Vehicle driver vs passenger

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This study is intended as an in-depth consideration of what is meant by vehicle driver. It is based chiefly on a judgment delivered by the Provincial Court of Appeal of Cartagena and a question referred by a Dutch court to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

This question might initially seem relatively inconsequential, in that the driver is the person who operates a vehicle and who in the relevant circumstances is liable for harm suffered by third parties, including the passengers riding in the vehicle. Harm to the driver that causes a traffic accident is excluded from coverage pursuant to section 5(1) of the Spanish Motor Vehicle Civil Liability and Insurance Act [LRCSCVM, for its initials in Spanish], and hence the driver responsible for causing a traffic accident is not covered by the compulsory vehicle insurance (CVI) all motor vehicles in Spain must carry, because in the driver's case the requirement of causing harm to another is not fulfilled.

The judgment of 9 May 2023 by the Provincial Court of Appeal of Cartagena, Fifth Section, ruled that the passenger of a vehicle who had at a given point in time jerked on the steering wheel should be regarded as the driver and that the driver of the vehicle, who had been severely injured, should therefore be regarded as the passenger and hence covered by the compulsory vehicle insurance for the vehicle he was driving.

However, the aspect of the matter considered in the above-mentioned judgment and in the question referred to the CJEU for a preliminary ruling that interests us here is that both these cases concern serious personal injuries sustained by the driver – who is excluded from coverage – as a result of reckless conduct by certain passengers (not the driver) of the vehicle. That is, the intent in these cases is for the passenger to be considered to be the driver responsible for causing the accident and for the injured driver to be considered to be a passenger and thus to be covered under the compulsory motor vehicle third-party liability insurance.

Judgment by the Provincial Court of Appeal of Cartagena dated 9 May 2023

The judgment of 9 May 2023 by the Provincial Court of Appeal of Cartagena, Fifth Section, ruled that the passenger of a vehicle who had at a given point in time jerked on the steering wheel should be regarded as the driver and that the driver of the vehicle, who had been severely injured, should therefore be regarded as the passenger and hence covered by the compulsory vehicle insurance for the vehicle he was driving.

The judgement found that the passenger had jerked on the steering wheel of the vehicle in order to take an exit. This caused the vehicle to swerve out of control and ultimately to suffer the accident that seriously injured the driver. The police accident report stated that the accident had happened because "the vehicle's direction of travel had changed when the rider in the right front seat had grabbed the steering wheel". The driver of the vehicle sued the insurer of the vehicle he was driving, claiming that at the time of the accident he was to be considered to be a third party (passenger) in the vehicle, since he did not cause the accident.

The court agreed that when the vehicle went out of control, the claimant was indeed not the driver but rather a third party injured in the accident caused by the insured vehicle and hence was covered by the CVI. The court therefore ordered the insurance company to pay the driver an indemnity for his injuries.

Referral to the CJEU for a preliminary ruling, case C-490/24

In a similar matter, last 12 July the Supreme Court of the Netherlands referred a question to the CJEU for a preliminary ruling (case C-490/24), and the referral is pending decision by the CJEU.

As in the matter considered by the Provincial Court of Appeal of Cartagena, the claimant, the driver of the vehicle, had submitted a claim to the insurer, Nationale Nederlanden, under the compulsory motor vehicle third-party liability insurance. The claim had been denied because under Dutch third-party liability legislation, the policy taken out did not cover harm to the driver of the vehicle, who was excluded under the terms of the third-party liability insurance.

In view of the uncertainty surrounding the issue, the Dutch courts asked the CJEU to rule on whether compulsory third-party liability insurance should cover harm suffered by the (initial) driver of the vehicle where a passenger interferes with the steering of the vehicle and an accident occurs as a result of that interference.

Facts underlying the matter referred for a preliminary ruling

In late 2016 a traffic accident occurred involving a passenger van owned by a football club. The club had taken out a third-party liability policy on the vehicle with Reaal Schadeverzekering N.V., which subsequently merged with Nationale Nederlanden, as prescribed by the Dutch Motor Vehicle Third-Party Liability Insurance Act (WAM).

The vehicle was used to take the club's players to and from its facilities. The claimant and some teammates had been allowed use of the vehicle on the date of the accident.

The claimant and his teammates were driving in the vehicle to another football club's facilities after playing a match as the visiting team. There they had met a former coach of theirs who had climbed aboard the vehicle to go to a party being thrown by another football club. The claimant had taken the steering wheel of the vehicle, with his teammates sitting by his side and behind him and the coach sitting in the right-hand rear section of the vehicle.

While the vehicle driven by the claimant was driving along a conventional highway, the coach had suddenly pulled on the vehicle's handbrake. The vehicle was going around 70 km/h at the time.

Pulling on the handbrake while the vehicle was in motion caused the vehicle's rear wheels to seize up, and the vehicle had skidded sideways out of control and had crashed into a concrete stanchion of a railway viaduct on the right-hand side of the highway. The vehicle had then spun around in the right-hand lane and had come to a stop in the left-hand lane when the rear of the vehicle crashed into another stanchion. The claimant and the teammate sitting next to him had been thrown out of the vehicle and had both suffered severe injuries.

The teammate sitting next to the claimant had died of his injuries in hospital the day after the accident, and the claimant was hospitalised with life-threatening injuries.

The claim filed by the claimant (the vehicle driver)

The claimant, the driver of the vehicle, had submitted a claim to the insurer, Nationale Nederlanden, under the compulsory motor vehicle third-party liability insurance. The claim was denied because the policy taken out under the WAM did not cover harm to the driver of the vehicle, who was excluded under the terms of the third-party liability insurance.

In partial proceedings dealing with the accident, the claimant had petitioned for Nationale Nederlanden to be held liable for the harm the claimant had suffered and would subsequently suffer in future. One of the arguments he put forward was that the exclusion of liability for harm suffered by the driver of the vehicle that had caused the accident envisaged in section 4(1) WAM was not applicable to the case at hand. Although the claimant had been at the wheel of the vehicle at the time of the accident, he could no longer be considered to be the driver within the meaning of the WAM, because by pulling on the handbrake the coach had acted as the vehicle's driver.

Judgments delivered by the Dutch courts

The Dutch Court of First Instance had accepted the claimant's claim and ruled that he could no longer be considered to be the driver within the meaning of section 4(1) WAM and that Nationale Nederlanden was in principle bound to indemnify him for the injuries he had sustained.

On appeal by Nationale Nederlanden, the court of appeal had overturned the judgment in the partial proceedings and dismissed the claimant's claim based on the coverage envisaged in the WAM. In that court's view, even though the person who had pulled on the handbrake had done so in the capacity of driver, this did not mean that the person sitting behind the steering wheel was no longer the driver. Accordingly, the court had held that the claimant did not lose his status as the driver when the handbrake was pulled, the event that could have triggered his no longer being considered to be the driver at the time of the accident, since in the final analysis the claimant was still the person sitting in the driver's seat who was at the steering wheel, who had set the vehicle in motion, and who had decided on its speed and direction of travel. He was at the vehicle's controls, and that circumstance was not altered by the fact that the coach had suddenly pulled on the handbrake and therefore also performed an act of driving.

The question referred for a preliminary ruling

Having in mind that neither the case law handed down by the Benelux Court of Justice nor the case law handed down by the Court of Justice of the EU provides any guidance as to how the *rechtbank*[1] should interpret the meaning of driver, in the corresponding appeal the Supreme Court of the Netherlands referred the following questions for a preliminary ruling:

1. Is Article 12(1) of codified Directive 2009/103 to be interpreted as requiring compulsory insurance to cover liability for the (initial) driver's damage in a case where a passenger interferes with the steering of the motor vehicle and an accident occurs as a result of that intervention?

2. If the first question is answered in the affirmative, do certain requirements arise from EU law that the national court must take into account when determining whether a driver, within the meaning of Article 12(1) of codified Directive 2009/103, has lost the capacity of driver in the circumstances of the case and is entitled to claim passenger protection under the general rule?

Remarks and conclusions

The issue raised both in the judgment delivered by the Provincial Court of Appeal of Cartagena and in the matter referred for a preliminary ruling is clear: at a certain point in time, a passenger in a vehicle acts rashly and causes a traffic accident. The driver of the vehicle is injured and claims an indemnity from the vehicle's third-party liability insurer.

As explained above, the ultimate aim in these cases is to have the driver considered to be a passenger in the vehicle and the passenger considered to be the driver, so that the initial driver can be compensated for the harm suffered.

In our opinion this interpretation would be in breach of section 5(1) of the Spanish Motor Vehicle Civil Liability and Insurance Act, which excludes harm arising from injury or death of the driver of a vehicle that has caused an accident from coverage under the compulsory third-party liability insurance.

To hold otherwise would mean that any circumstance involving an event that could have been a causal factor outside the control of the driver of a vehicle that has caused an accident would turn the driver into a passenger, in breach of the aforesaid section 5(1) of the Spanish Motor Vehicle Civil Liability and Insurance Act. This would mean leaving the decision as to when the exclusion laid down in that section had effect up to the interpretation of each individual court, thereby giving rise to a high degree of legal uncertainty in matters pertaining to motor vehicle third-party liability.

We think the above-mentioned section 5(1) of the Spanish Motor Vehicle Civil Liability and Insurance Act is clear, in that it is the person who is operating the vehicle that causes an accident who is excluded from receiving compensation for harm he may suffer, and that person's status cannot be changed simply because an outside event may have occurred in the course of the accident. Consider, for instance, accidents caused by a pedestrian, by an animal suddenly crossing the road, by a wasp flying into a vehicle's passenger compartment, or even by the glare of the sun, all cases in which, as in the case that concerns us here, the driver may be momentarily affected by a factor other than his own actions.

[1] Court, law court.

That is the interpretation of section 5(1) of the Spanish Motor Vehicle Civil Liability and Insurance Act handed down by the First Section of the Civil Division of the Spanish Supreme Court in its judgment no. 1023/2008 of 3 November 2008: *Compulsory insurance covers third-party liability that may be incurred by the driver of a motor vehicle for harm caused to people or property in the course of driving, within the established limits (sections 1 and 2 of the Spanish Motor Vehicle Civil Liability and Insurance Act. The insured party is the driver, the object of the insurance is the harm he causes, and section 5(1) provides that coverage of the compulsory insurance will not include harm caused to the person of the driver of the insured vehicle. What it does cover, and what is binding on the insurer, within the established limits, is the risk that the insurer will be forced to meet an obligation to indemnify a third party for harm arising as a result of the action of driving for which the insured party bears civil liability under the law (section 73 of the Spanish Insurance Contract Act). In case there was any doubt about this, this conclusion is made abundantly clear by section 10(1) of the Implementing Regulations to the Spanish Motor Vehicle Civil Liability and Insurance Act enacted by Spanish Royal Decree 7/2001 of 12 January 2001, which excludes "all harm arising from injury or death of the driver of a vehicle that has caused the accident" from coverage by the compulsory insurance. These Implementing Regulations do not interpret the underlying Act in force from the date of publication and do not add any exclusions that do not arise from the wording of the provisions of the Act itself. In point of fact, they merely set out more clearly what the Act already envisages (judgment of 15 April 2002, Supreme Court, Chamber 3, Contentious-Administrative Review Division). Furthermore, the wording of section 5 of the Spanish Motor Vehicle Civil Liability and Insurance Act as amended by the Spanish Act 21/2007 of 11 July 2007 has dispelled existing uncertainties. Under the new wording, "harm arising from injury or death of the driver of the vehicle that has caused an accident does not fall within the scope of coverage under the compulsory insurance".*

The cases considered here involve acts by third parties that fall within the risks associated with driving. They are generally understood to be a type of internal *force majeure* attaching to those risks, also referred to as fortuitous events, which does not relieve the driver of the vehicle and the third-party liability insurer from civil liability and in no case alters the status of the driver of the vehicle.

In addition, item 1 in Annex I to the Spanish Royal Legislative Decree 6/2015 approving the Traffic, Motor Vehicle Operation, and Road Safety Act defines a driver as that *Person who, subject to the exceptions set out in item 4, paragraph two, operates the steering mechanism or is at the controls of a vehicle or is in charge of an animal or animals. For vehicles operated for driver training purposes, the driver is understood to be the person who is in charge of the dual controls.*

In the accidents considered here, there is no question as to who was operating the steering mechanism and was at the controls of the vehicles. It was the claimants, who were sitting in the left front seat, the driver's seat, and further they were the ones who were able to operate all the vehicle's driving mechanisms, e.g., pedals, brakes, gear shift, lights, and more generally all the equipment used to make the vehicle go forward or back up.

In short, the driver is the person who has control of a vehicle at all times. In other words, a passenger who suddenly activates the handbrake or grabs the steering wheel is not in control of the vehicle or its steering mechanism, nor does that person change the status of the initial driver of the vehicle. To assert otherwise not only takes away from legal certainty, it means altering what is envisaged in law and gives rise to myriad interpretations in which any interference by a passenger in a vehicle other than the driver could switch the original status of those parties inside the vehicle and in so doing manipulate the contents of the law and hence the effects of the protection afforded by the compulsory motor vehicle third-party liability insurance.

Still, while in our view the status of driver cannot be changed simply because an outside event may have occurred in the course of an accident, this issue is undeniably controversial, and we will therefore be looking forward with great interest to the final decisions taken by the courts. This matter remains relevant, because the judgment of the Provincial Court of Appeal of Cartagena has been appealed to Spain's Supreme Court, and at the same time the CJEU has yet to render its preliminary ruling on the question referred to it by the Dutch Supreme Court.

It is interesting to consider what could transpire if the Spanish Supreme Court were to deliver its decision on this issue before the CJEU's ruling and the two interpretations were to differ. In this regard it should be noted that it is mandatory for our country's courts to apply CJEU case law, which serves as a source of law for all EU member states. If the Supreme Court is aware of this matter that is pending a ruling, and we assume it will be, it might be best for it to wait for the CJEU's ruling and then act in consonance.