Case Commentary

Motor Vehicle Operational Risk and Awarding Damages in the Event of a Traffic Accident

A commentary on the judgment of the Estonian Supreme Court of 19 March 2013 in civil case no 3-2-1-7-13

I Introduction

Incidents whereby individuals harm each other using motor vehicles occur every day. In such events, damages will need to be determined. Since traffic accidents occur on a daily basis, one might think that resolving matters concerning damages arising from traffic accidents is a routine job for courts. The Estonian example vividly illustrates that this is not necessarily so.

This article is inspired by the judgment of the Estonian Supreme Court of 19 March 2013 in civil case no 3-2-1-7-13, in which the court explains in detail the determination of damages in a situation where two motor vehicles have caused mutual damage. In this judgment the court, for the first time, discussed the risk associated with operating a motor vehicle as a basis for reducing damages and came to the following somewhat contentious conclusion:

1 The definition of a motor vehicle is given in clause 40 of § 2 of the Traffic Act: ‘A motor vehicle is a vehicle that is powered by an engine. Motor-assisted bicycles, small mopeds, off-road vehicles, trams and vehicles with a design speed of less than six kilometres per hour are not deemed to be motor vehicles.’ It should be noted that this provision alone is insufficient to substantiate § 1057 of the Law of Obligations Act (LOA), which provides for the strict liability of the actual possessor of a motor vehicle, because § 1057 considers, for instance, an aircraft to be a motor vehicle as well. Article 1057 provides that: ‘A direct possessor of a motor vehicle shall be liable for any damage caused upon the operation of the motor vehicle, unless: 1) the damage is caused to a thing being transported by the motor vehicle and which is not being worn or carried by a person in the vehicle; 2) the damage is caused to a thing deposited with the possessor of the motor vehicle; 3) the damage is caused by force majeure or by an intentional act on the part of the victim, unless the damage is caused upon the operation of aircraft; 4) the victim participates in the operation of the motor vehicle; 5) the victim is carried without charge and outside the economic activities of the carrier.’

Estonian legislation is available in English at <www.legaltext.ee>.
2 The judgments of the Estonian Supreme Court are available in Estonian at <www.riigikohus.ee>.
3 The Estonian Supreme Court expressed this position in its order of 26 March 2013 concerning correction of the aforementioned judgment. The initial judgment expressed the following opi-
If the level of involvement of drivers in causing an accident is unknown and no significant differences appear in the risks arising from the vehicles, each vehicle possessor must fully compensate the other for the damage caused.

This judgment may be of crucial importance in shaping the practice of Estonian insurers regarding the indemnification of damage relating to traffic accidents. To date, Estonian insurance companies have usually not taken the traffic risk arising from motor vehicles into account in the context of indemnification of damage.4

This article discusses the underlying issues that arise from the judgment of the Estonian Supreme Court in case no 3-2-1-7-13 with regard to mutual damage caused by two motor vehicles. Before focusing on the substance, the article first outlines the facts on which the judgment is based and the central features of the judgment for the purpose of clarity. It does not analyse issues concerning the subjects of liability (that is, who is entitled to damages and who is obliged to compensate the damage)5 or additional specific problems that arise in a situation where more than two motor vehicles are involved in an accident. The article explores the matter under consideration via a comparative analysis of the case law of the Republic of Estonia and the Federal Republic of Germany.

It should be added that although damage arising from a traffic accident is, in practice, usually indemnified by liability insurers, the topic of the article is essentially concerned with the law of delict: according to the general principle, the liability insurer of the injuring party is obliged to compensate only if the injuring party (policyholder) is liable and only to the extent that the injuring party is liable towards the injured party. Thus, the prerequisites and scope of the personal (delictual) liability of the injuring party serve as the basis for the insurer’s obligation to indemnify damage. As for the claim of the injured party, the injuring party and their insurer are joint and several obligors (see subsec 2 of § 521 LOA).

4 See, for instance, the judgment of the Tallinn Court of Appeal of 11 December 2012 in civil case no 2-11-7277/61. The judgments of courts of appeal and courts of first instance are available in Estonian at <www.riigiteataja.ee>.

5 It should be noted that under § 1057 of the Estonian LOA, based on strict liability, the direct possessor of a motor vehicle is the person liable for damage caused by the motor vehicle. In terms of subsec 1 of § 33 of the Estonian Law of Property Act a possessor is a person under whose control a thing is.
II Facts of the case and judgment

A Facts

On 3 June 2007 an automobile belonging to the claimant, but operated by a third party, and a motorcycle, with regard to which a motor third party liability insurance contract had been concluded with the defendant, were involved in a traffic accident. The accident happened when the driver of the automobile made a left turn and collided with the oncoming motorcyclist. The motorcyclist did not hold a licence to drive a motorcycle. The courts of lower instance held that the automobile driver did not give way to the motorcyclist driving on the priority road but should have done so. The claimant filed a claim for damages against the defendant in the amount of €16,768. The Harju Court of First Instance dismissed the claim. The Tallinn Court of Appeal upheld the judgment of the Court of First Instance.

B Judgment of the Estonian Supreme Court

The Civil Chamber of the Estonian Supreme Court upheld the judgment of the Court of Appeal regarding its final conclusion, but revised the reasons given in the judgment of the lower court. The Supreme Court noted that the judgment of the Court of Appeal should be quashed and sent back for a new hearing, but this was not possible given that the claimant’s claim had expired and thus had to be dismissed.

The Supreme Court held that a motor vehicle can be considered a major source of danger and that damage caused by a motor vehicle must be considered damage arising from its operation, above all when that damage is caused by the purposeful use of the motor vehicle as a motor vehicle operating in traffic. The Court found that it cannot be precluded that, for the purposes of § 1057 LOA, a slow moving vehicle or, in exceptional circumstances, even a non-moving vehicle on a road, may also be considered the operation of a motor vehicle.

The Supreme Court opined that circumstances arising from the risk as well as circumstances characterising the behaviour of drivers can be taken into account in determining the amount of damages for the purposes of § 139 of the LOA. Once the level of involvement of the direct possessor of each motor vehicle has been ascertained, the sum of all causes must be assessed. Above all, the objective extent of the potential threat arising from each vehicle involved in the accident must be considered as circumstances arising from the risk. The extent of a potential threat depends, amongst other things, on the mass, speed, technical
condition and safety equipment of the vehicle. Such threats are presumed to be
associated with every vehicle and, regardless of the carefulness of its driver, can
only be fully precluded from the cause of damage by way of an exception. The risk
level may be increased or reduced by specific circumstances. Thus, the risk
arising from a large lorry is considerably higher than that arising from a moped.
The risk arising from a motorcycle may be presumed to be lower than that arising
from a car as regards the extent of damage but may not be lower regarding the
probability of the occurrence of damage because a motorcycle may be more
difficult to operate and control than a car. Additionally, the objective nature and
degree of danger associated with the specific manoeuvres of a vehicle as a result
of which an accident occurred (for example, overtaking or turning into a priority
road) can be assessed.

On the other hand, the behaviour of the drivers of the motor vehicles involved
in causing an accident, especially the failure to exercise due care and disregard of
traffic regulations, can also be taken into account. In the event of a collision of
vehicles in terms of the Traffic Act it must be determined who caused the accident.
Once it has been decided to what extent the injured party was responsible, it must
also be taken into account, amongst other things, which of the drivers failed to
exercise due care to a greater extent. Subjective circumstances, such as tiredness,
alcoholic intoxication, exceeding the speed limit or absence of the right to drive
influence the amount of damages only insofar as they actually contributed to
causin the accident.

Damages can be reduced to the minimum or precluded altogether only by
way of an exception, notably if it has been determined that the accident was
cased solely by a serious mistake of the injured party as a result of which the
injuring party who did not violate any law was reasonably (ie by exercising
due care) unable to prevent the damage and the risk arising from the vehicle
that caused the damage was fully eliminated by the conduct of the injured
party.

The Supreme Court held that, if the level of involvement of the drivers in
casing an accident is unknown and there are no substantial differences in the
isks arising from the vehicles, each vehicle possessor must fully compensate the
damage caused to the other.

III Operating a motor vehicle

It should be noted that both under Estonian and German law strict liability can
only be discussed in connection with damage caused by a motor vehicle if the
damage has been caused upon operating a motor vehicle § 1057 LOA and § 7
Straßenverkehrsgesetz, Road Traffic Act, StVG). Accordingly, one first needs to define what is meant by the operation of a motor vehicle. The question is also important because the operational risk arising from operating a motor vehicle can only influence the division of liability or the amount of the damages if the damage has been caused by operating the motor vehicle.7

It is not easy to give an unambiguous answer to the question of what constitutes ‘operating’ a motor vehicle. The first place to look would be case law. For instance, the Bundesgerichtshof (Federal Court of Justice, BGH) has held that the operation of a motor vehicle commences with the starting of the engine and ends with the stopping of the engine outside an area designated for public traffic.8 Thus, operation continues even when a motor vehicle stops, for instance due to a traffic jam or in order to allow a passenger to get out of the car.9 In a case of a parked motor vehicle, the question is whether a parked vehicle posed a threat to traffic or not. It can also be said that damage has been caused upon operating a motor vehicle when a characteristic threat arising from the motor vehicle has at least partially caused the damage.10

In the judgment of case no 3-2-1-7-13, the Estonian Supreme Court defined the overall nature of the operation of a motor vehicle. The Court justifiably held that damage is caused upon operating a motor vehicle, above all, when it is caused by the purposeful use of the motor vehicle as a motor vehicle in traffic. Further it expressed the view that the slow movement of a vehicle or, in exceptional circumstances, the static status of a vehicle on the road, may be considered operating the vehicle.

It can be argued that in general, in the event of the collision of two moving vehicles, determining whether or not a vehicle is in operation is not too complicated. The issue becomes more complex, however, in specific circumstances – for example, where a non-moving vehicle is involved. Drawing the line between

6 Available at <http://www.gesetze-im-internet.de/stvg/>.
7 The connection between operating a motor vehicle and the operational risk is also demonstrated by the fact that the operational risk arising from the vehicle of the injured party can be taken into account only if the injured party is liable for the realisation of the risk towards the other party. See R Greger, Haftungsrecht des Straßenverkehrs. Handbuch und Kommentar (4th compl rev edn 2007) 601.
8 BGH judgment of 5 July 1988, BGHZ (Entscheidungen des BGH in Zivilsachen, Decisions of the BGH in civil matters) 105, 65; Neue Juristische Wochenschrift (NJW) 1988, 3019.
10 See Greger (fn 7) 48. An example would be if the main reason for A colliding with B and causing damage is extensive snowfall but the accident is nevertheless partially caused by the threat arising from the motor vehicle. In this case one would still say that damage has been caused upon operating the vehicle.
when a non-moving motor vehicle is in operation and when it is not should depend on whether the vehicle poses a threat to other road users. For instance, it is probably incorrect to consider the parking of a vehicle in a car park in accordance with the rules as the operation of the vehicle. However, if a vehicle stands in the middle of a carriageway in the dark and is not lit, it could constitute the operation of the vehicle.

IV Legal ground for liability in the event of damage relating to operating a motor vehicle

If damage is caused via a motor vehicle in Estonia, the direct possessor of the motor vehicle is liable regardless of fault (ie strict liability). In the event of strict liability no attention is paid to the conduct or fault of the injuring party, but the focus is on whether the harmful effect was caused by the materialisation of a heightened risk that is characteristic of a thing or activity. Strict liability means that the one who creates an excessive threat to others may do so, but must accept the obligation to compensate damage regardless of fault.

In Estonia, the general provision on strict liability is found in subsec 1 of § 1056 of the LOA, which stipulates that ‘[i]f damage results from a danger characteristic of a thing constituting a major source of danger or from an extremely dangerous activity, the person who controlled the source of danger will be liable for causing the damage regardless of the person’s fault.’ Subsection 2 of § 1056 provides that ‘[a] thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist.’

11 The Harju Court of First Instance held in its judgment of 11 December 2006 that the parking of a car in an underground garage cannot be considered the operation of a vehicle.
13 It should be noted that there is no general clause on strict liability in Germany or Switzerland. A brief overview concerning discussions on a general clause of strict liability in European tort law is given in H Koziol, Basic Questions of Tort Law from a Germanic Perspective (2012) 236–238. In Estonia, the application of § 1056 (1) LOA is, in practice, very rare. Until now the Estonian Supreme Court has only applied § 1056 (1) in one case in 2011 where it found that road construction constitutes a major source of danger. For more on this case see J Lahe/I Kull, Estonia, European Tort Law (ETL) 2011, 190, nos 10–18.
Section 1057 of the LOA provides for the strict liability of the direct possessor of a motor vehicle upon operating the motor vehicle.14 The Estonian Supreme Court has repeatedly noted that risk liability also applies when damage is caused to a person who controlled the other motor vehicle as a major source of danger.15

In German law, strict liability relating to a motor vehicle is not provided for in the German Civil Code (Bürgerliches Gesetzbuch, BGB), but in § 7 of the StVG.16 Both in § 7 StVG and in subsec 1 of § 1056 LOA, the application of strict liability is limited to events where a person’s death, bodily injury or damage to health has been caused or where a thing has been damaged by operating a motor vehicle.

In addition to strict liability, the application of general delictual liability is also possible in the event of damage caused by operating a motor vehicle. Subsection 3 of § 1056 LOA provides that the provisions of strict liability do not preclude or restrict bringing claims on another legal ground including for compensation of unlawfully and culpably inflicted damage. The Estonian Supreme Court also noted in its judgment in case no 3-2-1-7-13 that it is possible to bring a claim on the basis of the fault-based liability of the injuring party under § 1043 LOA as well as on the basis of the strict liability of the possessor of the car under § 1057 LOA. Likewise, in German law, the delictual liability provisions of the BGB also have relevance alongside the StVG regarding traffic accidents.17

It should be noted that if damage is caused via a motor vehicle while it was not in operation, only general delictual liability of the liable person is possible.18

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14 It should be noted that § 458 of the Civil Code of the Estonian Soviet Socialist Republic (SSR) that preceded the LOA provided for the strict liability of the possessor of a car. The possessor was released from liability when damage was caused by force majeure or as a result of the intent of the injured party.
15 Judgment of the Civil Chamber of the Estonian Supreme Court no 3-2-1-75-07 of 24 September 2007; judgment no 3-2-1-76-09 of 28 September 2009; judgment no 3-2-1-161-10 of 2 March 2011; and, most recently, in case no 3-2-1-7-13.
16 For instance, the strict liability of a motor vehicle operator can also be found in Swiss law. See subsec 1 of § 1 of the Swiss Strassenverkehrsgesetz (Road Traffic Act, SVG). Available, for instance, at: <http://www.admin.ch/ch/d/sr/741_01/index.html>.
17 For example, because the StVG establishes maximum limits for damages. See also CE Simsa, Die gerichtliche und außergerichtliche Regulierung von Verkehrsunfällen in Deutschland und den Niederlanden, Bundesanzeiger 1995, 78. It should be noted that the Estonian LOA does not provide limits for traffic damages. However, the insurer’s liability is still limited: according to art 51 (1) of the Motor Third Party Liability Insurance Act, the maximum limit of compensation payable for traffic damage sustained in Estonia is € 1 million for one insured event in the case of property damage and € 5 million in the case of personal injury.
18 The principle that the prerequisite for the liability of the custodian of a motor vehicle is the custodian’s fault in the event of the non-operation of the vehicle has also been provided for expressis verbis in subsec 2 of § 58 of the Swiss SVG.
In addition to the aforementioned, the contractual liability of the possessor or custodian of a motor vehicle towards the injured party cannot be precluded.\textsuperscript{19} For instance, according to Estonian law, contractual liability is possible if the injured party and injuring party have a contractual agreement and damage caused by a motor vehicle falls within the category of a non-performance or improper performance of the contract by the injuring party. Under subsec 3 of § 1044 LOA the claimant can in such an event choose whether to bring a claim on a contractual or delictual ground but only if the harmful consequence is the death of a person, their bodily injury or damage to their health. In other events the existence of a contract usually pushes delictual claims aside.

V Compensation of damage in the event of a traffic accident involving two motor vehicles

A General logic behind division of liability

In German law, the division of liability in the event of a traffic accident is governed by § 17 of the StVG. Under that provision, the obligation of multiple custodians of motor vehicles to compensate for damage caused to a third party depends on the circumstances of the accident, in particular, which party was primarily responsible for the damage.\textsuperscript{20} Under subsec 2 of § 17 StVG, the principle set out in subsec 1 also applies to the division of the mutual liability of the custodians of motor vehicles if damage has been caused to the custodian of a motor vehicle that was involved in the accident.\textsuperscript{21} Section 17 StVG is a special

\textsuperscript{19} Whether the legal ground of the liability of the injuring party has relevance to the indemnification obligation of the liability insurer and what such relevance might be is also an interesting issue. However, the focus of this article is elsewhere.

\textsuperscript{20} It should be added that there is also separate regulation regarding the division of liability in Swiss law. For instance, subsec 1 of § 61 of the Swiss SVG prescribes that, upon division of liability in the event of bodily injury, the level of fault of the custodians of the motor vehicles determines liability, unless special circumstances such as the operational risk justify another division. Subsection 2 of the same section regulates the division of damage in the event of damage to things.

\textsuperscript{21} The respective provisions also apply if damage has been caused mutually by a motor vehicle and a trailer, a motor vehicle and an animal or a motor vehicle and a train (subsec 4 of § 17 StVG).
provision with regard to the general provision in § 254 BGB that allows for the reduction of damages.22

There is no separate provision in Estonian law on how to divide liability in the event of mutual damage caused by motor vehicles. However, the general provision governing the reduction of damages (subsec 1 of § 139 LOA) does allow for the adjustment of damages: ‘If damage was caused partially by circumstances arising from the injured party or as a result of a threat for which the injured party is liable, the damages will be reduced to the extent that the circumstances or threat contributed to the occurrence of damage’.23

Thus, the parties are, first and foremost, liable to each other under § 1057 LOA and, thereafter, the scope of the damages is adjusted for each person under § 139 LOA.24 A party must request that the court applies § 139 LOA25 and the injuring party or its insurer must then prove that the prerequisites for the application of § 139 exist.

It is arguable that the absence of separate regulation of the division of liability is not particularly problematic in Estonian law. Subsection 1 of § 139 LOA also allows for the reduction of damages in the event that damage was partially

22 FJ Säcker/R Rixecker/H Oetker, Münchener Kommentar zum Bürgerlichen Gesetzbuch (Münch Komm) vol 2: Schuldrecht. Allgemeiner Teil (6th edn 2012) 530. Section 254 of the BGB applies in events that fall outside the scope of § 17 StVG.

23 For instance, the Tallinn Court of Appeal held in its judgment of 8 February 2011 in civil case no 2-09-66992 that, if injured parties get into a vehicle driven by a driver whom they know to be drunk, their damages must be reduced by 50%.

24 The foundations for this approach were laid by the Estonian Supreme Court in its judgment no 3-2-1-75-07 of 24 September 2007. Subsequently, the approach has been reiterated in various other judgments, most recently in case no 3-2-1-7-13. With the previous approach the situation was somewhat different. In the judgment no 3-2-1-118-06 of 14 November 2006, based on the Civil Code of the Estonian SSR, the Supreme Court held that, if the possessors of multiple major sources of danger inflict damage upon themselves, the fault of the possessor of each major source of danger in inflicting the damage is relevant to identifying the civil liability of the possessors of the major sources of danger. If both major sources of danger were at fault in causing the accident, the extent of the fault of both drivers must be taken into account upon identifying civil liability. If, based on the existing evidence, it is not possible to determine the extent of the fault of both drivers, it must be concluded that both drivers were equally at fault. Based on the fault of the parties, the Tallinn Court of Appeal has divided the liability 25% and 75% in, for instance, a situation where the first party drove a non-lit vehicle and the other party unexpectedly crossed the priority road (judgment no 2-03-519 of 22 June 2006).

25 The Estonian Supreme Court has repeatedly held this – see, for example, the judgment no 3-2-1-76-09 of 28 September 2009 and the judgment no 3-2-1-126-11 of 13 December 2011. It should be added that the application of § 139 LOA may also be requested by the liability insurer of the injuring party.
caused by a loss for which the injured party is liable. This is sufficient for taking the motor vehicle operational risk into account upon reducing damages. Thus, if interpreted reasonably, the provisions of the LOA should, in principle, facilitate reaching solutions similar to those under the German StVG.

**B Circumstances taken into account in the division of liability or reduction of damages**

According to the German StVG, various circumstances need to be taken into account in the division of liability. First, the operational risk (Betriebsgefahr) of the motor vehicles involved in an accident must be taken into account. The reduction of the liability of the injuring party based on the operational risk of the injured party does not amount to accusing the injured party of not performing or improperly performing an obligation.26

In addition to the operational risk, the fault of the persons involved in an accident which is associated with the behaviour of the persons who drove the vehicles must be taken into account. Thus, the degree of fault is of relevance upon division of liability, but it must nevertheless be assessed whether there was a causal link between the driver’s fault and the inflicted damage.27 The extent of the operational risk and fault of one person depends on the operational risk and fault of the other person involved in the accident.28

Liability quotas are established on the basis of all these circumstances. For instance, if one party to an accident has been negligent, but the other has not, the latter party will in general merely bear the operational risk of approximately 20–30%.29 Although each situation must be assessed separately, these quotas serve as a baseline30 for the division of liability in specific circumstances.31 The liability quotas are set in such a manner that the parties’ shares amount to 100% in total.32 Damage is compensated on the basis of the liability quotas in such a

26 MünchKomm/Oetker (fn 22) 528.
27 Greger (fn 7) 611.
29 MünchKomm/Oetker (fn 22) 562.
31 For detailed discussion of the practice concerning liability quotas, see C Grüneberg, Haftungsquoten bei Verkehrsunfällen. Eine systematische Zusammenstellung veröffentlichter Entscheidungen nach dem StVG (10th rev and ext edn 2007). This book systematises approximately 4,400 judgments and orders.
32 Ibid.
manner that if, for instance, A’s liability quota is 25% and B’s liability quota is 75%, A must compensate B for 25% of B’s damage and B must compensate A for 75% of A’s damage. As noted above, the division of liability must be assessed separately on each occasion.

Based on the aforementioned judgment of the Estonian Supreme Court (no 3-2-1-7-13) it can be concluded that, under Estonian law, both the circumstances arising from the risk as well as the behaviour of the drivers can, similarly to the approach developed in German case law, be taken into account in reducing the damages on the basis of § 139 LOA. The Estonian Supreme Court listed the mass, dimensions, speed of movement, technical condition and safety equipment of a vehicle as circumstances that affect the operational risk of the vehicle. The court pointed out that the risk arising from a lorry is much higher than that of a moped. According to the Estonian Supreme Court, one can also take into account the special operational risk (the objective nature and dangerousness of a specific manoeuvre).

Similarly to German law, the Estonian Supreme Court also considers the conduct of persons involved in an accident, in particular their failure to exercise due care and follow traffic regulations, as important with regards to the reduction of damages. The Supreme Court also justifiably stated that, in order for subjective circumstances to be taken into account such as tiredness, alcohol intoxication, exceeding the speed limit or the absence of the right to drive, such factors must have actually contributed to the accident.

The authors of the article consider the approach of the Estonian Supreme Court regarding the circumstances to be taken into account in reducing damages to be well-founded and, in principle, that this will contribute towards reaching a just solution on a case by case basis.

The Supreme Court, in clarifying the circumstances to taken into account when reducing damages, nevertheless left one matter of principle open: whether and how the reduction of the damages of one party to an accident affects the reduction of the damages of the other party. The authors of this article hold the view that the ultimate result must be damages that do not exceed 100% in total – that is, if the damages of one party must be reduced to 40%, those of the other must be reduced to 60%. However, it is possible that a result where one party receives compensation for damage to the extent of 50% and the other to the extent of 100% may arise from a procedural error whereby the first person does not rely on the other person’s share in inflicting damage and does not prove the relevant circumstances. Such an outcome is undesirable and the Estonian courts should seek to avoid this by applying subsec 1 of § 139 LOA of their own initiative and reducing damages to the extent of the injured party’s share in inflicting the damage.
C Reducing one party’s damages to zero

Upon division of liability, an interesting question arises, namely whether damage mutually inflicted by two motor vehicles can result in a situation where one of the parties is liable in full and the other is not liable at all. In the context of Estonian law, this would mean that the damages of one party are not reduced and those of the other are reduced to zero.

Under subsec 3 of § 17 of the German StVG, the custodian of a motor vehicle may be released from liability upon the occurrence of an unavoidable event (unabwendbares Ereignis).33 If the overwhelming cause of an accident is the fault of one party, it may eliminate the operational risk arising from the other party’s vehicle.34 Thus, one party may have to bear his own damage in full. In general, a road user may trust that another road user will not wilfully commit a serious violation of traffic regulations.35 Thus, a driver who fails to notice a red light and consequently causes a traffic accident is liable for the full damage.36

The Estonian Supreme Court also noted in its judgment in case no 3-2-1-7-13 that the reduction of damages to the minimum or the preclusion of damages altogether can be possible by way of exception. Thus, if it is clear that the accident was caused solely by a serious mistake of the injured party, the liability of the injuring party who did not violate any rules and was reasonably (that is, while exercising due care) unable to avoid the accident, and the risk arising from the vehicle that caused the damage, will be fully eliminated by the conduct of the injured party.

This is certainly a reasoned opinion. In the event of a serious violation of traffic regulations by one party, the court must have the opportunity to require the violator to bear the damage in full.37 The position of the Supreme Court

33 It should be noted that according to subsec 2 of § 7 of the German StVG the liability towards a third party is excluded only in the case of force majeure.
34 MünchKomm/Oetker (fn 22) 562.
36 Greger (fn 7) 631. In the event of crashing into a parked vehicle that does not obstruct traffic, the liability of the person who parked the vehicle is usually denied (BGH judgment of 22 December 1964, Versicherungsrecht (VersR) 1965, 362).
37 In fact, Estonian courts have done so. For instance, in a case where the claimant’s son sat in the middle of the road under a non-lit bridge at night, wearing dark clothes and no reflector in an area where pedestrians were not permitted and where the speed limit was 70 km/h, the court held that the damages must be reduced to zero due to the share of responsibility of the son in the damage. See the judgment of the Tallinn Court of Appeal of 5 October 2012 in civil case no 2-12-5891. In a case where an accident occurred because the first driver turned from a non-priority road into a priority road without giving way to a vehicle moving on the priority road, the court
nevertheless still leaves plenty of discretionary freedom for the courts of lower instance to shape the case law.

**D Compensation of damage in the event of equal operational risk and infliction of damage**

The judgment of the Supreme Court in case no 3-2-1-7-13 does not give any direct answer to the question of how damage must be compensated if the parties’ involvement in causing an accident and the operational risks of the vehicles are equal. According to Estonian case law, in the past both parties have usually been awarded damages to the extent of 50% of their damage in such events.

According to § 17 of the German StVG and German case law, liability must be divided 50-50 if the operational risk and fault of both parties is equal. For instance, the court has split liability 50-50 in a situation where the driver of a motor vehicle suddenly hit the brakes in front of an intersection where the traffic lights were not functioning and the driver of another motor vehicle rear-ended his vehicle.

The authors find that reducing the damages of both parties to 50% in the event of equal involvement and operational risk is likewise reasonable. It would be illogical if the damage of the parties was compensated in full in the event of equal involvement and operational risk.

held that the person moving along the priority road must be fully compensated for damages (judgment of the Tallinn Court of Appeal of 16 March 2007 in civil case no 2-05-2060).

It should be noted that the answer was in the initial text of the judgment in case no 3-2-1-7-13, which provided for the full compensation of damage to both parties of the accident. However, the position was revised by the order of 26 March 2013.

For instance, the Tallinn Court of Appeal awarded the claimant 50% of the damage in the event of an accident where a lorry driven by a member of the board of the claimant commenced turning left and collided with an oncoming passenger car whose driver was exceeding the maximum speed limit (judgment no 2-08-1835 of 9 April 2012). The Court has also held that the claimant is entitled to damages amounting to 50% of the damage in a situation where the defendant suddenly hit the brakes and the claimant rear-ended the defendant’s vehicle with his motor vehicle (judgment of the Tallinn Court of Appeal no 2-07-8695 of 27 November 2007). A similar principle was also followed by another court where a driver started to turn left and failed to notice an oncoming ambulance car that was moving at a high speed, as a result of which a collision occurred (judgment of the Tartu Court of Appeal no 2-07-5067 of 4 March 2008).

For more information see Grüneberg (fn 31).

E Compensation of damage where the circumstances giving rise to damage are unclear

Frequently it is impossible to identify and prove the circumstances of an accident after it has occurred, for example in a situation where A says that he had the green light and B says that he had the green light. In such an event the matter will also need to be decided on the basis of the correct principle to apply in awarding damages to the parties.

The part of the judgment of the Estonian Supreme Court in case no 3-2-1-7-13 that is most disputed is the paragraph where the court stated: ‘If the level of involvement of drivers in causing an accident is unknown and there are no substantial differences in the risks arising from the vehicles, each vehicle possessor must fully compensate the damage caused to the other’.42

This proposition creates a difference of principle between the Estonian and German approaches, because, according to German case law, the liability quota of each party is 50% in such an event.43

The basis for the approach taken by the Estonian Supreme Court is understandable in the context of Estonian law: since both parties are liable towards one another under §1057 LOA and since the circumstances of the accident are such that one party cannot prove the other’s share in inflicting the damage, the damages can seemingly not be reduced under subsec 1 of §139 LOA. For various reasons, however, the authors of this article do not agree with such an approach.

Firstly, the given position of the Estonian Supreme Court seems to ignore the need to take into account the reduction of damages due to the behaviour of the injured party or the operational risk of the vehicle(s). Even if the circumstances of an accident cannot be clarified, the accident obviously could not have happened without the involvement of both parties in causing the damage. In such an event, it should rather be assumed that both parties caused the accident to an equal extent if the operational risk is equal. Thus, the damages of each party should be reduced by 50% in the given situation. Although the uncertain circumstances in such an accident prevent the party involved from providing evidence to prove the other party’s share in the damage, the courts can surely establish such a presumption.

Secondly, in light of the general approach of the Estonian Supreme Court, it also seems somewhat illogical that the parties involved in a traffic accident should end up materially better off if the accident takes place in unknown

42 Civil case no 3-2-1-7-13, 33.
43 Greger (fn 7) 619; Grüneberg (fn 28) 31.
circumstances on the basis that they can then both claim a full indemnity from the insurer of the opposite party. Theoretically, the person who has violated traffic regulations and caused an accident could thus end up in a better position than the person who cannot be blamed for anything but whose damages must be reduced on the basis of the operational risk. According to the approach taken by the Estonian Supreme Court, the person who violated the regulations will receive compensation if the circumstances of the accident remain unknown and the operational risks arising from the vehicles are equal.

Such a position may actually encourage parties not to disclose the circumstances of an accident to their insurer (the person who did not violate the traffic regulations must take into account the possibility that he will not receive full compensation if the operational risk of his vehicle was higher than that of the other party). Reducing the damages of both parties by 50% would probably avoid this.

As noted above, the position espoused by the Supreme Court will theoretically not result in an unfavourable situation for the parties to a specific accident in practice: since the injuring party’s damage will be indemnified by his liability insurer (who has the right of recourse against the injuring party only in exceptional circumstances) and since the injuring party himself gets full indemnity from the insurer of the other party, such a solution may even seem favourable for policyholders.44 In practice, however, this is generally not the case. If insurers are forced to pay higher indemnities they will in turn be forced to raise the insurance premiums of all policyholders. Thus, policyholders will ultimately pay the higher damages themselves.

VI Summary

In conclusion, the judgment of the Estonian Supreme Court that is the focus of this article arguably creates more problems than clarity in quite a few aspects. On the one hand, the Supreme Court outlined the circumstances to be taken into account upon reducing damages. This is a positive development as it largely coincides with the approach taken in German case law regarding the division of

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44 It should be added that under subsec 1 of § 67 LOA each joint and several obligor can only set off a claim against his own claim. Thus, the insurer against whom a party files a claim cannot set it off against the policyholder’s claim for damages (which the latter has against the claimant). Rather, a set-off can only be made by the injuring party himself, but generally the injuring party is not interested in doing so.
liability. On the other hand, the Supreme Court did not specify how the reduction of one party’s damages affects the damages of the other party.

Furthermore, the Supreme Court took a questionable position on how damage should be compensated if the respective involvement of the parties causing the damage is unknown and their operational risks are equal, holding that in such an event both parties should be awarded damages in full. It is difficult to agree with this approach because it fails to take into account the share of responsibility of each party in causing the damage. The person who violated the traffic regulations may actually end up in a better financial position than the person who did not violate the regulations. The position taken by the Supreme Court is also problematic because it may encourage parties to an accident not to inform their insurers about the circumstances of the accident. Further, it can be argued that the inevitable consequence of the payment of higher damages by insurers is higher indemnities by policyholders in the form of higher insurance premiums.

In conclusion, it is arguable that the issues raised in this article are not the direct consequence of the lack of a separate provision in Estonian law regulating the division of liability in the event of the mutual infliction of damage by two motor vehicles. In fact, it is suggested that § 139 of the LOA is sufficient for developing just and reasonable case law regarding compensation arising from a traffic accident.

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