III. Bulgaria

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1. Supreme Court of Cassation (SCC) Interpretative Decision No 1 from 21 June 2018 on Interpretative Case No 1/2016, General Assembly of the Civil, Commercial and Criminal Chamber[1]

For a long time, Bulgarian case law adopted a restrictive approach to determining the circle of persons entitled to compensation for non-pecuniary damage resulting from the death of a close relative. The right to compensation was strictly limited to first-degree relatives in the ascending and descending line (parents and children), as well as the spouse, as established in Supreme Court (SC), Decree No 4 from 25 May 1961, Plenum and Supreme Court, Decree No 5 from 24 November 1969, Plenum.

Subsequently, SC, Decree No 2 from 30 November 1984, Plenum explicitly refused to recognise the rights of siblings, grandparents and grandchildren to receive compensation for non-pecuniary damage. It was accepted that these relatives were not sufficiently close to the injured party (the deceased), thus they failed to meet the 'proximity' requirement, and also that such recognition could lead to an uncontrolled number of claims for compensation, consequently to an abuse of rights.

Thus, with SCC, Decision No 212 from 26 April 2010 on Criminal Case No 143/2010, Criminal Division, 3rd Bench, the Court ruled that the Supreme Court's decrees, which are legally binding, exhaustively list those persons entitled to compensation for non-pecuniary damage in the event of the death of a relative. Since siblings are not among them, their claims should not have been examined on the merits. In effect, the proceedings should have been terminated by the first instance court as having been initiated by an unentitled person.

In SCC, Decision No 219 from 14 July 2010 on Criminal Case No 163/2010, Criminal Division, 3rd Bench, it was declared that the claims of the grandchildren of a murdered woman were correctly dismissed on the grounds that they were not legally entitled to claim non-

[1] Reported in *V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2018 (2019) 56, nos 7–16.

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pecuniary damages as a result of her death, this being clearly stated in the theory and case law expressed in SC, Decree No 4 from 25 May 1961, Plenum and SC, Decree No 5 from 24 November 1969, Plenum.

In SCC, Decision No 526 from 1 February 2011 on Criminal Case No 441/2010, Criminal Division, 2nd Bench, the SCC concluded that binding case law limits the circle of eligible persons and does not include siblings, regardless of the non-pecuniary damage they have suffered owing to the loss of a close relative.

In SCC, Decision No 181 from 30 November 2012 on CC No 958/2011, Commercial Division, 2nd Bench, the Court acknowledged that from a medical and psychological point of view, the bond between twins may be stronger than the biological bond between parent and child, whereby the claimant experienced severe emotional pain and suffering as the result of the death of his twin brother. Nevertheless, these circumstances are irrelevant to the proceeding, since the mandatory directions in SC, Decree No 2 from 30 November 1984, Plenum exclude the legal possibility of compensation. The claim was therefore dismissed.

The SCC, Interpretative Decision No 1 from 21 June 2018 on Interpretative Case No 1/2016, General Assembly of the Civil, Commercial and Criminal Chamber changed the standing practice and ruled that the persons identified in SC, Decree No 4 from 25 May 1961, Plenum and SC, Decree No 5 from 24 November 1969, Plenum, as well as (exceptionally) any other person who had created a lasting and deep emotional connection with the deceased, and as a result experiences continuing pain and suffering, should be fairly compensated. Compensation is to be awarded once a particularly close connection with the deceased, in addition to damage actually incurred as a result of their death, have been proven.

Following the adoption of this Decision, the practice was reversed. Thus, for example, in SCC, Decision No 50399 from 5 June 2023 on CC No 1624/2022, Commercial Chamber, 1st Bench, the right of a brother to receive compensation for non-pecuniary damage resulting from the death of his brother in a traffic accident was confirmed. The Court found that exceptional circumstances had been proven in this case, which justified the payment of compensation. The testimony of the witnesses and a social report established that, to the claimant, his deceased brother was like a father, given that his actual father had become disinterested in him. The bond between the two brothers was extremely strong and the sudden death of the brother had a very negative impact on the claimant's psyche. It was concluded that persons outside the immediate family circle (parents, children and spouse) are recognised

as 'victims' and entitled to compensation for emotional damage only where, due to specific life circumstances, the attachment had become so strong that the death of the relative caused a degree of emotional pain and suffering exceeding the intensity and duration that would normally be present in the family relationship concerned. It was accepted, in this case, that an emotional relationship had been proved, differing from the norm in terms of type, intensity and duration, and in which a relationship similar and extremely close to that existing between the closest circle of persons had been established.

In other cases, if no evidence of a particularly strong relationship between the deceased and the person claiming compensation (most often brothers, sisters and grandparents) is presented, the claim was dismissed.[2]

It appears that the interpretation set out in the Interpretative Decision is being successfully applied by the courts, which shows that the fear of an excessive number of claims being filed, and compensation being awarded to a large number of relatives and others closely associated with the deceased, was unjustified. Without a doubt, the decision of the SCC can be described as 'revolutionary', not only because it results in the changing of a conservative, 50-year-old, practice but because it extends the concept of 'proximity' in order to give a right to claim compensation to any person who can prove a close and lasting relationship with the deceased, resulting in considerable moral pain and suffering being caused by their loss. As long as such a relationship can be proved, it is no longer only relatives of the deceased who can claim compensation – emotional connections are also relevant. This interpretation gives the courts freedom to review each particular case. Nevertheless, the courts have correctly concluded that the idea is not to compensate all those close relatives who suffer negative emotions from someone's death, but only those closest who, as a rule, suffer the most (parents, children and spouse), and others who, in a particular case and owing to extraordinary circumstances, suffer significantly with this suffering having been proved.[3]

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[2] Eg SCC, Decision No 50555 from 21 October 2023 on CC No 2011/2022, Civil Division, 4th Bench; SCC, Decision No 50078 from 26 October 2023 on CC No 2045/2022, Civil Division, 1st Bench; SCC, Decision No 50562 from 13 October 2023 on CC No 2078/2022, 1st Bench; SCC, Decision No 60374 from 17 June 2021 on CC No 1753/2020, Civil Division, 1st Bench; SCC, Decision No 50610 from 14 November 2022 on CC No 2573/2021, Commercial Division, 2nd Bench; SCC, Decision No 646 from 25 November 2020 on CC No 457/2020, Commercial Division, 2nd Bench, etc.

[3] Eg SCC, Decision No 3479 from 13 November 2023 on CC No 1011/2023, Civil Division, 3rd Bench.

2. SCC, Decision No 71 from 6 April 2020 on Civil Case (CC) No 3804/2019, Civil Division, 4th Bench[4]

For the first time in Bulgarian judicial practice, the tort liability of the National Assembly was recognised in Supreme Court of Cassation (SCC), Decision No 71 from 6 April 2020 on Civil Case (CC) No 3804/2019, Civil Division, 4th Bench. The decision was rendered in a seemingly simple case, which nevertheless is of substantial importance for the understanding and application of numerous legal principles, including those relating to the Constitution of the Republic of Bulgaria.

The dispute before the SCC arose from the following circumstances: the claimant is a company, an owner of photovoltaic power stations. The company was affected by an amendment in the legislation from 2014 according to which, a fee of 20% is due on all income from the production of solar and wind energy. By Decision No 13 from 13 July 2014, effective as of August 2014, the Constitutional Court declared the statutory provision establishing this 'fee' unconstitutional. The company then sought compensation for all 'fees' paid in this eight-month period, amounting to approximately € 200,000 from the National Assembly for adopting an unconstitutional law.

The main legal issue stemmed from art 151, para 2 of the Constitution, which provides that a law declared unconstitutional ceases to apply as of the date on which the Constitutional Court's decision enters into force, meaning that decisions of the Constitutional Court produce effects for the future (*ex nunc*). Consequently, compliance with the law as applicable at a given moment was considered not to constitute damage and therefore not subject to compensation. This was the reasoning adopted by the Sofia City Court and the Sofia Court of Appeal in rejecting the claim.

The SCC took a revolutionary step with its decision. First, it held that since the Constitution itself provides that the State is liable for damage caused by unlawful acts and actions of its bodies, this implies that all representatives of the executive, judiciary and legislative branches can bear such liability. This was the first time that a court accepted that the legislative body, namely the National Assembly, could be held liable (alongside executive and judicial authorities). At the same time, the SCC clarified that the liability of the National Assembly is not related to the immunity of members of Parliament for their individual actions as such. Secondly, and even more significantly, the SCC overturned the idea that

[4] Reported in *V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2020 (2021) 53, nos 3–10.

the effect for the future of decisions of the Constitutional Court declaring a law or part of it unconstitutional blocks any path for seeking compensation for damage when this law was in force. The SCC declared that the adoption of an unconstitutional law is a tort since its adoption represents an unlawful act (to a high degree) and the application of such an unconstitutional law inevitably causes damage to legal subjects – both to the State itself and to citizens and entities that are equally subordinate to the law until it is brought into accordance with the Constitution. It is the National Assembly's responsibility to adopt laws that are compliant with the Constitution as members of Parliament undertake under oath, as their main obligation, to comply with it.

Furthermore, the SCC based its reasoning on art 22, para 4 of the Constitutional Court Act, according to which, the authority that adopted the unconstitutional act is obliged to eliminate the adverse legal consequences resulting from its application. This means that the failure of the National Assembly to address the legal consequences of an unconstitutional law also constitutes a tort, as such inaction is just as unlawful as the adoption of the law itself. As long as the National Assembly does not settle all legal consequences deriving from the application of the unconstitutional law by adopting the appropriate legal provisions, including provisions enabling compensation for the continuing violation of rights, the constitutional order remains 'damaged', which is unacceptable for the rule of law.

Owing to the depth and coherence of its reasoning, the decision may properly be characterised as a milestone in Bulgarian case law as it served as a basis for a series of subsequent decisions in similar cases.[5]

An interesting evolution in judicial reasoning may be observed in later decisions. While other SCC benches accepted the principle of the National Assembly's liability for damage, they sought alternative legal grounds to justify it. Thus, in SCC, Decision No 91 from 26 August 2021 on CC No 1489/2020, Civil Division, 4th Bench, it was argued that claims for the restitution of sums paid under a law later declared unconstitutional should be characterised as claims based on unjust enrichment rather than tort. The reason for this can again be traced to the legal significance of a law that was applicable until it was declared unconstitutional.

The resulting inconsistency in case law prompted the adoption of SCC, Interpretative Decision No 1 of 20 April 2023 on Interpretative Case No 1/2022, General Assembly of Civil and Commercial Chambers.

[5] Such as in SCC, Decision No 204 from 9 March 2021 CC, No 3812/2018, Civil Division, 3rd Bench, and in SCC, Decision No 91 from 26 August 2021 on CC, No 1489/2020, Civil Division, 4th Bench

In this binding decision, the SCC ruled that the adoption by the National Assembly of unconstitutional law is a tort, as is the failure of the National Assembly to comply with its obligation to redress the effects of the law declared unconstitutional. In this sense, the legal basis for a claim brought against the State in this factual situation is tort law and the liability of the State is tortious, strict, no-fault based, and is effective regardless of whether the conduct of the officials concerned was culpable.

In conclusion, notwithstanding the divergent lines of reasoning previously adopted by individual SCC benches, the jurisprudence initiated by the 2019 decision has firmly established the possibility of holding the National Assembly liable for damage caused by the adoption of unconstitutional legislation and by the failure to remedy the legal consequences of its application.

3. SCC, Interpretative Decision No 2 from 12 January 2023 on Interpretative Case No 3/2021, General Assembly of Civil and Commercial Chambers[6]

In recent years, the question of the standard of proof required for lost profit in cases of a tort has become increasingly relevant. This and contradictory practice from different benches of the SCC is the reason for this significant Interpretative Decision from 2023. The Supreme Court decided that the lost profits caused by a tort must be proven with certainty, in the same manner as lost profits caused by a breach of a contractual obligation. This decision could be significant for the future and could significantly reduce the number of claims for lost profit in tort cases.

It should be considered that all the cases examined by the SCC in connection with contradictory case law are related to the fact that, as a result of a tort, the owner of a movable or immovable property was deprived of the opportunity to use it or to receive income from it. Therefore, the relevant question is whether the lost profit in the form of lost rent should be compensated if it is not proven that the claimant tried to rent out the real estate. However, instead of initiating an interpretative case on this practical issue, the SCC issued an interpretation on the question: 'Should the loss of profits caused by a tort be proved with certainty, just as the loss of profits caused by a breach of a contractual obligation must be proved with certainty?'

In order to understand the meaning of the interpretative question, the SCC Interpretative Decision 3 from 12 December 2012 on Interpretative

[6] Reported in *V Tokushev/H Tancheva*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 69, nos 11–19.

Case No 3/2012, General Assembly of Civil and Commercial Chambers should be considered. In this decision, it was decided that for damages in the form of lost profits resulting from delayed performance of an obligation to build a construction to be awarded, there must be a degree of certainty that there would have been an increase in the value of the creditor's property, as such certainty is not assumed. In addition, in the grounds of the decision, the SCC refers to its key argument: '...the lost profit represents a real and not hypothetical damage, this assumption must always be based on a proven possibility of a certain increase of the property and cannot lie on a logical assumption of lawful occurrence of the increase.'

In fact, the 2023 decision of the SCC was in a sense predetermined by the manner in which the interpretation question was defined. Thus, the answer that the lost profits in the case of tort should be proved in the same way as in the case of a breach of a contractual obligation is logical and there is no legal basis for them to be treated differently, at least not in Bulgarian law. The problem is that, by introducing the requirement that the lost profits must be proven with certainty, the possibility of them being claimed is significantly limited, which makes it difficult for the injured party to receive full compensation.

In the authors' opinion, the interpretative question should have been: Can there be certainty in the case of lost profits? Bulgarian theory unanimously adheres to the understanding, quoted also in the decisions of the SCC, that lost profit is a lack of increase in the value of property. In this sense, by definition, the lost profit is not real: it is assumed, because it would have been realised if there had been no breach of contract or damage to the interests of the party injured by the tort. As far as there is a breach of an obligation or a tort, the profit has not materialised and is 'lost'. In this sense, the requirement of certainty should be understood not as a requirement for the 'reality of the damage', but as a requirement for a greater probability of its occurrence.

If we move from theoretical discussions and look at the cases that provoked the Interpretative Decision, we can assume that when the party injured by the tort could not use their property due to the actions of the tortfeasor, it is not enough merely to state that they intended to rent them in order for them to be awarded damages for lost profits. In such a case, the Court should investigate whether the injured party had another home to rent, whether the property was suitable for renting and whether the injured party made any efforts to rent it (by placing advertisements, having interviews with tenants, etc). It seems that the SCC wants to reduce its workload and, by introducing the certainty requirement, it appears that the Court is saying that lost profits can only be certain if there is a lease

agreement. This ultimate understanding of the standard of proof is not acceptable, because even when an agreement has been concluded, there is no guarantee that it will be rightfully executed for its entire term.

In this sense, the interpretation of the SCC cannot be supported and, as mentioned above, can be very problematic for future case law. There is no presumption of lost profit but requiring it to be proven with certainty is too burdensome and will certainly not be helpful in practice. It would have been far better if the instructions of the SCC had been directed towards a more nuanced approach, based on the usual development of events and the specific circumstances of the case, in the sense of the recommendations of theory and the dissenting opinions.

4. Varna District Court, Decision No 1164 from 18 October 2011 on CC No 1489/2011

According to prior case law, it was generally accepted that the destruction of, or damage to, property could not cause non-pecuniary damage. Thus, in SCC, Decision No 1102 from 9 April 1981, on CC No 623/81, Civil Division, 1st Bench, a decision awarding compensation for non-pecuniary damage, comprising 'fear and anxiety' suffered by the claimants while watching their home burn down due to gross negligence on the part of the defendant, and the subsequent 'suffering and inconvenience' caused by its restoration was overturned. The argument was that not every unpleasant sensation or feeling, and not every depressive feeling gives grounds for awarding compensation for non-pecuniary damage, only those that justice requires to be compensated. The Court clearly considered that in this case, justice did not require an award of compensation. Nevertheless, it then seemed to leave the door open for another specific case in which compensation could be awarded.

More recently, in Varna District Court, Decision No 1164 from 18 October 2011 on CC No 1489/2011, the claimant's right to compensation for non-pecuniary damage, suffered as a result of the killing of his pet by the defendant's dog, was recognised. Compensation was claimed for non-pecuniary damage, consisting of negative changes in the claimant's mental and emotional state resulting from the killing of his pet (a cat). The Court accepted that contemporary Bulgarian society has elevated the value of the humane treatment of animals, protecting them with legal means. The Decision also states that it is a 'moral duty of mankind to respect all living creatures', and that pets have a special relationship with humans contributing, as they do, to the quality of life, thus being of value to society. Considering the nature and character of the suffering and

negative emotions experienced by the claimant in the case in relation to the loss of his pet cat, which he had owned for ten years from a kitten, the Court decided that it was fair to award compensation for this non-pecuniary damage in the amount of € 500.

Similarly, in SCC, Decision No 60456 from 17 December 2021 on CC No 3132/2021, Civil Division, 2nd Bench, the Court refused to grant a Cassation Appeal against the decision of the Appellate Court, which upheld that of the Regional Court. This latter ordered the defendant to pay compensation in the amount of € 3,750 in non-pecuniary damages, resulting from the claimant's pet being killed by the defendant's dog.

In Sofia Regional Court, Decision No I-31 from 9 July 2015, on CC No 16443/2015, the Court dismissed a claim for compensation of non-pecuniary damage in a similar case, albeit one in which the animal did not die. The case established that while on a walk, the claimant's dog, a Pomeranian, was attacked by the defendant's dog, which was not on a lead or wearing a muzzle. The claimant's Pomeranian suffered a severe laceration, for which it was rushed to a veterinary clinic, where it underwent surgery and was hospitalised and medicated. This was followed by a recovery period under home care. The claimant sought compensation of non-pecuniary damage, consisting of pain and suffering, fear and anxiety for the life and health of his dog, and worry over whether it would survive and recover from the trauma. The Court acknowledged that it is not impossible, and indeed quite normal, for an act of damage against property to also cause mental suffering to its owner, especially in the case of animals, which are living creatures to which people can become attached. However, it dismissed the claim, arguing that awarding compensation for the non-pecuniary damage suffered by the owner of an injured pet, when compensation for non-pecuniary damage suffered by an injured loved one could not be awarded, constitutes a devaluation of the worth of human life and is immoral. In other words, the Court accepted that, since compensation is not payable to relatives when a person suffers bodily injury, there is even less reason to award compensation when an animal is injured.

The Decision was appealed, and overturned, by the Sofia City Court, Decision No 9265 from 21 December 2016 on CC No 96/2016. The Court held that it had been established in the case that the claimant had suffered non-pecuniary damage as a result of the incident involving his own dog. To wit, he had experienced pain and suffering in connection with the injury to his own dog. Contrary to the findings of the court of first instance, the Sofia City Court held that it was permissible to award compensation for non-pecuniary damage suffered in connection with an injury to one's pet, finding that the fair amount of compensation was € 500.

The SCC also ruled on a similar case. Through SCC, Order No 3733 from 23 November 2023 on CC No 1239/2023, Civil Division, 1st Bench, the SCC confirmed a Court of Appeal Decision which awarded € 5,000 in non-pecuniary damages to the claimant. The claimant and his dog were both bitten by the defendant's dogs and the claimant sought non-pecuniary damages, both for the pain he himself suffered and the suffering caused to him by the injury to his dog. The Court established that, after the incident, the claimant fell into an emotional state of depression, increased anxiety, and fear of which he had had no previous experience. The claimant looked after the dog intensively, visiting the vet for treatment of its wounds for about two months. He himself suffered considerably as a result of his pet's suffering. It was established that the dog had been kept by the claimant's family for several years, and that the deep emotional bond between the dog and its owner was normal and understandable, which is why compensation was awarded both for the pain and suffering caused by the claimant's own injuries and for the negative emotions experienced in connection with those of the dog.

As can be seen, the practice of the last 15 years shows that the courts now consider certain cases of damage to, or destruction of, property as causing non-pecuniary damage when it is fair and justified by the specific circumstances of the case (most often in the case of pets, which, although considered 'chattel', are nevertheless animate objects, not only when killed but also when injured). Non-pecuniary damage should always be subject to compensation when it is actually suffered (proved), as art 52 of the Bulgarian Obligations and Contracts Act does not impose restrictions on who is to be compensated, what type of property must have been damaged, or how. On the contrary, the rule is so broad that it allows for discretion by the judicial authority. This in no way means that all claims for non-pecuniary damages should be upheld. Only those for which it has been proved that pain or suffering has been experienced, and that it is 'fair' and reasonable to compensate should be deemed to merit an award.

5. SCC, Interpretative Decision No 1 from 23 December 2015 on Interpretative Case No 1/2014[7]

Contributory negligence – understood as the injured party's contribution to the harmful result – represents one of the principal grounds on which the liability of the person who caused the damage may be reduced.

[7] Reported in *C Takoff/V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 54, nos 4–10.

For this reason, its precise delineation is of enduring importance for practice. In this respect, particular significance attaches to SCC, Interpretative Decision No 1 from 23 December 2015 on Interpretative Case No 1/2014. In point 7 of this Decision, the Court addresses the question of whether the conduct of an injured person qualifies as contributory negligence in cases where they willingly accepted a ride with a driver who had consumed alcohol.

The SCC found that there is contradictory case law on this issue. According to the first group of decisions, in such cases, the injured person voluntarily consents to take a known risk, which could be qualified as contributory negligence. The reasoning is that, even if the injured person did not contribute to the occurrence of the accident, they contributed to their injury. According to the second group of decisions, in such cases, there is no contributory negligence. The reasoning is that the person's conduct neither caused nor contributed to the accident, and that their knowledge of the fact that the driver consumed alcohol, by itself, is not a ground to establish contributory negligence.

After considering these two views, the SCC held that the first is correct. The Court reasoned that a person's conduct may be qualified as contributory negligent in at least two forms. In the first, the person's negligence contributed to the occurrence of the accident, while in the second, it contributed to the occurrence of the injury suffered (in both, the injured person's conduct can be qualified as contributory negligence). The definition of the second form of contributory negligence is the key outcome from this decision, which will prove to be significant in the coming years.

According to the SCC, the acceptance of a predictable known risk or its total disregard objectively constitutes a contribution of the injured person to the injury caused. Such contribution is unlawful and there is a direct causal link between the negligent conduct and the injury caused by the traffic accident. Therefore, the SCC ruled firmly that: 'The conduct of an injured person qualifies as contributory negligence in cases where they accepted a ride with a driver who had consumed more than the legally permissible amount of alcohol if the injured person had known this fact'.

The SCC held further that a party claiming contributory negligence (eg the person who caused the accident or the insurer) as a defence has the burden of proving it. The extent of the contributory negligence is to be considered in each individual case. Thus, the compensation awarded to the injured person should be reduced by the extent to which they were liable, but it can never be totally barred.

The interpretative decisions of the SCC are binding on all lower courts in Bulgaria and therefore any interpretative decision is a ground

for consolidation of the court practice on the matter. The decision should generally be supported. Although it may seem unfair to injured parties, the decision correctly recognises that the subjective knowledge about the driver's consumption of alcohol constitutes voluntary consent to encounter a known risk and, thus, is grounds for receiving less compensation.

This decision has proven to be significant because the question of whether there is contributory negligence in such cases has almost never been raised in the recent practice of the SCC – an issue which is relevant to other cases of contributory negligence in motor vehicle accidents, for example the wearing of seat belts.