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How far shall the protection of a traffic accident victim go under motor third party liability insurance?

This paper was inspired by a recent reference for a preliminary ruling lodged by the French Cour de Cassation (Mutuelle assurance des travailleurs mutualistes (Matmut) v TN and Others, Case C-236/23). The Cour de Cassation asked whether 'Articles 3 and 13 of Directive 2009/103 of the European Parliament and of the Council of 16 September 2009 must be interpreted as precluding the nullity of a contract for civil liability motor insurance from being declared enforceable against a passenger who is a victim where that person is also the policyholder and intentionally made a false statement at the time of conclusion of the contract which gave rise to that nullity'. The Cour de Cassation observed that the CJEU had never ruled whether the nullity of the contract can be relied on against a victim who was a passenger in the vehicle where the victim is also the policyholder and the person who made the intentional false statement, which resulted in the insurance contract being null and void under national law. None of the judgments delivered by the CJEU relate to that specific situation. Even though the Court has been strengthening the rights of victims of traffic accidents for many years, by applying a rigorous interpretation of the provisions of the motor insurance directives precluding national rules that would allow for the avoidance of a policy response towards a passenger beyond the scope of the exclusions expressly allowed in the directives, some questions remain. In this case, we are dealing with an obvious insurance fraud committed by a person who subsequently suffered injuries in an accident caused by a driver of the vehicle for which a policy had been taken out by the injured person being at the same time a policyholder. Should the EU law protect also those persons who are clearly attempting to misuse an insurance contract? Shall we slur over the fact that by its nature an insurance contract has always been based on mutual trust (uberrimae fidei contract)? Should the rules governing motor third party liability insurance go as far as in no other insurance? Do fraudsters deserve protection?

Keywords: Motor third party liability insurance, exclusions of liability, fraud, preliminary ruling

Introduction

The scope of insurance cover provided for by compulsory motor third party liability insurance ("MTPL") has been a subject of numerous judgements of the CJEU (ECJ). One of the issues dealt with by the Court is the possibility of the insurer avoiding a policy response because the accident was caused by a person not authorised to drive the vehicle. It might seem that this issue has already been clarified in the case law, but a recent reference for a preliminary ruling lodged by the French Cour de Cassation proves that some doubts still arise. The Cour de Cassation is asking whether '*Articles 3 and 13 of Directive 2009/103 of the European Parliament and of the Council of 16 September 2009 must be interpreted as precluding the nullity of a contract for civil liability motor insurance from being declared enforceable against a passenger who is a victim where that person is also the policyholder and intentionally made a false statement at the time of conclusion of the contract which gave rise to that nullity'* (request for a preliminary ruling from the Court de Cassation lodged on 7 April 2023 — Mutuelle assurance des travailleurs mutualistes (Matmut) v TN and Others, Case C-236/23).

Doubts of the Cour de Cassation

The request for a preliminary ruling was lodged by the French court in proceedings regarding the following case.[1] A person called PQ concluded a motor insurance contract with an insurer called Matmut, stating that he was the only driver of the insured vehicle. Subsequently, a traffic accident occurred involving that vehicle driven by another person called TN, who was under the influence of alcohol. PQ, a passenger travelling in the vehicle, was injured in the accident. Prosecuted before a criminal court, TN was found guilty. At a hearing in the course of the criminal proceedings, in which PQ's claims for civil damages were examined, Matmut claimed the objection of nullity of the contract on the grounds of PQ's false statement of the usual driver's identity, requesting that it be exonerated and that liability for PQ's damages be assumed by the *Fonds de garantie des assurances obligatoires de dommages* (FGAO). The criminal court ruled that the insurance contract was null and void because of the intentional false statement made by the insured. It released Matmut from liability, ordered TN to pay compensation to the victims and declared the judgment to be enforceable against the FGAO. The appeal court upheld the judgment in that it had ruled that the insurance contract concluded between PQ and Matmut was null and void. It held that PQ had made an intentional false statement of the usual driver's identity, which had manifestly changed the insurer's opinion of the risk, given that TN had previously been convicted of drink-driving. However, it refused to release Matmut from liability and, in consequence, released the FGAO therefrom. The appeal court observed that it follows from the precedence of European Union law over national law that the nullity of a contract because of an intentional false statement of the insured person, as laid down in Article L. 113–8 of the (French) Insurance Code, is not enforceable against victims of a traffic accident or their successors. Matmut brought an appeal before the Cour de Cassation against that

1. https://curia.europa.eu/juris/showPdf.jsf;jsessionid=4DC4B689FB9E6B8BA3FA92BC78E8ED7E?text=&docid=275347&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1354021

judgment. The Cour de Cassation observed that it had never ruled whether the nullity of the contract can be relied on against a victim who was a passenger in the vehicle where the victim is also the policyholder and the person who made the intentional false statement, which resulted in the insurance contract being null and void. Then the Cour de Cassation noted that none of the judgments delivered by the CJEU relate to that specific situation. The French Court pointed out in this context the following judgements: Candolin, 30 June 2005, Case C-537/03, ECLI:EU:C:2005:417; Churchill Insurance Company, 1 December 2011, Case C-442/10, ECLI:EU:C:2011:799; Marques Almeida, 23 October 2012, Case C-300/10, ECLI:EU:C:2012:656; Csonka and Others., 11 July 2013, Case C-409/11, ECLI:EU:C:2013:512; Fidelidade, 20 July 2017, Case C-287/16, ECLI:EU:C:2017:575; Delgado Mendes, 14 September 2017, Case C-503/16, ECLI:EU:C:2017:681; Van Ameyde, 10 June 2021, Case C-923/19, ECLI:EU:C:2021:475. This is why the Cour de Cassation decided to stay the proceedings and to lodge a request for a preliminary ruling with the CJEU.

The Court of Cassation also considers in its request whether, in the event that nullity of the insurance contract is declared to be unenforceable against the victim who is the policyholder, the insurer may be permitted, without contravening EU law, to bring an action against this person for reimbursement of the sums paid to him/her in the performance of the contract. The French Court also asks whether the fact that the FGAO is required to compensate that victim where the nullity of the contract is declared to be enforceable against the victim would be likely to affect the outcome of the proceedings.

French law

As explained in the reference for a preliminary ruling, according to Article L. 113–8 of the Insurance Code, the insurance contract is null and void in the event of an intentional omission or false statement by the insured person where that omission or false statement changes the subject matter of the risk or reduces its extent in the insurer's opinion, even if the risk omitted or misrepresented by the insured person had no bearing on the accident.

Until a repealing judgment of 29 August 2019 (2nd Civil Chamber, 29 August 2019, Appeal No 18–14.768)[2], the Cour de Cassation held that the nullity of the contract resulting from the insured person's false statement could be relied on against the victim, since the insurer which denied its warranty claim had duly directed a claim against the FGAO. Since that judgment of 29 August 2019, the Cour de Cassation has held that it follows from Article L. 113–8 and R. 211–13 of the Insurance Code, interpreted in the light of Article 3(1) of the First Directive and of Article 2(1) of the Second Directive and of Articles 3 and 13 of Codified Directive 2009/103 that the nullity laid down in Article L. 113–8 of the Insurance Code cannot be relied on against victims of a traffic accident or their successors and that the FGAO cannot be required to compensate the victim in such a case. It is worth noting that this judgment refers to the *Fidelidade* case (see later).

This ruling was delivered in a case in which an accident had been caused by a person who was the owner and the usual driver of a vehicle insured by another person, who had wanted to 'do a favour' to the owner of the car and thus had misled the insurer. It was not disputed that that the policyholder acted in bad faith.

2. https://www.legifrance.gouv.fr/juri/id/JURITEXT000039064184/

The French Insurance Code was amended in 2019 and states clearly now that the nullity of a motor insurance contract cannot be relied on against victims of damage arising from a traffic accident or their successors, and that, in such a situation, the insurer covering civil liability for the vehicle involved is required to pay compensation to them. The insurer is subrogated to the rights of the person entitled to compensation against the person responsible for the accident, to the extent of the amount of the sums that it has paid.

Relevant provisions of Directive 2009/103

It seems useful to refer to the provisions of Directive 2009/103 mentioned in the request. Under Article 3, '*each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered, and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph*'. Article 13 deals with exclusion clauses and reads that '*each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by:*

(a) persons who do not have express or implied authorisation to do so;

(b) persons who do not hold a licence permitting them to drive the vehicle concerned;

(c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

However, the provision or clause referred to in point (a) of the first subparagraph may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger'.

As known, Directive 2009/103 codifies the previous directives relating to the MTPL[3] (it is also called 'Codified Directive'). In the context of the judgements of the CJEU that will be discussed below,

3. Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Fourth motor insurance Directive), the Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC

it is worth noting that the provision on the exclusion clauses was introduced to EU law by Article 2 of the Second Directive (this is because some of the judgements that will be quoted below refer to this provision of the Second Directive).

Notwithstanding the provisions of Directive 2009/103 indicated in the reference for a preliminary ruling, it seems that Article 12 should also be taken into account. This provision is concerned with special categories of victim and states that without prejudice to the second subparagraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle. As recital 23 of the preamble explains, '*the inclusion within the insurance cover of any passenger in the vehicle is a major achievement of the existing legislation. This objective would be placed in jeopardy if national legislation or any contractual clause contained in an insurance policy excluded passengers from insurance cover because they knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of the accident. The passenger is not usually in a position to assess properly the level of intoxication of the driver. The objective of discouraging persons from driving while under the influence of intoxicating agents is not achieved by reducing the insurance cover for passengers who are victims of motor vehicle accidents. Cover of such passengers under the vehicle's compulsory motor insurance does not prejudge any liability they might incur pursuant to the applicable national legislation, nor the level of any award of damages in a specific accident*'.

Article 10 of the Codified Directive must be taken into account as well. Under para 1 of this provision, '*Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied*'. Paragraph 2 states that '*Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured*'.

The European case law

As it was rightly observed in legal doctrines, '*the Directives are vague and have needed significant interpretation by the then ECJ, the EFTA and the CJEU, particularly with regards to exclusion clauses as this Article 13 is particularly vague*.'[4] Hence, a brief analysis of the case law up to date is needed in order to understand correctly the problem raised in the reference for a preliminary ruling.

In this reference, the French court rightly pointed out several judgements of the CJEU (ECJ) that may be relevant in the case at hand. Although the Cour de Cassation claims that none of them deals with exactly the same issue as the one being discussed in these proceedings, each of them

of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles.

4. M. R. Channon, Validity and Effect of Exclusion Clauses Against Third Parties in Motor Insurance, University of Exeter, 2017, p. 144, https://ore.exeter.ac.uk/repository/bitstream/handle/10871/32099/ChannonM.pdf?sequence=1

provides some guidance, and at least two of them seem to be particularly useful for providing an answer to the question asked by the French Court.

First, it is the judgement of the Court of 1 December 2011 delivered in Case C-442/10 (*Churchill Insurance Company*). The Court of Appeal (England and Wales) asked the Court the following questions:

'*1. Are Articles 12(1) and 13(1) of Directive 2009/103 to be interpreted as precluding national provisions the effect of which, as a matter of the relevant national law, is to exclude from the benefit of insurance a victim of a road traffic accident, in circumstances where:*

- *that accident was caused by an uninsured driver; and*
- *that uninsured driver had been given permission to drive the vehicle by the victim; and*
- *that victim was a passenger in the vehicle at the time of the accident; and*
- *that victim was insured to drive the vehicle in question?*'

These questions were asked in the specific context of English law, where an MTPL policy provided cover for (a) person(s) indicated therein and not for a vehicle (or more precisely: all potential vehicle users). At the same time, it is important to take into account the facts of the underlying proceedings. They related to separate cases (joined by the English court of second instance), where the insured person gave permission to drive the vehicle to a person not named in the insurance contract as authorised to drive and not covered by insurance of their own. In both cases there occurred an accident in which the insured person, travelling as a passenger, suffered personal injuries. The insurance companies refused to pay compensation to the victims, relying on the right given by English law to recover from the insured person the sums paid for damage or injury caused by an unauthorised person whom the insured person had allowed to use the vehicle. The insurers set off the compensation for the victims and their recourse towards the insured, because the victim and the insured were one and the same. The referring court explained that in its view this is equal to refusing insurance monies.

In this context, the Court responded that '*Article 1, first subparagraph, of the Third Council Directive [E], and Article 2(1) of the Second Council Directive [E], must be interpreted as precluding national rules the effect of which is to omit automatically the requirement that the insurer compensate a passenger who is a victim of a road traffic accident when that accident was caused by a driver who was not insured under the insurance policy and when the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself but who had given permission to the driver to drive it*'. Then the Court emphasised that '*the answer to the first question is not different depending on whether the insured victim was aware that the person to whom he gave permission to drive the vehicle was not insured to do so, whether he believed that the driver was insured or whether or not he had turned his mind to that question*'.

The Court referred to its previous case law and stated that '*legal position of the owner of the vehicle, present in the vehicle at the time of the accident as a passenger, to be the same as that of any other passenger who is a victim of the accident*'. The Court upheld the line of reasoning according to which the second subparagraph of Article 2(1) of the Second Directive, which provides that certain persons who voluntarily entered the vehicle which caused the damage or injury when the insurer can prove that they knew the vehicle was stolen may be excluded from compensation, is of exceptional nature and the derogations from the first subparagraph of Article 2(1) may only be made in that single, specific case.

The Advocate General Mengozzi in his opinion delivered on 6 September 2011 in this case advised that '*Court's case-law teaches us that, unless one of the exceptions laid down by the Directive is applicable, the victims of an accident are always entitled to be compensated by the insurer. Given that in the present case it is established that the facts are not caught by any of the exceptions expressly provided for by the Directive, application of the Candolin and Others case-law tends to confirm that the two insured persons who gave unauthorised persons permission to drive their vehicles are none the less entitled to be compensated for their personal injuries*'. Also, the following passage in his opinion regarding the interpretation of Article 13 (1)(a) seems to be noteworthy: '*in the provision requiring contractual clauses to be deemed void for excluding insurance cover for want of 'authorisation' has to be interpreted broadly, as referring to all situations in which the person driving a vehicle might not drive it, because he had not been authorised by the insurer, or by the owner of the vehicle, or by the insured. In all those cases, insurance cover must none the less be guaranteed, in order to protect the victims, and in principle the insurer may not avoid the duty to make payment*'.

Another ruling that seems to be of assistance in the present case is the one delivered by the Court on 20 July 2017 in Case C-287/16 (*Fidelidade*). The Court held that '*Article 3(1) of Council Directive 72/166/EEC of 24 April 1972 [E], and Article 2(1) of Second Council Directive [E] must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims, in circumstances such as those at issue in the main proceedings, the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and of the usual driver of the vehicle concerned or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the conclusion of that contract*'.

The referring court was dealing with a dispute stemming from the following facts. A road traffic accident took place involving, on the one hand, a motor vehicle driven by Mr Teixeira Pereira and belonging to Ms Crystello Pinto Moreira Pereira and, on the other, a motorcycle driven by its owner, Mr Seemann. The accident resulted in the death of both drivers. Subsequently, the Caisse Suisse de Compensation brought legal proceedings against the Fundo de Garantia Automóvel and Ms Crystello Pinto Moreira Pereira seeking reimbursement of the compensation paid to the family members of its insured, Mr Seemann. The defendants in those proceedings argued that legal proceedings could not be brought against them, basing that argument on the fact that, at the time of the accident, a valid insurance contract was in place, concluded with the company now known as Fidelidade-Companhia de Seguros, which covered civil liability in respect of the motor vehicle concerned. However, that company claimed that the contract for motor vehicle insurance against civil liability was not valid, on the grounds that the policyholder had made a false statement on the date the contract was concluded, claiming to be both the owner of the vehicle and its usual driver.

The Court stated that the '*fact that the insurance company has concluded that contract on the basis of omissions or false statements on the part of the policyholder does not enable the company to rely on statutory provisions regarding the nullity of the contract or to invoke that nullity against a third-party victim so as to be released from its obligation under Article 3(1) of the First Directive to compensate that victim for an accident caused by the insured vehicle'. Even if the question referred to the Court concerned in fact the legal conditions of validity of the insurance contract, which – as the Court observed – are governed not by EU law but by the laws of the Member States,*

'those States are nonetheless obliged to ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three abovementioned directives'. Member States must exercise their powers in that field in a way that is consistent with EU law and that the provisions of national legislation which govern compensation for road accidents may not deprive the First, Second and Third Directives of their effectiveness.' The *Marques Almeida* case was cited in this context.

Another finding of the Court that should be reminded in the context of the subject-matter of this paper is that the right of victims of an accident to receive compensation must be protected even if it is possible for the victim to receive compensation from a guarantee fund. '*The payment of compensation by the body referred to in Article 1(4) of the Second Directive was, in fact, designed to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage has not satisfied the requirement for insurance referred to in Article 3(1) of the First Directive, that is to say, it is a vehicle in respect of which no insurance contract is in place*'.

The Cour de Cassation observed in its request for a preliminary ruling that '*although it is apparent from that case-law that the only distinction permitted by EU rules relating to compulsory insurance against civil liability in respect of the use of motor vehicles is that between the driver and passenger and although the fact that the passenger who is the victim of the accident is also the person insured to drive the vehicle does not allow him to be denied the status of a third-party victim, none of those judgments had to deal with the situation of an insured person who is both the passenger who is the victim of an accident and the person who caused the insurance contract to be null and void through that person's own fault. In particular, the Fidelidade judgment, relating to the consequences to be drawn from the nullity of a contract, concerned the situation of victims who were not the policyholders and the Churchill Insurance Company judgment did not concern the consequences to be drawn from the nullity of a contract, but a national provision which had the effect of automatically excluding, in certain circumstances, the obligation on the insurer to compensate an insured person who was a passenger and victim of a road traffic accident where the insured had authorised an uninsured person to drive*'. Indeed, the *Fidelidade* judgment repeats the notion of a '*third party victim'* several times. In the *Churchill Insurance Company* case, the disputes before the national court formally did not concern the nullity of the MTPL policy (because the insurers did not challenge it) but the issue of setting off the compensation with the recourse. It also seems important that in the *Churchill* case the insureds acted negligently by allowing an uninsured person to drive the vehicle, but it seems that they had not acted fraudulently when taking out a policy. Even though these two judgements seem to be the closest to the case referred by the French Court to the CJEU, they do not forejudge the outcome of this case.

The British example

The Cour de Cassation asks whether the nullity of a contract for civil liability motor insurance may be enforceable against a passenger who is a victim and at the same time a fraudulent policyholder. Thus, two issues have to be taken into account: validity of an MTPL policy and the possibility to deny a policy response towards the victim based on its nullity. As far as the first issue is concerned, there are no provisions in the Directive harmonising it, at least in an explicit way. The second one falls within the scope of the European legislation though (this is the interpretation

stemming from the CJEU judgement discussed above). How does it impact national legislation that allows for a nullity of an MTPL policy and does not contain provisions precluding an insurer's defence against the victim based on it? This issue was dealt with by English Courts (in a pre-Brexit case). In the ruling of the Court Of Appeal (Civil Division) of 22 March 2022 in the case between Daniel James Colley and the Motor Insurers' Bureau ('MIB')[5], the Court decided that in a case where there is an insurance policy valid at the time of an incident giving rise to liability but that policy is subsequently avoided *ab initio*, the insurer is not liable but there is the MIB's obligation under the Codified Directive to cover the claim. Nevertheless, the MIB is liable as an emanation of the state for the improper implementation of the Codified Directive.

This decision was delivered in the following case. Mr Colley was a passenger in a car driven by Mr Shuker when, by reason of Mr Shuker's negligence, an accident occurred, which caused Mr Colley to suffer injuries. It was Mr Shuker's father who had taken out a policy of insurance with the insurer and the policy named the father as the policyholder and main driver of the vehicle. Thus, the policy did not provide cover for Mr Shuker himself to drive the vehicle because he was not a named driver. Mr Colley knew before he entered the vehicle that Mr Shuker did not have a valid driving licence and was not insured to drive the vehicle. After the accident, the insurer obtained a declaration against Mr Shuker's father that it was entitled to avoid the policy on the grounds of material misrepresentation. Pursuant to the provisions of English law, this declaration released the insurer from any obligation to make payment to Mr Colley. At the same time, the court had no doubts that this provision was not compliant with Articles 3(1) and 13(1) of the Codified Directive. Notwithstanding the above, as already mentioned, Mr Colley's claim against the insurer was struck out by the judgment. This happened because the court held that the aforementioned provisions of English law provided the insurer with complete defence and although they were incompatible with the Secretary of State's obligations under the Codified Directive, the Codified Directive had no horizontal effect in respect of a private individual or other entity (the insurer) that was not an emanation of the state. At the same time, the court held that the claimant could rely upon Articles 3(1) and 12 of the Codified Directive to require the MIB, as an emanation of the state and compensation body, for the purposes of Article 10 to pay compensation in these circumstances. As a side note: this ruling raised some doubts among British scholars[6], but there is no need to discuss this issue further in this paper.

The question asked by the French Cassation Court (and the rulings delivered by the courts of first and second instance) suggest that the French judges take into account the horizontal effect of Directive 2009/103 and probably assume that the answer that will be delivered by the CJEU will impact the interpretation and hence the application of the national legislation.

5. https://caselaw.nationalarchives.gov.uk/ewca/civ/2022/360?query=DANIEL+JAMES+COLLEY
6. J. Marson, K. Ferris, 'When is an insured vehicle an uninsured vehicle? In Colley v MIB the Court of Appeal continues its struggle with EU motor vehicle insurance law', The Modern Law Review Volume 86, Issue 2, 551–563, 2023. https://doi.org/10.1111/1468–2230.12762; J. Marson, K. Ferris, 'From insurer of last resort to an insurer of convenience: the Court of Appeal and the recanted policy', Law Quarterly Review, 138, 546–551, 2022. https://www.researchgate.net/publication/360919527_From_insurer_of_last_resort_to_an_insurer_of_convenience_the_Court_of_Appeal_and_the_recanted_policy

Conclusions

The Court has been strengthening the rights of victims of traffic accidents for many years at least since the judgment of 28 March 1996 in Case C-129/94, ECLI:EU:C:1996:143 (*Bernaldez*). The Court has been very consistent in doing so. To this end, so far the Court has applied a rigorous, if not formalistic interpretation of the provisions of the motor insurance directives precluding national rules that would allow for the avoidance of a policy response towards a passenger beyond the scope of the exclusions expressly allowed in the directives. Only the exception referring to a joy rider, expressly provided for by the EU law maker, was permitted[7]. The Court is concerned with guaranteeing a uniform interpretation of motor insurance directives across the EU in order to avoid disparities in this respect among the Member States. In an attempt to achieve this goal, the maximum standard of cover was adopted. Hence, in the CJEU case law it was decided that a victim deserves protection also when s/he acted negligently, e.g. decided to travel as a passenger with an intoxicated driver (*Bernaldez*[8]) or with a person they knew was not covered by insurance (*Churchill Insurance Company*). Although the motor insurance directives focus on insurance coverage, the CJEU case law dealt also with issues that formally fall out of their scope, but indirectly may have an impact of the insurer's duty to compensate the victims. In particular, the Court held that the nullity of an insurance contract (which, as a rule of thumb, is governed by national legislation) stemming from a false statement made by the policyholder could not be invoked by the insurer against the victim (*Fidelidade*).

Also the European law maker has been constantly improving the level of protection of the victims in subsequent generations of the motor insurance directives.

Even though the aforementioned tendency of strengthening the position of victims is well established (and understandable), some questions still remain. The Court and the European law maker stress that the far-reaching protection of passengers is one of the most important achievements of EU regulations regarding the motor third party liability insurance. In this case, however, we are dealing with an obvious insurance fraud committed by a person who subsequently suffered injuries in an accident caused by a driver of the vehicle for which a policy was taken out fraudulently. Should the EU law protect also those persons who are clearly attempting to misuse an insurance contract? Shall we slur over the fact that by its nature an insurance contract has always been based on mutual trust (*uberrimae fidei* contract)? I believe that the question asked by the Cour de

7. As the Advocate General Geelhoed pointed out in his opinion delivered on 10 March 2005 In Case C-537/03 (Candolin), '*the second subparagraph of Article 2(1) provides for an exception. If the insurer can prove that persons who voluntarily entered the vehicle which caused the damage or injury knew that the vehicle was stolen, the insurer may rely on this as against the passengers. The Community legislature's intention with this provision was to provide for an exception to the rule that statutory provisions or contractual clauses in an insurance policy may not be relied on as against passengers and third parties who are the victims of an accident. This exception must be interpreted narrowly and as being exhaustive since it forms a departure from the general rule'. He further explained the rationale for such a strict construal claiming that 'any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid'.*

8. This rule was subsequently confirmed by Article 1 Para 2 of the Third motor insurance Directive.

Cassation stems from this sort of dilemmas. The Cour de Cassation seems to be looking for some boundaries of the paradigm that the victim must be always protected. An answer to its question does not have to be straightforward, and the present request for a preliminary ruling is a good opportunity to rethink the limits of legal protection guaranteed to victims. Should the rules governing motor third party liability insurance go as far as in no other insurance?

It also worth noting in this context that one of the issues in the present case is the recourse (even though it seems not to have been an issue before the courts of first and second instance). The judgement in the *Bernaldez* case confirms that the First Directive does not preclude the insurer's right of recovery. I am obviously aware that in the aforementioned case the victim and the insured were not one and the same person. The judgement in the *Churchill Insurance Company* case where the insured became also the victim seems to preclude the recourse towards an insured being also a victim, but in fact it is more ambiguous than it may seem at first glance. Suffice it to say, it was the national court that rejected the insurers' position according to which the case was about the right to compensation to the victim followed by reimbursement of the same amount by the insured (being at the same time the victim) to the insurer, and the question the British court asked to the CJEU was based on the assumption that the dispute focused on the automatic exclusion of the benefit of compensation. The CJEU answered this question, highlighting that it was exclusively the national court's power to interpret the national legislation and assess its effects. In this context, it seems that the issue of recourse against a policyholder who committed a fraud when taking out an MTPL policy and subsequently became a victim is still open. Is there anything in the wording or the goals of the Directive 2009/103 that precludes a recourse towards a fraudulent policyholder if such a person becomes subsequently a victim?

Last but not least, the Cour de Cassation assumed that in the event that the nullity of the insurance contract is declared to be unenforceable against the victim who is the policyholder, the victim will be entitled to receive compensation from the insurance guarantee fund ('*the Fonds de garantie des assurances obligatoires de dommages*'). As a side note: one can presume that it would not be the case if the insurer were held to be liable towards the victim on the grounds of the MTPL policy, but would be allowed to enforce its right of recovery towards the policyholder (and the victim at the same time). Anyway, the French court is not asking about the interpretation of Article 10 (1) and (2) of Directive 2009/103 and the possibility of excluding also the liability of the insurance guarantee fund if a policyholder who subsequently becomes also a victim intentionally makes a false statement towards the insurer, and it leads to the nullity of the policy *ab initio* under national law. One may, however, still wonder whether it was the European law maker's intention to provide protection to a fraudster who happened to become also a victim.

To sum up, it is not my intention to challenge the tendency to protect victims of road traffic accidents in their dealings with MTPL insurers, even if they act in a negligent way. Nevertheless, there must be some boundaries to this tendency. Do fraudsters deserve protection?

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Jak daleko powinna sięgać ochrona poszkodowanego w wypadku drogowym w ramach ubezpieczenia komunikacyjnego OC?

Niniejszy artykuł został zainspirowany wnioskiem o wydanie orzeczenia w trybie prejudycjalnym złożonym przez francuski Cour de Cassation (Mutuelle assurance des travailleurs mutualistes (Matmut) przeciwko TN i innym, sprawa C-236/23). Cour de Cassation zwrócił się z pytaniem, czy „art. 3 i 13 dyrektywy Parlamentu Europejskiego i Rady 2009/103 z dnia 16 września 2009 r. należy interpretować w ten sposób, że stoją one na przeszkodzie uznaniu nieważności umowy ubezpieczenia komunikacyjnego odpowiedzialności cywilnej wobec pasażera będącego poszkodowanym, w sytuacji gdy osoba ta jest również ubezpieczającym i umyślnie złożyła fałszywe oświadczenie w momencie zawierania umowy, które spowodowało tę nieważność". Cour de Cassation zauważył, że TSUE dotychczasowo nie orzekł, czy na nieważność umowy można się powołać wobec poszkodowanego, który był pasażerem pojazdu, w przypadku gdy poszkodowany jest jednocześnie ubezpieczającym i osobą, która złożyła umyślnie fałszywe oświadczenie, co spowodowało nieważność umowy ubezpieczenia w świetle prawa krajowego. Żaden z wyroków wydanych przez TSUE nie odnosi się do takiej sytuacji. W tym przypadku mamy do czynienia z oczywistym oszustwem ubezpieczeniowym popełnionym przez osobę, która następnie doznała obrażeń w wypadku spowodowanym przez kierowcę pojazdu, na który została wykupiona polisa przez poszkodowanego będącego jednocześnie ubezpieczającym. Czy prawo unijne powinno chronić również te osoby, które ewidentnie próbują nadużyć umowy ubezpieczenia? Czy mamy pomijać fakt, że umowa ubezpieczenia ze swej natury zawsze opierała się na wzajemnym zaufaniu (umowa uberrimae fidei)? Czy zasady rządzące ubezpieczeniami komunikacyjnymi OC powinny iść tak daleko, jak w żadnym innym ubezpieczeniu? Czy oszuści zasługują na ochronę?

Słowa kluczowe: Ubezpieczenie komunikacyjne OC, wyłączenia odpowiedzialności, oszustwo, orzeczenie prejudycjalne

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