Scope of subrogation actions brought by insurance companies against the Consorcio de Compensación de Seguros in cases of dispute. Interpretation of the status of injured party

Judgment 148/21 of 16 March 2021 by the Spanish Supreme Court Opinion written by Justice José Luis Seoane Spiegelberg

José A. Badillo Arias
Regional Representative in Madrid
Consorcio de Compensación de Seguros

One of the problems encountered in practice –the substantive matter addressed by the judgment discussed below– concerns who is to be understood to be the "injured party" to be paid compensation by the CCS in a dispute, because sometimes there are "other injured parties" involved in an accident that claim entitlement to compensation from the CCS by application of the dispute mechanism. These are insurance companies that have paid compensation to their insured party, hospitals that have treated the victim, repair shops, and the like.

1. The Consorcio de Compensación de Seguros (CCS)'s role in helping victims in cases of dispute

1.1. Background

Under the former legislation, in cases where both the insurer and the Guarantee Fund took the view that neither should pay for the consequences of an accident, the victims of traffic accidents were condemned to the odyssey of having to bring suit against one or both, not only incurring considerable cost but also suffering delays in collecting the indemnity to which they were entitled because of the accident. This was ordinarily the result of discrepancies over whether or not a policy was in force. Furthermore, since rulings generally went against only the Guarantee Fund or the insurance company, the victim had to pay the costs of the entity found not to be at fault.

Most disputes – past or present – between the Guarantee Fund and private insurers concern automobile insurance. In certain difficult cases, the insurance company says that it is not the insurer of a given vehicle that has caused injury to a third party, while the Guarantee Fund maintains that according to the information submitted by the insurer to the Informative Records of Insured Vehicles [*Fichero Informativo de Vehículos Asegurados (FIVA)*], the policy is in force, so it

too does not accept liability for the loss. These are cases involving non-payment of the initial premium, subsequent premiums, or premium instalment payments.

Difficulties have also arisen, for instance, in cases in which the insured automobile has been sold, but under sections 34 and 35 of the Spanish Contracts of Insurance Act [*Ley de contrato de seguro* (LCS henceforth)] it is not always easy to decide which was liable, the insurer of the seller of the automobile or the Guarantee Fund itself when the automobile was sold without the compulsory insurance.

1.2. Third Directive relating to insurance against civil liability in respect of the use of motor vehicles

Faced with this problem, to protect the victims of traffic accidents, Article 4 of the Third Directive relating to insurance against civil liability in respect of the use of motor vehicles sought to settle the matter once and for all by providing that in the event of a dispute between the Guarantee Fund and the civil liability insurer as to which must compensate the victim, the Member States would take the appropriate measures so that one of these parties was designated to be responsible in the first instance for paying compensation to the victim without delay. This was without prejudice to reimbursement of the party that had paid by the other party if it was ultimately decided that that other party should have paid all or part of the compensation.

In the case of Spain, that provision in the Third Directive was transposed in section 8(1)(d) of the Spanish Insurance against Civil Liability in respect of the Use of Motor Vehicles Act [*Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor*] (the "Act"), now section 11(1)(d), whereby the CCS is responsible for compensating victims of personal injuries or property damage in cases where there are discrepancies between the CCS and the insurance company as to which is liable for indemnifying the injured party in the cases that fall under the compulsory insurance scheme or are stipulated in section 11(1), letters (a) to (c), setting out the duties of the CCS. Without prejudice to the above, if it is later decided that the insurance company is responsible for paying compensation, the company is to reimburse the CCS for the sum of the indemnity plus statutory interest, increased by 25%, from the date on which the indemnity was paid out.

1.3. The concept of Injured Party in the Directive and in Spanish legislation

One of the problems encountered in practice –the substantive matter addressed by the judgment discussed below– concerns who is to be understood to be the "injured party" to be paid compensation by the CCS in a dispute, because sometimes there are "other injured parties" involved in an accident that claim entitlement to compensation from the CCS by application of the dispute mechanism. These are insurance companies that have paid compensation to their insured party, hospitals that have treated the victim, repair shops, and the like.

We have seen that Article 4 of the Third Directive refers to "a dispute between the Guarantee Fund and the civil liability insurer as to which must compensate the victim". When the Directive was transposed under section 8(1)(d) of the Act, now section 11(1)(d), the term "victim" was changed to "injured party", namely, "a dispute between the Consorcio de Compensación de Seguros and the insurance company as to which must compensate the injured party". In our opinion the change from "victim" to "injured party" was due to the need to use a more precise term, because where the victim dies, the victim is not the same as the injured party. Accordingly, in speaking of an injured party we are referring to a victim that has survived but to the injured party when the victim of the accident has died. In fact, during the Directive review process currently in its final trilogue stage among the Commission, the European Parliament, and the European Council, a proposal has been made to replace the term "victim" with the term "injured party".

In any case, it seems to us that this change from "victim" to "injured party" should not go beyond the intended purpose of the Third Directive when dealing with disputes of this kind. As just explained, what the Directive was endeavouring to avoid was for the "victim" or the "injured party" left by a deceased victim to have to bring suit when neither the insurer or the Guarantee Fund could reach agreement, for example, as to whether or not there was insurance coverage. In short, the point is to avoid delays in paying indemnities to accident victims who have suffered

personal injury or property damage. That is the basis for the interest in paying compensation to victims before a final decision as to who is ultimately liable for paying the indemnity is taken.

By contrast, it seems obvious that there is no justification for this exceptional procedure where the beneficiary of the indemnity is, for instance, another insurance company that had previously indemnified the victim in the performance of its own obligations under another insurance policy that was bringing an enforcement action against the CCS to try to benefit from application of the dispute mechanism pursuant to section 43 of the LCS.

It should be borne in mind that in this case the CCS is not *a priori* actually liable for the loss but rather that under the law it is to pay the corresponding compensation on a *prima facie* basis solely to benefit the victim until a decision is subsequently taken as to which party is liable for the accident by a court or by agreement between the parties.

Therefore, we take the view that in line with the Third Directive, coverage of the matter in dispute by the CCS is solely for the benefit of traffic accident victims and that for the reasons discussed above this is not extensible to other injured parties such as insurance companies, hospitals, repair shops, and so forth. This was the ruling made, for example, by the judgment of 24 May 2012 by the Fourth Section of the Provincial Court of Appeals of Murcia (JUR [*Law Reporter*] 2012\232467), in which the appellant insurance company, after paying its insured party for the own damage cover, sought the status of an injured party for purposes of application of the dispute mechanism. The judgment found that "in the event of a dispute, the lawful party is the injured party that has been directly harmed; that is not the status of the insurance company, which paid the indemnity it is now claiming under an all-risks insurance policy".

Naturally, the scope of application of the dispute mechanism is the scope of application of the Act. Therefore, the matter should involve a traffic incident caused by a motor vehicle. It also does not seem reasonable to rely on application of the dispute mechanism when there is a discrepancy between two or more insurance entities as to which of them should take liability for a given accident or a discrepancy regarding which of the drivers of the vehicles involved was responsible for causing the accident or regarding the grounds for discharge of civil liability under section 1 of the Act.

2. Judgment 148/21 of 16 March 2021 by the Spanish Supreme Court

Notwithstanding the above, the positions taken by the lower courts have not been devoid of controversy concerning the concept of "injured party" under the aforesaid section 11(1)(d) of the Act. Some judgments have taken the position of the CCS described above, while others, in contrast, have expanded the concept of injured party to other entities apart from the victim on condition that they had a right of claim against the CCS.

The recent judgment of 16 March 2021 by the First Chamber of the Supreme Court has held insurance companies to be injured parties where they have exercised the subrogation action envisaged in section 43 of the LCS and have taken the place of the victim after indemnifying the victim under a voluntary own damage cover. The Court therefore held that they should be considered injured parties for purposes of applying the dispute mechanism pursuant to sections 11(1)(d) of the Act and 20(2) of the Spanish Regulation on compulsory civil liability insurance for motor vehicle use [*Reglamento del seguro obligatorio de responsabilidad civil en la circulación de vehículos a motor*] (Compulsory Motor car Third-Party Liability Insurance, MTPL).

2.1. Findings of Fact in the Judgment

In the case considered here, the appellant insurance company brought a subrogation action under section 43 of the LCS against the CCS based on section 11(1)(d) of the Act.

The insurer had paid out for damage to the insured vehicle under a voluntary own damage cover. The other vehicle

was responsible for the accident, so after paying compensation to its insured party, it sent an out-of-court claim letter to the other vehicle's insurer, which denied coverage on grounds that the vehicle was uninsured, and to the CCS, which argued that the vehicle was in fact insured and that the claimant was not an injured party for purposes of applying the dispute mechanism under the aforesaid section 11(1)(d) of the Act.

The CCS refused to pay, and the insurer took legal action against it, arguing, in short, that pursuant to the subrogation action brought against the CCS, the insurer took the position of the victim and hence was to be considered the injured party for purposes of applying the dispute mechanism.

2.2. The position taken by the lower-court judgments

The trial court accepted the CCS's arguments explained above and dismissed the claimant's action, holding the injured party to be the accident victim, not the insurance company that had been subrogated to the victim's position.

The Provincial Court of Appeals of Madrid dismissed the claimant's appeal on grounds similar to those set forth in the trial court's judgment, though it based its decision directly on the provisions of Directive 2009/103/EC of 19 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles. The Court therefore held: "The wording of Article 11 of the Directive headed 'Disputes' has the same telos or ultimate purpose, namely, to ensure that the victim is compensated without delay. This being the case, compensation of its insured party by the insurance company and bringing a subrogation or recovery action under section 43 of the LCS cannot be taken to come within the scope of operation of section 11(1)(d) of the law said to have been breached, which differentiates between the injured party and the insurance company".

2.3. The Supreme Court's ruling

The claimant insurer lodged an appeal in cassation against the aforesaid judgment. The grounds put forward by the claimant in its appeal can be summarised as breach of section 43 of the LCS and of the Supreme Court's settled case law, in that the insurance company that brought the direct action envisaged in section 11(3) of the Act against the CCS after previously having paid its insured party (who did not cause the accident) the indemnity owed under the policy was not considered to be the injured party in Finding of Law One in the judgment of the Provincial Court of Appeals of Madrid.

The Court accepted the claimant's appeal in cassation and thus held the aggrieved insurance company to be the injured party within the scope of the dispute mechanism laid down in section 11(1)(d) of the Act. It first made reference to the dispute mechanism in Directive 2009/103/EC of 19 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles.

It then touched on transposition of the above-mentioned Directive in section 11 of the Act and noted that pursuant to the decision-making authority conferred by the Directive on the Member States, Spanish lawmakers opted for the CCS to take on the obligation to redress the harm suffered in case of dispute.

Lastly, the Court then considered in detail the nature of the subrogation action envisaged in section 43 of the LCS and the case law interpreting it. Accordingly, it stated that the case law has set out the prerequisites for successfully bringing a subrogation action and cited judgment 699/2013 of 19 November 2013, which held that "(i) the insurer has fulfilled its obligation to pay the insured party the indemnity under the coverage specified in the policy; (ii) the insured party has a claim for redress against a third party that caused the harm, in other words, subrogation does not arise where there is no third party liable for compensation, (Supreme Court judgments of 14 July 2004 and 5 February 1998, *inter alia*); and (iii) intent on the part of the insurer to be subrogated, inasmuch as subrogation is an optional right that may or may not be exercised, as the insurer prefers, hence under the Spanish Commercial Code [*Código de Comercio*] subrogation does not arise by operation of law".

In the case that concerns us here, the Court held that the aforesaid prerequisites for subrogation actions were fulfilled and that in addition a dispute had arisen, in that it had been proven that the claimant had approached the insurance company for the vehicle responsible for the accident, which had refused to take liability for the accident on grounds that the vehicle was uninsured. These were the circumstances in which it brought its claim against the CCS for purposes of section 11(1)(d) of the Act to have the CCS to take charge of the indemnity it had paid in settlement of the accident. The CCS refused the claimant's request because "... the claim cannot be accepted, because it is a case in which there is a dispute, and since all risks cover is involved, the company is not an injured third party under the law".

That is, the CCS expressly acknowledged that there was a legal situation that involved a dispute, although it did not accept the claimant's request because it did not recognise the claimant's legal status as injured party.

With respect to application of the dispute mechanism by the CCS, the Court held that the finding that the insurance company was not the injured party contained in the lower court's judgment was contrary to the nature of subrogation actions, which put the insurer in the same position as the injured party. It therefore held the Provincial Court of Appeals' interpretation not to be in conformity with the fundamental nature of subrogation actions, which confer on the claimant the capacity to exercise the rights and actions of the insured party entitled to take direct action against the CCS under section 11(1)(d) of the Act.

Conclusions

The CCS's interpretation regarding application of the dispute mechanism set up by section 11(1)(d) of the Act is that in accordance with the Third Directive, coverage by the CCS has been established solely for the benefit of traffic accident victims and that for the reasons discussed in section 1.3, this is not extensible to other injured parties such as insurance companies, hospitals, repair shops, and the like. Basically, the purpose of the Third Directive was to avoid delays in paying indemnities to accident victims who have suffered personal injury or property damage. That is its objective and the basis for arranging to pay compensation to victims up front, before any decision as to who is finally liable for paying the indemnity is taken.

However, in the judgment considered here, the Supreme Court concluded that by its very nature a subrogation action places an insurer that has indemnified an insured party under a voluntary own damage policy in the same position as the insured, and hence that the insurer should be considered to be the injured party for purposes of application by the CCS of the dispute mechanism envisaged in section 11(1)(d) of the Act.

Still, a single judgment does not set doctrine, and it is our understanding that this does not mean that the dispute mechanism should be extended and applied to other types of injured parties, e.g., repair shops, medical centres, or hospitals, because that issue was not specifically addressed by the judgment under discussion.