

# LEGAL ELIGIBILITY OF PURSUING THE CLAIMS BY THE INSURER FROM THE EMPLOYEE – A DRIVER WHO HAS INFLICTED DAMAGE IN A ROAD TRAFFIC IN POLISH LEGAL SYSTEM

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## General notes

Compared to many other European Union countries<sup>1</sup> a degree of protection of workers against liability for damages in Poland seems very high, and sometimes even absurd<sup>2</sup>. Many doubts are raised in partic-

<sup>1</sup> Cf. e.g. Marhold, F.; Friedrich, M., *Österreichisches Arbeitsrecht*, Wien – New York 2006, p. 230 et al.; Linck, R. [in] Schaub, G., Koch, U., Linck, R., *Arbeitsrecht-Handbuch*, München 2005, p. 438 ff.; Honeyball, S.; Bowers, J., *Labour Law*, Oxford University Press 2002, p. 58 ff. Cf. European Employment and Industrial Relations Glossaries: France, *Responsibilite du Salarie*, usp. <<http://www.eurofound.eu>> (12.05.2015).

<sup>2</sup> The liability of employees for damage caused to the employer in the performance of employment duties (also called material responsibility) is in the Polish legal system governed first and foremost by the Chapter V of the Labour Code (Act of 26.6.1974, the Labour Code, Dz.U. [Journal of Laws] of 1974, No. 24, pos. 141, hereinafter referred to as the LC). The provisions of this law applies only in situations where the damage was caused by a person who remains with the employer in an employment relationship, and its occurrence is related to the breach of any employee duty, in a manner that allows the accusing perpetrator of unintentional fault at least. Thus, if the employee causes damage to the employer in violation of only generally binding orders and prohibitions, his responsibility will be based (regardless of the type of fault) on the civil law regulations (cf. Judgment of the Supreme Court of 28.5.1976, IV PR 49/76, PiZS 1977, No. 8-9, p. 89 with the gloss by Kasiński, T.; Radwanski, Z., *OSP i KA* 1979, No. 1, pos. 16). If, however, a breach by an employee of common orders and prohibitions simultaneously fills the grounds of non-performance or improper performance of employee duties, then we can talk about the so-called employee tort (more on this subject Zielinski T., *Odpowiedzialność deliktowa pracowników według kodeksu pracy, Państwo i Prawo* 1975, No. 6, p. 28 ff.). Material liability of employees is differentiated by the legislature according to various criteria (cf. Sanetra, W., *Odpowiedzialność według prawa pracy. Pojęcie, zakres, dyferencjacja*, Wrocław 1991, *passim*), of which the most popular is a kind of guilt and damage object. Due to the nature of guilt it can be divided into liability for damage caused by intentional fault or unintentional fault, and due to the damage object into the general liability (also referred to liability for damage to property other than that entrusted) or liability for damage to property entrusted to the employee with the obligation to return or account for it. The latter is further divided depending on the type of entrusted property or the number of persons required to account for it. The specificity of Polish regime of the employee legal responsibility is that its rules have been significantly alleviated, and the scope of the obligation for compensation has been significantly reduced, compared to the responsibility of a civil law nature. For example, if the employee caused damage by unintentional fault, he is only responsible for *damnum emergens* (Article 115 the LC) and the amount of compensation may not exceed three months' wages due to the employee on the day of causing damage (Article 119 the LC). In addition, it is possible to reduce the compensation payable by the employee by way of a court or out of court settlement (Article 121 the LC). The above possibilities are, in principle, excluded in the event of intentional damage causing (Article 122 the LC), but of course, even in such case it cannot be excluded inconceivable that the employer from the private sphere will limit his demands or completely waives pursuit of his claims (see Rylski, M., *Wina umyślna pracownika a miarkowanie odszkodowania – rozważania na tle art. 121 the LC, Praca i Zabezpieczenie*

ular by the provision of Article 120 of Polish Labour Code (hereinafter referred to as the LC), according to which in case of causing by an employee in the performance of his employee duties the damage to a person other than the employer (a third party), only the employing entity is obliged to repair it (§ 1). While the employer has a right of recourse against the employee-perpetrator of the damage, but only when the damage is repaired, and basically, due to the unintentional guilt of the employee, it shall be limited to the amount of *damnum emergens* and three times the salary of the employee (§ 2). This regulation therefore raises doubts as to preservation by the legislator of a right balance in the distribution of property risks, which are burdened with the parties implementing the relationship and other entities whose interests have been violated by an employee in the work process.

The said issue is particularly important in the event of causing by the employee-driver damage in road traffic at the occurrence of the conditions referred to in Article 43 of Polish Law on Compulsory Insurance<sup>3</sup>. These conditions include infliction of damage by the vehicle driver intentionally in the state after use of alcohol or intoxicated or after using narcotics, psychotropic substances or their replacement within the meaning of Polish regulations on preventing drug addiction, as well as the infliction of the damage by him, when he entered into possession of the vehicle as a result of committing a crime, did not have the required permissions to driving a motor vehicle (except in cases when it came to saving human lives or property or for the pursuit of a person taken immediately after the commission of the offense by him/her), or fled from the scene. In such situations, an insurance company which under compulsory insurance of civil liability of vehicle owners has repaired the damage to the victim, has, as a rule a right of recourse directly to the vehicle driver (i.e. a typical insurance recourse). Note, however, that if the vehicle was driven by the person performing his/her duties under an employment relationship, in accordance with the literal wording of Article 120 the LC he/she cannot be liable towards other parties than his/her own employer and only provided that the latter has fixed the damage. Thus the case may be here that on the one hand, the worker who has caused damage in road traffic for reasons that generally can be regarded as morally reprehensible, remains completely unpunished, and on the other hand, the legitimate interests of the insurance company cannot be in any way satisfied. The provision of Article 43 of the Law on Compulsory Insurance does not offer the possibility of referring the claims directly to the employer of the person driving the vehicle, but only to the driver alone.

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Spoleczne 2012, No. 11, p. 30 ff.). Type the employee's fault also affects the length of limitation periods in respect of the employer claims by virtue of damage caused to him, which is comprehensively regulated in the section XIV the LC (it is worth noting that in the Polish labour law, as opposed to civil law, the statute of limitations applies not only to a financial claim, but also to non-pecuniary claims – cf. the judgment of the Supreme Court of 11.4.2001, I PKN 367/00, OSNP 2003, No. 2, pos. 38). Regardless of the type of fault the employee is not liable for damage to the extent to which the employer or other person contributed to its occurrence or increase (Article 117 § 1 the LC), as well as for damages resulting from the operation within the limits of acceptable risk (Article 117 § 2 the LC). In addition, any indications of the overall responsibility of the employee must always be proved by the employer (Article 116 the LC). Finally, it should also be noted that although the financial liability of employees is a separate from the civil law institution of the labour law which is regulated in a comprehensive manner (cf. Guidelines of judiciary and judicial practice concerning material liability of employees contained in the resolution of the Full Bench of the Chamber of Labour and Social Security of the Supreme Court of 12.29.1975, V PZP 13/75, OSNCP 1976, No. 2, pos. 9), however, due to its incompleteness sometimes it requires the auxiliary use of civil law regulations. In accordance with the provision of Article 300 the LC in matters not regulated by the labour law regulations to the employment relationship, the provisions of the Civil Code are applicable accordingly, unless they are contrary to the principles of labour law. This type of the matter includes, among others the issues of joint and several liabilities of employees for damage.

<sup>3</sup> Act of 22.5.2003 on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau (i.e. Dz.U. [Journal of Laws] of 2013, Pos. 392).

## 1. Position of the Supreme Court

The aforementioned issue, which is the essential object of the paper, is part of a broader issue concerning the limits of worker protection on the grounds of Article 120 the LC, when the damage caused to a third party is repaired by any entity other than the employer of the damage perpetrator<sup>4</sup>. These problems are undoubtedly very complex, what is reflected by the existing in this field not uniform jurisprudence of the Polish Supreme Court. As regards the possibility of direct claiming of the recourse claims from the employee-driver by the insurance company, which covered for the employer the damage caused to a third party in a road traffic, the Supreme Court has stated its views on several occasions<sup>5</sup>, usually by rejecting the legality of such a practice. A representative resolution for this line of jurisprudence is a ruling of 7 judges dated 16.10.1976<sup>6</sup>, in which the Court has found that the pursuing by the insurer for reimbursement of compensation paid to the injured party is disabled in relation to the driver of a motor vehicle who is not a holder of the appropriate driving license, and who, when performing the employee's duties unintentionally caused the damage to a third party.<sup>7</sup> The ruling was motivated by grammatical construction of Article 120 § 1 the LC (after all with the sole responsibility of the employer to the injured party, referred to in it), application on the basis of labour law a principle of the limited financial liability of the employee<sup>8</sup>, rejection of the possibility of the impact of labour law regulations on civil law relationships, and thus the differentiation of principles of employee responsibility depending on who actually repaired the damage, and finally, referring by the adjudication

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<sup>4</sup> This includes in particular, two groups of cases, the first of which concerns the possibility of a settlement of the employer's claims in the event when the employer has repaired damage caused at his own employee as a result of an accident at work, however, caused by the employee of another workplace (cf. Resolution of the Supreme Court of 31.07.1975, III CZP 50/75, OSNC 1976, No. 4, pos. 7 and judgment of the Supreme Court of 28.08.1980, IV LP 252/80, OSNC 1981, No. 4, pos. 65). The other concerns the circumstances referred to in regulation of the Article 828 § 1 of the Polish Civil Code (hereinafter referred to as the CC). According to the latter regulation, unless otherwise agreed, the date of payment by the insurer to the policyholder's claim against a third party liable for the damage passes by the operation of law to the insurer up to the amount of paid compensation. However, if the insurance company has covered only part of the damage, as to the rest the policyholder has a preference of being satisfied before the insurer's claim. According to the Polish Supreme Court, when an employee unintentionally caused damage to his employer, the policyholder of the latter insurance company cannot, pursuant to Article 828 § 1 the CC, claim from the damage perpetrator reimbursement of benefits provided to the injured party (cf. Resolution of the Supreme Court of 07.11.1977, III CZP 80/77, OSNC 1978, No. 5–6, pos. 84). According to the Supreme Court it would be contrary to the principle applicable on the basis of Polish legal regulation concerning employee of a limited financial liability of the employee (Article 300 the LC), as well as would lead to inconsistency in the legal system, consisting in a different configuration of the legal situation of the perpetrators of damage, depending on whether the damage has been repaired by employer or another entity. The Supreme Court also rejected the opportunity to demand from the employee satisfying the claims to a limited extent, analogous to that to which the employer of that employee is entitled on the basis of the Labour Code.

<sup>5</sup> Cf. e.g. the resolution of the Supreme Court of 31.07.1975, III CZP 21/75, OSNC 1976, No. 5, pos. 92 and the judgment of the Supreme Court of 28.6.2002, II CKN 1001–1000, System Informacji Prawnej Wolters Kluwer "LEX", No. 55259.

<sup>6</sup> III CZP 38/76, OSNC 1977, No. 2, pos. 19.

<sup>7</sup> Cf. also Maśniak, D., Komentarz do art. 43 u.u.o. [in] Prawo ubezpieczeń gospodarczych. Komentarz. Tom I. Komentarz do przepisów prawnych o funkcjonowaniu rynku ubezpieczeń, Ed. Brodecki, Z., Glicza, M., Serwach, M., System Informacji Prawnej Wolters Kluwer "LEX" 2010, Point II.2.

<sup>8</sup> This principle is reflected, among others in limiting the compensation to three times the salary of the employee, in limiting the damage only to the actual loss in the short (annual) period of limitation for claims of the employer, in exclusion of the employee liability for damages resulting from an act within the limits of the so-called acceptable risk, in the limited collective responsibility (Article 118 the LC), in an individualized understanding of the concept of employee guilt, as well as in the protective for the employee procedural regulations (on the protective function of the regulations of Articles 459–477<sup>7</sup> of the Act of 11.17.1964 – Code of Civil Procedure, Dz.U. of 1964, No. 43, pos. 296, cf. in particular Mędrala, M., Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy, Warsaw 2011, *passim*.

panel to the collision principle of *lex specialis derogat legi generali*, where the Labour Code was regarded as a special act.

The situation in this field, however, fundamentally changed in 2009, in which the Supreme Court gave a completely different view that Article 120 § 1 the LC does not preclude the application of Article 43 paragraph 3 of the Law on Compulsory Insurance against drivers who, without the required license to drive a motor vehicle, in the performance of employment duties unintentionally caused injury to a third party<sup>9</sup>. It should also be noted that the justification for this ruling brings a much broader conclusion that a worker protection laid down in Article 120 § 1 the LC is limited only to cases where the damage caused to a third party is repaired directly by the employer. Apart from its scope there are therefore also other than those specified in the Act on compulsory insurance cases, like the one indicated in the aforementioned Article 828 § 1 of the Civil Code (hereinafter referred to as CC). Therefore, even more deserving disapproval is the fact that the Supreme Court did not substantiate its position more broadly, but only demonstrates that Article 120 § 1 the LC, although located in the Labour Code, in its view belongs to civil law and does not have the character of a specific provision in relation to Article 43 of the Insurance Law, as is the object of their regulations is different and so different are their aims. According to the Supreme Court the justification for recourse of insurance company to the insured driver, who has caused a traffic accident following a particularly reprehensible behaviour from the social and legal point of view, is the need for the most efficient, and so based on economic sanction action, to prevent such behaviour. On the other hand, these considerations are, according to the Court equally important in a situation in which the damage is caused in the performance of official duties by an employee who is a professional driver and the driver who is not an employee. The Supreme Court also stressed that the regulations of law do not clearly show that this first category of subjects is exempted from operation of Article 43 of the Insurance Law, and the arguments relating to the need for increased protection of the employee in the work process can be sufficiently respected by reference by the authorities applying the law to the principles of social coexistence and the clause of socio-economic purpose of law (Article 5 of the Civil Code). Finally, it is also worth mentioning that the Supreme Court has also rejected the possibility of referral by the insurance company the recourse claims directly to the employer, and not just on the basis of Article 43 of the Act on Compulsory Insurance, but also of Article 120 § 1 the LC<sup>10</sup>.

## 2. Position of the Author

It should first be stressed once again that for the evaluation of the point raised in the article topic it is important to first examine the occurrence of circumstances referred to in Article 43 of the Law on Compulsory Insurance, as under the Polish legal system the insurance company is not in principle entitled to have recourse claims to the driver holding a civil liability insurance. This situation seems fully justified by mere construction of this type of insurance, and the exceptions from it, as has repeatedly been mentioned, are introduced just by Article 43. The first step is therefore to examine the

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<sup>9</sup> Judgement of the Supreme Court of 10.9.2009, V CSK 85/09, OSNC-ZD 2010, No. 2, Pos. 63. Cf. also the judgement of the Court of Appeal in Wrocław of 14.11.2008, I ACa 849/08, System Informacji Prawnej Wolters Kluwer "LEX", No. 566424; judgement of the District Court in Lublin of 16.10.2013, II Ca 610/13, usp. [http://orzeczenia.ms.gov.pl/content/\\$N/153005000001003\\_II\\_Ca\\_000610\\_2013\\_Uz\\_2013-10-16\\_002](http://orzeczenia.ms.gov.pl/content/$N/153005000001003_II_Ca_000610_2013_Uz_2013-10-16_002) (12.05.2015); judgement of the District Court in Lublin of 8.11.2013, I C 29/12, usp. [http://orzeczenia.ms.gov.pl/content/\\$N/153005000000503\\_I\\_C\\_000029\\_2012\\_Uz\\_2013-11-08\\_001](http://orzeczenia.ms.gov.pl/content/$N/153005000000503_I_C_000029_2012_Uz_2013-11-08_001) (12.05.2015).

<sup>10</sup> In par the Supreme Court in a judgement of 9.10.2002, IV CKN 1409/00, System Informacji Prawnej Wolters Kluwer "LEX", No. 80275.

fulfilment of the conditions specified therein, which only apparently seem to be obvious<sup>11</sup>. However, if they have been fulfilled in the particular circumstances, another important issue is the legal basis upon which the driver carries out his professional duties. If the basis are the civil law relations (contract for specific service, specific task contract, services contract, a contract of carriage, etc.), the legality of the implementation by the insurer of recourse claims should not raise any doubts. Similarly, in a situation, when the driver admittedly performs his duties on the basis of the employment relationship, but the damage, which he caused occurred by way of the intentional wilful fault. Because, according to the view currently dominant in the Polish doctrine and jurisprudence, the protective mechanism of Article 120 the LC is applicable only when an employee causes injury to a third party by way of unintentional fault<sup>12</sup>. And, if he does so deliberately, he bears direct and unlimited in terms of amount liability on the principles of civil law, and therefore it is undoubtedly permissible to pursue from him the claims referred to in Article 43 of the Law on Compulsory Insurance.

The biggest controversies relate to, as already mentioned, a situation where the driver holding employment on the basis of the employment relationship causes injury in road traffic by way of unintentional fault, because only then the problem arises of the Article 120 the LC relationship to the Article 43 of the Law on Compulsory Insurance. The legal situation of the insurer on the basis of the latter regulation is all the more special that the right to claim he has is qualified in the doctrine as spontaneous and more independent than those referred to in the general regulations (e.g. in Article 828

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<sup>11</sup> Doubts on this background are well illustrated even by the premise of escape by the damage perpetrator from the accident scene to assessment of which it is useful to refer to the jurisprudence of criminal courts. And so, for example, this condition has not been fulfilled, according to the Supreme Court, if: a) the perpetrator has not notified the Police about the accident, but he wanted to take the injured to the hospital, and then he called to the hospital informing about the accident and he sent his wife to the hospital to be convinced about the consequences of the accident and to take care of the injured (order of 27.08.1968, RW 948/68, OSNKW 1968, No. 12, pos. 143); b) after the accident, the perpetrator called an ambulance, giving his data and remained with the injured until the ambulance took him, and only did not inform the Police about the accident (judgment of 15.3.2001, III KKN 492/99, OSNKW 2001, No. 7-8, pos. 52); c) the perpetrator walked away from the accident scene to a friend's house, located just 300 meters from the scene of the incident, informed his son about the incident by telephone, then asked him to go to the scene of the accident, and when he returned with the information that the hit pedestrian was dead in less than an hour after the incident the perpetrator returned to the scene and informed the police officer that he was the perpetrator of the accident (judgment of 27.3.2001, IV KKN 175/00, System Informacji Prawnej Wolters Kluwer "LEX", No. 51400); d) the offender after the accident remained at the scene and talked to a witness of the accident and ambulance staff, waited 40 minutes for police to arrive, drove off because of the need to care for a disabled son, but the next day he reported at a police station (judgment of 17.1.2012, V KK 389/11, OSNKW 2012, No. 4, pos. 42); e) the perpetrator walked away from the accident scene, but went to the nearest police station to report a case, and when it turned out that the police station was closed, returned to the scene of the accident, informing the police already present there (order of 11.18.1998, II CKN 40/98, System Informacji Prawnej Wolters Kluwer "LEX", No. 462991). On the other hand, as the escape from the scene was considered a situation where the perpetrator although remained at the scene for some time, but did not approach the scene of the accident, did not give his data and then drove away, and finding him was only possible thanks to the initiative of one of the witnesses (judgement of z 30.3.2005, WA 3/05, OSNWSK 2005, No. 1, pos. 639).

<sup>12</sup> And so among others by Bieniek, G. *Odpowiedzialność materialna pracowników w praktyce*, Warszawa 1988, p. 163; Pietrzykowski, J., *Glosa do wyroku SN z 25.2.1975 r.*, I PR 223/74, NP 1975, No. 9, p. 1247; Marek, W., *Odpowiedzialność cywilna za szkodę wyrządzoną przez pracownika osobie trzeciej*, NP 1977, No. 12, p. 1549; Wolak, G., *Odpowiedzialność pracownika za szkodę wyrządzoną osobie trzeciej przy wykonywaniu obowiązków pracowniczych*, PiZS 2015, No. 1, p. 22; Resolution of the Bench of 7 Judges of the Supreme Court of 12.6.1976, III CZP 5/76, OSNCP 1977, No. 4, pos. 61; judgement of the Supreme Court of 2.2.2011, II PK 189/10, unpublished. Contrary, however, Wagner, B., [in] *Kodeks pracy. Komentarz*, Ed. L. Florek, Warszawa 2009, p. 672; A. Holowski, *Zmiany w unormowaniu odpowiedzialności materialnej pracownika za szkodę wyrządzoną osobie trzeciej*, [in] *Z Problematyki Prawa Pracy i Polityki Socjalnej* 1977, No. 1, p. 146; P. Zbroja, *Odpowiedzialność pracowników tymczasowych za szkodę wyrządzoną pracodawcy i osobie trzeciej*, MoP 2003, Nr 6, p. 286; resolution of the Supreme Court of 11.10.1977, IV PZP 5/77, OSNCP 1978, No. 4, pos. 66.

§ 1 CC)<sup>13</sup>. The moment the damage is covered a new debt claim arises on the insurer's side, implying a right of recourse, which, like to some extent the provisions on financial liability of employees, have preventive and repressive function in relation to the perpetrator of the damage<sup>14</sup>. This particular case was the subject of the considerations of the Supreme Court decisions discussed above and the cause of differences in interpretation occurring in them.

The view presented by the Supreme Court in the resolution of 16.10.1976 should be completely rejected, primarily due to the socio-economic system existing in Poland today and constitutional and axiological realities associated with it. The position leading to total impunity for damage caused by the employee driving a vehicle for instance without the required permissions, while depriving the creditor of any possibility to satisfy his undoubtedly legitimate claims, must be considered detrimental to the common sense of justice. In addition, there is no doubt that such a view, even defensible in the realities of the former socialist system, would lead to the conclusion that Article 120 the LC undermines the principle of proportionality of interference by the legislature in private ownership (Article 31 Paragraph 3 of the Constitution of the Republic of Poland<sup>15</sup>), which in the current Basic Law in Poland is covered by the same protection as any other type of ownership (cf. Article 64 of the Constitution of the Republic of Poland). This type of interference must always meet the test of constitutionality, which consists in considering three issues: firstly, whether the introduced legislative regulation is able to bring it to the intended effect; secondly, whether the regulation is necessary to protect the public interest with which it is associated; thirdly, whether the effects of introduced regulations remain in proportion to the burdens imposed by it on a citizen<sup>16</sup>. The criticized here understanding of Article 120 the LC, for the reasons already given above, does not seem to pass a test so constructed, and in particular the second (necessity) and third point (proportionality). Additionally, it seems that such a position would lead to a breach of the principle of equal treatment (both on the side of creditors and debtors), and in addition, it would completely betray not only preventive and educational function of the rules of the material responsibility of employees, but also a provision of Article 43 of the Law on Compulsory Insurance, which has as similar function.

For the above reasons, generally the view presented by the Supreme Court in its judgment of 10.9.2009 should be accepted, but only in so far as it relates to the realities of Article 43 of the Law on Compulsory Insurance, though, and even that can obviously raise some concerns. For it presupposes the possibility of unlimited pursuit solely and directly from the employee of the recourse claims by the insurance company, and the only protective mechanism it proposes for the employee is the institution of the abuse of rights (Article 5 the LC). Such a mechanism may, however, in practice, be insufficient, and in addition, this view may raise the question of axiological consistency of differentiation on the basis of Article 120 the LC of the legal situation of employees driving a motor vehicle from the criteria listed in Article 43 of the Law on Compulsory Insurance. This last question is, however, alleviated by the fact that each of the conditions in that provision for legality of the pursuit of claims by the insurer is associated with morally reprehensible attitude of the employee and that at the considerable level (causing damage deliberately or under the influence of alcohol or other drugs, running away from the scene, etc.). On the other hand, one should remember that also on the basis of the general provisions of labour law on financial liability the legislature significantly diversified its range depending on degree of the seriousness of the employee attitude in connection with caused damage (intentional and unin-

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<sup>13</sup> Cf. Judgement of the Court of Appeal in Rzeszów of 11.10.2012, I ACa 240/12, System Informacji Prawnej Wolters Kluwer "LEX", No. 1254472.

<sup>14</sup> Warkało, W., *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice*, Warszawa 1962, p. 40.

<sup>15</sup> The Polish Constitution of 2.4.1997 (Dz.U. of 1997, No. 78, pos. 483).

<sup>16</sup> The judgment of the Constitutional Tribunal of 26.4.1995, K 11/94, OTK 1995, No. 1, pos. 12.

tentional fault). If in addition to this we recall that the contrary view would result in total impunity of the worker driving a vehicle, in the absence of the possibility for the creditor to have been satisfied, then opt for the concept presented by the Supreme Court in its judgment of 10.9.2009 seems, despite some shortcomings, more justified. Paradoxically, it also leads to less axiological inconsistency than the opposite view and is in line with the prevailing trend in Polish jurisprudence to grant an employee absolute protection on the grounds of Article 120 the LC only when on the injured party's side there is any possibility to satisfy his property interests<sup>17</sup>.

The ideal would be, of course, to find an intermediate to the above-described solution, but the only thing that could be taken into account without any interference by the legislature in the legal system, is the admission of recourse by the insurer directly to an employer who insured the vehicle. This concept does not seem acceptable, although the literal wording of Article 43 of the Law on Compulsory Insurance in conjunction with Article 120 § 1 the LC points indirectly to this possibility. The first regulation makes it possible to refer recourse by the insurance company directly to the employee driving a motor vehicle, and the other allows this liability be transferred to the employer. Such an interpretation, however, would not be correct, and it is not even because Article 120 § 1 the LC does not constitute an independent basis of liability of the employer<sup>18</sup>, but because it goes against the very essence of this type of insurance. Its sense lies precisely in the fact that an insurance company in exchange for a financial contribution calculated accordingly, removes completely from the policyholder the risk of a need to cover damage arising from the movement of a motor vehicle, unless of course the policyholder was the driver during a traffic incident.

The employer, who is a sole owner of the car, has an agreement of third-party liability insurance of motor vehicles (TPL) concluded with the insurer. With this agreement, in accordance with Article 822 § 1 of the Civil Code, the insurer undertakes to pay the contractual compensation for damages caused to third parties to whom responsibility for the damage is borne by the policyholder or insured. While according to Article 35 of the Law on Compulsory Insurance TPL insurance of the owners of motor vehicles covers the civil liability of any person who, when driving a motor vehicle during the period of insured liability, caused damage in connection with the movement of the vehicle. Therefore, at the time of causing damage to a third party, associated with the movement of the motor vehicle and covered by the insured TPL, on the injured party side a claim for compensation arises against those that are responsible for the damage, who mainly include the employer and insurer. The first, as an independent holder of a motor vehicle, by virtue of Article 436 § 1 of the CC in conjunction with Article 435 § 1 of the CC, and the second under the insurance agreement concluded with the employer (Article 822 § 1, Article 34 and 35 of the Law on Compulsory Insurance), from whom the injured party may pursue claim directly (Article 822 § 4 of the CC, Article 19 of the Law on Compulsory Insurance). Basically, when the damage was culpable, the injured party could also direct his/her claims to the driver of a motor vehicle, which is covered by TPL. However, when the driver was an employee, then according to Article 120 § 1 of the Labour Code his/her direct responsibility to a third party is excluded, and therefore in the present case the injured party may direct his / her claims only to the employer and the insurer. By virtue of an agreement with the employer, however, the insurer is the one, who shall pay in full the damage and having done so he may exceptionally, pursuant to Article 43 of the Law on Compulsory Insurance, to pursue his claims only from the vehicle driver. From the employer, however, the insurer could not claim anything, because this would undermine the essence of insurance paid by the employer, consisting precisely in taking over by the insurance company of the risk of damage covering.

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<sup>17</sup> Cf. Resolution of the Bench of 7 Judges of the Supreme Court of 7.6.1975, III CZP 19/75, OSNCP 1977, No. 2, pos. 20 and the judgement of the Supreme Court of 11.4.2008, II CSK 618/07, OSNC-ZD 2009, No. 2, pos. 41.

<sup>18</sup> Cf. e.g. the Judgement of the Supreme Court of 9.10.2002, IV CKN 1409/00, *op. cit.*

At the end, it still requires consideration whether the claim of the insurance company is unlimited, or because of the special status of the damage perpetrator, it must be limited analogous to the legal regulations concerning employee. Because, unlike other recourse of the insurer (e.g. Article 828 § 1 the CC) a provision of Article 43 of the Law on Compulsory Insurance enacts claims of independent nature, the concept limiting the responsibility of the employee with reference to the labour laws does not seem to be defensible. Despite the fact that the new debt claim remains to some extent dependent on the debt claim satisfied by the insurer, it does not seem that this dependency would be aimed that far. In addition, one needs to remember that the satisfied claim is the entitlement of not the employer, but the injured party, towards which the employee's responsibility was not limited but totally disabled. Thus a difficulty is encountered here in form of assumption that, while the injured party was not entitled to claim against an employee, the insurance company is entitled to it. Note, however, that the differences in the situation of the injured creditor and the creditor of the insurance company lies in the fact that the former has the ability to satisfy its property interests from the employer, and the other has no such possibility. This, in turn, supports the submitted earlier position.

## **Conclusions**

Analysis of the legal admissibility of pursuit by the insurer of recourse claims from the employee-driver causing damage in road traffic has led to the following conclusions. If the conditions of Article 43 of the Law on Compulsory Insurance are fulfilled, the insurance company may, against the literal wording of Article 120 LC, make its claims exclusively and directly to the employee, and that is regardless of his guilt (intentional fault / unintentional fault). In every case, these claims will have unlimited nature, as based on the regulations of civil law, rather than labour law.

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