GLOSS

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https://doi.org/10.33995/wu2024.1.5
date of receipt:02.03.2024
date of acceptance: 23.04.2024

Gloss to a judgement of CJEU of 30th or March 2023, C-618/21 AR and others versus PK S.A. and others

Judgement of CJEU of 30th of March 2023, C-618/21 AR and others versus PK S.A. and others address the question referring to the possibility of estimation of insurance compensation for the damaged car due to the injured from insurance against civil liability in respect of the use of motor vehicle as hypothetical costs of repair. The author approves the judgement of CJEU which says that national law may limit the redress accessible to the injured party from the insurer to the monetary compensation, and that such compensation may not be lower than compensation accessible according to a national law on general basis. As far as admissibility of estimation of the insurance compensation as the hypothetical costs of repair in the Polish law the author adopts the compromise view pointing that it depends on the circumstances of the case. As a rule the insured party has the right to such compensation without the need of proving how much he has spent for the repair, but the injured does not have such right if the car was sold without repair.

Keywords: Insurance compensation, costs of repair, compulsory motor insurance, direct right of action,

Article 18 of Directive 2009/103/ must be interpreted as

- not precluding national legislation which, in the event of a direct action by the person whose vehicle has suffered damage as a result of a road traffic accident against the insurer of the person responsible for that accident, provides that the sole means of obtaining redress from that insurer is by way of monetary compensation,
- precluding rules for the calculation of that compensation and conditions relating to its payment, in so far as they would have the effect, in the context of a direct action brought under Article 18,

of excluding or limiting the insurer's obligation, under Article 3, to cover all the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by that party.

The judgement was the effect of arequest for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla m.st. Warszawy (District Court for the Capital City of Warsaw, Poland).

Polish Background

The questions that were raised by the District Court in Warsaw seems to be a result of a "crusade" lead by the legal environment connected with the University of Warsaw against so-called estimation method of the motor insurance claim settlement. To make the context clear to a non-Polish reader it should be explained that so-called partial losses, that is losses not exceeding the value of the car before the accident, are traditionally liquidated by Polish insurers in two ways:

1) in the so-called service method the insurer covers the value of the invoices issued by a car garage for the car repair,
2) in the so-called estimation method the insurer prepares the estimation of the costs of hypothetical repair of the car and pays their value.

For a long time the second method was economically beneficial for both parties: for insurers, because by cutting costs of the estimation they usually pay less than in a service method; for the injured, because nobody was asking them how they would really use the money. As a result they may repair the car cheaper than predicted by the insurer keeping the surplus or even sell the damaged car without repairing it still keeping the damages paid by the insurers.

In recent years the trade with claims against insurers has developed. Those claims were excessively assigned to various firms that tried to sue the insurers for damages calculated on the basis of the estimation method regardless of what had happened with the car. Unfortunately for the insurers the judicature of the Polish Supreme Court does not justifyany differences for the detriment of the victim as regards cutting of estimation for example by adopting the wages of the non-authorised car garage and the costs of used or not original spare parts. In 2022 Polish Financial Supervision Authority issued a "Recommendations on motor vehicle insurance claim settlement for the insurers" preventing them from using different wages and costs in estimation method than in the service method[1]. From that moment the estimation method lost economic justification from the point of view of the insurers. As a result of those the insurers started to quote in the courts the opinions of some Warsaw scholars questioning the admissibility of the estimation method under the Polish civil law especially when the car was sold unrepaired or repaired cheaper than the estimated (hypothetical) costs of the repair.

Article 363 § 1 of the Polish Civil Code (CC) provides:

'Compensation for the damage should be effected, as the injured party chooses, either by restoration to the previous state or by payment of a corresponding sum of money. However, if restoration to the previous state is impossible or involved excessive difficulty or costs for the party liable, the injured party's right of action shall be limited to a monetary payment.'

1. The recommendations in theory do not make the binding law, but the supervision authority may discipline the insurers in various ways for not following it.

Article 822 § 1 to 4 CC states:

§ 1. By a civil liability insurance contract, the insurer undertakes to pay compensation, as specified in the policy, for damage caused to third parties in respect of whom the policyholder or insured person bears liability.

(…)

§ 4. A person entitled to compensation for a contingency covered by a civil liability insurance policy may bring an action directly against the insurer.

The Polish Supreme Court accepted the described above practice of the settlement of motor insurance losses by paying the hypothetical costs of the repair regardless of the car owner's intention to repair the car or not, and if yes – where. The usual justification was that the loss is suffered once the car is damaged and it may be covered by paying to the owner the hypothetical cost of the repair to the owner. The later decisions of the owner not to repair the car or repair it cheaper than estimated donot matter since the owner may do with theircar whatever they wish. Furthermore, if the car is repaired cheaper than estimated it is probably not repaired properly[2].

Some Warsaw scholars challenged the estimation method in total by saying that it is not envisaged by the Polish Civil Code, which provides only for reinstatement *in natura* or paying the damages estimated with the use of the differential method, that is granting the injured party the difference between the value of a property if the damage did not occur and the value of a damaged property, not allowing that party to enrich itself[3]. Some others are of the opinion that Art. 822 CCmodifies Art. 363 CC allowing the insurer to pay the cost of reinstatement instead of reinstating (repairing) the property *in natura*[4] or that the cost of repair are corresponding sum of money according to Art. 363 CC[5]. All those authors agree, however, that paying the hypothetical cost of repair leads to enrichment of the injured party when the repair is no longer possible (the car has been already repaired

2. E.g. judgements of the Polish Supreme Court of 16th May 2002, V CKN 1273/00, not published, of 8th March 2018, II CNP 32/17, not published, of 12th April 2018, not published, , II CNP 43/17, of 7th December 2018, III CZP 73/18, of 3rd April 2019, II CSK 100/18, not published, of 11th April 2019, III CZP 102/18, not published, of16th May 2019, III CZP 86/18, not published.

3. M. Kaliński, *O wadliwej obiektywizacji szkody*, SI 2007, t. 47, p. 108 – 110, M. Kaliński, *Glosa do wyroku SN z dnia 12 stycznia 2006*, II CK 327/05, PA 2009, nr 7, p. 67., M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2011, p. 496–497, R. Hadrowicz, P. Ratusznik, *O tak zwanej „restytucji pieniężnej" – przyczynek do rozważań na temat zakresu ochrony poszkodowanego*, Przegląd Sądowy 2002, nr 7–8, p. 78, S. Hadrowicz, *Roszczenie o restytucję pieniężną a sprzedaż uszkodzonego pojazdu*, Glosa 2002/4, p. 82–85.

4. M. Krajewski, *Szkoda na mieniu wynikająca z wypadków komunikacyjnych*, Warszawa 2017, s. 47–51, M. Krajewski, *Rola orzecznictwa w wyznaczaniu granic ochrony poszkodowanych w wypadkach komunikacyjnych* (in:) *Ubezpieczenie OC posiadaczy pojazdów mechanicznych – nowe spojrzenie na znaną instytucję*, Ed. M. Orlicki, J. Pokrzywniak, A. Raczyński, Poznań 2021, p. 76–79.

5. B. Janiszewska, *Nadmierne koszty restytucji a odpowiedzialność ubezpieczeniowa za tzw. szkody komunikacyjne*, SI 2007, t. 47, s. 43 i n.

or sold without reparation). Two of those authors were appointed the judges of the Supreme Court[6] and try to enforce their opinions changing the earlier constituted and described line of jurisdiction[7].

European Union law

Recital 30 of Directive 2009/103 stresses the importance of a direct right of action provided for victims of motor vehicle accidents towards the insurer.

Article 3 of the Directive states that:

'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.

…

The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.

Article 9 paragraph 1 of the Directive sets minimum guarantee sums for a compulsory motor insurance.

Article 18 of Directive 2009/103 obliges Member States to equip the injured in car accidents direct right of action against the insurer of the person responsible for the accident.

The disputes in the main proceedings and the questions referred for a preliminary ruling

There were six similar cases pending before the District Court for the Capital City of Warsaw.. In five of them the applicants sought compensation for the damage caused to their vehicles as a result of road traffic accidents. In the sixth dispute, AR sought compensation for the damage caused to vehicle by a falling garage door. All of the applicants in the main proceedings assessed their loss on the basis of repair costs corresponding to the estimated market value of the original parts and labour required to repair the damaged vehicle. Insofar as the vehicles concerned have not yet been repaired, the referring court classifies those repair costs as 'hypothetical'. The defendants – insurance companies, argued that the compensation may not exceed the value of the loss calculated according to a 'differential' method, that is the difference between what would have been the value of the damaged vehicle if the accident had not occurred and the current value of the vehicle, in its damaged state. According to insurance undertakings, the repair costs can be taken into account only if it is demonstrated that those costs were actually incurred.

6. The appointment was made by the new National Council or Judiciary whose independence is doubted by CJEU, so the validity of the appointment as well as the judgements of the persons appointed may be a matter of controversy. – See e.g. judgements 19th November 2019, C-585/18, C-624/18, C-625/18, of 15th July 2021, C-791/19, European Comission vs Republic of Poland, ECLI:EU:C:2020:147.

7. Judgements of the Polish Supreme Court of 17th of July 2019, V CNP 43/19, not published, 18th November 2021, OSNC 2022/11/112, 10 June 2021, IV CNPP 1/21, OSNC 2022/3/33, of 7 December 2022, II CNPP 762/22, OSNC 2023/6/62, of 15th December 2022, II CNPP 7/22, not published.

According to the referring court, the court practice accepting the compensation to be paid to the owner of a damaged vehicle calculated on the basis of the hypothetical costs of the repair regardless of the answer to the question whether such compensation may be used to finance the repair of the vehicle results in the unjustified enrichment of those persons, to the detriment of all other policyholders, to whom insurance undertakings pass on the cost of that excessive compensation, by requiring them to pay ever higher premiums. The court noted that the criticised case law allowing the enrichment of the plaintiffs could be justified by the special protection of victims of road traffic accidents under EU law which makes it necessary to clarify the scope of the injured party's rights arising from the direct right of action against the insurer, provided for in Article 18 of Directive 2009/103.

The court consider of whether the EU law precludes the provisions of national law which have the effect of depriving an injured party who wishes to bring a direct action against the insurance undertaking of one of the means of redress for damage provided for by national law. According to the court Art. 822 CC may be interpreted as that the benefit provided by the insurer can only be of a monetary nature or that it recognises that injured party's right to require from the insurer, instead of arranging the repair, to pay the funds necessary for that purpose. Favouring the second option the court also asks whether EU law precludes the application of rules of national law which allow the payment to the injured party of the funds necessary for the repair of his or her vehicle to be accompanied by conditions intended to prevent that person from being able to use those funds for purposes other than that repair and from benefiting from a situation in which his or her assets would increase as a result of the accident, which would be the result of adjudicating the compensation equal to the hypothetical costs of the repair to a party who sold the car unrepaired.

Finally, the court recognised that the claim of the applicant whose car has been damaged as a result of the falling of the garage door does not fall within the scope of Directive 2009/103. However, it seems reasonable to that court, in the light of the 'principle of equality before the law', to apply to such a dispute the same principles as those applicable to the other disputes in the main proceedings.

In those circumstances the Court decided to stay the proceedings and to refer the following questions to CJEU for a preliminary ruling:

1) Must Article 18 of [Directive 2009/103, in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an injured party who exercises a direct right of action for repair of the damage to his or her vehicle in connection with the use of motor vehicles against an insurance undertaking covering the person responsible for the accident, as regards civil liability, can obtain from the insurance undertaking only compensation for the real and actual loss to his or her property, [that] is to say, the difference between the value of the vehicle in its state before the accident and the value of the damaged vehicle, plus the reasonable costs actually incurred in repairing the vehicle and any other reasonable costs actually incurred as a result of the accident, whereas if he or she sought a remedy directly from the person responsible, he or she could opt to require the latter to restore the vehicle to its state before the damage occurred (repair of the damage by the person responsible or by a garage paid by that person), instead of claiming compensation?
2) If the answer to the previous question is in the affirmative, must Article 18 of [Directive 2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an injured party who exercises a direct right of action for repair of the damage

to his or her vehicle in connection with the use of motor vehicles against an insurance undertaking covering the person responsible for the accident, as regards civil liability, can obtain from the insurance undertaking, instead of compensation for the real and actual loss to his or her property, [that] is to say, the difference between the value of the vehicle in its state before the accident and the value of the damaged vehicle, plus the reasonable costs actually incurred whilerepairing the vehicle and any other reasonable costs actually incurred as a result of the accident, only an amount corresponding to the costs of restoring the vehicle to its state before the damage, whereas if he or she sought a remedy 6 ECLI:EU:C:2023:278 JUDGMENT OF 30. 3. 2023 – CASE C-618/21 AR AND OTHERS (DIRECT ACTION AGAINST THE INSURER) directly from the person responsible, he or she could opt to require the latter to restore the vehicle to its state before the damage occurred (and not merely provide funds for that purpose), instead of claiming compensation?

3) If the answer to the first question is in the affirmative and the answer to the second question is in the negative, must Article 18 of [Directive 2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an insurance undertaking, to which the owner of a car damaged in connection with the use of motor vehicles applied for payment of hypothetical costs which he or she has not incurred but would have had to incur if he or she had decided to restore the vehicle to its state before the accident, can: (a) make that payment conditional on the injured party proving that he or she genuinely intends to have the vehicle repaired in a specific way, by a specific mechanic, at a specific price for parts and services, and to transfer the funds for that repair directly to that mechanic (or to the seller of the parts necessary for the repair), subject to reimbursement, if the purpose for which the funds were paid should not be fulfilled, and if not, (b) make that payment conditional on the consumer undertaking to show, within an agreed period, that he or she has used the funds paid to repair the vehicle or to reimburse them to the insurance undertaking, and if not, (c) after the payment of those funds and indication of the purpose of the payment (the manner in which they are used) and expiry of the necessary period during which the injured party was able to have the car repaired), require him or her to show that those funds have been spent on the repair or refunded so as to rule out the possibility of the injured party enriching himself or herself as a result of the damage?

4) If the answer to the first question is in the affirmative and the answer to the second question is in the negative, must Article 18 of [Directive 2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which the injured party, who is no longer the owner of the damaged car because he or she has sold it and received money in return, and thus can no longer have it repaired, cannot therefore claim from the insurance undertaking covering the person responsible for the accident, as regards civil liability, payment of the costs of the repair which would have been necessary to restore the damaged vehicle to the state before the damage, and [the injured party's] right of action is limited to claiming from the insurance undertaking compensation for the real and actual loss to his or her property, [that] is to say, the difference between the value of the vehicle in its state before the accident and the amount obtained from the sale of the vehicle, plus the reasonable costs of repairing the vehicle actually incurred and any other reasonable costs actually incurred as a result of the accident?'

The judgement of CJEU

The doubts referring to the admissibility of the request for a preliminary ruling concerned two demurs. First, according to one of the defendants, the questions referred to the scope of insurance compensation for losses arising from the use of motor vehicles, as provided for in the Polish law. Second, according to the Polish government the first two questions were hypothetical since the plaintiffs do not seek the repair of the vehicle but payment of the damages.

As far as the first demur is concerned, the CJEU stated that the referring court wants to know whether the exercise of a direct right of action provided by Art. 18 of Directive 2009/103 may be restricted by additional rules as provided for by domestic law by a member country. As far are the second demur is concerned, the CJEU noted that the referring court is conscious of the fact that the plaintiffs seek monetary compensation, but want to know whether in the situation where the domestic law provides for monetary compensation or repair of the vehicle according to the choice of the injured party the latter may exercise their direct right of action towards the insurer seeking compensation calculated not on the basis of the 'differential' method but on the basis of the costs necessary to restore that vehicle to its original condition.

At the same time CJEU observed that the loss that was effected by the fall of the garage door does not fall within the scope of Directive 2009/103. Considerations whether the principle of equality before the law suggests that the situation of the person injured by falling of the garage door and by a motion of a vehicle should be similar according to the principles of the domestic law, and thus fall outside the CJEU jurisdiction. Consequently, CJEU admitted the request for a preliminary ruling, except insofar as it concerns the dispute referring the scope of compensation for falling of the garage door.

According to CJEU all questions may be treated jointly as referring to one problem, that is whether the direct right of action provided by Art. 18 with conjunction of Art. 3 of the Directive precludes domestic laws of the member states from limiting the remedy to monetary compensation and, if applicable, what obligations arise from such provisions as regards the rules for the calculation of that compensation and the conditions relating to its payment. The CJEU cited recital 30 of the Directive which allows the injured party that is not a party to the insurance contract to invoke such a contract and claim from the insurer directly, and observed that athird party may have only such right that could be raised from the insurance contract by the insured. Thus, if the insurance contract provides for monetary compensation as the sole remedy, only such remedy is accessible to the insured party. To be concluded, the EU law does not preclude member states from limiting the direct right of action to the action for monetary compensation as it is done by Art. 822 of the Polish Civil Code.

Considering questions referring to the scope of such compensation and possibility of introducing the conditions intended to ensure that the injured party will designate all the proceeds gained from the insurer for repair of the vehicle, CJEU reminded that according to its earlier judicature the national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the European Union does not result in unjust enrichment of the persons concerned. However, according to CJUE, the EU law concerns only the obligation to provide insurance cover against civil liability for damage caused to third parties by motor vehicles and not the extent of the compensation to be afforded to them on the basis of the civil liability of the insured person which is a separate question. The EU law does not harmonise the national laws as regards to the second question.

According to the CJEU the payment of the benefit by the insurer may be only subject to conditions expressly laid down in the insurance contract. The member countries may not undermine the effectiveness of the direct right of action provided for in Article 18 of Directive 2009/103. Neither the provisions of the domestic law, nor the provisions of the insurance policy may have the effect of excluding or limiting the insurer's obligation, under Article 3 of the Directive, to cover in full the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by the latter. Consequently, the CJEU gave the answers quoted at the beginning of the present gloss.

Personal evaluation of the judgement

The first *prima facie* impression after reading the judgement of CJUE is disappointment. The referring court might have felt disappointed after realizing that all the questions except the last one were allowed and, at the same time the judgement does not give the answer to the real problem of whether the injured party hasa right to a compensation calculated as the cost of repair of the car regardless of the fact whether the car has been repaired and on what costs it has been repaired.

It is submitted, however, that this first impression is wrong. Taking into account the aims of the Directive, CJUE could not have given more precise answers and more proper impression should be a relief that CJUE, despite allowing all the questions, did not try to interfere with the standards of compensation provided by national laws.

As it was noted at the beginning of the gloss, the District Court for the Capital City of Warsaw was really trying to obtain CJUE's support for the opinion of the Warsaw scholars that the so-called estimated method of liquidation of the motor losses has no grounds within the national legal framework, and that the foregoing line of the judicature of Polish courts should have been changed. Looking for the help of CJUE at this subject seems a bit awkward and it may be doubted whether the referring court was really expecting a direct answer to its problem or counted just onsome guidelines. Anyway, instead of solutions or any guidelines, the court got only a reminder of the basic principles of EU law.

The importance of the judgement lies really in the above reminder of those principles and the distinction between what is covered by the EU law and what is not. The principles are that civil liability in respect of use of motor vehicles in EU shall be covered by insurance. The injured party shall have the right to claim compensation directly from the insurer on similar basis regardless of where the accident took place and which member states citizens were involved. On the other hand, the extent of the liability covered, as well as the terms and conditions of the insurance cover are to be determined by the member states (Art. 3). The European legislator stresses the importance of protection by compulsory cover for personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised road users. But even in this respect indicates that compulsory motor insurance cover does not prejudge any liability that might be incurred pursuant to the applicable national legislation, nor the level of any award of damages in a specific accident (Art. 12).

Both answers given by CJUE stem from the above. Firstly, the countries may limit the claim towards the insurer to a monetary compensation. This may be additionally justified by the fact that monetary compensation is a traditional way of performance by the insurer. Performance

in natura (specific performance) is rather exceptional and refers mainly to assistance insurance (group 18 according to Annex II to Directive 2009/138). In the modern world specific performance is rare and difficult to enforce. It is more practical to claim damages. The common law traditionally treats specific performance as an exceptional supplementary remedy available only if damages are inadequate[8]. Secondly, monetary compensation from a motor insurer may not be smaller or subject to special conditions in comparison to the compensation which the person responsible for the damage must provide to the injured party according to a national law.

What is also important, the Directive outlines only a minimum standard of protection letting member states to maintain or bring into force provisions more favourable to injured parties than the provisions of the Directive (Art. 28). Probably for this reason the CJUE did not answer the real question of the referring court that is whether the compensation from the insurer may have greater extent than the compensation which the person responsible for the damage must provide. In this respect the CJUE only reserved, quoting its previous judgement of 25 March 2021, Balgarska Narodna Banka, C-501/18 and of 21 March 2023, Mercedes-Benz Group, that national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the European Union does not result in unjust enrichment of the persons concerned.

Consequently, the question whether the action for compensation calculated as the hypothetical cost of repair of the car is accessible to the party that had the car repaired or had it repaired cheaper shall be answered by the national courts. It must be noted that the above problem is not specifically Polish, although probably it has the biggest importance there, since the Polish citizens have learned to earn on insurance demanding such compensation without repairing the car or with repairing it at the cheapest costs possible. The problem wasmet also by German[9] and Austrian Courts[10], which held that compensation estimated as the cost of repair may not exceed the objective decrease of the value of the thing unless the injured party really repaired the thing.

This view is contrary tothe traditional opinion of the Polish Supreme Court which, up till the appointment of the so-called new judges, consequently adopted the view that the loss is suffered once occurred. If the thing is damaged, the injured party may claim according to their choice the difference in the value of undamaged and damaged or the costs of repair. In the second case it is his/her decision as the owner of the thing whether he/she spends the money on the repair of the thing or onsomething else. Furthermore, the injured may not bear the consequences of the wrong decisions of the insurer whichwrongly refuses to pay the compensation covering the costs of the repair or underestimates them. The injured does not have to wait with the repair till the outcome of the court proceedings, which may last few years in Poland.

It is alleged that according to the Polish standpoint a compromise view may be adopted. According to the Code of Civil Procedure the court, when giving the judgement, shall take into account the state of facts from closing of the court proceeding (Art. 318). This means that the court should not skip over the circumstance that the car was sold without repair or was already repaired. In the first case the estimate compensation shall be limited to the objective decrease of the value

8. E.g. E. McKendrick, *Contract Law*, London 1998, p. 397.
9. Judgement OLG Koblenz of 10.02.2020, 12 U 1134/19, NJW-RR 2020, 349, Jugdgement BGH of 3.12.2013, VI ZR 24/13, NJW 2014, 535. – Both cited by S. Hadrowicz, *Roszczenie o restytucję* …, p. 85.
10. Judgement of Autstrian Supreme Court of 29.09.2019, 1 Ob 105/19a,JBI 2019, 787. Cited by M. Kosmol, *Odszkodowanie kosztorysowe a nieosiągnięcie zamierzonego celu świadczenia*, WU 2021/4.

of car, unless the car was sold during a course of a protracting court proceeding . In the second case it is not the problem of the injured to prove that the actual cost of the repair was equal to the hypothetical estimate cost, but of the insurer – that they were smaller. If the insurer is able to prove that the repair was done at a cheaper cost and the effect of the repair was exactly the same as the repair done at the estimate cost, the compensation may be reduced to the objective diminution of the damaged car value. The same shall be done when the claimant is not the owner of the car but the assignee of the claim for compensation who did not prove what actually happened with the car. In all other situations the compensation equal to hypothetical costs of repair shall be adjudicated unless the insurer is able to demonstrate that in the proven state of fact claiming such compensation is the abuse of the right of the claimant.

The Polish problem at the moment is a consequence of the development of the judicature of the Supreme court that not always takes into account the changing conditions of a modern world and the mentioned "Recommendations on motor vehicle claim settlements" issued by the Polish supervision authority. It is alleged that when the claimant demands damages estimated as the cost of a hypothetical repair without proving that the repair was done and at what cost the damages shall be estimated, not according to pay rates of the authorised car garage, but according to the rates of aneasily accessible independent garage providing services of the same quality as an authorised one without additional cost. This was normal judicature of the Polish courts[11] which makes the estimate method of motor insurance claim settlement profitable both to insurers and to injured parties. This is also the judicature of German courts[12]. Obliging the insurer to use the excessive rates of authorised car garages always when settling the claims according to estimation method upsets the balance of interests and economic justification of the estimation method on the insurance market referred to at the beginning of the gloss.

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12. Judgement of BGH of 7.02.2017, VI ZR 182/16, VersR 2017, 504, cited by S. Hadrowicz, *Roszczenie o restytucję*…, p. 85.

Glosa do wyroku TSUE z dnia 30 marca 2023 r., C-618/21 AR i in. przeciwko PK S.A. i in.

Wyrok TSUE z 30 marca 2023 r. w sprawie C-618/23 AR i inni dotyczy pytania o możliwość wyliczania należnego poszkodowanemu odszkodowania z obowiązkowego ubezpieczenia odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych za uszkodzony samochód jako hipotetycznych kosztów naprawy. Autor aprobuje rozstrzygnięcie TSUE, który wskazał, /że odszkodowanie z ubezpieczenia OC posiadaczy pojazdów mechanicznych może być ograniczone do odszkodowania pieniężnego oraz, że nie powinno być ono mniejsze niż odszkodowanie dostępne według prawa krajowego za zasadach ogólnych. W sprawie samej dopuszczalności wyliczania odszkodowania jako hipotetycznych koszów naprawy w prawie polskim autor zajmuje stanowisko kompromisowe wskazując, że zależy to od okoliczności sprawy. Co do zasady poszkodowany ma prawo do takiego odszkodowania nie musząc dowodzić, ile wydał na naprawę, nie ma go jednak, jeżeli zbył samochód nie naprawiwszy go.

Słowa kluczowe: odszkodowanie ubezpieczeniowe, koszty naprawy, ubezpieczenie OC posiadaczy pojazdów mechanicznych, roszczenie bezpośrednie,

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