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ISSUES CONCERNING THE NATURE OF CIVIL LIABILITY OF THE INSURER IN THE CRIMINAL TRIAL IN THE EVENT OF COMPULSORY INSURANCE AGAINST CIVIL LIABILITY AND THEIR LIABILITY FOR DAMAGES CAUSED BY VEHICLE ACCIDENTS

Laura BULGARU

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Laura BULGARU [1]

Abstract

In recent years, controversies have arisen in judicial practice related to the procedural position of insurance companies in criminal trials in terms of the repair of damages caused by insured defendants who have committed ofenses while driving on the public roads. Thus, initially, insurance companies had a position of civilly liable parties stipulated by art. 16 of the Code of Criminal Procedure, while later on they affirmed the position of civilly liability insurer or guarantor of payment of damage compensation (in this sense, see Decree no. 3154/2000, Supreme Court of Justice, Criminal Department, in the Bulletin of Jurisprudence 2000, p. 342).

These controversies have been established by an appeal in the interest of law, by decision no. 1 / 2005, being decided that "the insurance company participates in the criminal proceedings as civilly liable insurer". The High Court of Cassation and Justice states, in the reasoning of this decision, that "from the analysis of the legal provisions and of the principles of law, to which reference has been made, it results that in the event of a crash which caused a certain demage, for which a compulsory insurance against civil liability was contracted, the liability in tort, based on art. 998 of the Civil Code, of the person who, by his/her action has caused the damage, coexists with the contractual liability of the insurer, based on the insurance contract concluded under the conditions regulated by Law no. 136/1995."

While this solution solved the issue of the insurance company position in criminal trials, it still failed to answer the issues relating to the nature and the way in which the insurer becomes liable given the latest amendments to Law 136/1995 by Government Emergency Ordinance. 61/2005, approved with amendments by Law no. 283/2005. Thus, the establishment of the nature of this liability, the possibility of co-responsibility of the insured and the insurer or of the direct liability of the insurer under the insurance contract still remain open.

Keywords:
insurance companies, civilly liable insurer, criminal trials, coresponsibility

[1] Laura BULGARU - "Petre Andrei" University from Iasi, Romania, Email Address: laura.av2008@yahoo.com

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Based on the reasoning of the Supreme court and given the logical interpretation of the statutory provisions it is clear that the scope of the insurer's civil liability is not limited to the liability in tort, but circumscribed to contractual liability. Since the insurer's liability derives from the contract of civilly liability insurance for damage caused by car accidents to third parties is a contractual liability for damages caused by accidents, which is also a civil liability, within the meaning of art. 24 paragraph 3 of the Code of Criminal Procedure, just like the liability in tort.

In the legal literature of recent years several opinions were formulated about the nature and foundation of the legal liability of the insurer to third parties who suffered damage in accidents caused by the defendants, the holders of the civil liability insurance policy. Thus, according to recent views (in this respect see, *V. Pătulea , "The legal nature of civil liability insurance for damage caused by car accidents and the procedural position of the insurer"*, in "Dreptul" no. 8 / 2004, p .42-43), the legal basis of the possibility that an injured party has to directly sue the insurer lies *in the subrogation of the insurer in the civil liability obligation of the insured* for the damage caused by their fault to third parties, having a case of indirect civil liability. It has been stressed that in this case we no longer deal with patrimonial or non-patrimonial values at risk, but with a legal subrogation of the insurer in a compensation obligation owed by the insurer, as a result of their wrongful act against third parties. The conclusion of this opinion is that the liability of the insurer is not a direct responsibility, but a vicarious tort liability, indirect through subrogation, while the fact that the legal relationships between the insurer and the insured have a contractual nature has no relevance.

Other authors showed that the conditions of the subrogation institution in the field of vehicle insurance liability cannot be met, since, by accident, the insured has not become a creditor of the third party, but the debtor, while the insurer could not become a creditor, although he paid the insurance indemnity, except the cases covered by art. 58 of Law no. 136/1995. Thus, by a payment made under the civil liability insurance a creditor cannot be replaced by another creditor, which is in fact the essence of subrogation, a payment is made under a contractual obligation entered into force, on the basis of which the insurance premiums for bearing the patrimonial consequences of the illicit behavior of the insured. In addition, the insurer's liability occurs not only in cases when the damage is attributable to the insured, but also when the the one who is guilty of producing a damage is a person other than the insured (Article 51 paragraph 1 of Law 136/1995 as amended) as well as when the author of the accident remained unidentified (Art. 51 paragraph 3 of the same law). Civil liability insurance cannot be assimilated to subrogation in terms of the payment of the debt to the injured victim, as the insurer makes no payment for the perpetrator or along with the perpetrator, but fulfills his/her obligation assumed by the insurance contract, corresponding to the received insurance premiums. The same authors (Irina Sferdian, Lucian Bercea) consider that the stipulation for

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another is a foundation of the direct action against the compulsory insurance against civil liability insurer, since the insurance relationships required by law are established only by a contract made between the insurer and the insured, while the injured third party may claim directly from the insurer the insurance coverage. In the vehicle liability insurance, the policyholder provides, while the insurer promises that in case the insured risk should happen, the insurance indemnity payment will be made for the benefit of third party, the victim of the accident caused due to the insured vehicle. The insurer's liability to the injured third party is a contractual, direct one, as it was assumed by contract, not a tort, indirect one. It is thus obvious that the vehicle civil liability insurance contract assumes a definite and unmistakable stipulation, meaning that the insurer engaged to enforce the payment of indemnity, which represents the compensation to a third party, the from the fault of the insured. The third party compensation comes from this stipulation, because if there was no contract, the third party could not invoke in his favor the direct action under Art. 54 paragraph 2 of Law 136/1995, as amended by GEO. 61/2005. According to the article mentioned above: "... providing that the compensation is determined by court order, the rights of persons injured in accidents caused by vehicles owned by insured persons in Romania are exercised against the civil liability insurer, within the limits of his obligations, as presented in this article, with the compulsory attendance of the person or persons responsible for the accident as intervening force."

Related to these arguments it cannot be agreed that the vehicle insurance against civil liability is an indirect liability, namely a vicarious liability in tort, nor can we consider it a contractual vicarious liability because the act is not committed by another, namely by a third person, but by one of the contracting parties, namely by the insured, so that the insurer is not liable for the act of "another", but for his/her own act, namely, that of assuming the conduct of the contracting party. The practice has raised the question whether, after the amendments made by Emergency Ordinance no. 61/2005, the decision of the High Court of Cassation and Justice is still actual regarding the joint responsibility of the insured and the insurance company or if, under the new regulations, the injured person is to be directed only against the liability insurer. Clearly, it can be noticed that in relation to the provisions of former Art. 57 of Law no. 136/1995, now repealed, which gave the injured third party the right to pursue action against those responsible for the damage, but also directly against the liability insurer, the new regulation strongly supports the direct action against the liability insurer. Also, unlike in the previous legislation, the legislator is not only in the position of defendant in civil trials of the civil liability insurer, but also in that of intervening force of the liable insured. This does not preclude third party from being directed exclusively against the insured, under an action based on civil liability in tort. The solutions suggested by the research do not fundamentally change the issue of liability of the insurer, which has to be

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resolved in a civil action brought to trial. Otherwise, it would be paradoxical for a civil action whose purpose is to make the insurer liable for the damage caused by car accidents, brought in court, to be handled differently than the action having the same object, but brought separately before a civil court, all the more so the provisions of art. 14 of the Code of Criminal Procedure provide that the compensation for damage is made under civil law. So, the legal nature of the liability insurer under the contract of liability insurance is a contractual liability for damages caused by accidents. There is no justification for the limitation of the insurer's liability to the vicarious liability in the sense acquired by this expression in the doctrine of civil law in matters of contractual liability, tort liability respectively. The provisions of criminal procedure do not make reference to the one who is responsible for the act of another, but to the one responsible for the damage caused by the action of another. In this latter category fall the insurers, who are contractually responsible for the patrimonial consequences of the conduct of their contractual partner. Thus, as the effect of the insurance contract, a forced contract having legislative effect, the insurer is liable for damage caused by the action of the defendant guilty of the accident, who may be the insured or another person, undertaking to compensate injured third parties. The mechanism of this form of contractual liability is stipulation for another. The insured stipulates that the insurer has to compensate the third party in case he/she will cause any damage in an accident involving the insured vehicle, whether it will be a liability based on fault, namely a subjective one, or one caused by a fortuitous event, namely an objective one.

Under current regulations, when a civil action for damage caused by accident is brought to trial, along with criminal proceedings, the insurer no longer becomes the civilly liable party under art. 16 of the Code of Criminal Procedure, but the insurer. The acquirement of this position of insurer is made either on the civil party's initiative, by bringing a civil action against the insurer or, in case of passivity of the civil party who brought a civil action only against the defendant, on the latter's initiative or on the insurer's initiative.

Given the views of doctrine concerning the nature of the civilly liable insurer in terms of the insurer becoming liable to persons injured in car accidents, different solutions came up in practice. Some courts have held that the insurer is obligated to pay compensation **jointly** with the insured, while others felt that their obligations are **conjunct**, not cohesive.

As far as the first solution in legal practice is concerned, in the sense of the joint obligation of the insurer with the insured, it has been appreciated that, in relation to art. 41 paragraph 1 of Law no. 136/1995, art. 1000 paragraph 1 of the Civil Code and art. 1003 of the Civil Code, the injured party is able to claim any of the obligors, in case of passive solidarity, the execution of the obligation arises from the production of the criminal act, each obligor being regarded as the main one (in this sense, the Court from Cluj, the commercial and legal administration department , Decree. no. 23/2003 in "The Court of Appeal Cluj.

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Jurisprudence Bulletin 2003"). Thus, on principle, the injured party would be able to claim compensation either from the insured or from the insurer, relying on provisions of art.1003 of the Civil Code from both, jointly.

Other solutions outlined by other authors (I. Sferdian, L. Bercea in quoted article, Andrei Claudiu Andrei Rus in "Discussions regarding the insurer's liability under the compulsory insurance against civil liability for damages caused by car accidents, in "Dreptul", p. 48-49) state that in case of the actions arising from the contract of compulsory liability insurance, there isn't a joint liability for the payment of damages between the insurer and the person responsible for the injury to the person injured. Thus, the provisions of art. 3 of Law no. 136/1995 represent the standard general framework applicable to cases where insurance is mandatory, providing that *the relationship between the insured and insurers, the rights and obligations of each party are set by law*. Also, art. 41 paragraph 1 of the same law provides that in case of the civil liability insurance, "*the insurer undertakes to pay compensation for the damage for which the insured is held responsible under the law against third parties injured and the expenses made by the insured in the civil trial*."

According to art. 49 of Law no. 136/1995, "the insurer shall offer compensation, under the insurance contract for damages to which they can be held liable to third persons who suffered damage in accidents .. ", and art. 54 paragraph 2 provides that in case the amount of compensation is determined by court order, the rights of the people who suffered damage in car accidents is exercised against the liability insurer, within the limits of their obligation.

In relation to the to law cited it is clear that the insurer's liability is committed directly under the law and the insurance contract under art. 3 and 49 of Law. 136/1995, without having the right to decide whether to intervene or not to repair the damage. The phrase used by the legislator in art. 49 "under the contract of insurance" points out that this document is meant to determine the appearence of the insurer's liability, the extention of his/her liability for the amounts that can be paid as compensation as well as for the persons who benefit from these amounts, namely the third parties injured in vehicle or tram accidents produced by the insured. It is indeed clear that the legal relationship between the insurer and the insured, are contractual and subjected to the *pacta sunt servanda* principle.

The present regulation, by art. 54 paragraph 2 and 55 of Law. 136/1195, provides that in all cases, for damages suffered by the injured party due to a car accident, the insurer is liable, and not the person who caused the damage (the insured). Only in exceptional circumstances, where the extent of the insurer's liability, determined by the insurance contract would not be likely to cover all the damage, the insurer may be held liable for the uncovered damage, under tort liability.

Such a solution is natural, given the fact that in relation to all legislation it is clear that the intention of the legislator was to ensure the compensation of damage caused by car accidents with promptitude and at the same time , by

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protecting the injured party, the civil party in the trial, from a possible insolvency of the person responsible for the damage.

By making the vehicle insurance against civil liability mandatory, in addition to avoiding the insolvency of individuals responsible for the accident, the very substance of the insurance contract becomes effective, meaning that the insured, in return for premiums paid, gets insured for a uncertain event, and in case this happens he/she will not see his/her assets diminished by an amount equivalent to the damage. Or, if the possibility to obligate the insured to pay the compensation, either alone or jointly with the insurer was admitted, he would be put in a position to see his/her assets decreased, suffering the exact effects of the risk for which he/she got insured. Compared to the problems and interpretations of the doctrine, the practice has clearly outlined in this matter different solutions depending on the option of the courts to acquiesce to one of these guidelines.

I) Bearing in mind that third persons suffered damages in accidents involving motor vehicles insured by law, some courts have cited in a criminal case the insurance company and found that the insurer had the capacity of **civilly liable insurer** only for the **enforceability decision**. In the motivation of the solution, the courts have argued that 'in criminal proceedings, the person responsible for the accident is the defendant who is the main party, so that the provisions of article 54 of Law no. 136/1995, as amended by Government Emergency Ordinance Nr.61/2005, have a limited practicality in civil action before the civil court and cannot be extended by analogy to the civil action in criminal proceedings, the possibility of obliging the insurer to pay direct compensation being excluded. "

1. Thus, by criminal sentence no.3258/28.10.2008 given by the court of Iasi, the court sentenced the defendant for "second degree murder", granted in part the civil action and found the enforceability decision against the insurer S.C. "OMNIASIG SA.

To pass this sentence, regarding S.C. OMNIASIG's liability, the court held that under Art. 49 of Law 136/1995, modified and republished, the insurer shall, as stated in the insurance contract, be responsible for the damages for which the insured is liable to third parties who suffered damage in car accidents. Damage compensation is granted for the amounts that the insured is obligated to pay as compensation and the adverse legal expenses of people who were injured or killed in the accidents, including the case when the one who was driving the vehicle, responsible for the accident, is a person other than the insured.

Therefore, although the provisions of Law 136/1995 result in the establishment of a silent solidarity between the insurer and the insured regarding the payment of damage compensation caused by road accidents, we cannot conclude that in case of a civil action, besides a criminal one, the insurer and the insured will respond jointly. In this case, the civil action is based on art. 998-999

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of the Civil Code, so tort liability or the insurer's liability rests in the contract between the latter and the civil liable party. Consequently, the court found that the insurer was not liable for damage compensation jointly with the insured, his participation in the criminal proceeding having the role of giving them the opportunity to defend themselves, given that the decision would be opposable.

II) In another jurisprudential case, the insurer was obligated to pay compensation **jointly** with the defendant.

Courts have held that by decision no. I of 28 March 2005 of the United Polling it has been noted that the legal relations between the insured and the insurer were based on a **tacit solidarity**, established by the insurance contract.

The tort liability of the one who by his action caused harmful effects and the contractual liability of the insurer impose their joint liability. However, to compel only the defendant to pay civil damages would lead to the situation in which the injured party would be unable to recover the material or moral damages obtained in a criminal court.

Other courts have reasoned that the insurance company was jointly liable with the defendant, as the insurer's liability was based on the idea of guarantee and risk taking.

1. By criminal sentence nr.4025 of September 10, 2003, Târgu Jiu Court, under art. 178 paragraph 2 of Criminal Code, with the application of art.74 and 76 of the Criminal Code, sentenced the defendant R.D.M. to one year in prison and applied provision of art.1 and 7 of Law no.543/2002. The defendant was jointly liable with SC-AGRAS-SA Bucharest to pay 30 million lei, material damages and 60 million lei, moral damages, the adverse legal expenses of 1.5 million lei to civil party Giorgi Ion, as well as legal expenses of 1 million lei to the state.

To pass this sentence, the court held the fact that on 4 September 2002, at around 1.45 a.m. while driving his personal car on Motru-Târgu Jiu route, in Ciuperceni village, the defendant failed to adapt the speed to traffic conditions and being disturbed by the lights of a vehicle that circulated in the opposite direction, he did not notice in time two people who accompanied two animals that traveled on the roadway in the same direction and collided into them. The accident led to the death of Giorgi Ioan Sorin, aged 26 years and seriously injured aggrieved party Covrig Cătălin who suffered injuries for whose cure 25-30 days of medical care were needed.

The defendant made an appeal against this sentence, the civil party Giorgi Ion and the civilly liable party and by criminal decision no.689 of 15 October 2003, the Gorj Court noted the withdrawal of the appeal declared by civil party Giorgi Ion; the court dismissed as unfounded the appeal of the defendant and upheld the appeal of the civilly liable party, partially ruling out the sentence in the sense that the defendant was obligated to pay the amounts shown above, jointly with SC-AGRAS SA Branch Gorj.

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The Court of Appeal held that the court had wrongly ordered the joint obligativity of the defendant and of the civilly liable party to pay civil damages, as according to the civil law in matters of insurance policies, for motor vehicle accidents, such liability was subsidiary and limited, considering that according to Law no. 136/1995, the insurer paid either instead of the insured or directly to him, in which case the joint liability was excluded.

The defendant's appeal against the decision, regarding the conditions of civil liability on appeal was founded. The appellate court had wrongly removed joint and liability of the defendant and of the insurance company because *just as with vicarious liability, the insurer's liability is based on the idea ofwarranty case, the guaranteeing and protection of the interests of the person injured, but also on the idea of assumed risk*.

At the same time, the fact that the solving of the civil action in criminal proceedings is conducted by the rules of civil law, allows the injured person to sue both the insurer and the insured, the latter can be forced to compensate for damages directly to the injured. It is also worth noting that between the injured person, insured and insurer, an agreement can be made just like the transaction between the applicant and respondent, the law of criminal procedure does not provide another position for the people called to pay in the defendant's place, although in principle an insurance company may not be a civilly responsible party under tort provided by art.998 and the following of the Civil Code, however it gains this position in light of the provisions of art. 44 and 49 of Law 136/1995, which shows that the insurer pays compensation directly to the injured, unless he already received compensation from the insured, the insurer paying the compensation for damages for which the insured is liable under law, to all persons injured in car accidents, as well as for the adverse legal expenses.

Therefore, given that an insurance contract is concluded for the insurance company to guarantee the payment of damage compensantion, wrongly, the appeal court said that this had a subsidiary responsibility, not a joint one with the defendant to pay damages, considering that this quality was not foreseen by Article 24 of the Code of Criminal Procedure.

III) Other courts have required the insurance company to pay compensation **together** with the defendant within the obligation they have.

In this approach, the courts have noted that the different legal bases of the liability of the insurer and of the defendant (contractual, tort respectively) excluded their **joint** liability.

1.By sentence no.1244/19.11.2008 passed by the Court of Constanta in the criminal case no.848/212/2008, under article 184, paragraph 1, 3 of the Criminal Code in relation to Article 63 of the Criminal Code, defendant I. Gh. was sentenced to pay a fine in the amount of 1500 lei, for the offense of injury by negligence.

Based on art.631 of the Criminal Code, the defendant was warned of the provisions regarding the replacement of the fine with imprisonment sentence, in

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case of exemption in bad faith from the execution of the fine. Under Article 14 in relation to art.346 paragraph 1 of the Criminal Procedure Code in conjuction with art.998-999 of the Civil Code, the civil action filed by the civil party D.M.N. was admitted in part and defendant Iusca Gheorghe was forced, along with insurer S.C. CARPATICA ASIGURARI S.A. by Constanta Branch, and jointly with the civilly liable party S.C. TAXI COMPANY GENERAL S.R.L. Constanta to pay to the civil party D.M.N. the sum of 10,000 lei as moral damages, 1520.04 lei, as damage to property and 4950 USD, the equivalent in lei at the date of actual payment, representing civil damages for property damage, while the insurer had to respond jointly with the defendant within the legal ceiling.

The rest of civil claims brought by the civil party D.M.N. were rejected as unfounded.

Under Article 14 in relation to art.346 paragraph 1 of the Code of Criminal Procedure in conjunction with art.998-999 of the Civil Code, the civil action filed by the civil party the Trauma, Orthopaedics and Medical Rehabilitation Hospital from Eforie Sud was admitted and defendant I. Gh., along with insurer S.C. CARPATICA ASIGURARI S.A. Constanta Branch jointly with the civiliy liable party S.C. TAXI COMPANY GENERAL S.R..L. Constanta was forced to pay to the civil party Trauma, Orthopaedics and Medical Rehabilitation Hospital from Eforie Sud the amount of 1240 lei, as civil compensation for property damage, while the insurer would be held liable along with the defendant within the legal ceiling. The civil action filed by the injured party Constanta County Emergency Hospital was dismissed as late.

Under article 191, paragraph 1, 3 Code of Criminal Procedure, the defendant was jointly obligated along with the civilly liable party S.C. TAXI COMPANY GENERAL SRL Constanta to pay the amount of 800 lei, legal expenses advanced by the state. Under Article 193, paragraph 1, 4 Code of Criminal Procedure, the defendant was obliged, along with the insurer SC CARPATICA ASIGURARI S.A. Constanta Branch and jointly with the civilly liable party S.C. TAXI COMPANY GENERAL S.R.L. Constanta to pay to the civil party D.M.N. the amount of 800 lei, as adverse legal expenses, representing the attorney's fees, while the insurer would be held liable along with the defendant within the legal ceiling.

By **Constanta Court final decision no. 282/23.03.2009**, in the case concerning the insurer's liability in the criminal trial it was motivated that:

In terms of the insurer's liability, the court finds that the first court sentence does not include unlawful or unfounded elements, given that the case file contains evidence that the insurance contract and the manifestation of the will of the victim regarding the insurer's liability (tab 67 of the criminal investigation file), and the changes to Law no. 136/1995 by Law no.172/2004 and G.E.O. no.61/2005, approved by Law nr.113/2006, did not aim at removing the liability of the insurance companies in the criminal case, regarding

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the amounts representing compensations and legal expenses determined by traffic accidents.

By decision of the High Court of Cassation and Justice passed in appeal in the interest of law no.1/2005 the position of these companies was passed on to the civil liability insurer, with the exclusion of the quality of civil reliable party, but this does not mean that citing these companies in the criminal trial would only take place to ensure the enforceability of the decision, without the possibility of civil liability, along with the liability of the defendant in a way specific to obligations "in solidum", in the absence of legal text providing passive solidarity.

On the contrary, Article 54 paragraph 2 of Law 136/1995 provides for the possibility of the injured persons to exercise their rights against the civil liability insurer and the reference to a number of institutions specific to civil trials, such as the intervention, does not preclude the possibility of liability of the insurer in the criminal case as long as the damage compensation is made appropriate with civil law provisions, under Article 14 paragraph 3 of the Criminal ProcedureCode.

Moreover, the insurer's liability in the criminal trial, which does not exclude the main liability of the defendant, but adds it, in order to protect the victims, results from the existence of other laws which set a liability ceiling, the legislator's will being thus unequivocal in regulating this aspect.

The only problem that may lead to different interpretations is that concerning the co-liability of the defendant, but such a possibility results from his liability beyond the legal ceiling, as well as from the content of the provisions of art.55 paragraph 3 and art. 50 paragraph 1 of Law 136/1995, which states the possibility of the insured's liability regarding the amount awarded as damage compensation and legal expenses in case of injury, death, damage or destruction of property, which are usually specific to a criminal case.

Regarding the significance of the provisions of Article 55 paragraph 1 of Law 136/1995, their purpose is that of determining the destination of the sums awarded as damage compensation, not that of relieving the insured or the insurer of their liability, as the compensation must be paid to the injured person, entitled to cover their damage, who are indemnified from other creditors, in accordance with Article 55 paragraph 2 of the law.

IV). In the same matter, other courts have obliged **only the insurance company** to repair the damage caused by the insured vehicle, within the limits of their obligation

Courts that have adopted this solution indicated that the liability of the company was involved directly under the insurance contract, an obligation which had been expressly assumed. The reason for concluding an insurance policy is precisely that of eliminating the risk of insolvency of the person guilty for the road accident.

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1.By criminal sentence no. 87/21 March 2005, Zărneşti court sentenced the defendant M.G. to pay 5,000,000 criminal fine for the offense of bodily injury, provided by art. 184 paragraph 1 and 3 of the Criminal Code, by drawing attention to the provisions of art. 63 / 1 of the Criminal Code. Under art.346 of the Criminal Procedure Code and Art. 998-999, 1000 paragraph 3 and 1003 Civil Code obliged the defendant, jointly with the civilly liabile parties S.C. "A C" S.R.L. Pitesti and ASIGURAREA ROMÂNEASCĂ ASIROM S.A. - Arges County Branch, to pay civil damage compensation to the Health Insurance House of Defense, Public Order, National Security and Judicial Authority Bucharest and to civil party Popa Marius Valentin. The court found that the decision was enforceable to the insurer within the amount established by Order no. 3113/2003.

By **criminal court decision no. 36/24 January 2006**, the Brasov Court determined that, although the court correctly established the quality of the insurance company, in accordance with decision no. I of March 28, 2005 of the High Court of Cassation and Justice, appealed in the interest of law, namely that of civil liability insurer, the finding that the decision was enforceable within the amount established by Order no. 3113/2003, had no legal basis and was not likely to be enforced. *The mention of the reasons of the decision, that in this way, the civil party has the possibility to choose the one who would pay the damage compensation is equivalent to a joint liability, although the solidarity has been expressely removed by the court.*

The fact that the traffic accident is the result of an offense does not preclude the contractual liability of the insurer, which is bound to repair the damage caused to the accident victim within the limits of art. Article 10, paragraph 1 letter b of Order no. 3113 / 3 December 2003 on law enforcement in terms of compulsory civil liability insurance for damage caused by traffic accidents to third parties, the amount being limited to 70,000 RON. To think in this way means to devoid of meaning the obligation assumed by the insurer and harm the interests of both the insured as well as of the victim of the accident, which would see themselves in the impossibility to recover the damage compensation in case of insolvency of the one found guilty for the accident. As shown in the reasoning of the decision of the Supreme Court, tort liability of the insured person, found guilty of the accident, coexists with the insurer's contractual liability, the former being employed only if the damage exceeds the maximum amount that the insurer can pay.

As in this case the damage caused both to the civil party P.M.V. and to the civil party C.A.S.A.O.P.S.N.A.J. Bucharest does not exceed the sum of 70,000 lei, the compensation shall be paid exclusively by the insurer.

2. By criminal sentence no.3745/4.12.2008 of Iasi District Court, the court sentenced the defendant G.C. to 9 months imprisonment for the offense of "bodily injury" provided and punished by art. 184 paragraph 2, 4 of the Criminal Code and under art. 14 and art. 346 of Criminal Procedure Code and Art. 998 of the Civil Code upheld in part the civil action brought to court by the

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civil party SNAO and obliged the insurer SC ASTRA SA to pay to this civil party the amount of 15,000 lei as moral damages.

To pass this sentence, the court held that for the civil party the sum of 15,000 would compensate for the negative effect of the unlawful act attributable to the defendant, namely the mental distress caused by the consequences and by the need of hospitalization care of the civil party, and ordered the insurer SC ASTRA SA to pay the sum of 15,000 lei, under the policy signed by the defendant and the legal provisions in force, namely Order no. 3108/2004 issued by the CSA, which provided that the RCA insurers should grant, based on insurance premiums, compensation for damage for which the person insured by them was liable, under law, to third parties injured in car accidents. Given the fact that established moral damages of the injured party could not be included in the cases provided by Art. 22 of Order no.3108/2004 issued by the CSA for which the RCA insurer should not grant damage compensation, the court held that that the insurer should be ordered to pay moral damages directly to the civil party.

3. By criminal sentence no. 704/07.04.2008 passed by Bacau District Court the defendant M.P. Ş**.** was sentenced to 1 year and 6 months imprisonment for the offenses provided by Art. 184 paragraph 1, 3, 4 ind.1 of the Penal Code and Art. 184 paragraphs 2, 4, 4 ind. 1 of the Penal Code, with the application of art. 33 letter b and Art. 34 letter b of the Penal Code.

The court also ordered the insurer SC B.T. Asigurari Transilvania insurance to pay the amount of 5000 lei material damage and 15,000 moral damage to the civil party Muraru Petru, 1500 material damage and 20,000 lei moral damage to the civil party Doru Cristinel, 537.10 lei material damage to the civil party, the Municipal Hospital from Moineşti, 1243, 27 lei to the civil party the Emergency County Hospital from Bacau, 90, 64 lei to Bacau Ambulance service.

In solving the civil side, the court found that the tort liability conditions were met, as the case file included photocopies of the mandatory liability insurance policy for the car driven by the defendant, at the date of the accident.

According to art. 49 of Law no. 136/1995- The insurer shall grant damage compensantion, under the insurance contract, for the damage for which the insured is liable to third partoes injured in car accidents and for the adverse legal expenses. Compensation is granted regardless of the place where the car accidents took place, both while driving and when stationary.

Article 50 of the same law - "Compensation shall be paid for the sums that the insured is obligated to pay as compensation and the adverse legal expenses of people who suffered damage by injury or death as well as the damage or destruction of personal assets.

In case of injury or death, compensation is granted both to persons outside the vehicle that caused the accident, and for persons in the vehicle, except the driver. Compensation is also given if the people who make claims for

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compensation are the husband (wife) or dependents of the owner or driver of the insured vehicle, responsible for the accident. "

For the reasons we have mentioned, set out in art. 14 and art. 346 paragraph 1 of the Code of Criminal Procedure, of art. 999 of the Civil Code, art. 313 of Law no. 95/2006 modified by GEO No. 72/2006 and of art. 49, 50 and 55 of Law no. 136 / 1995 the court ordered the insurer SC B.T. Asigurari Transilvania to pay the amount of 5000 lei material damage and 15,000 moral damage to the civil party Muraru Petru, 1500 and 20,000 lei moral damage to the civil party Doru Cristinel, 537.10 lei material damage to the civil party The Municipal Hospital Moineşti, 1243, 27 lei to the civil party The Emergency County Hospital from Bacau, 90,64 lei to Bacau Ambulance service.

V) Other courts, although they rejected the idea of joint liability of the insurer and the insured, they decided that the insurer's liability as resulting from the agreement concluded with the policyholder should be a subsidiary one for the contracts concluded before the entry into force of GEO 61/2005, respectively 10.08 .2005, substantive civil laws.

1. By criminal sentence no. 531/25.06.2008 the Court of Bucharest Sector 1, pursuant to art. 184 paragraph 2 and 4 of the Penal Code, sentenced the defendant C.V. to a penalty of 1 year imprisonment for the offense of negligent bodily injury. Under art. 81 of the Criminal Code the Court ruled conditional suspension of sentence on 3-year probation, established by Article 82 of the Penal Code. Under art. 359 of the Criminal Procedure Code the defendant was informed of the provisions of art.83 of the Criminal Code. Art.71 was applied in relation to art. 64 letter a, 2nd thesis and letter b of the Criminal Code. Under art. 71 (5) of the Criminal Code the court suspended the accessory sentence during the conditional remission of sentence.

Under art. 14 and 346 of the Criminal Procedure Code, in relation to art.998 - 999 and Article 1000 (3) of the Civil Code the civil action was allowed in part and the defendant C.V. was jointly obligated with the civil party SC T.A. SRL to pay the amount of 500 lei material damages to the civil party D.(S.)S. and 14,000 lei moral damages.

Under art. 14 and 346 of the Criminal Procedure Code, in relation to art.998 - 999 and Article 1000 (3) of the Civil Code the court admitted the civil action brought by civil party S.C.U. and the defendant C.V. was jointly obligated with the civilly liable party SC T..A SRL to pay 308.50 lei, hospitalization expenses.

Under Article 55 paragraph 1 of Law no. 136/1995, the court obliged in subsidiary the civil liability insurer SC A. SA Bucharest, Carol the 1st Bulevard, no. 31-33, sector 2 to pay the amounts owed by the insured, the civilly liable party SC T.A. SRL as material damage compensation previously shown, in the amount of 500 lei, moral damages. in 14,000 to the civil party D. (S.) S. and the amount of 308.50 lei to civil party S.C.U. within the ceiling established by Civil

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order no. 3101 of January 13, 2004 issued by the Insurance Supervisory Commission.

Under art. 14 and 346 of the Criminal Procedure Code related to art.998 and the following of the Civil Code, the civil action was admitted and the defendant C.V. jointly ordered with the civilly liable party SC T.A. SRL. to pay the sum of 500 lei as damage to property and the amount of 14,000 lei as moral damages to the civil party D. (S.) S. and the sum of 308.50 lei hospitalization expenses to S.C.U. Regarding the payment modality of these damage compensations, the court would obligate, in the subsidiary, the civilly liable insurer SC A. SA to pay the amounts owed by the insured, the civilly liable party SC T.A. SRL in compensation for material and moral damage previously revealed to the civil party and to the civil party S.C.U. within the ceiling established by civil order no. 3101 of January 13, 2004 issued by the Insurance Supervisory Commission.

Thus, at the time of the accident, the car driven by the defendant was insured by the above-mentioned insurance company, with a compulsory vehicle insurance against liability. According to Article 49 of Law no. 136/1995 on insurance and reinsurance in Romania, the insurer must give compensation for the damages for which the insured are liable, by law, to third parties who suffered damage in car accidents, and for the adverse legal expenses.

It follows therefore that the insurer's liability is a contractual liability, employed on the basis of the insurance contract concluded with the insured and not a form of tort liability. Consequently, the insurer may be liable jointly with the insured and the defendant (the agents of the insured) to pay compensation to accident victim.

According to Article 57 of Law 136/1995, the rights of persons who suffered damage in vehicle accidents shall be exercised against those responsible for the damage. These rights can be exercised directly against the civil liability insurer within his duty.This means that the insurer is liable for damages within the limits prescribed by law for compulsory insurance against civil liability.

In case of damage caused by vehicle accidents occurred in 2004 under Article 10 paragraph 1 letter b of the Rules on Enforcement on compulsory civil liability insurance for damage caused to to third parties through car accidents, the insured was compensated in the limit established by Order no. 3101 of January 13, 2004 issued by the Insurance Supervisory Commission.

According to Article 55 paragraph 1 of Law 136/1995, the damage compensation shall be paid by the insurer directly to individuals or legal entities, to the extent that they were not compensated by the insured.

In regard to these provisions, the court considers that the liability of the insurer may not be a joint liability with the defendant. Moreover, according to art.1041 of the Civil Code, the joint liability cannot be presumed, it must be expressly stipulated; this rule is ruled our only when joint obligation occurs, the passive solidarity emerging from the law or from the will of the parties.Or, in

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this case neither Law no. 136/1995, nor the compulsory civil liability insurance contract does not provide that in case of the victims who suffered damage in car accidents, the insurer and the insured should be jointly liable. If the liability of the parties was a joint liability it would mean that according to art. 1042 of the Civil Code, the creditor of the civil obligation could address to any of the debtors, namely that he would be entitled to pursue the debtor he had chosen since all debtors are main debtors, contrary to the provisions of Article 55 paragraph 1 of the Law 136/1995, given above.

It should also be mentioned that by GEO no. 61/2005, which came into force on 10.08.2005, Law no. 136/1995 on insurance and reinsurance in Romania has been amended substantially, including the foregoing. Thus, according to Article 55 paragraph 1 of Law 136/1995, as amended by Art. I point 22 of GEO no. 61/2005, the damage compensation is paid by the insurer directly to individuals or legal entities that suffered the damage. Therefore, the condition that the insurer had to pay only to the extent that individuals or legal entities that suffered damage had not been compensated by the insured has been dropped. Also, Art. 57 of the Act was also repealed by art. I, point 24 of GEO no. 61/2005.

Accordingly, to the new statutory provisions, it can no longer be supported that the liability of the insurer has a subsidiary character to that of the insured, the former may be obligated directly to pay damage compensation as a result of the insured risk.

But this latter aspects cannot be taken into account to determine the insurer's liability in this case, since these are substantive laws, on the one hand, and on the other hand according to the transitional provisions contained in Article IV of Ordinance no. 61/2005, the insurance contracts concluded before the entry into force of this emergency ordinance [10.08.2005] will continue according to the terms and conditions accepted at the date of conclusion.

Under article 191 paragraph 1, 3 of the Code of Criminal Procedure, the court shall require the defendant, jointly with the civilly liable party to pay the amount of 1,000 lei legal expanses to the state.

Starting from the statutory legal provisions and solutions embraced by the courts in case law it is clear that the legal nature of the insurer's liability in case of compulsory insurance against civil liability is a contractual, direct liability. Vehicle liability insurance is a contract, an agreement by which the insurer undertakes, correlatively with the collection of insurance premiums, to pay compensation for damages for which the insured is liable to third parties who suffered damage in car accidents (damage to property, physical integrity or life of third parties - Article 49 and Article 50 of Law 136/1995). Moreover, the compensation is paid by the insurer even when the accident is caused by a person other than the insured, should the insured vehicle, not the insured, be involved in the accident (Article 51 paragraph 1).

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These are the cumulative conditions that the law (Article 49 - 52) establishes for the liability of the insurer and to which the additional conditions established by rules of the Insurance Supervisory Commission (53) are added. Calculating and providing compensation (art.54) is performed under the contract of insurance (art.43 and art. 49) or by administrative procedure established by the Supervisory Commission rules (see Article 35 and following of Annex 1 to Order 11/2007, mentioned above) or by court order.

The damage compensation paid by the insurer to the injured in accidents of vehicles is not recovered by him/her from the person responsible for the damage. The insurer has recourse for compensation paid only in special cases, expressly and exhaustively laid down in Article 58 of Law 136/1995. Exceptional situations governed by Article 58 are exceptional cases, derogatory from the rule according to which, in this matter, the insurer has no recourse action.

From this perspective it can be concluded that the liability of the insurer to the victim, regarding the insurance against vehicle civil liability is a contractual liability, assumed by the insurance contract. Moreover, it is a direct responsibility, the insurer being liable for his/her act of assuming the conduct of the insured and the associated risks. When the insurer covers the damage suffered by third parties, the accident victims, they do not make a payment for the perpetrator or along with the perpetrator, but fulfill their obligation under the contract of insurance.

From this conclusion only the cases provided by Article 58 of Law 136/1995 are departed from the law when the compensation paid by the insurer to the injured person is recovered from the person responsible for the accident. Only in these cases, the insurer has a simple role of guarantor of payment of compensation, advancing without eventually having to bear the costs, an amount that returns to their heritage by way of regress. In all other cases, the insurer is not usually a mere guarantor, but the true debtor of compensation that the injured third party has to receive, because they not only advance, but support, effectively and permanently the damage caused by the fault of the insured.

As this is the legal nature of the insurer's liability in case of the compulsory insurance against civil liability and given that, in case of criminal proceedings most often deal with the exceptions provided by art. 58 of Law 136/1995 (the accident was produced intentionally, the accident occurred during the commission of acts punishable by the laws of traffic on public roads as intentional offenses - the most common hypothesis, etc..), the insurer will be obliged to pay compensation to third parties injured. The amount of these damages must meet the standards established by the Insurance Commission norms (Article 55 paragraph 1 with reference to art. 53). Subsequently, the insurer will have in these situations the right of recourse against the person responsible for the damage.

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In all cases where damages are claimed, the court must take into account that the injured person is entitled to request all benefit from either sides of the insurance contract without being obliged to divide their claim. The origin of this obligation is represented, for the insurer by the insurance contract, while for the insured, by the offense; therefore, the liability of the insurer is conventional, while the liability of the insured is tort liability. Therefore, the obligations of the insurer and the insured to the injured person are not united by the existence of a unique obligation, but by the creditor's right to require payment in full to any of them. So, here we refer to an *obligation in solidum*. It is obvious that both the insurer and insured cannot be forced to pay damages jointly and severally.

In conclusion, the obligation of the insurer to pay damage compensation should take into account the nature in soldium of his liability, the existence of the recourse action against the person responsible for the accident only according to the hypothesis provided by art. 58 of Law 136/1995 and of the possible limitation by rules issued by the Insurance Supervisory Commission (empowered in this respect by art.53 of Law 136/1995), of the level of compensation.

Given the above considerations, the Prosecutor General of Romania Laura Codruta Kovesi, filed an appeal on 08/10/2009 regarding the lack of a unified view in terms of civil legal liability of the insurer in the criminal trial under the hypothesis of the compulsory civil liability for damages caused by vehicle accidents.

Starting from the necessity of the insurer's presence in the criminal case, the gaps of the Law 136/1995 and of the provisions of art. 24 paragraph 3 of the Code of Criminal Procedure, promoting the appeal in the interest law referred to the position of civilly liable party that the insurance company must have.

Thus, it was argued that in order to have the criminal court order the insurer, his presence in the criminal trial, and the identification of his procedural quality is required.

But, regarding this aspect Law No. 136/1995 amended contains only the provision contained in art.54 paragraph 1 (Article 57 of the original version of Law no. 136/1995 being repealed by the Government Emergency Ordinance no. 61/2005). Through the issues it states, art.54 paragraph 1 shows that it refers only to a civil lawsuit. In this context, the provisions of criminal procedure are directly related to the parties. Thus, Article 24 paragraph 3 of the Code of Criminal Procedure establishes that the party civilly liable is the **person called** to answer in criminal proceedings, under civil law, **for the damage caused by the action of the defendant or the accused**.

Or, under the contract of insurance, **the insurer is liable for the damage caused by the offense the defendant or of the accused guilty of the accident**, being obligated to compensate the victims. It has no importance whether the person of the accused / defendant and the insured are one of the

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same person, as another person, a third party in the insurance contract may be guilty of the accident. This is because the insurer's liability is employed by a contract intuitu rei, and not intuitu personae, the essential condition being that the vehicle involved in accident should be insured (Article 51 paragraph 1 of Law 136/1995).

Liability for damage caused by **the act** of the accused / defendant (of **another**) is not limited to **vicarious liability**, as it was identified with **tort liability**. In fact, the liability stated by Article 24 paragraph 3 of the Criminal Procedure Code includes contractual liability as well, the latter being a liability under civil law as the tort liability. Article 24 paragraph 3 of the Criminal Procedure Code does not refer to vicarious liability, but to liability for the damage caused by the action of another. Or, this is in fact the position of the insurer that Article 49 of Law 136/1995 explicitly states.

In conclusion by appeal it has been decided that the insurer has in the criminal trial the position of civil liable party, asking by means of an obligatory decision to establish the unitary way of interpretation and application of law.

By decision no. 29 of November 16 2009, United Polling rejected the appeal filed by the general prosecutor of the High Court of Cassation and Justice in connection with the civil legal liability of the insurer in criminal proceedings in the case of compulsory civil liability for damages caused by vehicle accidents."

Therefore, insurers will be civilly liable in criminal proceedings under the RCA policy.

It is obvious that the problem of legal nature regarding the insurer's liability in the criminal trial will continue to be a controversial issue. Currently, the only procedural position that can be attributed to the insurance company in the criminal case is that of "insurer", as a result of decision no. 1 / 2005 of the High Court of Cassation and Justice - United Sections, binding decision according to Art. 414 ind 2 paragraph 2 of the Code of Criminal Procedure. By means of this decision the will of the legislator was undoubtedly to limit the procedural position of the insurance company to "insurer", as in this position it has the opportunity to make a case.

Obviously, due to the acquirement of the "insurer" position, now, until a possible reconsideration of the position by the High Court of Cassation and Justice, it would not be possible to order the insurance company in the criminal trial to pay compensation to third parties who suffered damage, as the provisions of art. 14 of the Criminal Procedure Code exhaustively state that the only persons who may be employed in solving the civil action, next to the criminal one, are the defendant and the civilly responsible party.

Other authors (I. Sferdian, L. Bercea) consider that, subsequent to the amendment of Law no. 136/11995 brought by O.U.G. no. 61/2005, Decision no. 1 / 2005 of the High Court of Cassation and Justice can no longer be effective, basing its argument on the idea that courts do not have the authority "to determine the moment when a decision rendered for the settlement of an

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appeal in the interest of law ceases to produce its binding effects." In fact, this is a lack of the legislation on criminal procedural law, since the current regulation of Art. 414 ind. 2 of the Code of Criminal Procedure contains no provision to that effect. Thus, a clear and express constancy is required to clarify these contradictions. An attempt of clarification was made by means of the appeal in the interest of the law passed last year by State Prosecutor, Laura Codruta Kovesi, unfortunately rejected by the High Court of Cassation and Justice. Until other measures, the civil liability companies keep their "insurer" position in the criminal trial with the same controversy related to the nature of its legal liability.

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