğuzman / Öz, p.135; Tekinay/Akman/Burcuoğlu/Altop, p.670; Nomer, p. 155; Eren p.614; Kılıçoğlu p.313; Hatemi/ Gökyayla p.149.

[5] Cees van Dam, European Tort Law, NY, 2006, s. 77.

[6] It shall be noted that TCO Art. 72 impose a general rule of strict liability along the other special rules / codifications. For a detailed analysis of this general strict liability provision and other types of strict liabilities in the same vein see Ayça Akkayan – Yıldırım, "6098 Sayılı Türk Borçlar Kanunu Düzenlemeleri Çerçevesinde Kusursuz Sorumluluğun Özel Bir Türü Olarak Tehlike Sorumluluğu" IUHFM V. LXX, I. 1, 2012, p.205. Also see Mustafa Tiftik, Türk Hukukunda Tehlike Sorumluluklarının Genel Kural ile Düzenlenmesi Sorunu, Ankara, 2005.

[7] General Assembly of Turkish Court of Cassation, Case No.: 2012/17-215 Decision No: 2012/413 dated 27.6.2012 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[8] Official Gazette, 13 Oct. 1983 No: 18195, Enacted: 18 Oct. 1983.

[9] For historical background and features of this regulation see Fikret Eren, "Karayolları Trafik Kanunu'na Göre Motorlu Araç Işletenin Akit Dışı Sorumluluğunun Hukuki

RTA, is basically regulating the liability for damage caused as a result of motor vehicle being "in operation", regardless of the question of whom is at fault[10]. This is referred as strict liability as we have already mentioned. The way in which the compensation is then determined and calculated is laid down in the TCO, which is regulating the Turkish Law of Damages. It shall be noted that that the mentioned regulations of TCO are framed in a very general way, which means that these provisions are not specifically designed for the probable consequences of road traffic accidents[11].

B. The Strict Liability Imposed on the Operator

1. RTA Art. 85: Liability Provision

Art. 85 of Turkish RTA impose upon the "operator" of a "motor vehicle" strict liability for personal injury, death and property damage, resulting from the "operation of a motor vehicle"[12].

In cases where the motor vehicle is being operated under a name of a commercial enterprise, then the operator of the motor vehicle and

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Niteliği ve Unsurları" Journal of Ankara University Faculty of Law, 1982-1987, V.XXXIX, I.1-4, p.160 ft. 2 [Hereinafter Eren, Akit Dışı Sorumluluk]; Kılıçoğlu p.367.

[10] See Oğuzman / Öz, p.201; Tekinay/Akman/Burcuoğlu/Altop, p.710; Nomer, p. 190; Kılıçoğlu p.386. For proper application of RTA, the scope of the regulations shall be determined. See RTA Art. 2 a& b. For detailed information about the scope of the Act see Nomer, p.185 ff.

[11] After the presentation of this conference paper, four articles of RTA have been amended with Law No: 6704 dated 14.04.2016. (Official Gazette, 26 April 2016 No: 29695, Enacted: 14 April 2016). The amendments will be covered in relevant sections. At this point it is important to note that new provisions based on the fact that in consequence of the special characteristic of the compensation claims within the scope of mandatory liability insurance, the procedures and principles stipulated in RTA and the general conditions of the insurance shall be applied primarily. As regards the matters not regulated in RTA and the general terms and provisions, then tort provisions of TCO shall be applied.

[12] See Haluk Nomer, ''2918 Sayılı Karayolları Trafik Kanununa Göre Motorlu Araç İşletenin Hukuki Sorumluluğu'', İstanbul Bar Journal, 1992/66, N. 1-2-3, pp. 36-89. Also see Oğuzman / Öz, p.196; Tekinay/Akman/Burcuoğlu/Altop, p.706; Nomer, p. 186; Eren p.668; Kılıçoğlu p.368; Hatemi/ Gökyayla p.156.

the owner of the related enterprise will be deemed jointly and severally liable for the damages according to the provisions[13].

This liability is established independent from the operator's intentional or negligent conduct. This means, unlike general tort liability, here the victim does not have to prove the facts that the defendant (operator) acted intentionally or negligently, in order to justify the application of liability rules[14]. In other words, driving (operating) a vehicle is allowed by law but due to the undertaken risk, victims can more easily prove their claim and get compensation. Thus the position of the victim can be deemed improved when compared to the general tort liability.

2. Positive Requirements Regarding the Imposed Strict Liability

We shall focus on three positive requirements regarding the imposed strict liability: motor vehicle, motor vehicle operator and damage caused in the course of the operation (running) of the motor vehicle.

a. Motor Vehicle

Motor vehicle is defined in the third article of the RTA that refers basically to vehicles moving with an engine power[15]. It is important to mention that only the liability for damages caused by motor vehicles will be deemed within the scope of the regulation[16].

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[13] Oğuzman / Öz, p.206; Nomer, p.192; Eren p.679; Kılıçoğlu p.376; Hatemi/ Gökyayla p.156. Also see 4th Circuit of Turkish Court of Cassation, Case No: 2009/3997 Decision No.: 2009/6066 dated 28.04.2009 LegalBank (www.legalbank.com) (Last Visited: November 23, 2015); 4th Circuit of Turkish Court of Cassation, Case No: 2005/12 Decision No: 2005/13603 dated 15.12.2005 LegalBank (www.legalbank.com) (Last Visited: November 23, 2015).

[14] 21st Circuit of Turkish Court of Cassation, Case No: 2013/16505, Decision No.: 2013/22364 dated 2.12.2013 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[15] Oğuzman/Öz, p.198; Tekinay/Akman/Burcuoğlu/Altop, p.710; Nomer, p.190; Eren p.676; Kılıçoğlu p.384.

[16] E.g. Trolleybuses, elevators and cablecars are not within the scope. See Oğuzman / Öz, p.198; Tandoğan, p.234; Kılıçoğlu p.385.

b. Motor Vehicle Operator

The liability is primarily imposed on the "operator" of the motor vehicle. The operator is the person who uses the vehicle in his own expense and who has the power of disposal that goes with such use. In other words he is the person who has the supervision of the motor vehicle [17]. The owner is usually deemed to be the operator but the owner need not always be the operator[18]. Motor vehicle driven by the employees of the operator and causing damage will render the operator liable under the provisions of RTA Art. 85/5[19]. As stated above in cases where the motor vehicle is being operated under a name of a commercial enterprise, then the operator of the motor vehicle and the owner of the related enterprise will be deemed jointly and severally liable for the damages. The ruling of Turkish Court of Cassation is in line with this provision[20].

Another important issue that has to be taken into consideration is usage of vehicles by third persons. A person using a vehicle on short-term basis, for instance someone who borrows the vehicle for a

[17] For detailed information about the operator see Oğuzman / Öz, p.203; Tekinay/Akman/Burcuoğlu/Altop, p.712; Nomer, p.190; Eren p.681; Kılıçoğlu p.370.

[18] See 4th Circuit of Turkish Court of Cassation, Case No.: 2002/14353, Decision No.: 2003/4658 dated 14.4.2003 that considered the position of the operator Kazancı Precedent Database (www.kazanci.com) (Last Visited: May 23, 2016). The burden of proof lies with the one making the claim. 17th Circuit of Turkish Court of Cassation, Case No.: 2013/9991, Decision No.: 2013/12832 dated 25.9.2013 Kazancı Precedent Database (www.kazanci.com) (Last Visited: May 23, 2016). Also see Oğuzman / Öz, p.204; Tekinay/Akman/Burcuoğlu/Altop, p.712; Nomer, p.191; Eren p.681; Kılıçoğlu p.370.

[19] Nomer, p.193; Eren p.689; Kılıçoğlu p.382.

[20] As an example, Turkish Court of Cassation ruled that; in case of a traffic accident caused by cargo trailer which has been used under name of a company, the operator (who was the owner in that case) and the cargo company shall be deemed jointly liable for the damages. 4th Circuit of Turkish Court of Cassation, Case No: 2009/3997 Decision No.:2009/6066 dated 28.04.2009 (Journal of Court of Cassation Judgments, 2009/10, p. 1859). Also see 17th Circuit of Turkish Court of Cassation, Case No.: 2014/22035, Decision No.: 2014/17799 dated 4.12.2014 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015)

couple of days will usually not be treated as operator[21]. But in case of long term lease agreement, the user of the vehicle may be treated as the operator[22] if he is taking care of all the running costs[23].

The same approach applies in cases of vehicle liens. But those cases in which the lien is put on the vehicle by registration instead of establishing possession shall be considered differently. The pledgee is not going to be deemed as operator then[24].

If the motor vehicle is used with the consent of the operator, or if it has been stolen because of the negligence of the operator, the operator will remain liable under RTA Art. 107[25].

[21] Oğuzman / Öz, p.274; Nomer, p.191; Eren p.682; Kılıçoğlu pp.371-372.

[22] For instance, the financial leasing company is not held liable for the damages caused by the long-term lessee. 17th Circuit of Turkish Court of Cassation, Case No.: 2014/15245, Decision No.: 2014/12483 dated 24.9.2014 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015); 4th Circuit of Turkish Court of Cassation Case No: 2010/10330 Decision No.: 2011/12331 dated 23.11.2011 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015)

[23] Kılıçoğlu p.373; Eren, Akit Dışı Sorumluluk, p.176. Turkish Court of Cassation requires support of the above stated facts with additional evidence. See Nomer, s. 191 especially footnote 590. Also see 17th Circuit of Turkish Court of Cassation, Case No.: 2013/18596, Decision No.: 2015/10502 dated 12.10.2015 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015), 17th Circuit of Turkish Court of Cassation, Case No.: 2013/21210, Decision No.: 2015/6525 dated 5.5.2015 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015), 17th Circuit of Turkish Court of Cassation, Case No.: 2013/1732, Decision No.: 2013/2886 dated 5.3.2013 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015). In these cases, the Court held that the long term lease agreement shall be supported by the evidences such as invoices, permits, commercial books and current account statements.

[24] See Nomer s. 191 for details.

[25] See the judgement of 11th Circuit of Turkish Court of Cassation in line with this. Case No: 2007/11144 Decision No.: 2009/78 dated 12.01.2009 LegalBank (www.legalbank.com) (Last Visited: November 12, 2015). Also see Oğuzman / Öz, p.206; Nomer, p.186; Eren p.685; Kılıçoğlu p.378; Hatemi/ Gökyayla p.157.

3. Damage Caused in the Course of the Operation (Running) of the Motor Vehicle

The typical way is the harm caused through collusion of the moving motor vehicle with moving or even immovable objects[26]. If the above liability requirements are satisfied then the operator of the motor vehicle will be liable in accordance with the RTA Art. 85.

IV. Unavoidable Events

Since we are dealing with a kind of strict liability it is never easy to raise a defense. Nevertheless, defendants of road traffic accident liability cases will be able to raise force majeure as a defense[27]. Thus, the operator of the motor vehicle will not be held liable if he can prove that the accident was caused as a result of force majeure or circumstances that can be imputed to the gross fault of the victim or a third party, according to RTA Art. 86/1.

In order to avoid the liability of the operator due to unforeseeable and unavoidable events, it is important to understand that the reason shall be an external one such as natural events and act of a third party. It is also significant to mention that the defects in the construction of the vehicle[28], mechanical failure of the vehicle[29], human failure of the driver[30] will not count as an unavoidable event.

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[26] Tekinay/Akman/Burcuoğlu/Altop, p.527-528; Eren p.676; Kılıçoğlu p.390; Eren, Akit Dışı Sorumluluk, p.183.

[27] Oğuzman / Öz, p.202; Nomer, p.194; Eren p.704; Kılıçoğlu p.399; Hatemi/ Gökyayla p.157.

[28] Oğuzman / Öz, p.202; Eren p.703; Kılıçoğlu p.398; Eren, Akit Dışı Sorumluluk, p.202. E.g. A broken tire chain causing the damage does not count as an unavidable event. General Assembly of Turkish Court of Cassation, Case No.: 2012/4-107 Decision No.: 2012/326 dated 30.5.2012

Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[29] In this case, liability for defective products may be in question. See Nomer, p.192; Eren p.703; Eren, Akit Dışı Sorumluluk, p.202.

[30] Nomer, p.194; Eren p.702; Kılıçoğlu p.397. To illustrate, death of the driver does not count as an unavidable event. General Assembly of Turkish Court of Cassation,

These kinds of situations cannot even constitute basis for a reduction in the amount of compensation to be paid.

V. Injured Party's Contributory Fault (Negligence)

Contributory negligence is an important element of Turkish tort law. The role contributory negligence plays in the context of strict liability is the same as it plays in the context of fault based liability. The aim here is to adequately attribute to each party involved their own part of the loss[31]. Thus victim's fault will be considered as a contributing factor to his hurt and the damages awarded to him will be reduced in accordance with RTA Art. 86/2. This approach is possible towards all persons. In other words this approach reduces the liability of the tortfeasor by taking the contributory fault (negligence) of the victim into account, regardless of victim's age or other features[32] [33].

It shall also be noted that, according to the provisions of RTA Art. 90[34], the form and content of the compensation will be subject to TCO Art. 51[35].

Case No.: 2012/11-1096 Decision No.: 2013/382 dated 20.3.2013 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[31] For detailed analysis of the legal consequences of contributory negligence see Başak Baysal, Zarar Görenin Kusuru, İstanbul, 2012.

[32] Oğuzman / Öz, p.208; Tekinay/Akman/Burcuoğlu/Altop, p.540; Nomer, p.193; Eren p.707; Kılıçoğlu p.401.

[33] 17th Circuit of Turkish Court of Cassation Case No: 2013/503 Decision No.: 2013/3122 dated 11.3.2013 LegalBank (www.legalbank.com) (Last Visited: November 12, 2015).

[34] After the presentation of this conference paper some RTA provisions have been amended as we've previously mentioned. Latest amendment related to RTA Art. 90, which have been made with Law No: 6704 dated 14.04.2016, shall be expressed at this point. According to the new provision of RTA Art. 90, compensation within the scope of mandatory liability insurance is subject to the procedures and principles stipulated in RTA and the general conditions prepared in the framework of this Act. As regards the question of reparations and compensation, matters not

VI. Non-Paying Passengers Traveling in the Motor Vehicle

In these cases victim's claims can be based on the general provisions according to the provisions of RTA Art.87[36]. As stated, TCO Art. 49/1 and TCO Art. 66 shall be applied regarding the liability in this sense. The exclusion of the injuries suffered by the non-paying passengers from the scope of RTA shall be deemed as a weakness.

VII. Liability of the Driver

In those cases where the accident occurs while the motor vehicle is driven by a third person other than the operator than the liability of the driver will be based on the general fault provision of TCO Art. 49/1[37].

VIII. The Obligatory Insurance Imposed by the RTA and its Function

The introduction of strict liability is important and can be deemed as a regulation in favor of the victims. But imposing strict liability regulations helps the victims of traffic accidents only so long as the tortfeasors can pay.

The regulations set forth in RTA Art. 91-93 regarding the obligatory insurance, impose an obligation on insurers to provide the minimum mandatory coverage and this can be deemed the protection of the public is assured[38]. It shall be noted that not only the strict liability regulations but also tort law in general is very much

regulated in RTA and the general terms and provisions, tort provisions of TCO shall be applied.

[35] See Oğuzman / Öz, p.208 for details and comparison.

[36] Oğuzman / Öz, p.200; Tekinay/Akman/Burcuoğlu/Altop, pp. 526-527; Eren p.708; Kılıçoğlu p.403; Hatemi/ Gökyayla p.156.

[37] Oğuzman / Öz, p.220; Tekinay/Akman/Burcuoğlu/Altop, p.533; Nomer, p.192; Eren p.689; Kılıçoğlu p.375.

[38] Rayegan Kender, Türkiye'de Hususi Sigorta Hukuku, 14th ed. (updated), XII Levha, Istanbul, 2015, pp.6-7; Tekinay/Akman/Burcuoğlu/Altop, p.542; Nomer, p.194; Eren p.718; Hatemi/ Gökyayla p.157.

influenced by the development of the insurance possibilities[39]. Thus the establishment of the obligatory insurance in this context can be deemed as factor to balance the high operational risks of the motor vehicle. In addition to that many Turkish drivers voluntarily obtain insurance coverage[40]. It is also very important to highlight that the victim has been given a right of action against the insurer according to RTA Art. 97[41].

IX. Liability Regarding the Cases where the Motor Vehicle is not in Operation

The operator of a motor vehicle may also be held liable for the consequences of the road traffic accidents even if the car is not 'in operation'.[42] This is the case if the operator is to blame for the accident or if a fault in the car caused the accident[43]. Such a case constitutes a combination of fault liability and strict liability. (*See* RTA Art. 85/2 for details.)

[39] See van Dam, p.816.

[40] Nomer, p.194.

[41] After the presentation of this conference paper some RTA provisions have been amended as we've previously mentioned. Latest amendment related to RTA Art. 97, which have been made with Law No: 6704 dated 14.04.2016, shall be expressed. According to the new provision of RTA Art. 97, the victim shall submit a written claim to the related insurance company before going to litigation within the limits prescribed by the liability insurance policy. If the insurance company does not reply in written within 15 days from the date of submission of the claim or in case of any dispute concerning whether the written answer meets the demand or not, the victim may go to litigation for damages or may choose to arbitrate within the framework of Law No: 5684.

[42] Oğuzman / Öz, p.213; Tekinay/Akman/Burcuoğlu/Altop, p.710; Nomer, p.186; Eren p.695; Kılıçoğlu p.387; Hatemi/ Gökyayla pp.156-157.

[43] Eren p.698; Kılıçoğlu p.387.

X. Assessing the Situation: Against whom can the Victim of a Road Traffic Accident Claim Damages Resulting from that Accident?

Based on the liability construction mentioned above, we need to clarify one last issue before getting on the compensation system. As a victim of road traffic accident, one can always direct his claim to the one/s that is deemed liable under the provisions mentioned above[44]. But a claimant demanding damages, primarily has to assess the economic power and the fault level of the other side. In most of the cases with regard to road traffic accidents the address shall usually be the insurance company since the amount of the compensation stemming from the road traffic accident might be high in value for the tortfeasor[45].

Claims for compensation must be submitted to the insurer of the party responsible for the damage. Victims are authorized to demand the compensation from the insurer by the means of a lawsuit within estimated boundaries of compulsory liability insurance[46].

Of course there is always the possibility of the absence of insurance. Although compulsory automobile liability insurance

[44] See supra Section III ff.

[45] "…Compulsory … insurance sub LoB accounted for approximately 74% of the policies issued in land vehicles liability insurance in 2014. The share of the sub LoB in direct premium volume and claim payments are 91% and 98%, respectively..." See Republic of Turkey Prime Ministry Undersecretariat of Treasury, "Annual Report about Insurance and Individual Pension Activities", 2014, p.44.

[46] After the presentation of this conference paper some provisions of RTA have been amended. Latest amendment related to RTA Art. 97, which have been made with Law No: 6704 dated 14.04.2016, shall be expressed at this point. According to the new provision of RTA Art. 97, the victim shall submit a written claim to the related insurance company before going to litigation within the limits prescribed by the liability insurance policy. If the insurance company does not reply in written within 15 days from the date of submission of the claim or in case of any dispute concerning whether the written answer meets the demand or not, the victim may go to litigation for damages or may choose to arbitrate within the framework of Law No: 5684.

(which is also called as traffic insurance) is required for every vehicle in Turkey according to provisions of RTA Art. 91, victims may face with cases where the involved motor vehicle is not insured. For those cases Turkish lawmaker was used to regulate a trust account in order to compensate the damages caused by a driver who lacks traffic insurance[47]. It has to be mentioned that the regulations regarding this trust account is abolished in 2007 with Law No. 5684[48].

XI. Compensation

A. General View

Victims of road traffic accidents may face several types of injuries as a result of the accident. Material injuries which will give victim the right to demand so called "pecuniary damages". The compensation can be claimed by the injured party for the amount required to restore the damaged vehicle to its former condition[49].

The injured party can also claim for loss of use with a daily rate depending on the type of the vehicle[50]. In line with the scope of this paper, below we will focus on the compensation for personal injuries and death. In order to present the structure preferred by the lawmaker, it is important to make a distinction between the cases that victims of road traffic accidents stay alive but get injured and cases that cause death of the victims of road traffic accidents.

B. Cases that Victims of Road Traffic Accidents Stay Alive but Get Injured

In cases that victims of road traffic accidents stay alive but get injured, TCO Art. 54 define the types of damages that the person liable for a tortuously inflicted personal injury has to pay. In other

[47] Oğuzman / Öz, pp.208-209; Tekinay/Akman/Burcuoğlu/Altop, p.543; Nomer, p.196; Eren p.721.

[48] Official Gazette, 14 June 2007 No.: 26552, enacted: 3 June 2007.

[49] Oğuzman / Öz, p.110; Tekinay/Akman/Burcuoğlu/Altop, p.786; Nomer, p.209; Eren p.741; Kılıçoğlu pp.411-412; Hatemi/ Gökyayla p.159.

[50] Oğuzman / Öz, p.111; Tekinay/Akman/Burcuoğlu/Altop, p.787; Nomer, p.209; Eren p.742; Kılıçoğlu p.412; Hatemi/ Gökyayla p.159.

words, victim of a road traffic accident can claim for damages pursuant to TCO Art. 54 in cases of personal injury. It must be noted that not only physical injury but also mental (psychological) injury can cause pecuniary loss and non-pecuniary loss.

The victim may demand the specific damages referred by TCO Art. 54 are:

- Medical expenses
- Lost wages
- Loss or impairment of working capacity
- Loss resulting from jeopardized economic future

In terms of date of damage assessment, the damage from bodily injury is to be calculated on the day of the award according to TCO Art. 75[51].

Most special laws that provide for strict liability refer to general regulations of the TCO, including TCO Art. 56, on the subject of reparation. RTA is one of those legal regulations. TCO Art. 56/1 provides for the payment of an "appropriate sum" for non-pecuniary prejudices in case of bodily injuries under certain preconditions. TCO Art. 56/2 also allows the ones who are closely related to the heavily injured victim to claim reparation from the liable third party [52] . Spouse, parents, siblings and in special cases fiancé may be considered as the ones who are closely related to the victim[53][54]. The

[51] For detailed analysis see Oğuzman / Öz, p.130; Nomer, p.218; Kılıçoğlu p.429.

[52] Nomer, p.235; Haluk Burcuoğlu, "Yeni Yasal Düzenlemeler Işığında Bedensel Zararların Tazmini Esasları ve Usulü Kongresi", Ankara Barosu, 2013, p.16.

[53] Oğuzman / Öz, pp.101-102; Tekinay/Akman/Burcuoğlu/Altop, pp.837-842; Nomer, p.235; Fulya Erlüle, « 6098 Sayılı Türk Borçlar Kanunu'nda Beden Bütünlüğünün İhlalinden Doğan Manevi Tazminat Talebi », MÜHFD, Özel Hukuk Sempozyumu Özel Sayısı, 6098 Sayılı Türk Borçlar Kanunu Hükümlerinin Değerlendirilmesi Sempozyumu (3-4 Haziran 2011), Sempozyum No: III, Prof.Dr.Cevdet YAVUZ'a Armağan, 2011, p.145 ft.2. See for the discussion under the former TCO (Law No. 818) Nomer, p. 234.

[54] The ones who are closely related to the victim do not have to be the successor of the victim. 17th Circuit of Turkish Court of Cassation, Case No: 2013/8536 Decision No.: 2013/8925 dated 13.6.2013 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

aforementioned are the ones who are affected not directly but in a reflective way.

Here it must be stated that the characteristic of the injury suffered shall be severe in order to be regarded within this context[55]. This is a subjective criterion and shall be evaluated according to the facts of the case. Before 2012 codification, the closely related ones were not allowed to claim non-pecuniary damages in case of a bodily injury, even the injury is severe[56]. After the ruling of Turkish Court of Cassation (which is so called a principle ruling), courts started to rule in favor of the closely related ones especially when a severe injury or severe after-effect is in question[57]. After 2012 codification, the closely related ones are allowed to claim non-pecuniary damages in case of a bodily injury by law, which can be deemed as a real improvement[58].

TCO Art. 56/1 is also referring to special circumstances, which means that certain degree of severity of the injury is required even for the application of the first article.

Each case is unique and requires specific attention: the specific circumstances of each case will be determinants of compensation level and this is highlighted in the wording of the related article (see TCO 56/1). The same injury may have different consequences for the

[55] Burcuoğlu, p.16; Seda İrem Çakırça, "6098 Sayılı Türk Borçlar Kanunu'na Göre Ağır Bedensel Zararlarda Yakınların Manevi Tazminat Talebi", Prof. Dr. Aydın Zevkliler'e Armağan, C.I, p.790.

[56] 21st Circuit of Turkish Court of Cassation, Case No: 1997/8067 Decision No.:1997/8106 dated 8.12.1997 and 21st Circuit of Turkish Court of Cassation, Case No: 2004/24 Decision No.: 2004/1413 dated 23.02.2004 Kazancı Precedent Database (www.kazanci.com) (Last Visited: May 12, 2016).

[57] Oğuzman / Öz, p.263; General Assembly of Turkish Court of Cassation, No.:11-22/430, dated 26.4.1995; General Assembly of Turkish Court of Cassation, No.:4-251/265 dated 01.04.1998 Kazancı Precedent Database (www.kazanci.com) (Last Visited: May 12, 2016). See for further information and comparison with Swiss Law Erlüle, p.149 ff.

[58] Oğuzman / Öz, p.258; Kılıçoğlu p.438; Legislative Intent of Art. 55, Grand National Assembly of Turkey, Draft Law No. 6098 and Committee of Justice Report (2011)(http://www.kgm.adalet.gov.tr/Tasariasamalari/Kanunlasan/2011Yili/kanmetni/6098ss.pdf) (Last Visited: November 12, 2015).

victims of traffic accidents since some injuries can affect the careers and lives of victims differently[59]. The loss of a finger by a professional pianist will have a different impact on his career than the same loss for an opera artist. Thus the level of compensation may be adjusted according to the specific factors of the case[60].

C. Cases that Cause Death of the Victims of Road Traffic Accidents

In case of the death of a victim, people who indirectly effected due to the death have right to claim for material and moral damage such as the victim's relatives, mother, father, spouse, children, siblings, fiancé and the persons who are in the care of the victim.[61] Those are people who are in close relation to the victim.

The ones who are in close relation to the deceased are entitled to claim compensation:

- Funeral expenses[62]
- Medical expenses and victims losses with regard to the loss or impairment of working capacity if the injured party has stayed alive for a while after the accident[63]

According to the provisions of TCO Art. 53/3, if the injured person is died as a result of the accident, surviving ''dependents'' can claim damages from the liable party. Those are the ones whom the victim was supporting in a way. Here the calculation will be based on the costs of maintenance of dependents to the extent that the deceased would have been able to pay the sum should he have survived according to TCO Art. 53/3[64]. According to TCO Art. 56/2, in the case of death, the judge may award an appropriate sum as

[59] See Eren p.770; Hatemi/ Gökyayla p.165.

[60] See Oğuzman / Öz, p.275.

[61] Oğuzman / Öz, p.99; Nomer, p.219; Eren p.755; Kılıçoğlu p.416; Hatemi/ Gökyayla p.163.

[62] Oğuzman / Öz, p.99; Nomer, p.219; Eren p.752; Kılıçoğlu p.415.

[63] Oğuzman / Öz, p.99; Nomer, pp.220-221; Eren p.753; Kılıçoğlu p.414.

[64] Oğuzman / Öz, p. 106; Tekinay/Akman/Burcuoğlu/Altop, p.638; Nomer, p.219; Eren p.760; Kılıçoğlu p.417.

reparation to the ones closely related to the deceased. Here the assessment of the special circumstances is also crucial[65].

XII. Non-Pecuniary Damages Under Turkish Law: How it functions?

The non-pecuniary damages under Turkish law is still not functioning as a satisfaction but rather the purpose of procuring for the injured party (or the one who is closely related to the injured or dead victim when regulated by law) through a monetary payment, an amenity to offset mental distress, reduced enjoyment of life[66]. We can observe that in the most recent rulings, Turkish Court of Cassation is aiming to set the reparation amounts in severe cases of non-pecuniary impairment considerably higher than before[67]. The claim to non-pecuniary damage is basically inheritable and transferable[68]. One of the preconditions for the inheritance is that the person entitled to claim has expressed his intention to assert claims before his death, according to the TCC Art. 25/4[69].

XIII. The Amount of Compensation: Important Role of Judicial Discretion

Injuries and/or death may affect the victims and the ones who are closely related to the victims differently. In this regard, judges supposed to have great discretion in determining the amount of the compensation[70]. TCO Art. 51/1 clearly states that the judge

[65] Nomer, p.219; Kılıçoğlu p.439.

[66] ''Satisfaction'' is a notion that is taken from Swiss Law. Turkish Legislator instructed the judge to weigh all the surrounding circumstances when deciding the level of the award.

[67] See 17th Circuit of Turkish Court of Cassation, Case No: 2010/1488 Decision No.: 2010/4651 dated 24.5.2010 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[68] Oğuzman / Öz, p.267; Tekinay/Akman/Burcuoğlu/Altop, p.923; Nomer, p.236; Eren p.787; Hatemi/ Gökyayla p.183.

[69] Oğuzman / Öz, pp.267-268; Tekinay/Akman/Burcuoğlu/Altop, p.923; Nomer, p.236; Eren p.788; Hatemi/ Gökyayla p.183.

[70] 4th Circuit of Turkish Court of Cassation, Case No: 2012/5054 Decision No.: 2012/7616 dated 30.4.2012 Kazancı Precedent Database (www.kazanci.com) (Last Visited:

determines the form and extent of the compensation provided for loss or damage incurred, with due regard to the circumstances and the degree of culpability.

Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, TCO Art. 52/1 gives the judge the discretionary power to reduce the compensation due or even dispense with it entirely. In cases in which the loss or damage was caused neither willfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship, the judge may reduce the compensation according to the provisions of TCO Art. 52/2[71].

The level of the compensation on the other hand, could be argued. It is not easy to objectively and comparatively evaluate compensation levels as low, adequate or high. Nonetheless at this stage it is possible to point out the criteria that have to be taken into account while determining the amount of the compensation.

The question here is whether 'family', 'profession', 'standard of living' and 'social statuses' shall be taken into account while determining the amount of the compensation or not. When the answer is positive, it's widely accepted that the victims may feel compensated. However, when the answer is negative, it's widely accepted that the victims may feel under-compensated. These criteria had been covered by former regulations of TCO but cancelled by the effectuated code on the grounds that the judge has given a great discretionary power and it is not necessary to explicitly state those criteria in the wording of the regulation[72].

November 23, 2015); 21st Circuit of Turkish Court of Cassation, Case No: 2016/986 Decision No.: 2016/4813 dated 21.3.2016 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015); 11th Circuit of Turkish Court of Cassation, Case No: E. 2009/1969 Decision No.: 2010/8243 dated 12.7.2010 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[71] For detailed information see Nomer, s. 223 ff.

[72] See Official Reasoning of TCO Art. 51/1.

XIV. Form of Compensation

It is at the discretion of the judge whether the compensation for bodily injury or death takes the form of an annuity or a lump sum; the judge determines the type and size of compensation for the damage that has occurred according to the TCO Art. 51[73]. In practice, a lump sum is usually awarded to the injured party in Turkey[74].

Under certain circumstances it is not possible to determine the exact scope of the bodily injury at the time of the compensation judgment. In those cases the judge may keep and exercise his authority to make alteration in compensation judgment for the two consecutive years starting from the date of the finalization of judgment according to TCO Art. 75.

XV. Statutory Prescription Period

Claims for pecuniary damages based on the provisions of RTA (against the operator of the motor vehicle or an insurance company) have a statutory prescription period of 2 years starting from the time when the damage and the perpetrator have become known by the victim[75]. (See RTA Art. 109). In any case, duration of 10 years starting from the date of the road traffic accident, is the long-stop period that shall be taken into account[76]. If the traffic accident requires a criminal case procedure then prescription shall be prolonged pursuant to Penal Law, thus longer prescription durations shall become valid[77].

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[73] Oğuzman / Öz, p.113; Tekinay/Akman/Burcuoğlu/Altop, p.672; Nomer, p.222; Kılıçoğlu p.774.

[74] Nomer, p.222; Hatemi/ Gökyayla p.169.

[75] Oğuzman / Öz, p.211; Nomer, p.244; Eren p.830; Kılıçoğlu p.503; Hatemi/ Gökyayla p.157; 17th Circuit of Turkish Court of Cassation, Case No: 2013/16843 Decision No.: 2015/4189 dated 12.3.2015 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015)

[76] Oğuzman / Öz, p.211; Nomer, p.244; Eren p.833; Kılıçoğlu p.503; Hatemi/ Gökyayla p.157.

[77] Oğuzman / Öz, p.211; Nomer, p.242; Eren p.834; Kılıçoğlu p.488; Hatemi/ Gökyayla p.157. 17th Circuit of Turkish Court of Cassation, Case No: 2013/3218 Decision No.: 2014/2861 dated 3.3.2014 Kazancı Precedent Database (www.kazanci.com) (Last

Claims for non-pecuniary damages of road traffic accident victims on the other hand, shall be based on the provisions of the TCO (with the reference of RTA Art. 90[78]) thus there is a statutory prescription period of 2 years starting from the time when the damage and the perpetrator have become known by the victim[79]. It has to be noted that a 10 year long-stop period is also applicable here according to the related provisions of TCO Art. 72)[80].

One additional point, however, still remain to be considered. According to the abovementioned provisions, a short period of prescription that is based on a subjective criterion (knowledge of the victim) and a long-stop period of ten years (from the moment when the wrongful act –here the accident- was committed, regardless of the victim's knowledge, shall be applied together. As seen, personal injury claims are treated as the same as all the other types of claims and subject to the general prescription regime. However, personal injuries are generally regarded as more serious than property damage. Thus a particular importance has to be attached to the former with regard to the prescription periods. At this stage it is important to highlight the clear international tendency towards implementing special prescription provisions to be applied in personal injury cases[81].

Visited: November 23, 2015); 17th Circuit of Turkish Court of Cassation, Case No: 2009/6982 Decision No.: 2009/5833 dated 29.9.2009 Kazancı Precedent Database (www.kazanci.com) (Last Visited: November 23, 2015).

[78] After the presentation of this conference paper some RTA provisions have been amended as we've previously mentioned. Latest amendment related to RTA Art. 90, which have been made with Law No: 6704 dated 14.04.2016, shall be expressed. According to the new provision of RTA Art. 90, compensation within the scope of mandatory liability insurance is subject to the procedures and principles stipulated in RTA and the general conditions prepared in the framework of this Act. As regards the question of reparations and compensation, matters not regulated in RTA and the general terms and provisions, tort provisions of TCO shall be applied.

[79] Oğuzman / Öz, p.211; Nomer, p.244; Eren p.830; Kılıçoğlu p.505; Hatemi/ Gökyayla p.157.

[80] Oğuzman / Öz, p.74; Nomer, p.241; Eren p.833; Kılıçoğlu p.487; Hatemi/ Gökyayla p.157.

[81] See Reinhard Zimmermann, Comparative Foundations of a European Law of Set-Off and Prescription, Cambridge, 2004, pp. 62-111 for detailed comparative analysis of the highlighted issue.

XVI. Importance of Road Traffic Accidents Involving Visiting Victims

Visitors in Turkey are also at risk of road traffic accidents. According to the official Road Traffic Accidents Statistic Report of Turkish Statistical Institute[82]:

- Total number of foreign persons involved in road traffic accidents in Turkey in 2013 → 3414
- Number of persons involved in accidents with death → 124
- Number of persons involved in injured accidents → 3289
- Number of persons killed → 70
- Number of persons injured → 2717

Non-residents involved in road traffic accidents generally fall into two different categories. The first main profile concerns tourists involved in road traffic accidents. The second profile relates to cross-border workers. There is no doubt that the impact of the road traffic accident will be different depending on the profile. It's most likely that the cross-border worker may be covered by labor insurance policies. The shock of the tourists, who are far away from their home, may be different. And when we consider family vacations, the likelihood of children being involved in road traffic accidents involving tourists is also greater. How the accident will affect them?

We do not have any data distinguishing the types of the tourists (as the ones with rental cars / coach passengers / pedestrians…) or whether they are more at fault than local residents. The absence of comprehensive and comparable data makes it very difficult to comment on the legal consequences of road traffic accidents involving visitors. But it is obvious that over the last decade there has been an increased number of compensation claims from visiting victims and this issue would definitely be determined specifically in order to point out the hardship and create more satisfactory conditions for those victims.

[82] "Road Traffic Accidents Statistic Report", Turkish Statistical Institute (http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT_ID=15&KITAP_ID=70) (Last Visited: November 12, 2015).

XVII. Conclusion

The safety of roads has been improved by physical measures in Turkey and we all have benefitted from this improvement. But road traffic injuries can still be deemed as one of the important public health and development issue according to the official data supplied by the Turkish National Police Head of Traffic Services Department.

Turkish Law holds a strict liability with regard to the compensation for damage caused by motor vehicles. In this respect the position of road traffic victims are favorable when compared to traditional fault liability.

Compensation regime on the other hand has been greatly influenced by social and political circumstances; social security systems as well as the national health provisions. Turkish compensation practice can be analyzed in two aspects: in cases of pecuniary loss due to bodily injury or death, the awarded compensation may be deemed fairer when compared to the compensation awards in non-pecuniary damage. It is not possible to figure out the individual value of the non-pecuniary disadvantages in monetary terms. But the judge should be focused on severity of the injury and the loss of amenities of the claimant in order to award an adequate compensation. Turkish compensation system works well on the whole, but there are still important tasks to accomplish regarding liability law especially the non-pecuniary damages within this regard in the coming future.

The establishment of the obligatory insurance, as factor to balance the high operational risks of the motor vehicle, is in favor of the victims. In addition to that many Turkish drivers voluntarily obtain insurance coverage. It is also very important to highlight that the victim has been given a direct right of action against the insurer according to RTA Art. 97.

After 2012 codification, the closely related ones are allowed to claim non-pecuniary damages in case of a bodily injury by law, which can be deemed as a real improvement that also affects road traffic accident cases. This improvement makes the position of the victim and the closely related one to the victim more favorable without any doubt.

The provision that gives the judge an opportunity to keep and exercise his authority to make alteration in compensation judgment for the two consecutive years starting from the date of the finalization of judgment can also be deemed in favor of the victims, especially regarding the cases that is not possible to determine the exact scope of the bodily injury at the time of the compensation judgment.

Defense of contributory negligence on the other hand can be considered as a factor which makes the position of a road traffic victim less favorable since this approach reduces the liability of the tortfeasor by taking the contributory fault (negligence) of the victim into account. The exclusion of the injuries suffered by the non-paying passengers from the scope of RTA could also be deemed as another weakness.

Applicable prescription provisions have to be considered as another area that has to be analyzed carefully. Despite the fact that there is an international tendency towards implementing special prescription provisions to be applied in personal injury cases; the same prescription period regulations apply in all the injuries caused by a road traffic accidents regardless of the type of the injury.

One can claim that the levels of compensation of road traffic accident victims are not high enough. Especially when we make a comparison from common law - civil law perspective, it is possible to notice a difference between compensation levels. There are a lot of underlying policy factors, along with the difference between the substantive and procedural laws as well (*e.g.*: civil action claims raised by road car accident victims are not tried by juries in civil law countries so as in Turkey).

But despite the existing differences it is always possible to link the two perspectives by the help of unifying factors. The contact of the strict liability and related compensation regime with insurance law shall be valued and may be taken as a unifying factor in order to open a room for comparative discussions and legal borrowings as Markesinis had perfectly stated in his comparative treatise[83].

We do strongly believe that this comparative approach would help to enhance national compensation practices in order to protect the

[83] *See* B.S. Markesinis / H. Unberath, The German Law of Torts (A Comparative Treatise), Oregon, 2002, p. 738.

victims of the road traffic accidents in a better way, even if there is no way to achieve a perfect compensation for personal injuries and death.

ABBREVIATIONS LIST

Art.	Article
ed.	edition
ff.	folio
ft.	footnote
I.	Issue
No.	Number
p.	page
pp.	pages
RTA	Road Traffic Act
TCO	Turkish Code of Obligations
V.	Volume

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Gravity of the Act as an Effective Tool for Differentiation between Traffic Crimes and Offences or Just Another Stumbling Stone*

Aleksander KARAKAŠ**

Abstract

After refreshing basic knowledge about the states right to punish and to define when and how it will be the particular conduct punished and then through well known different approaches in the delimination between crimes and offences, our efforts in this article are focused on question, how to establish prior mentioned distinction in cases where the road safety is on the line. Namely if the weight of some individual act is by prevailing quantitative delimitation its main distinctive sign, there must be taken into account not only its outcome, but also perpetrators conduct, which could be more or less risky. On the one hand this simple fact helps us in deliminating serious acts from less serious, but on the other, when the conduct and its outcome are not proportionate, takes us to a new areas, where the prior delimination becomes quiet uncertain. In such cases it is necessary to seek additional criteria by which to get a scale with most and less serious traffic delicts and thereby separation between traffic delict as a crime and offence. Without that tresspasing the prohibition of dual criminality is difficult to prevent. Designing two major crimes against the road safety in Penal code, slovenian legislator did not go down this path . Criminalization of the first act by weight of the effects and the second by weight of conduct, gravity of the particular

* Geliş Tarihi: 25.01.2016, Kabul Tarihi: 17.11.2016.

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act as a whole becomes unclear and internally unconsistent, while in the light of discussed delimination demands special judicial attention toward dual criminality prohibition, which could be obstructed.

Keywords: right to punish, criminality, categorisation, differentiation, crimes, offences, road safety, incriminations, conduct, effects, dual criminality, legality principle, functionality.

I. Introduction

To make my task easier, for a starting point I've borrowed some general remarks from theory of law and the state about states right to punish (*ius puniendi*). As we are all aware this is one of the corner stones of the state sovereignity as a factual and effective power over territory and its residents.[1] Without that right, state power can not be effectivly executed, because there is no other guarantee, that the residents will voluntarily obey the orders of that state[2] and even less that will be respected from other surrounding states (outer sovereignity). In last case, if not from other reasons, than at least to prevent the expansion of damaging consequences, caused by ineffective power of one state, to another.

If the right to punish is by itself somekind of urge, the states in particular are rather free in decision in which cases and in which manner, this right should be acomplished. Decision depends upon the importance of interests, followed by the state or its expectations, what should be with the right to punish effectively achieved.[3] Greater the interests are, more likely the states right to punish shall be activated and *vice versa*. Similar situation is by expectations, which are after the majority treshold is reached, determing the goals and its number, with wich this right is justify. But the importance of interests and determined expectations could not be identify just through establishing right to punish on general, but also how this is in particular state further lawfully developed.

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[1] *Pitamic L.*, Država (The State), Cankarjeva založba, Ljubljana 1996 (1927), p.37.

[2] *Robert S. Summers*, Form and Function in a Legal Sistem, A General Study, Cambridge University Press, Cambridge, 2006, p.283.

[3] *Ibid. p. 305.*

II. Categorisation of Criminality

When the decision about the importance of interests once is achieved or when the selected expectations are so justify, that they should be secured by punishment which is in its core still causing somenone's harm, next step is in defining acts with which those interests or expectations are endangered and in finding proper response to those acts which should not repeat anymore. The first part of a mission is a kind of mixture between crime policy concepts about possible damaging effects of certain behavior and its formal positioning in different normative frames (incriminations),while the second part is more or less focused on setting counterweight to abolished inbalance caused by these behavior. After the mission is completed, we receive normative act, usually legal code, which already by its text, points on legislator attitude toward interests or expectations, standing behind the legal incriminations. Sometimes even layout of chapters in special part of particular code can lead to assumption that the legislator prefer one interes instead of another. For example in Slovenian Penal Code *(Kazenski zakonik),* with small exception of crimes against humanity, first chapters of its special part are reserved for crimes somehow connected with individual and his rights and after that crimes considering community as a whole. Even more such legislature's attitude shows the type and level of penalties, where Slovenia is probably just one of the countries where defence power of the state is more valuable or in bigger interest than individual honnor and good name. The difference between penalties, like for the Evaiding from defence duties as crime under Article 361 of the penal code and the crime of Defamation under Article 158 of the same Penal Code, although not huge, is still such that any other interpretation could probably be excluded. Finally, the legislature's diversified attitude toward crimes according their weight may be manifested even in the field of criminal proceedings. In Slovenia, for example, by significantly expanded possibilities of resolving cases by consensus (diversion), and within the various reductions of criminal procedure, which intentionaly should be faster and less complicated than the regular criminal procedure, which deals with serious crimes.

In the above case as said legislature's attitude is recognizable indirectly, directly this attitude is recognizable when the acts are formally demarcated by theirs weight. As we know, the French Penal Code (*Code Penal*) from 1810 divided all criminal acts into crimes, misdemeanors and offenses. A similar tripartite division was followed by the Austrian Criminal Code (*Strafgesetz ueber Verbrechen, Vergehen und Uebertretungen*) from 1852, while today, for example in Germany we will meet the bipartite division of criminal acts in those which are *Verbrechen* and those that are *Vergehen.* Foundation of the division is in Article 12 of the Germans Penal Code, where the level of the sentence is proscribed. Notwithstanding between the legislations with the unitary system of criminal acts and legislations in which those acts are divided, for a sake of transparency warning should be noted, that we are dealing with categorizations of criminality within the same *species* as the epistemological unities. Why is this wrapped findings important?

Because of the general social development and development of state organization especially with an increased impact on relationships between individuals, which bursts out offences as violations of administrative law, spread through all areas of social life (French approach) or as infringements originating in a specific law of offences which, similarly as Penal Code for crimes, lays down the basic conditions for their criminality, as well as the basic pillars of its procedure (German approach).[4] Notwithstanding the differences in approaches, single fact is, that somekind of parallel criminality was obtained. Its nature was for a long time under disput, whether criminality for offences is a special one or is it just a part of criminality for crimes, without any differences that make possible separation justify.

III. Differentiating Criminality and its Significance

Attempts to make the crimes and offences qualitatively delimited are several and well known. Following with one, it was necessary to

[4] *Šelih A.* Prekrški v primerjalno pravni perspektivi (Offences in Legal Comparative Perpective), Zbornik 1. dnevi prekrškovnega prava, GV Založba, Ljubljana 2006, p. 176-177.

look for differences in the very purpose of penal law in the protection of legal interests, such as the foundations of social peace, while offences protect the missions of public administration in providing social welfare. On the other is the difference in outcomes when with crimes legal goods are damaged, while with offences, they are only under an abstract threat. According to other authors, and these are in the majority, the difference is in unlawfulness, where everyday offence has no concrete content. They are pure breaches of the law without its substrate.[5]

The present state in penal theory shows that the above attempts are about to be exceeded. Social peace and social prosperity are especially in cases of crimes *malum mere prohibitum* often two sides of the same coin. The same applies to the effects, where it is clear that even in the case of crimes merely abstract endangerment is possible like by Transporting or carrying explosives or dangerous goods in contravention of the regulations under Article 319 slovenian penal code and when it is not clear why the legal interest by perpetrating offence could not be damaged as by any other crime. Qualitative delimitation between crimes and offences is even more ambiguos by unlawfullnes, where it is impossible to know, when excatly the legislator was led by the substance and when he was already satisfied with the form in achieving its goals or why in fact in such cases the particular incrimination is necessary. In short, anything would seem that crimes and offences could be qualitative deliminated, after the above condensed presentation turned out to be unreliable. Such as the necessary distinctive character (*differentia specifica*) of deferred income is simply not sufficient and could not be accepted.

Having in mind the upper failure, quantitative distinction between crimes and offences works logical. If these do not differ according to species, the difference between them, could only be within the same species. But even in that case we have to register the

[5] For overview see *Karakaš A.*, Vprašanje upravičenosti gospodarskih prestopkov kot samostojne kategorije kaznivih ravnanj in problem prekrškov z vidika načela zakonitosti (The Question of Justificatication of Economical Contraventions as an Autonomous Category of Criminal Acts and Problem of Offences from the Standpoint of Legality Principle Pravnik 6-8/1996, p. 393-395.

characters with which this new distinction is justified. The most common character which could be met is the weight of the act. By itself, the weight is not something uniform, but rather the cicumstance, which could be estimated by the amount of the penalties for the act at the normative level and in the next stage at practical level, after a series of other circumstances related to the actual conduct, unlawfulness, guilt and in particular to the effects, caused in the outside world.[6] As smaller as possible are, the greater the likelihood that the individual conduct constitutes an offence and *vice versa*. The problem in this case is that the assessment is by definition not precise, so that the distinction between crimes as graver acts and offences as lesser one is actually uncertain. Probably therefore the classification of offences in the so-called penal law in its broader sense,[7] which implies their criminal nature and at the same time that they should not be equated with the crimes which are a core element of penal law in the strict sense.

However successfull clasification into broader penal scheme still can not remedy the problems implied by the same demarcation. Namely if the boundary between crimes and offences is too loosely or too fluent, the overlap in their criminalization seems inevitable.The overlap almost by itself raises a constitutional issue of dual criminality (*ne bis in idem*), which is tangibly more acute in cases where the criminality of the crime and the offence is based on the same blanket stipulation and where the perpetrators behavior is fully included in the described crime.[8] Second constitutional legal question which is open after the boundaries are too fluent is the legality of such a regulation as a whole. It is quiet clear that the overlapping increases the number of criminalization and it is also clear that such an arrangement can not be transparent or thus determined that the individual is without fear knowing that his conduct in any case is not be punishable in any sense. Finally, and by no means least important

[6] *Selinšek L.*, Kazensko pravo splošni del in osnove posebnega dela (Penal Law, General Part and Basics of the Special Part), GV Založba, Ljubljana 2007, p. 284.

[7] *Novoselec P.*, Opći dio Kaznenog prava (General Part of Penal Law), Sveučilište u Zagrebu, Zagreb 2004, p. 59.

[8] *Ibid.*

constitutional issue is equality before the law, when at high porousness is much likely that individuals will be for the similar act once treated as offenders of the crime and once as offenders of the offence.[9]

Besides unjustified inequalities on a broader level will be such perpetrators in the event of differences in the type and level of penalties quite specifically harmed. However, if the penalties are comparable, it will be difficult for offenders to find an excuse, that they were being dealt with faster, more streamlined, in short, with a smaller set of procedural guarantees as perpetrators of the crime.[10] In this regard, the recent practice of the European Court of Human Rights in case of *Maresti against Croatia*,[11] is unambiguous. The larger set of procedural assurances in proceedings for offences in consequence lead to a shift in the direction of the criminal proceedings, which deals with crimes and the possible transfer of jurisdiction from the administrative authorities to the courts, or at least such of their organization that the above mentioned assurances shall be fully respected.

IV. Delimitation of Criminality in Ensuring Road Safety

From the perspective of everyday life road safety is one of the conditions for participation in traffic. If this is not safe or if it dangerous, probability of presence in traffic is low, which in turn makes its volume can not be large. This is today during the general mobility of people, goods and information unimaginable. The first indication of the hazards of traffic, is the number of traffic accidents, but it is not the only one. For himself it is in fact insufficient, since the further informations are with particular accident blocked. Therefore

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[9] *Bonačić M./Rašo M.*, Obilježja prekšajnog prekršajnog prava i sudovanja, aktualna pitanja i prioriteti *de lege ferenda* (Elements of Law of Offences and its Proceedings, Actual Questions and Priorities *de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu (Croatian Yearbook for Penal Law and Practice), p. 444. See also CASE OF TOMAŠEVIĆ v. CROATIA *(Application no. 55759/07) at http://hudoc.echr.coe.int/eng.*

[10] I*bid.*

[11] CASE OF MARESTI v. CROATIA *(Application no. 53785/09) at http://hudoc.echr.coe.int /eng.*

we should deal with infinitiv number of traffic accidents to confirm that danger, which is rather unrealistic. From here, we have to make a shift in the time immediately before the accident to determine its etiology and to find measures to prevent it or locate conditions in which the accident would not have occurred. On such basis, together with a certain number of cases, system of measures is derived, with which the road safety should be ensured and already as a distinct concept identified. As we know, those measures are divided into three major groups. The first are measures aimed at detection and enforcement practices by which alone the transport participants achieve the highest possible safety impacts (education). The second group includes measures which prevent the behavior that traffic accidents are not directly related (prevention) and the third group are actions to eliminate those practices which are reguraly behind accident. Building such a system in countries with solid social structure is pyramid whereby the bottom, the widest part illustrates education, secondary prevention, top, smallest repression as a last resort, intended for the most outstanding examples. That the last is subject of penal law in the strict sense is not likely to be any doubt, and we will not be much mistaken in supposing that the prevention of practices that traffic accidents are not directly related offences should be covered as part of the penal law in the broader sense .

But as life can not be compressed in a separate mold as well as the two courses do not have separete armors, out of which even femenologicaly they could not exist. We want to stress that, although traffic accident the worst possible outcome of the prior risk or dangerous situation is, its dimensions in all cases will not be the same. Even more, in some cases, the accident (for example, collision of cars in the shoping centers garage) will be barely perceptible event, in which participants below do not be reluctant to engage in future anymore. It is clear that this is not one of outstanding examples, which claimed the attention of the penal law in the strict sense, but again there is the question of what to do when anyone was in the upper case physically injured. The crime is still excluded, but it is already an act that exceeds the mere threat to what was originally booked for offences. On the other hand, it is difficult to exclude life

situations in which, because of participant's conduct occurrence of an accident is very likely, however, that due to some lucky coincidence will not occur. If the case is noteworthy only because of traffic accidents itself and its dimensions, then in the above collision in the garage can not be subject to penal law in the strict sense. A bit different situation is, when the excessiveness of the case is judged not only by the impact, but also by the participant's conduct which would otherwise be in another, less happy outcome resulted in an accident with serious dimensions. We are facing with the problem where the clean, prestine positions are carried out only at its extremities. If the offender's conduct is outstanding and if the effects of that conduct are also oustanding, then it is quiet obvius that we are dealing with crime. In the opposite case, when conduct and effects are not something outstanding and if the conduct is unlawfull, anything other than the offence is out of our discussion. The problem sharpens when we are dealing with oustanding conduct and common effects and, in particular, when the conduct is nothing special, but the effects are on the contrary very striking. Then it is necessary to find criteria for gradualisation conducts and its effects, without which the crimes and offences in traffic as very dynamic category are difficult to distinguish.

V. Slovenian Attempt to Solve the Problem

Hopefully I think that this is not occasion to represent the whole historical development of slovenian criminality considering traffic safety,[12] neither to fully discuss about the current state of our home legislation. This would be for me an impossible task and beside the topic would be unduly exceeded. Therefore, I would like to concentrate on just some fragments of that legislation which I prefer that should not be ignored. In Slovenia, the traffic safety is a part of the public safety secured through the criminalization of crimes in the penal code and through offences such as mainly are set out in the Law on road traffic rules *(Zakon o pravilih cestnega prometa).*

[12] For full overview see *Dežman Z.* in *Korošec D. et. al*. Cestnoprometno kazensko pravo (Roadtraffic Penal Law), GV Založba, Ljubljana 2013, p. 49-65.

Considering incriminations in penal code, the actual underlying crimes are causing an accident through negligence in Article 323 of the penal code and dangerous driving in road traffic according to Article 324. In terms of topics, we discuss, by the first crime accent is put on the effect that is caused, which is a car accident with serious injuries in basic form or in death of one or more persons in qualifying form. By the second crime in its center is list of hazardous conducts, which should result in an immediate danger to the life and body of any person in their basic form or in the qualified form injury, serious injury or the death of one or more persons. A special feature is that the part of that imminent danger is also considering a traffic accident as a change in the outside world.[13] Result is a kind of a formula dangerous conduct, a change in the outside world and then specific risk of further change, all of which give the prohibited consequence as a whole a so far unknown quality.

Comparison of both incriminations with problem above, appears that the first criminalization cover cases where the offender's conduct otherwise is not oustanding, while the effects are striking. In the second criminalization we have in its first part an offender's outstanding conduct and then effects, which are not oustanding as a whole, but just in part (car accident) which is identical to the previous criminalization. In the second part of this incrimination we need the outstanding effects which are completed since the damage and death without an car accident can not be caused. Anything less than the above may be subject only to offences as a result of absent direct connection with an accident or because of its milder consequences, which are generally considered to be easier to acts.

The incriminations in penal code, although individually reasonable, are rather incomplete. If is it right that any conduct, which causes traffic accident with serious injury or death is crime, than it is not clear why a particularly dangerous conduct without an accident would not be punishable. Especially, such conduct is almost regularily a kind of introduction to a car accident or because, where

[13] See *Ambrož M./Jenull H,* Kazenski zakonik, Razširjena uvodna pojasnila (Penal Code Expanded Introductory Explanations), GV Založba 2012, p. 212.

in the case of lesser dangerous conduct, car accident is likely to be an exception. The second criminalization indicated otherwise inconsistencies resolved by that particularly dangerous conduct and traffic accident with no further consequences for its participants merely exception rather than the rule. Again, on the other hand, those further consequences are without an accident, in practice very difficult to prove. According to established, it appears that incriminations lives their own life and that it would be in terms of regulatory consistency, and in particular the necessary gradualisation, more appropriat, if they were combined in one incrimination. But because of the actual gap between non distinctive and outstanding conduct and because of the differences in quality of its effects, yet is not possible. If the legislator's attention is focused on the danger of conduct then everything which is not dangerous, goes to offences, regardless of their impact and weight. This is due to possible follow-up, even fatal consequences arising from traffic accidents unacceptable, because it would be with offences as minor criminal act incriminated something, which is in effect serious. If the legislator's attention is focused on the result, then the offence includes anything that is not a traffic accident with injuries result. This as we have seen in Article 323 it is not excluded, but in the same time is not consistent, because on the one hand incorporates conduct, which rarely causes traffic accident and excludes danger conduct, with which in some case traffic accident (luckely) did not occur.

At the end offences as they are incriminated in the above mentioned rules on road traffic are left to disscus. They are not exelerated as forms of conduct in Article 324 are. It means that each could be separated only in effect when you have one with result in an accident, but with no further consequences from the Article 323 and 324 and others that have been completed by the mere execution. In the latter case problems with overlaping incriminations from penal code and with dua criminality are not expected, while in cases of offences with traffic accident those troubles are possible. If an offence which was carried out by specially dangerous conduct causes a traffic accident, then it will, at least in most cases, overlap imminent danger for life or body from Article 324, which would, as stated by traffic

accident easiest to prove. Quite consistently correct objection is that the cases of traffic accidents without present danger, are not excluded, but then, this is subject of demanding evidentiary proceeding, similar as in the case of the above crime, where should be the present danger proved despite the fact that traffic accident was not caused. However, in any case we are considering on two levels elementary the same subject, which as such, should be in one case closed.[14]

VI. Conclusion

Quantitative delimination between crimes and offences, although now widely adopted, it still requires some caution. Order in criminal law doctrine does not guarantee the order in normative application when it is already due to their diversification difficult to control, why particular behavior was classified as offence under what circumstances was considered to be less serious and whether it was accordingly required the sanction. Latest even more, because the disproportionalety in prescribed penalties for offences actually denied quantitative delimitation as a method, which mean's the fusion of all criminal activities in one form, which must be treated all the same. This is from the point of legality principle due to lack of transparency of the system outside and because inside substantive disparities, unimaginable and from the perspective of demands deriving from constitutionaly protected right to judicial protection not feasible. A similar, but less extensive effects of the quantitative delimitation is denied in the case of overlap between the criminalization of crimes and offences, which almost regularily causes dual criminality problem, which is already and also from constitutional point of view inadmissible.

In present contribution I have discuss about consequences as parts of delimitation between crimes and offences which are mainly understood as smaller and less importans unlawfull acts. I have found that the consequences for themselves as an instrument for

[14] See CASE OF ENGEL AND OTHERS v. THE NETHERLANDS *(Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72).*

delimitation are not sufficient because they are also as a qualitaty so different and in the same time that they are not the only quality with its special characteristics and restrictions with which the graveness of the act is determined. Their composing in one supreme criminalization, which will then be followed by a cascade of criminalization in relation to the gravenes of the acts, is a task that's Slovenia has not yet been sucsessfully fulfilled. From the perspective of the topic, our system is based on two incrimination's in penal code which are due its differences irreconcilable. This is for legal practice not very big issue, until we remember that in combination with offence we can relatively easy slip into problem of dual criminality, which demand that we have to built the criteria for delimination between crimes and offences in any particular case. If we fail, there is very present possibility that someone will be punished for something more that he actually comitted, but also, that he could get through with lesser punishment, that he desert. In neither case justice was done and in both cases states right to punish was unfunctional.

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CASE OF MARESTI v. CROATIA *(Application no. 55759/07) at http://hudoc.echr.coe.int/eng.*

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

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[*] Geliş Tarihi: 18.01.2016, Kabul Tarihi: 17.11.2016.

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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 1995[1], 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-1to 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] Bavcon 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 offence[5]

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 theorists[12]. 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 ommitted, 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.

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

Elif BEKAR**

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.

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* *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 life[1].

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 immunity[2].

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 human[3]. 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 injury[4].

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 incompletely[5].

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[1] Mahmut Koca/İlhan Üzülmez, 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/Üzülmez, Özel Hükümler, p.130.

[4] Koca/Üzülmez, Özel Hükümler, p.220.

[5] Kayıhan İçel, Ceza Hukukunda Taksirden Doğan Sübjektif Sorumluluk, İstanbul, 1967, p.22; Mahmut Koca/İlhan Üzülmez, 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 wanted[6]. 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 happen[7]. 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 traffic[8]. There is a tight relationship between the breach of attention and care liability, and foreseeing the consequence. Understanding the foreseeability of consequence requires an evaluation [9].

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[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 Gökcen/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 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 consequences[10].

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 status[11].

Regarding this differentiation between different types of negligence, there is a judgment taken by the Assembly of Criminal Chambers[12]. 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 case[13].

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 offender[14]. 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 Tahlili: Yargıtay Ceza Genel Kurulunun 25.3.2008 tarihli ve E.2008/9-43, K.2008/62 Sayılı Kararı Işığında Taksir-Bilinçli Taksir Ayrımı", 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 problems[15]. 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 judge[16]. 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 reasons[17].

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[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 commited 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/Artuç, 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 possible[18]. 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 Özgenç/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 unnecessary[20]. 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 reduced[21].

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 unnecessary[22].

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 applied[23].

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[20] Önok, p.195.

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

[22] Murat Önok, "Criminal Law", in: Introduction to Turkish Law (eds. T. Ansay 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 necassary, 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 safety[24].

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 fikri içtima) is applied, the offender will be punished for the crime which requires heavier punishment[25]. 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 appearance[26]. 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 danger[27]. In regard to the primary norm the punishment shall be determined according to damage crime[28]. When the context of primary norm-secondary norm or formal aggregation rules are considered, this decision is appropriate.

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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.kazancı.com).

[24] Y. 9. CD. 22.10.2010, 10462/3278 (www.kazancı.com).

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

[26] Kayıhan İçel, Suçların İçtimaı, 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 makers[29].

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 follows[30]:

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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Alman Federal Embriyonun Korunması Hakkında Kanun (Alman Embriyo Koruma Kanunu)[*]

Rahime ERBAŞ[**]

I. Kanun'un Takdimi

İlk yapay yolla döllenme *(in vitro fertilizasyon- IVF)-* halk arasında bilindiği adıyla *tüp bebek- R. Geoffrey Edwards* tarafından İngiltere'de 1978 yılında gerçekleştirilmişti[1]. Bilim dünyasında yaşanan bu olumlu gelişme, hukuki ve etik tartışmaları da beraberinde getirmişti. Bu olaya binaen birçok Avrupa ülkesi, hukuk sistemlerindeki boşluğu doldurmak üzere düzenlemeler yapmaya başlamıştı. Bu düzenlemeler yapılırken de her ülke farklı bir yöntemi benimsemişti[2].

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[*] Geliş Tarihi: 09.11.2016, Kabul Tarihi: 23.12.2016.

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[1] *R. Geoffrey Edwards,* dünyada ilk kez yapay yolla döllenmeyi gerçekleştirdiği için 2010 yılında Nobel Psikoloji veya Tıp Ödülü'ne layık görülmüştür. Bkz: **nobelprize.org**, *The Nobel Prize in Physiology or Medicine 2010*, (çevrimiçi) http://www.nobelprize.org/nobel_prizes/medicine/laureates/2010/, (Erişim Tarihi: 01. 04. 2015).

[2] Albin Eser/ Hans-Georg Koch, *"Rechtsprobleme biomedizinischer Fortschritte in vergleichender Perspektive Zur Reformdiskussion um das deutsche Embryonenschutzgesetz"*, in **Gedächtnisschrift für Rolf Keller**, editörler: Tübingen Üniversitesi Hukuk Fakültesi Ceza Hukuku Profesörleri ve Baden-Württemberg Adalet Bakanlığı, Mohr Siebeck, Tübingen, 2003, s.17, (çevrimiçi) http://www.freidok.uni-freiburg.de/volltexte/3868/pdf/Eser_Rechtsprobleme_biomedinischer_Fortschritte.pdf,(Erişim Tarihi: 01. 04. 2015).

1978 yılında Avrupa'da yaşanan bu gelişme nedeniyle Almanya'da da hukuki düzenleme yapılması ihtiyacı ortaya çıkmıştı. Modern üreme teknikleri ile ilgili meselelerin tartışılması, Almanya'da bugün de olduğu üzere yaşamın korunması *(lebenschutz)* ve insan onuru *(menschenwürde)* kavramları ekseninde şekillenmişti. Bu yeni üreme metoduna ilişkin tek mesele, kişilerin çocuk sahibi olması meselesi olmanın ötesine geçmiş ve doğal ya da yapay yolla meydana gelen embriyoların Alzheimer ve epilepsi gibi hastalıkların tedavisinde kullanılıp kullanılamayacağı gibi embriyonun hukuki statüsü etrafında klonlama da dahil olmak üzere birçok meseleyi biriktirmişti. Bu tartışmalar, bilimsel, hukuki, etik, politik ve medyanın da yoğun ilgi gösterdiği disiplinlerarası bir boyuta bürünmüştü[3]. Bu tartışmaların 1980'li yıllarda yoğunlaşmasıyla[4] çeşitli komisyonlar kurulmuştu. Bunlardan en önemlisi, adını Alman Federal Anayasa Mahkemesi eski başkanı, hukuk profesörü *Ernst Benda'nın* başkanlığında toplanan kamuoyunda *Benda Komisyonu*[5] olarak bilinen komisyon idi[6]. Adalet Bakanlığı ile Araştırma ve Gen Teknolojileri Bakanlığı'nın işbirliğinde oluşturulan ve 1984 ile 1987 yılları arasında faaliyet gösteren bu komisyon, disiplinlerarası 19 adet çalışma grubu oluşturmuştu[7]. İçerisinde doğa bilimcileri, tıp çevrelerinden uzmanlar, Max Plank Enstitüsü, hukukçular, felsefeciler, psikoterapistiler, Alman Araştırma Komitesi, İşverenler sendikası gibi toplumun çeşitli kesimleri yer almış ve nihayetinde de bir raporu yayınlamıştı[8]. 1987 yılında başka bir komisyon daha *(Enquete-Kommission)*- Alman Fede-

[3] "*Gentechnik - der Weg zur Menschenzüchtung?"*, **DER SPIEGEL 49/1985**, s. 17, (çevrimiçi) http://magazin.spiegel.de/EpubDelivery/spiegel/pdf/13514563, (Erişim Tarihi: 01. 04. 2015).

[4] Ralf Müller-Terpitz, **Das Recht der Biomedizin: Textsammlung mit Einführung: Textsammlung MIT Einfuhrung Taschenbuch**, Springer, Berlin-Heidelberg, 8 Mayıs 2006, s. 46.

[5] Komisyonun tam adı, in Vitro- Fertilizasyon, Genom Analizi ve Gen Terapisine İlişkin Bakanlıklararası Çalışma Grubu *(Interministeriellen Arbeitsgruppe — In-vitro-Fertilisation, Genomanalyse und Gentherapie)* şeklindeydi.

[6] Christian Müller- Götzmann, **Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft**, Springer, Berlin, Heidelberg, 2009, s. 236.

[7] *Gentechnik - der Weg zur Menschenzüchtung?"*, **DER SPIEGEL 49/1985**, s. 17.

[8] Müller- Götzmann, s.236.

ral Parlamentosu bünyesinde- oluşturulmuştu. Bu komisyon da *"Gen Teknolojilerindeki İmkânlar ve Riskler"* adı altında kapsamlı bir rapor yayınlamıştı[9].

Tüm bu disiplinlerarası tartışmalara rağmen yapay döllenme ve embriyo konusunda Almanya'nın seçtiği yöntem, ceza hukuku araçlarına başvurmak olmuştur[10]. Nitekim Alman Ceza Kanunu'nun 218 ve devamı maddeleri doğal yollarla döllenmeye ilişkin hükümler ihtiva etmekte; yapay yöntemlere ilişkin herhangi bir düzenleme ihtiva etmemekteydi[11]. Bu nedenle yapay döllenme konusunda ceza mevzuatında bir boşluk görülmüş ve yan ceza kanunu olarak federal düzeyde 13 Aralık 1990 tarihinde Embriyonun Korunması Hakkında Kanun kısaca Embriyo Koruma Kanunu kabul edilmiştir. Kanun, 1 Ocak 1991 tarihinde de yürürlüğe girmiştir.

Kanun'a yapılan önemli bir değişiklik 21 Kasım 2011 yılında yapılan ve bugün hala çok tartışmalı olan bir maddenin- *"Rahme Nakil Öncesi Teşhis (Präimplantationsdiagnostik-PID); Yönetmelik Çıkarma Yetkisi"* başlıklı § 3a maddesi olarak eklenmesi ile olmuştur. Bununla kanun koyucu ilk kez, istisnai hallerde uygulanabilen rahme nakil öncesi teşhisin koşullarını kapsamlı biçimde düzenlemiştir[12].

Kapsamına bakıldığında ise Kanun, yapay döllenme metotlarının ve insan embriyosunun kötüye kullanılması bağlamında çeşitli fiiller örneğin taşıyıcı anne olmayı kabul eden kimseye yapay olarak döllendirilmiş hücreyi nakletmek veya bir kadına bir yumurtalama dönemi içerisinde üçten fazla embriyo nakletmek gibi suç oluşturan

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[9] **Deutscher Bundestag**, *"Bericht der Enquete-Kommission „Chancen und Risiken der Gentechnologie"* , gemäß Beschlüssen des Deutschen Bundestages — Drucksachen 10/1581, 10/1693, 06. 01. 1987, (çevrimiçi) http://dip21.bundestag.de/dip21/btd/ 10/067/ 1006775.pdf, (Erişim Tarihi: 01. 04. 2015).

[10] Eser/ Koch, s.17; Ayrıca bkz: Müller-Terpitz, s. 46.

[11] Ulsenheimer, Klaus: **Arztstrafrecht in der Praxis**, 4., neu bearbeitete und erweiterte Auflage, § 6 Kastration und Sterilisation, Heidelberg, C. F. Müller Verlag, 2008, s.419, kn:358a.

[12] Georg Pelchen/ Peter Häberle, **Strafrechtliche Nebengesetze**, editörler: Georg Erbs/Max Kohlhaas, Band I, 195. Ergänzungslieferung, Verlag C.H Beck, 2013, ESchG § 3a Präimplantationsdiagnostik; Verordnungsermächtigung, kn: 1, Beckonline, (çevrimiçi) https://beck-online.beck.de, (Erişim Tarihi: 01. 04. 2015).

filleri sıralamış ve istisnai bazı haller dışında cinsiyet seçimini yasaklamıştır. Rıza olmaksızın döllenme gerçekleştirilmesi, embriyo nakli ve ölümden sonra yapay döllenme ve insan üreme hücrelerinin yapay olarak değiştirilmesi ve klonlama suç olarak düzenlenmiştir. 2011 değişikliği ile rahme nakil öncesi teşhis işlemine izin verilen durum ilk kez açıkça düzenlenmiştir. Kanun, 13 madde içermesine rağmen modern üreme metotlarından, cinsiyet seçiminden, genetik bilgilerin değiştirilmesinden, insan ve hayvan hücrelerinin birleştirilmesinden, klonlamaya kadar birçok konuyu ihtiva etmektedir. Önemli bir nokta Kanun'un izin verdiği yapay döllenme, embriyo nakli vb. konularda, sadece hekimlerin yetkili kılınmış olması ve aynı zamanda hekimlerin yapmakla veya katkı sağlamakla yükümlü olmadıklarının da açıkça düzenlenmiş olmasıdır. Belirtilmelidir ki; Almanya, bu tür konularda hukuki düzenlemelerinde sınırlayıcı ve muhafazakâr bir anlayışa sahip ülkeler arasında gösterilmektedir[13]. Bu noktada Almanya'nın üreme ve gen teknolojileri bakımından oldukça ilerde bir ülke olmasına rağmen hukuki düzenlemelerde böyle bir anlayışı benimsemiş olması ilginç bulunmaktadır[14].

Hukuki ve etik açıdan güncel ve tartışmalı meseleleri 1991 yılında 13 madde ile düzenleyen bu Kanun'u destekleyenler olduğu gibi eleştirenler de bulunmaktadır. Nitekim aradan 25 yıl geçmesine rağmen Kanun, halen Almanya'da çok tartışılmaktadır. Tartışmalar, bir taraftan Kant'ın "*insan hiçbir zaman araç haline getirilemez*" düşüncesinden hareketle; diğer taraftan bilimsel ve fenni gelişmeleri engellenmemesi ve yapay olarak meydana getirilen embriyonun bazı ağır hastalıkları iyileştirmesinde kullanılması ve hukuki değerlerin tartılmasına imkân verilmesi gibi argümanlar doğrultusunda yürütülmektedir[15].

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[13] John A. Robertson, *"Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics"*, **Columbia Journal of Transnational Law 2004**, Robertson - Revised Final Print Version.Doc, 12/02/04 6:55 PM, s. 191, (çevrimiçi) http://www.utexas.edu/law/faculty/jrobertson/rt_germany_usa.pdf, (Erişim Tarihi: 02. 04. 2015).

[14] A. Robertson, s.191-192.

[15] Claus Roxin, *"Lebensschutz im Strafrecht- Einführung und Überblick-*, in **Lebensschutz im Strafrecht, Internationales Strafrechtskolloquium der Koreanischen Gesellschaft für**

Bu kısa ancak tıp hukukunun ve bio-etiğin fevkalâde önemli meselelerini ceza hukuku sahasında düzenleyen *bir yan ceza kanunu* niteliğindeki 1991 tarihli bu Kanun, Türkçe'ye çevrilmeye değer görülmüştür. Bunun ilk nedeni, Kanun'un yapay döllenme, embriyo, gen analizleri, cinsiyet seçimi, klonlama gibi günümüzde oldukça tartışmalı olan meseleleri bir arada ele almasıdır. İkinci nedeni ise üreme ve gen teknolojilerinde bu kadar gelişmiş bir ülkede, hukuki düzlemde bu konuların çok sınırlayıcı ve muhafazakâr bir biçimde ele alınması ve bu anlayış doğrultusunda ceza hukuku sahasında düzenlenmesidir. Üçüncü ve en önemli neden ise ülkemizde bu tür konuların yönetmelik düzeyinde ele alınması ve bu konularda hukuki boşlukların bulunmasıdır. Bu konuların kanun düzeyinde ele alınması ve bir sistemin oluşturulması gerekleri karşısında, Kanun'un Türk hukukuna özellikle Türk ceza hukukuna katkı sağlayabileceği düşüncesi hâsıl olmuş ve Türkçe'ye çevrilmiştir. Çevirinin temel gayesi, Alman perspektifinin Türkçe ortaya konularak Türk hukuk öğretisinde yapılan çalışmalar için araştırmacılara küçük de olsa bir fayda sağlamaktır.

II. Kanun Alman Federal Embriyonun Korunması Hakkında Kanun

(Embriyo Koruma Kanunu) Metni[16]

§ 1. Yapay Döllenme Metotlarının Kötüye Kullanılması

(1) 1. Bir kadına döllenmiş yabancı bir yumurta hücresini nakleden,

2. Hamile bırakmak dışında başka bir amaçla bir kadının yumurta hücresini yapay olarak döllendiren,

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Strafrecht (KCLA), 12.-15 September 2001, Seoul, Korea, Editörler: Il- Su Kim/ Bernd Schünemann, Korean Institute of Criminology, 2013, Seoul, Republic of Korea, s. 4-5.

[16] Kanun'un çevirisine esas olan metin, Alman Federal Adalet ve Tüketici Koruma Bakanlığı'nın *(Ministerium der Justiz und für Verbraucherschutz)* web sitesinden alınmıştır. Metnin özgün haline ulaşmak için bkz: *Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz - ESchG),* **Ministerium der Justiz und für Verbraucherschutz**, (çevrimiçi) http://www.gesetze-im-internet.de/bundesrecht/eschg/gesamt.pdf, (Erişim Tarihi: 02. 04. 2015).

3. Bir kadına bir yumurtalama dönemi içerisinde üçten fazla embriyo nakleden,

4. Bir yumurtalama dönemi içerisinde üçten fazla yumurta hücresini, tüp içinde dondurulan gametlerin transferi *(intubaren gametentransfer)* suretiyle döllendiren,

5. Bir kadının bir yumurtalama dönemi içerisinde taşıyabileceğinden daha fazla yumurta hücresini döllendiren,

6. Embriyoyu bir kadının rahmindeki yuvalandığı yerden *(nidasyon)* zamanından evvel başka bir kadına nakletmek veya elde edilme amacı dışında başka bir amaç için kullanmak maksadıyla tahliye eden,

7. Çocuğunu doğduktan sonra üçüncü kişilere vermek üzere belirli bir süre tutmaya hazır bir kadında (taşıyıcı anne) yapay döllenme gerçekleştiren veya bu kadına bir insan embriyosu nakleden,

3 yıla kadar hapis veya adli para cezası ile cezalandırılır.

(2) Yumurta hücresinin sahibi olan kadını hamile bırakmak dışında başka bir amaçla,

1. Bir insan sperm hücresinin yine bir insan yumurta hücresi ile yapay olarak döllenmesine sebebiyet veren veya

2. Bir insan yumurta hücresinin yine bir insan sperm hücresi ile yapay olarak döllenmesine sebebiyet veren de aynı şekilde cezalandırılır.

(3) **1.1.** Fıkranın 1, 2 ve 6 numaralı bentlerindeki hallerde, yumurta hücresinin veya embriyonun sahibi olan kadın ile kendisine yumurta hücresi nakledilen veya nakledilecek kadın ve

2.1. Fıkranın 7 numaralı bendindeki halde, çocuğu kendisinde belli bir süre için kabul etmek isteyen kişi ile taşıyıcı anne, cezalandırılmaz.

(4) **1.** Fıkranın 6 numaralı bendindeki ve 2. fıkradaki hallerde, teşebbüs cezalandırılır.

§ 2. İnsan Embriyosunun Kötüye Kullanılması

(1) Yapay olarak döllendirilmiş ya da bir kadının rahmindeki yuvalandığı yerden *(nidasyon)* zamanından önce tahliye edilen döllenmiş yumurtayı satan veya bunları tutulma amacı dışında sunan, edinen veya kullanan kişi, 3 yıla kadar hapis cezası veya adli para cezası ile cezalandırılır.

(2) Hamile bırakmak dışında başka bir amaçla, insan embriyosunun yapay olarak gelişiminin devamına neden olan kişi de aynı şekilde cezalandırılır.

(3) Teşebbüs, cezalandırılır.

§ 3. Cinsiyet Seçiminin Yasaklanması

İçerisindeki cinsiyet kromozomunu seçerek daha sonra bir insan yumurta hücresini bir sperm hücresi ile yapay olarak döllendiren kişi, 1 yıla kadar hapis cezası veya adli para cezası ile cezalandırılır. Bu hüküm, çocuğun Duchenne tipi kas bozukluğu ve eyaletin yetkili mercileri tarafından çocuğu tehdit eden hastalık ağır bir hastalık olarak kabul edilmesi şartıyla benzer şekilde ağır derecede cinsiyetle bağlantılı bir hastalığından korunması amacına hizmet ediyor ise hekim tarafından gerçekleştirilen sperm hücresi seçimlerinde uygulanmaz.

§ 3a. Rahme Nakil Öncesi Teşhis *("Preimplantasyon Genetik Tanı- PGT")*[17]; Yönetmelik Çıkarma Yetkisi

(1) Bir embriyonun hücrelerini rahme nakletmeden önce genetik olarak inceleyen (rahme nakil öncesi teşhis), 1 yıla kadar hapis cezası veya adli para cezası ile cezalandırılır.

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[17] **Çev. Notu:** *"Rahme Nakil Öncesi Teşhis"* olarak Türkçe'ye çevirdiğimiz Almanca madde metninde geçen *"Präimplantationsdiagnostik (PID)"* terimi, Türk tıp çevresinde "*Preimplantasyon Genetik Tanı- PGT"* olarak ifade edilmektedir. Örneğin bkz.: T. Umut K. Dilek/Mesut Öktem/Akgün Yıldız, *"Preimplantasyon Genetik Tanı"*, **Türkiye Klinikleri Journal of Gynecology and Obstetrics 2002**, Cilt:12, Sayı:6, s.498- 513; Muhterem Bahçe, *"Preimplantasyon Genetik Tanı"*, **Türkiye Klinikleri Journal of Surgical Medical Sciences 2007**, Cilt: 3, Sayı:13, s.108-112.

(2) Yumurta hücresinin alındığı kadının veya sperm hücresinin alındığı erkeğin ya da her ikisinin de genetik durumu, bu kişilerin soyundan gelecekler için yüksek bir kalıtımsal hastalık riski taşıyor ise, yumurta hücresinin alındığı kadının yazılı rızası ile hamile bırakmak için rahme nakletmeden önce tıp bilim ve tekniğinin genel kabulüne göre embriyo hücrelerindeki bu hastalığı genetik olarak inceleyen kişi, hukuka aykırı olarak hareket etmiş olmaz. Yumurta hücresinin alındığı kadının yazılı rızası ile yüksek olasılıkla ölümle veya düşük gebelikle sonuçlanacak ağır bir hasarı tespit etmek amacıyla rahme nakil edilmeden önce teşhis işlemi gerçekleştiren kişi de hukuka aykırı olarak hareket etmiş olmaz.

(3) 2. Fıkraya göre rahme nakil öncesi teşhis ancak;

1. Kadının talep edilen embriyon hücrelerinin genetik olarak incelenmesi işleminin tıbbi, psikolojik ve sosyal sonuçları hakkında rızası alınmadan önce bilgilendirilmesi,

2. Rahme nakil öncesi teşhis için ruhsat verilmiş merkezlerde yer alan disiplinerarası şekilde oluşturulmuş etik komisyonun 2. fıkradaki koşulların yerine getirildiğini incelemesi ve bu konuda izin veren bir değerlendirmeyi sunması ve

3. Rahme nakil öncesi teşhis için ruhsat verilmiş merkezlerde çalışan rahme nakil öncesi teşhis için zorunlu tanısal, tıbbi ve teknik imkânları elinde bulunduran uzman hekim tarafından icra edilebilir.

Rahme nakil edilmeden önce gerçekleştirilecek teşhis işlemlerine yönelik tedbirlerin etik komisyon tarafından reddedildiği hallerde yetkili merkez bu durumu, ilgili merkeze anonimleştirilmiş bir form doldurarak bildirir ve durum belgelendirilir. Federal Hükümet aşağıdaki ayrıntıları yönetmelikle belirtir ve bunu da Eyalet Temsilciler Meclisi'nin onayına sunar. Bu ayrıntılar;

1. Rahme nakil öncesi teşhis işlemini yapmaya yetkili kılınan merkezlerin sayısı ve bunların koşulları ile burada böyle bir işlemi gerçekleştirmeye yetkili kılınan yetkili hekimlerin nitelikleri, sayısı ve yetkinin süresi,

2. Rahme nakil öncesi teşhis işlemi için etik komisyonunun oluşturulması, birleşimi, usulü ve finansmanı,

3. Rahme nakil öncesi teşhis işlemlerine yönelik tedbirlerin belgelendirilmesi ile görevli ilgili merkezin kurulması, oluşturulması,

4. Rahme nakil öncesi teşhis işlemlerine yönelik tedbirlerin ilgili merkeze bildirilmesine ve durumun belgelendirilmesine ilişkin koşullardır.

(4) 3. maddenin 1. fıkrasına göre rahme nakil öncesi teşhis işlemi yapan kişi kabahatten dolayı sorumlu olur. Bu kabahatin yaptırımı, 50000 Euro'ya kadar idari para cezasıdır.

(5) 2. fıkrada belirtilen işlemleri gerçekleştirmeye veya katkı sağlamaya hiçbir hekim yükümlü değildir. Bu katkının sağlanmaması halinde bir olumsuzluk söz konusu olamaz.

(6) Federal Hükümet, rahme nakil öncesi teşhis işlemlerin uygulamalarına yönelik her dört yılda bir rapor düzenler. Rapor, merkezi olarak hazırlanan belgeler ile anonimleştirilmiş verileri ve bilimsel değerlendirmelerin yanı sıra yıllık uygulanan işlem sayılarını içerir.

§ 4. Rıza Olmaksızın Yapılan Döllenme, Embriyo Nakli ve Ölümden Sonra Yapay Döllenme

(1) **1.** Kullanılan yumurta hücresinin sahibi olan kadının veya sperm sahibi erkeğin rızası olmaksın yapay döllenme işlemi gerçekleştiren,

2. Bir kadına rızası olmaksızın embriyo nakleden veya

3. Ölmüş bir erkeğin spermi ile yumurta hücresini yapay olarak döllendiren kişi

3 yıla kadar hapis veya adli para cezası ile cezalandırılır.

(2) **1.** Fıkranın 3. bendindeki durumda kendisinde yapay döllenme gerçekleştirilen kadın cezalandırılmaz.

§ 5. İnsan Üreme Hücrelerinin Yapay Olarak Değiştirilmesi

(1) İnsan üreme hücresinin genetik bilgilerini yapay olarak değiştiren kişi, 3 yıla kadar hapis veya adli para cezası ile cezalandırılır.

(2) Genetik bilgileri yapay olarak değiştirilen insan üreme hücresini, döllenme için kullanan da aynı şekilde cezalandırılır.

(3) Teşebbüs, cezalandırılır.

(4) **1.** Fıkra,

1. İnsan vücudu dışında bulunan insan üreme hücresinin genetik bilgilerinin yapay olarak değiştirilmesi, döllenme için kullanılmayacak ise;

2. Ölü ceninden, insandan veya ölüden alınan vücuda ait diğer insan üreme hücresinin genetik bilgilerinin yapay olarak değiştirilmesi,

a) Eğer bir embriyoya, fetüse veya bir insana aşılanmayacak ise ve

b) Bundan bir üreme hücresi meydana gelmeyecek ise

3. İnsan üreme hücresinin genetik bilgilerinin yapay olarak değiştirilmesini amaçlamayan aşı, ışın, kemoterapi veya diğer tedavi işlemlerinde uygulama alanı bulmaz.

§ 6. Klonlama

(1) Bir başka embriyo, fetüs, insan ya da ölü ile aynı genetik bilgilere sahip bir insan embriyosu meydana getiren 5 yıla kadar hapis veya adli para cezası ile cezalandırılır.

(2) 1. Fıkrada tarif edilen embriyoyu bir kadına nakleden da aynı şekilde cezalandırılır.

(3) Teşebbüs, cezalandırılır.

§ 7. imera ve Hibrit Gelişimi

(1) **1.** Farklı genetik bilgilere sahip embriyoları en az bir insan embriyosu kullanarak bir birim hücre yapısında birleştiren,

2. Bir hücreyi kendisinden farklı genetik bilgiler içeren ve bu şekilde farklılaşma yeteneğine sahip bir insan embriyosu ile birleştiren ya da

3. Bir insan yumurta hücresini bir hayvanın sperm hücresi ile döllendirme ya da bir hayvanın yumurta hücresi ile bir insan sperm hücresi ile döllendirme yoluyla farklılaşma yeteneğine sahip bir embriyo meydana getiren 5 yıla kadar hapis veya adli para cezası ile cezalandırılır.

(2) **1.** Fıkrada öngörüldüğü şekilde meydana getirilen bir embriyoyu,

a) Bir kadına veya

b) Bir hayvana aşılayan,

2. Bir insan embriyosunu bir hayvana aşılayan aynı şekilde cezalandırılır.

§ 8. Tanımlar

(1) Bu Kanun anlamında embriyo, hücrelerin *(yumurta ve sperm)* birleşmesinden *(karyogami)* itibaren henüz döllendirilmiş ve gelişim kabiliyeti olan insan yumurta hücresini ve ayrıca gerekli koşullar bulunduğunda kendi kendine bölünebilen ve bir bireyi meydana getirebilen embriyodan alınan çok fonksiyonlu (totipotent) hücreleri ifade eder.

(2) Hücrelerin birleşmesinden itibaren 24 saat içinde tek hücre aşamasından geçebilme kabiliyeti olmadığı tespit edilmedikçe bu zaman dilimi içerisinde döllendirilmiş insan yumurta hücresinin gelişim kabiliyeti olduğu kabul edilir.

(3) Bu Kanun anlamında insan üreme hücreleri, döllendirilmiş yumurta hücresinden oluşan insanların yumurta ve sperm hücrelerine kadar devam eden germ hattındaki ve ayrıca hücrelerin birleşmesine kadarki sperm hücresinin nüfuz ettiği veya beraberinde getirdiği yumurta hücresi, tüm hücreleri ifade eder.

§ 9. Hekim Tarafından Yapılma Şartı

1. Yapay döllenme,

2. Rahme nakil öncesi teşhis,

3. Bir kadına bir insan embriyosunun aşılanması ve

4. Henüz bir insan sperminin içine nüfuz etmiş veya yapay olarak ettirilmiş bir insan yumurta hücresinin yanı sıra bir insan embriyosunu saklanması işlemlerini yalnızca bir hekim gerçekleştirmeye yetkilidir.

§ 10. Gönüllü Yapılma

Hiç kimsenin 9. maddede tanımlanan işlemleri yapma veya yapılmasına katkıda bulunma yükümlülüğü bulunmamaktadır.

§ 11. Hekim Tarafından Yapılma Şartının İhlal Edilmesi

(1) Her kim hekim sıfatına sahip olmaksızın

1. 9. Maddenin 1. fıkrasında belirtilen yapay döllenme işlemini,

2. 9. Maddenin 2. fıkrasında belirtilen rahme nakil öncesi teşhis işlemini ve

3. 9. Maddenin 3. fıkrasında belirtilen bir kadına bir insan embriyosunun aşılanması işlemini

(2) Gerçekleştirir ise 1 yıla kadar hapis cezası veya adli para cezası ile cezalandırılır. 9. Maddenin 1. Fıkrası bakımından kendisinde böyle bir döllenme yapılan ve kendi spermi böyle bir döllenmede kullanılan erkek cezalandırılmaz.

§ 12. Kabahat Oluşturan Filler

(1) Her kim, hekim sıfatına sahip olmaksızın 9. maddenin 4. fıkrasında belirtilen bir insan embriyosunu veya orada tanımlanan bir yumurta hücresini saklayan kabahat işlemiş olur.

(2) Kabahat, 2500 Euro'ya kadar idari para cezası ile cezalandırılır.

§ 13. Yürürlük

Bu Kanun, 1 Ocak 1991 tarihinde yürürlüğe girer.

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