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Compensation for property damage in motor third party liability insurance

This article discusses to what extent damage to property (and in particular damage to a vehicle) can be recovered under compulsory motor third party liability insurance in Poland. The author first presents the rules governing liability for traffic accidents, and then introduces the compensatory mechanism of compulsory third party liability insurance. The core parts of the article focus on individual, old and new, elements of a recoverable loss, including the loss of market value of a repaired car, loss of use, and costs of legal representation in pre-trial claims settlement proceedings. In the light of case law there exists no standard uniform approach to compensation of property damage, but certain objective criteria must be applied on a case-by-case basis, depending onto the particular circumstances of each a given case.

Key words: amage to property, motor insurance, indemnity, cost of hire, loss of market value.

Introduction to the rules of liability for traffic accidents

When referring to liability for traffic accidents, the Polish Civil Code of 1964 (hereinafter, the “CC”) uses the expression “the liability for damage caused by the operation of vehicles propelled by forces of nature”. Since the pre-war period, it has been the general principle of Polish law that the possessor of a vehicle bears strict liability. This rule of thumb, formerly stated in article 153 of the 1933 Code of Obligations, has been re-iterated in article 436 [1] CC, read in conjunction with article 435 [1] CC. The liability is borne by the “independent possessor” of a vehicle, or by the “dependent possessor” of a vehicle, if the possession of a vehicle has been transferred by the former to the latter.¹ A driver who qualifies as a possessor will be liable as one, while in other cases, they can be held liable for his own fault, jointly and severally with the possessor of a vehicle.

However, by way of an exception to the general rule, the liability of the possessor will be fault-based with regard to:

1. Under the Code of Obligations of 1933, the liability rested primarily with the owner; the liability of the user or a person who took control of the vehicle was only secondary.

- 1) Counterclaims between possessors of the vehicles involved in a collision; and
- 2) Damage suffered by persons carried by courtesy.²

The concept of “collision” is broadly understood as the physical contact of at least two vehicles that remain in motion in relation to each other within the meaning of the Road Traffic Act of 20 June 1997.³ The collision is any contact of vehicles in motion, regardless of its cause.⁴ If both possessors are at fault, each of them is obliged to redress the damage suffered by the other. In the case where neither party acted negligently, no cause of action arises and each person has to bear his/her own loss.⁵

Obviously, injuries resulting from a collision may be suffered by persons other than possessors, for example by passengers carried for remuneration or gratuitously (by courtesy), as well as by passers-by. The liability of the possessors towards such victims is joint and several (article 441 CC).⁶ It is also a strict liability, except for that of the possessor who carries a passenger by courtesy, which is fault-based (as mentioned above).⁷ A driver who is not a possessor of the car involved in an accident is a third party vis-a-vis the possessor of the car. However, if the accident is solely attributable to the driver, he has no cause of action against the possessor.

1. Compulsory motor third party liability insurance

All possessors of cars are obliged to take out civil (third party) liability insurance against damage arising from road traffic. Compulsory motor third party liability (herein also referred to as ‘traffic liability insurance’) is governed by the Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers’ Bureau, which implements five EU motor insurance directives.⁸ When damage occurs, an insurer pays compensation to any injured person each time an insured bears civil liability for the damage, within the limits of this liability and subject to the contractual limit of coverage. The above-mentioned Act defines the terms and conditions of the insurance, hence they are uniform for all possessors of vehicles, irrespective of their choice of provider of motor third party cover.⁹

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2. M. Nesterowicz and E. Bagińska, “Civil Liability for Automobile Accidents in Polish law” in *Essays on Tort, Insurance, law and society in honour of Bill W. Dufwa*, Vol. II (Stockholm 2006), 839–840.
 3. Journal of Laws [Dz.U.] of 1998, item 602 as amended; the judgment of the Supreme Court [*Sąd Najwyższy*, SN] of 5 February 2002, case no. V CKN 644/00, OSN 12/2002, item 156.
 4. The judgment of SN of 4 March 1958, I CR 154/56, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* (Case Reports of the Polish Courts and Arbitration Commissions, currently published under the acronym OSP) OSPiKA 10/1959, item 257; SN, 2 January 1976, case no. III CZP 79/75, *Orzecznictwo Sądu Najwyższego Izba Cywilna* (Case Reports of the Supreme Court, Civil Chamber, OSNC) OSNC 7–8/1976, item 155.
 5. M. Nesterowicz and E. Bagińska, “Civil...”, 839.
 6. SN 19 May 1970, II CR 157/70, OSPiKA 5/1971, item 90.
 7. M. Nesterowicz and E. Bagińska, “Civil...”, 839.
 8. The Act on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers’ Bureau, (Compulsory Insurance Act) of 22 May 2003, Journal of Laws [Dz. U.] of 2003, no. 124, item 1152.
 9. See more: E. Kowalewski, “The decline of civil liability for traffic accidents – illusion or reality?”, in *Kompensacja szkód komunikacyjnych. Nowoczesne rozwiązania ubezpieczeniowe/ Traffic Accident Compensation Modern Insurance Solutions*, ed. K. Ludwichowska (Warszawa: Poltext, 2011), 23 and 33.

As already mentioned, Polish law has adopted the “car possessor” instead of the “car owner” legislation model, hence the insurance, technically speaking, should be taken out by the possessor.¹⁰ However, typically, the possessor will be the car’s owner. In particular, each new registration of the car (the first one or each that follows a transfer of the car’s title) will not proceed without a proof of motor third party liability insurance.

Compulsory motor third party insurance policies provide civil liability coverage for all persons – both possessors of motor vehicles and non-possessor drivers – who, while driving the car during the policy period (in principle, 12 months), caused personal injury or damage to property (subject to certain restrictions, listed in para. III.1. below) to anyone, including a passenger who possesses the vehicle jointly with the driver.¹¹ The courts have clarified that compulsory third party liability insurance applies also to cases where the negligent driver is not the vehicle’s possessor while the injured passenger is a co-possessor of the car.¹²

In the case of an accident, the injured person may bring their claim directly to an insurer (*actio directa*¹³) or – where a loss was caused by an uninsured tortfeasor or by an unidentified vehicle – to the Insurance Guarantee Fund. The legal basis for a claim against an insurer is article 822 (4) CC and article 19 of the Compulsory Insurance Act. The action may be instigated before a court of general jurisdiction, or a court of the plaintiff’s domicile.

The insurer who compensated the claimant for his loss may either file a regular (general) recourse action against a person liable for the damage (under article 828 CC) or a *sui generis* recourse action based on article 43 of the Compulsory Insurance Act. The second type of recourse is available exclusively in compulsory motor third party liability insurance. A third party insurer is entitled to file a recourse claim against the driver of the car in any of the following situations: (a) the driver had no valid driving licence, (b) the driver intentionally caused the accident intoxicated or under the influence of illegal drugs or other substances, (c) the driver operated a stolen vehicle, or (d) the driver fled from the scene of the accident.¹⁴

In addition, the Polish Motor Insurers’ Bureau (PMIB) operates as a compensation body and information centre within the meaning of the Fourth Motor Insurance Directive. The PMIB performs the role of a compensation body in accordance with the Compulsory Insurance Act and agreements between compensation bodies and guarantee funds. The compensation body will not consider any claims if the injured party has taken legal action against an insurance company. In the cases governed by article 123 of the Compulsory Insurance Act the victim may refer his claims directly to the PMIB. The compensation must be paid within 30 days after the country of the vehicle’s registration is identified. The PMIB is obliged to provide access (electronic access) to all information regarding the proceedings, the accident and the extent of damage.

From the victims’ perspective the Polish model can be considered a *de facto* insurance compensation system. Their claims will usually be settled either by the tortfeasor’s insurer or by the Insurance Guarantee Fund. Therefore, in practice claims are filed against and compensation is paid by the insurer. The model of *actio directa* means that the victim has his own claim against

10. Article 23 of the Compulsory Insurance Act; M. Nesterowicz and E. Bagińska, “Civil...”, 841.

11. SN, 7 February 2008, III CZP 115/07, OSN 9/2008, item 96.

12. SN, 19 January 2007, III CZP 146/06, OSN 11/2007, item 161.

13. SN, 13 May 1996, II CZP 184/95, OSN 7–8/1996, item 91.

14. SN, 10 September 2009, V CSK 85/09, OSNC-ZD B/2010, item 63.

the insurer, but also that the insurer is an independent debtor, who can be joined as co-defendant at all stages of proceedings (most often, the insurer is the only defendant in the proceedings). This notwithstanding, the prerequisites and the scope of liability are determined by the rules of civil law.¹⁵ This is where judicial jurisprudence comes into the picture to play a significant role in defining limits of indemnity provided by the insurer. In general, Polish courts interpret statutory provisions concerning strict liability extensively and present a mixed, objective-subjective, approach to the assessment of damage.

2. Heads of damages in cases involving property damage

2.1. General remarks

The possessor of a vehicle is obliged to compensate for any personal injury and property damage that is recoverable under the rules of civil liability (articles 435 and 436 CC).

In Polish law the scope of liability is governed by articles 361–363 CC, which lay down general rules on damage and causation, and articles 444–449 CC which apply to personal injury cases. According to the general principle of full compensation it follows that all kinds of damage must be redressed. Material (pecuniary) loss must always be remedied, while non-pecuniary loss is compensable in money when the law provides for such a claim. The next part of the paper I will focus on the reparation of damage to property.

The courts¹⁶ have defined the notion of property damage by referring to the theory of difference. According to this theory damage is the difference between what the victim would have had at his disposal, with respect to the values affected by the damage, if the event which caused the damage had not occurred, and what he actually has at his disposal in consequence of this event.¹⁷ Similarly to other legal systems, also in Polish law damages (compensation) are to restore the victim to the position he would have been but for the wrong complained. According to the letter of article 361 § 2 CC the reparation comprises both the loss suffered and lost profits.¹⁸ There is no definition of “consequential loss” in Polish tort law, but it will nonetheless be redressed as long as it passes the test of adequate causation (article 361 § 2 CC).

In traffic liability insurance, the scope of liability of the possessor or driver of a vehicle determines the scope of compensation, up to a certain guaranteed limit. The statutory limit of liability for damage to property arising from a single event (regardless of the number of victims involved) is one million euro.¹⁹ The victim of a tort may demand compensation that covers the entire pecuniary damage, whether involving the destruction of or damage to a vehicle or the loss of personal

15. E. Kowalewski, “The decline of civil liability...”, 29 and 33–34.

16. The notion of “damage to property” is used as opposed to the notion of damage to a person and to personality interests that are intangible in nature.

17. See, for instance, SN, 11 November 1957, 2 CR 304/57, OSNC 3/1958, item 76.

18. Article 361 [2] CC reads: “Within the limits specified above, in the absence of any legal or contractual provision to the contrary, the redress of damage shall include the losses suffered by the injured person and the profits which he could have gained had he not sustained the damage”.

19. Article 36 [1.2] of the Compulsory Insurance Act.

belongings. However, article 38 (1) of the Compulsory Insurance Act provides for certain exclusions that apply to damage to property. Accordingly, the insurer is not obliged to pay for:

- Any damage to property sustained by the possessor of a vehicle because of the driver's negligent conduct;
- Any damage to property where the same person possesses both vehicles involved in the collision: the vehicle that caused the loss and the damaged vehicle;²⁰
- Damage to cargo, baggage or parcels carried for a fee, unless the possessor of another vehicle is liable for the damage;
- Loss of money, jewellery, securities documents or collections of postmarks and other similar collections,
- Damage to the environment.

Under the rules of civil law, an injured person may choose to have the damage cured either by the restitution to the previous condition or by the payment of an appropriate sum of money. However, if the restoration to the previous condition is impossible or it would entail undue hardship or excessive costs to the person liable, the injured person's claim shall be limited to a pecuniary payment. (article 363 (1) CC). Notwithstanding this rule, an insurer may only be obliged to provide an indemnity by paying monetary compensation for the loss, even if the injured party elects restitution in the lawsuit filed against the tortfeasor. Moreover, third party insurance policies introduce a cap on damages, which limits the guarantee liability of the insurer.

Pursuant to article 363 (2) CC, the amount of damages is determined according to the prices prevailing at the time compensation is awarded, unless special circumstances require that prices existing at another time be taken as the basis for the calculation.²¹ As the occurrence of damage is a dynamic fact, the value of damages is generally established at the date of the court judgment. Compensation for damage to property is determined by its *pretium commune* and *pretium singulare* for a victim. According to jurisprudence, the value described as *pretium affectionis* cannot be accepted as a method of determination of damages, for there is no legal basis to accept that method of valuation.²²

Furthermore, the Polish legal system has not developed any – official or unofficial – binding formula for the assessment of damages. In assessing the value of compensation, courts should take into consideration all circumstances of the case, including the individual situation of a victim, which must always be taken into account. However, a judge may freely assess some (or even all) items of damages, pursuant to the rule laid down in article 322 of the Code of Civil Procedure (CCP), which reads as follows: "If, in the case of a claim for damages, the court deems that it would be impossible or extremely difficult to accurately prove the amount of the claim, it may award a relevant amount of money, in accordance with its own assessment based on all the circumstances of a case". Courts often use this competence in awarding compensation for lost profits and in personal injury cases. As regards the former, the claimant should prove that he could have gained certain

20. On the other hand, courts' decisions clarified that compulsory third party liability insurance extends to cases where a negligent driver is not the possessor of a vehicle, but the injured passenger is a co-possessor of the vehicle. SN, 19 January 2007, III CZP 146/06, OSN 11/2007, item 161.

21. For example, the market price of a stolen car, as of the date of the court's award of compensation, will be considered as a basis of damages rather than the car purchase price paid by the claimant, or its market value on the day it was stolen – SN, 15 January 1998, III KKN 322/97, OSN 7–8/1999, item 129.

22. A. Szpunar, "Odszkodowanie za szkodę majątkową" [Bydgoszcz: Branta 1998], 82.

profits but has not gained them because of the consequences of an event that caused damage [for instance, a taxi owner has not received any income when his car was in a garage for repairs].

The main category of property damage in traffic liability area is damage to (or destruction of) a vehicle. The duty to remedy this type of damage arises at the moment when the same was inflicted (here: during a traffic accident), regardless of whether the injured party has or has not actually repaired the damaged car. The loss exists from the moment the event occurs until the payment of compensation that is assessed in a manner defined by law. Therefore, the fact whether or not the car has actually been repaired is irrelevant for the determination of the compensation payable by the insurer because in compulsory motor third party liability insurance the injured party cannot demand that his car be returned to its previous condition, but is entitled only to the payment of money. This payment must make up the difference between the present patrimonial standing of the injured party and the standing that would have existed if the event causing the damage had not occurred. Hence, the injured party claims compensation for the loss suffered and not the cost of repair.²³

Finally, the amount of damages can be reduced in two basic situations

First, if the victim contributed to the occurrence or the aggravation of damage, compensation may be reduced accordingly and, in particular, according to the degree of fault of both parties (article 362 CC).

Second, the unwritten principle of *compensatio lucri cum damno* is accepted by doctrine and applied by courts. It is justified by the theory of difference: if damages are to restore the victim to the position he would have been in if the wrong complained of had not been committed, then, when determining the amount of damages, the court should generally take into account the benefits that the victim gains because of the event that caused damage. The principle was clarified, in the context of an insurer's liability, in the Supreme Court's case of 13 October 2005, case no. I CK 185/05.²⁴ The facts of this case are as follows: The claimant's car, driven by his friend, was damaged in an accident by an insured driver. The friend brought the car to a garage and had it repaired at his own expense. Although the scope of damage was not in dispute, the insurer denied compensation and the lower courts held that the claimant had failed to prove that a material harm to his patrimony existed at the time the trial court's judgment was delivered. The Supreme Court held that a voluntary repair of a car damaged in a traffic accident, made on a third party's instructions and at his own expense, had not given any grounds to object to the existence of the claimant's economic loss, for which the defendant was liable pursuant to the relevant provisions of the Civil Code (namely articles 415, 436 [2] CC, governing liability in tort, and articles 805, 822 CC, applicable to the contract of insurance). Redress must include both elements: the actual loss and lost profits. According to the Supreme Court, the repair of the car paid by a third party should have been contemplated in the context of the principle of *compensatio lucri cum damno*. The Court recalled that voluntary contributions given by third parties to a victim (e.g. donations from a benevolent fund created by co-workers) may not be taken into account in the assessment of damages. Such payments do not aim to discharge the debtor's duty to compensate, but aim to benefit the injured party *ex gratia* and without them acquiring any recourse rights toward the debtor. Only profits flowing from the event itself may be deducted from the amount of damages awarded. There is no

23. SN Resolution of 7 Judges, 17 May 2007, III CZP 150/06, OSN 10/2007, item 144.

24. OSN 7-8/2006, item 133, reported in English by E. Baginska, "Poland" in *European Tort Law 2006*, eds. H. Koziol and B.C. Steininger (Springer 2008), 379-380 and 29-34.

ordinary causal link between a benevolent contribution and the event causing the damage, thus the sources of the benefit and the damage are different. By way of exception from this rule, legal scholarship permits deductions of payments made by a third party, but only when it is expressly agreed that the purpose of this party's payment is to release the debtor from the obligation to remedy damage. Applying this line of argument, the Supreme Court held that the principle of *compensatio lucri cum damno* did not apply to the case at hand.

2.2. Cost of repair

The possessor of a damaged car may elect where to have it repaired, based on criteria such as the high professional standard of a provider of repair services, availability of authorised spare parts, etc. Although the possessor has no duty to search for the least expensive services, the compensation should only cover indispensable and economically justified costs of repair, reflecting the prices applied in a local market. Prices charged by a garage will be deemed economically justified regardless of whether they are higher than the average market prices for a certain type of services. In the judgment of 13 June 2003 (IV CZP 32/03)²⁵ the Supreme Court clarified that insurers cannot unilaterally calculate damages for losses suffered by car owners based on average prices of repair services, holding that the practice of denying the reimbursement of any higher sums is not acceptable. Absent a regulation in the Civil Code, it is courts which develop and apply the criteria of measuring the costs of restitution. Moreover, any statements regarding costs made to the aggrieved party who is not in a contractual relation with the insurer are of no significance.

There are a number of detailed questions concerning the prices and characteristics of spare parts used for repairs. These questions have triggered fierce litigation in recent years.²⁶

In a recent judgment (the case of 12 April 2012, case no. III CZP 80/11²⁷) the Supreme Court ruled that an insurer was obliged to pay compensation that covers the purposeful and economically justified costs of new parts and materials that were used to repair a damaged vehicle. If an insurer proves that these will lead to an increase in the vehicle's market value, the compensation may be reduced by that increment. As a rule, the amount of compensation should include all purposeful and economically justified expenses that have been reasonably incurred in order to reinstate the damaged vehicle to its previous condition. The Supreme Court followed the linguistic and functional interpretation of article 363 (1) CC, read in conjunction with article 361 (2) CC. The said provisions do not permit a reduction in compensation based on a difference in the market value of new and used parts, if such a value is calculated separately for each part. Restitution should bring the vehicle as a whole to its condition from before the accident. It may appear *prima facie* that the exchange of old parts with new ones brings profit to the injured party because the new parts are more valuable. This is not, however, a correct conclusion. Having been fitted in a vehicle, the parts cannot be regarded as separate market goods, as they become a single element that should be evaluated in the assessment of the loss.

25. OSN 4/2004, item 51.

26. See more: D. Fuchs, E. Kowalewski, M. Wałachowska, M.P. Ziemiak, "Odszkodowanie za szkodę w pojazdach mechanicznych a kwestia cen części oryginalnych oraz amortyzacji i urealnienia ich wartości. Rozważania na kanwie obowiązkowego ubezpieczenia komunikacyjnego OC", *Wiadomości Ubezpieczeniowe* 3 (2012), 31–52.

27. OSNC 10/2012, item 112 reported by E. Bagińska and K. Krupa-Lipińska, "Poland" in *European Tort Law 2012*, eds. K. Oliphant and B.C. Steininger (Berlin: de Gruyter 2013), 527–529 and 23–30.

Moreover, when the new part is fitted, there is a high probability that its life will be shorter than the life of the same part incorporated into a new car. Therefore, it is incorrect to account for the value of a new part in relation to its market value. The Supreme Court noted that an injured party would only be unjustifiably enriched if the new part increased the vehicle's market value as a whole while it is commonly known that the price of a repaired car is lower than an unrepaired one, irrespective of whether or not any new parts were used in the repair. Therefore, an insurer should include the costs of new parts in the calculation of compensation, only if they were necessary to repair the car. There is no ground to consider the value of each part separately and reduce the compensation according to the extent of the part's wear and tear at the time of the accident.

In some situations, however, the fitting of new parts can increase the market value of a vehicle as a whole. In such cases, an insurer may reduce the value of compensation. For example, this may happen when the exchanged parts were severely worn and technically obsolete and, at the same time, they constituted a major element of the vehicle. In such cases, the burden of proof lies with the insurer. The Supreme Court held that a reduction in compensation in such circumstances would encourage a search for old parts, without (or with a shorter) warranty. This may have a negative impact on the safety of repaired vehicles, which might lead to serious risks to the health and life of road users. Needless to say, in practice it is very difficult to find a part with the same life as the damaged one.

The analysed judgment was significant for practices of the insurance sector. The Supreme Court appears to have confirmed a conservative judicial approach to the matter.²⁸ A deduction of a depreciation value should only be allowed for those parts of a vehicle that are commonly and constantly used, like tyres, filters, batteries, brake blocks, wipers, etc.²⁹

The next problem relates to the origin of the spare parts. The liberalisation of the EU market for motor services triggered the insurers' practice of calculating damages on the basis of replacement, non-original spare parts, although claimants have consistently demanded the reimbursement for the cost of original parts. In 2012, the Supreme Court³⁰ ruled that an insurer should include the costs of **original parts** in the calculation of compensation if the use of such parts was reasonable and economically necessary to have the car repaired. The definitions of "original spare parts" and "spare parts of matching quality", as laid down in Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector,³¹ and the equivalent Polish regulation,³² are applicable only to the situations (agreements) to which

28. SN, 20 October 1972, II CR 425/72, OSNC 6/1973, item 11; SN, 5 November 1980, III CRN 223/80, OSNC 10/1981, item 186. An increase in the market value of a vehicle after a repair might be considered only when the repaired parts were damaged before the accident or if the repair led to an improvement of the vehicle in relation to its prior condition.

29. D. Fuchs, "Odszkodowanie z tytułu ubezpieczenia OC posiadacza pojazdu a kwestia amortyzacji części zamiennych użytych do naprawy uszkodzonego pojazdu", *Wiadomości Ubezpieczeniowe* 1 (2012) 13 ff.

30. SN, 20 June 2012, III CZP 85/11, OSNC 3/2013, item 37, reported in full by E. Bagińska and I. Adrych-Brzezińska, "Poland" in *European Tort Law 2013*, eds. E. Karner and B.C. Steininger (Berlin: de Gruyter 2014), 508–510 and 78–87.

31. Official Journal (OJ) L 129, 28 May 2010, 52–57.

32. Regulation of the Council of Ministers of 8 October 2010 on the exemption of certain vertical agreements in the motor vehicle sector from the prohibition of competition-restricting agreements, *Journal of Laws* (Dz U) no 198, item 1315. The regulation expired on 31 May 2013. The presently applicable Regulation is dated 30 March 2011, *Journal of Laws* (Dz U) 2013, item 622.

those laws apply. Hence, they were not designed to be applied to the assessment of third party liability compensation. An insurer may not invoke the said regulations to reimburse the victim for a lower price of a “spare part of matching quality”. Given that compensation should cover purposeful and economically justified costs of repair, the victim has the right to claim compensation for the cost of original parts supplied by the producer that are used to repair a damaged vehicle. The assessment of compensation does not violate the prohibition of anti-competitive agreements imposed by the above regulations. In addition, such agreements are permissible for new cars (up to three years old) that are still covered by a producer’s warranty.

In the above-commented decision of 20 June 2012, the Supreme Court once again emphasised that the costs of repair, including the price of original or replacement parts, should be evaluated on a case-by-case basis. In general, the fitting of original parts that are manufactured by the vehicle’s producer or parts that are authorised by the producer as those of comparable quality³³ (e.g. parts with the producer’s logo and trademark) may be required in two situations:

- Where the car has a valid producer’s warranty, or
- Where a special interest of the victim exists; for example, when the owner has always had the car serviced by authorised garages and only original parts have been used, which leads to the conclusion that fixing alternative spare parts will have an impact on the car’s market value.

In principle, the fitting of original spare parts will not be deemed economically reasonable in the case of consumable and frequently changeable parts (tyres, rubber elements, etc.). Since Polish cars are mostly old models, an insurer may generally rely on the prices of “spare parts of matching quality”,³⁴ provided that full restitution is made. Even so, the victim may have a special interest in having original parts assembled into an older car.

2.3. Loss of market value

In Polish law, a victim is also entitled to be compensated for the loss of the market value of the repaired car. Initially, the Supreme Court refused to award compensation for the loss of commercial value of a damaged car, holding that a victim’s loss cannot be measured by the market price of a car that could have been obtained had the car been sold.³⁵ That approach was taken in a different economic system, where there was no free market and no true market prices.³⁶

In the landmark judgment of 12 October 2001, case no. III CZP 57/01,³⁷ the Supreme Court ruled for the claimant who sought compensation from an insurer for the reduced commercial value of his car damaged in a crash caused by negligence of another driver. The damaged car had been in use

33. According to para. 2 [20] of the Polish Regulation “it is presumed that parts are original spare parts if their manufacturer certifies that they match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer”.

34. That is those manufactured by any undertaking that can certify that the parts in question match the quality of the components that are or were used for the assembly of the motor vehicles in question [para. 2 [21] of the cited Polish Regulation].

35. SN, 3 February 1971, III CRN 450/70, OSNCP 11/1971, 205.

36. At the time, prices of cars were fixed by the State Commission for Prices operating in the conditions of “the economy of deficiencies” (the reality was that purchasers had to wait for several years in order to purchase a car). These fixed prices were much lower than the market prices.

37. OSN 5/2002, item 57.

for 17 months. The insurer reimbursed the cost of repair by an authorised dealer service but denied further compensation. The Supreme Court held that in the case of a collision, compensation for the damaged car must include not only repair costs, but also payment of a sum corresponding to the difference between the value of the car before the loss and the value of the repaired car. The after-service value of a car is nothing else but its market value. Because such market value has been reduced due to the accident, the award should also embrace that difference. Moreover, the Court pointed out that the compensation payable for a destroyed movable thing should be assessed based on the market value of the thing, regardless of the manner of its future use. However, the Court held that the average market price is the correct point of reference rather than a specific price that could be negotiated at the sale of the thing.

The 2001 decision was criticised in legal writings,³⁸ which emphasised that the judgment deviated from both the established case law and the common *opinio iuris*. While the court focused on the principle of full compensation, it may have ignored the alternative character of the obligation under article 363 (1) CC. The obligation to remedy damage is traditionally construed as a special type of the alternative obligation (article 365 CC), where it is the creditor, not the debtor, who makes the choice of performance. Thus, once the injured party has chosen the way in which his damage should be redressed, the other claim extinguishes. Both claims (performances) may not be combined as this would be against the clear wording of article 363 CC. Furthermore, legal scholars observed the lack of precision in the court's line of argument, in particular in answering the question whether compensation should include the diminution in value only in special circumstances, or in every case of car damage. This criticism notwithstanding, the latter way of interpretation has prevailed in insurance practice, and this element of compensatory claims is now well-established.

2.4. Loss of use

Initially, Polish courts expressed the view that loss of use may be redressed only as actually suffered material damage. This meant that, in the case of damage or destruction of a car, such a loss was equated with the cost of renting a car. Following this interpretation, the courts allowed for the refund of rental costs, but only where the damaged car was used for conducting a business activity. Polish legal scholarship did not present a uniform approach to the question of compensation for the loss of use of a "consumer" vehicle, or a vehicle used solely for non-business purposes.

The situation changed in 2011, after the Supreme Court held that claims for reimbursement of car rental costs were admissible also in the cases involving private vehicles, subject to the proviso that the situation of the victim should be assessed on a case-by-case basis and provided that the rental cost is economically reasonable and necessary in a given situation. In the judgment of 17 November 2011, case no. III CZP 5/11³⁹ the Supreme Court answered two legal questions asked by the Polish Insurance Ombudsman. The first question reads: "If the injured party is a natural person not conducting a business activity, does this person's inability to use a destroyed or damaged vehicle constitute a pecuniary loss under article 361 CC?" The second question was: "Under

38. E. Kowalewski and M. Nesterowicz, Glosa do wyroku SN z 12 października 2001 (III CZP 57/01) "Note to the SN judgment of 12 October 2001 (III CZP 57/01)", *Prawo Asekuracyjne* 3 (2003), 69.

39. OSP 1/2013, item 2, commented by T. Szancitò, reported in English by E. Bagińska and K. Krupa-Lipińska, "Poland" in *European Tort Law*, 521–524 and 5–15.

a compulsory motor third party liability insurance policy, should the claim for the cost of renting a replacement car be based on an adequate causal link *and also* on the necessity of that rental, understood as a result of the person's inability to use means of public transport?"

The Supreme Court ruled that under a compulsory motor third party liability insurance policy an insurer would be obliged to indemnify the insured, whose vehicle, which is not used for business purposes, was damaged or destroyed, only for the purposeful and economically justified expenses related to the rental of a replacement car. A claim for car rental costs, held the Court, would be admissible irrespectively of the injured party's ability to use means of public transport. Hence, by this decision the Court equated the situation of all users, which was universally approved by legal scholarship. Still, the Supreme Court rejected the idea that the loss of the use of a certain good (in the cited case, a vehicle) itself constitutes damage (loss) within the meaning of article 361 CC. Firstly, the loss of use of a vehicle is not an independent pecuniary loss related to that good, regardless of its purpose. Secondly, has substitute property not been hired, a fundamental question arises as to the nature of the loss. If it is non-pecuniary, there are no legal rules that would enable its redress. The situation is different, however, when the cost of a car rental has been borne because of an accident and would not have been paid but for the accident. Payment of rental costs leads to a decrease in the injured party's assets, that is, to a loss. Necessary expenses associated with the event that caused damage constitute a loss. These include expenses that serve to restrict (exclude) negative pecuniary outcomes in the injured party's assets, such as the inability to use the vehicle (i.e. loss of an ownership right). In such a situation, the victim can claim the refund of expenses incurred in renting a replacement car that is not used for conducting a business activity. Notably, the refund may only be obtained if the expenses are actually incurred.

Notwithstanding the above, not all heads of expenses will be considered causally linked to the accident and hence refundable. The victim has a duty to prevent and mitigate the loss. In that regard, the tortfeasor (or the insurer) is obliged to reimburse the injured party only for those expenses that were purposeful and economically justified, that is, incurred with a view to eliminating (otherwise unremediable) negative outcomes of the loss. The right balance between the victim's benefit and the tortfeasor's burden has to be achieved. Otherwise, an excessive extension of the insurer's liability might lead to an increase in insurance premiums.

As regards the second question asked by the Ombudsman, the Supreme Court ruled that the use of public transport could not substitute for the use of one's own car, because these two are different types of use that cannot be equated. A car serves its owner's needs in a more universal and useful way, argued the Court and added that cars are commonly used. However, it may follow from the proportionality rule that a car rental was unnecessary, for example when an owner had not used his car before the accident, or when he has another car that could have been used. If the injured party rarely uses his car, it may be reasonable for him to use other, equivalent means of transport. Hence, access (or no access) to the public transportation system does not by itself determine coverage of car rental expenses. This issue should be evaluated individually, considering the factual circumstances of each case.⁴⁰

40. Ibidem, 253 and 254.

The said judgment was indeed ground-breaking and has already had great impact on compensation laws.⁴¹ In a subsequent decision, issued on 22 November 2013 (case no. III CZP 76/13)⁴² the Supreme Court dealt with the case that involved an insurer's decision to indemnify an insured for what is known as the "total loss". Under this mode of compensation, applied where the repair of a damaged thing (a vehicle) is impossible or would entail excessive costs; the injured party receives the difference between the value of the car before the event leading to a loss and the value of the severely damaged vehicle (salvage). In the case under consideration, the victim claimed the refund of the actual amount paid for the hire of a replacement vehicle, which also covered an extra week after the insurer had paid an indemnity and before the new car was purchased. The Court emphasised that there must be an ordinary causal link between the loss and the length of time during which the injured party was unable to use the damaged vehicle. The basic measurement is the normal duration of the period of hire, provided that no fault of the victim extended that period. After the insurer has communicated to the victim its decision on having qualified the claim as "total loss", the victim's damage resulting from a loss of use will last until a new car is purchased. The time needed for buying a new car should be assessed objectively and independently of the insurer's payment of indemnity or the financial situation of the victim. If the victim has taken action to buy a new car and to dispose of the salvage immediately after receiving the notice of the insurer's decision, these actions should be regarded – in the light of life experience and common sense – as necessary to mitigate the loss. Hence, the adequate causal link between the notice and the purchase is not interrupted by the insurer's payment of indemnity under the policy. This line of argument of the Supreme Court confirmed its views expressed in the judgment entered in case no. III CZP 5/11, and also referred to the relevant position of the German law, including the theory of *Kommerzialisierungschaden*.

To conclude, Polish courts took a reasonable approach to the problem of redressing the loss of use of a car. Comparative empirical research clearly shows that European legal systems have developed no uniform position regarding vehicle owners' entitlement to be compensated for the lost ability to use a car in a situation where they have not suffered any pecuniary consequences (such as rental or taxi expenses) of the loss to the car. Victims are treated in the most favourable manner by German courts (interestingly, Austrian law is far less "claimant-friendly" in this respect). The courts in the francophone countries lean towards giving a negative answer to the above question, since they consider the loss of use an example of non-material damage. Such a restriction on awards of compensation stems from the principle, generally accepted in European legal systems (with a notable exception of France), that non-pecuniary loss is remediable by damages only if and when the law so provides. Courts in some countries (like England or Hungary) do not follow this principle and try to circumvent it by qualifying the loss of use as pecuniary loss, however without much theoretical discussion. In general, an overwhelming majority of European countries do not allow claims for compensation for the deprivation of use of property that is used solely for

41. E. Kowalewski, "Dekalog konkluzji wynikających z uchwały Sądu Najwyższego w sprawie pojazdu zastępczego" in *Odszkodowanie za ubytek wartości handlowej pojazdu poddanego naprawie*, ed. E. Kowalewski, (Touris: TNOiK, 2012), 249 and 250; R. Trzaskowski, "Koszty najmu pojazdu zastępczego jako szkoda", *Palestra* 7–8 (2012) 121.

42. Supreme Court decision, 22 November 2013, III CZP 76/13, http://www.sn.pl/sprawy/SiteAssets/Lists/Zagadnienia_prawne/EditForm/III-CZP-0076_13_p.pdf.

personal or family, rather than business, purposes. A notable exception to this rule is Switzerland, where no such general rule exists).⁴³

As a rule, only such costs of car rental that have an adequate causal connection with the accident are legally admissible. However, the assessment of whether these expenses are purposeful and economically justified should be made on a case-by-case basis.⁴⁴ When evaluating the economic justification of such expenses, one has to take into account the victim's duty to prevent (or mitigate) the loss, his contribution to the loss and the principle of *compensatio lucri cum damno*.⁴⁵ Accordingly, the "case by case" approach has rightly been approved of by legal scholarship.

2.5. Prices

If a foreign possessor's car is destroyed during a journey in Poland, compensation should enable the victim (the foreigner) to purchase the same or a similar car in the state of his residence. This means that local prices should be applied in the assessment of compensation. In the judgement of 19 March 1998 (case no. III CZP 72/97)⁴⁶, the Polish Supreme Court ruled that only in exceptional cases damages payable for a destroyed thing might reflect the price at which it could have been sold had it not been destroyed. This will be allowed only if the victim satisfies the court that he had intended to sell the thing rather than to use it. In the latter situation, the extent of damage caused by the total destruction of a car is measured by the diminution of the victim's patrimony due to the lost opportunity to obtain sell the car at a price. Hence, if the vehicle is destroyed, compensation should be determined based on prices set by professional car dealerships in the victim's country of residence rather than prices of comparable cars available on the Polish second-hand market. The fact that the event leading to a loss took place in Poland is a random occurrence, irrelevant for the purposes of establishing damages.

Another much-litigated issue was the inclusion of VAT in the assessment of damages.⁴⁷ The Supreme Court, in the Resolution of a panel of seven judges of 17 May 2007, case no. III CZP 150/06h⁴⁸ answered the question on the point of law asked by the Insurance Ombudsman in response to varying practices in the insurance sector. According to article 17a of the Insurance Activity Act,⁴⁸ which entered into force on 17 August 2005, if the claimant, who is a person not registered for VAT purposes, presents the insurer with an invoice for the repair of "motor damage", the insurer is obliged to add VAT to the amount of compensation. Insurers cited this provision to deny the reimbursement of VAT in cases where article 17a did not apply. Some insurers required claimants to present invoices as a proof that VAT had actually been paid and the car repaired. The Supreme

43. E. Bagińska, "Koszty najmu pojazdu zastępczego czy utrata możliwości korzystania – dylematy odszkodowawcze w świetle orzecznictwa zagranicznego" in *Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym [najem pojazdu zastępczego]*, ed. E. Kowalewski, Ed. II extended, (Toruń: Dom Organizatora TNOiK, 2014), 61–80.

44. E. Kowalewski, "The decline of civil liability...", 251.

45. Ibidem 254 and 255.

46. OSNC 7–8/1999, item 133.

47. As to the direct vehicle insurance M. Wałachowska, and M.P. Ziemiak, "Odszkodowanie z ubezpieczenia auto-casco a VAT", *Wiadomości Ubezpieczeniowe* 1 (2012), 47–65.

48. Journal of Laws (Dz. U.) no. 124, 1151, as amended.

Court held that VAT is an element of the price and that VAT-registered persons may reduce their output VAT by the VAT they include in the prices of the services or goods they sell. Because VAT is a component of the price, it should be treated as a head of damages determined according to prices of goods or services (article 363 (2) CC). In the Court's opinion, any controversy surrounding this legal rule should be disposed of in view of the Civil Code principles governing compensation of damage, as well as in view of article 36 of the Compulsory Insurance Act. It is irrelevant for purposes of assessing the indemnity payable by the insurer whether or not a car has actually been repaired. In particular, article 17a of the Insurance Activity Act has not changed the effective date of the insurer's obligation to compensate; it is still the date when damage is inflicted. Hence, in motor third party liability insurance indemnity should be calculated on the basis of prices of spare parts and services that include VAT, up to the amount that would, in fact, be payable by the victim (i.e. it will depend on whether or not the victim is a VAT-registered person and can appropriately reduce the amount of the output tax). The approach taken by the Supreme Court is in accord with the leading case law and jurisprudence.

2.6. Costs of legal representative in pre-trial (claims settlement) proceedings

Another question that arose in the Polish insurance and court practice is whether the costs of legal representative employed by the victim in pre-trial proceedings handled by an insurance company (known as the claims settlement proceedings) can be reimbursed under compulsory motor third-party liability insurance. Claims for costs of legal representation were previously rejected in the jurisprudence of Polish courts.⁴⁹ In particular, in a decision of 20 February 2002 the Supreme Court held that the lack of an adequate causal link between the costs and damage merited dismissal in the circumstances of the case. The Supreme Court revisited the issue in the judgment of 13 March 2012, case no. III CZP 75/11.⁵⁰ This time, the Court ruled that the justifiable and necessary costs of legal representation services provided by a person with proper qualifications that had been incurred by the injured party in pre-trial proceedings might constitute, in the circumstances of a particular case, a reparable pecuniary loss, covered by compulsory motor third-party liability insurance.

In the reasons, the Supreme Court referred to the damage resulting from a traffic accident. The Court emphasised that causation played a double role in civil law: it is an element of the test of liability and a factor that restricts liability. An adequate causal link might be of an indirect nature, like a pecuniary loss resulting from involuntary expenses paid by a party injured by the event. The question of whether or not the cost of an attorney in pre-trial proceedings can be classified as damage that remains in an adequate causal relationship with the accident should therefore be evaluated on a case-by-case basis. The mere inconvenience in making a claim is not causally relevant, because this should be qualified as a non-compensable non-pecuniary loss. Causally relevant legal representation may be permitted when such representation is necessary for

49. SN, 11 June 2001, V CKN 266/00, OSP 3/2002, item 40; SN 20 February 2002, V CKN 908/00, not published; SN 7 August 2003, IV CKN 387/01, not published.

50. OSNIC 7–8/2012, item 81, reported in English by E. Bagińska, K. Krupa-Lipińska, "Poland" in *European Tort Law 2012*, 524–527 and 16–22.

the efficient and economically profitable pursuit of claims settlement proceedings for reasons attributable to the victim's health, personal skills or life situation. In fact, the victim incurs legal representation voluntarily. However, his decision is not taken freely, but forced by the occurrence of an accident. The Supreme Court referred to its previous decisions in which it justified claims for legal expenses on the basis of the adequate causation requirement, understood as the need to pay for necessary and reasonable costs.

Then, the Court turned to the question whether costs of legal representation are covered under compulsory motor third party liability insurance policies. According to articles 34 [1] and 36 [1] of the Compulsory Insurance Act, an indemnity under third-party motor liability insurance is available if the possessor or driver are obliged to compensate a person for a loss caused by their operation of a vehicle that resulted in death, bodily injury, health disorder or loss of health, or destruction of or damage to property. According to the Supreme Court, these articles point to the sources of insurers' liability. They do not limit liability to any explicitly mentioned direct losses, to the exclusion of adequately linked indirect pecuniary losses. The only limit to an insurer's liability is the sum insured [article 36 [1] of the Act].

The Court also listed the criteria for compensating costs of legal counsel in pre-trial proceedings. In order to be remediable, such costs need to be necessary and proper considering the amount of work and appropriate rates of counsel in question; also, there is the requirement that the representation services must be performed by a person with proper qualifications. These requirements result from a general legal duty of the creditor who is obliged to prevent and mitigate damage [articles 354 [2], 362 and 826 [1] CC]. Finally, the Supreme Court emphasised that its arguments about legal counsel also apply to other forms of useful and paid-for assistance, which the injured party may need in pre-trial proceedings (e.g. legal advice in making claims and presenting appropriate evidence, expert opinions on the extent and amount of the loss, other help in collecting and presenting evidence, as well as other activities necessary in pre-trial proceedings).

The Court's decision is correct from the legal point of view.⁵¹ The assessment of whether given costs are justifiable, necessary and have an adequate causal link with the event should be made on a case-by-case basis. The Court was right in holding that the type of damage plays an important role (namely the question whether it is 'mere' property damage or also bodily injury or death). For example, it will be necessary and reasonable for an injured party to have legal representative when the former has suffered serious bodily injury in an accident and has not been able to take part in pre-trial proceedings, or when a foreigner involved in an accident in Poland has no command of Polish or practical skills to take part in pre-trial proceedings in person. The same may not be said, however, about the Polish citizen involved in a minor crash who retains legal counsel only for the sake of his convenience. It might be worth noting here that more than 90 percent of claims stemming from compulsory motor third-party liability insurance are resolved amicably and most of the claimants do not use legal representation.⁵² As the obligations of an injured party

51. See comments in: E. Bagińska and K. Krupa-Lipińska, *European Tort Law 2012*, 519 and 11–15; M. Wałachowska and M.P. Ziemiak, "Kompensacja kosztów pomocy prawnej w postępowaniu likwidacyjnym", *Państwo i Prawo* 1 (2014), 58–71.

52. E. Kowalewski, M. Wałachowska, M.P. Ziemiak, "Wybrane problemy związane z ustaleniem odszkodowania z komunikacyjnego ubezpieczenia OC" in E. Kowalewski, *Odszkodowanie za ubytek wartości handlowej pojazdu poddanego naprawie* (2012), 221 and 222; R Trzaskowski, "Koszty pomocy prawnej i faktycznej w tzw. postępowaniu likwidacyjnym jako szkoda", *Palestra* 9–10 (2012) 99.

in the claims settlement process are very few and far between, legal representation is in most cases unnecessary.

Regrettably, the Court did not precisely explain what it meant by "an adequate qualification" of legal counsel retained in pre-trial proceedings and, more specifically, whether it is connected with appropriate education (in particular legal background) and some other qualifications (in particular being a qualified legal adviser, an advocate or at least a legal trainee). The judgment has already had significant practical consequences for the insurance sector. Many claims management companies have been established in Poland and have taken on the role of intermediaries between professional lawyers and clients in exchange for contingent fees.⁵³

Conclusions

The legal framework for compulsory motor third party liability insurance is provided for by the legislator. Although the focus of the article was the scope of compensation for a damaged vehicle under motor third party liability insurance, the role of courts is not limited to this aspect only. The case law outlined above has demonstrated a great role of civil courts in determining the scope of an insurer's duty to pay under the policy. In the last decade the Supreme Court has substantially broadened this duty adopting a more transparent victim-oriented approach. This notwithstanding, it should be reiterated that the Supreme Court accepts no abstract "compensation standard", which means that the insurer should investigate the individual circumstances of each case. In some cases the Court has explicitly placed great emphasis on the causal link between the underlying event and a specific type (element) of damage (such as loss of use, costs of legal representation in pre-trial proceedings and the like).

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53. E. Kowalewski, M. Wałachowska, M.P. Ziemiak, "Odszkodowanie za szkodę w pojazdach mechanicznych a kwestia cen...", 218.

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Odszkodowanie za szkody majątkowe z tytułu ubezpieczenia OC komunikacyjnego

W niniejszym artykule omówiono zakres, w jakim można w Polsce dochodzić naprawienia szkody majątkowej (a w szczególności szkody w pojeździe) z tytułu ubezpieczenia OC komunikacyjnego. Autorka rozpoczyna od przedstawienia zasad dotyczących odpowiedzialności za wypadek komunikacyjny, a następnie opisuje mechanizm kompensacyjny obowiązkowego ubezpieczenia OC komunikacyjnego. Najistotniejsze kwestie poruszone w artykule dotyczą poszczególnych starych i nowych elementów podlegających naprawieniu szkody, w tym utraty wartości rynkowej naprawionego pojazdu, utraty możliwości jego użytkowania, a także kosztów reprezentacji prawnej na etapie przedsądowego postępowania likwidacyjnego. W orzecznictwie brak jest standardowego i jednolitego podejścia do kompensaty szkody majątkowej; zamiast tego stosuje się określone kryteria obiektywne uzależnione od konkretnych okoliczności danej sprawy.

Słowa kluczowe: szkoda majątkowa, ubezpieczenia komunikacyjne, świadczenie ubezpieczyciela, koszt najmu, utrata wartości rynkowej.

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