

GLOSS to the judgment of the Supreme Court of 7 October 2016, II KK 157/16, Lex/el.

Summary

The glossed decision of the Supreme Court is particularly important for the practice, inasmuch as it addresses two extremely important issues. On one hand, the decision expresses a general principle that the mere fact of a driver approaching a pedestrian crosswalk does not impose on him the obligation to perform excessive defensive maneuvers. On the other hand, it recognizes the need for a timely response, depending on the road conditions and situations. Thus, the decision addresses an important issue of the relationship between a driver and a pedestrian occurring at a crosswalk. Importantly, the provisions in force impose different obligations on drivers and pedestrians, the only common liability being a requirement for a particular caution. However, the above comments do not solve the conflict, because the existing legislation often imposes the obligation to do the impossible on a stronger traffic participant, i.e. the driver, which was recognized by the Supreme Court, which expressed an opinion diverging from the previous jurisprudence, all the more valuable, as it is sound and realistically approaching the issue in question.

Keywords safety principles, particular caution, unpredictability of behavior, limited trust, predictability, model behaviors, the concept of general ascription of responsibility

The mere fact of approaching the crossing does not oblige the driver to undertake defensive maneuvers. Hence, the need for the deceleration of the vehicle is not contingent on the mere fact of approaching the crossing, but on the overall road situation and conditions allowing adequate reaction at a given speed.

The glossed court order, which is to be welcomed, addresses the issue essential for road safety, namely, the pedestrian-vehicle relationship occurring at pedestrian crosswalks, i.e. the areas where pedestrians are frequently struck with tragic consequences. To date, neither the existing traffic organization systems, road signs, nor legislation have been capable of solving this problem. It should be pointed out that the relationships between drivers and pedestrians are regulated by divergent provisions. A common directive stipulates that both drivers and pedestrians are obliged to exercise particular caution. Both the driver and pedestrian are required to assess the situation on the road, taking into account any visibility limitations, movement speeds of the individual road users as well as distances. However, in the case of a vehicle-pedestrian collision occurring at a pedestrian crosswalk, e.g., due to limited visibility, the fact of such a limitation should concern both parties involved, in a way that they refrain from any risky actions

that may cause danger. The above is important in view of the fact that, as practice shows, pedestrians who lose patience while waiting, attempt to cross the road ahead of the approaching vehicles. Furthermore, the drivers tend to accelerate in order to pass before pedestrians block the road, while the latter enter the crosswalk taking advantage of the gaps between the vehicles. Thus, the traffic at crosswalks gives an impression of both pedestrians forcing their right of way and them being intimidated by the drivers. The „pedestrians’ right of way” rule, applying to pedestrians present at a crosswalk, should be combined with a prohibition against entering the crosswalk in close proximity to the approaching vehicle. Pursuant to this regulation is a directive of the “relative right of way” of a vehicle at a crosswalk, which creates dangerous situations, especially under conditions of heavy traffic or limited visibility. Even the provisions of the Act on Road Traffic (Journal of Laws of 2012, item 1137, as amended) containing the detailed regulations addressed to the drivers in the form of prohibitions or obligations, are not capable of eliminating dangerous situations created by the legislature, given the fact that the principle of pedestrians having the right of way at crosswalks has grown into public consciousness. The declaration

granting special protection to pedestrians at specific crosswalks is only illusory. The conflict between vehicles and pedestrians moving along crossing paths cannot be eliminated without separating traffic routes. If a pedestrian has no right of way at a crosswalk, then this right may be exercised by a driver and vice versa. Should this issue be unequivocally resolved, even with minor imperfections, it would constitute an essential progress compared to the current misinterpretations, which can readily send a driver in the dock (more on this subject: K.J. Pawelec, *Zarys metodyki pracy obrońcy i pełnomocnika w sprawach przestępstw i wykroczeń drogowych*, Warszawa 2016, p. 97).

The issue of enacted legislation related to the attitude of drivers towards pedestrians at crosswalks has been repeatedly placed on the agenda of the Supreme Court. Typically, the judgments of the Supreme Court reflected a strict approach towards drivers, which was a generally accepted doctrine. It can be summarized as follows: a driver who notices the appropriate road signs or markings is obliged to apply the tactics allowing him to stop the vehicle over a short distance. A precaution expressed by the road sign applies only to the driver, obliging him to respond rapidly, even in the face of an unexpected road situation (cf. A. Bachrach, *Przestępstwa i wykroczenia drogowe w prawie polskim*, Warszawa, 1980, p. 188 et seq.). The driver must be prepared to counteract any signalized, abstract hazards without interrupting driving, even in the absence of an imminent threat. In its judgment of 2 July 1980, V KRN 136/80, OSNPG 1981, no. 5, item 48, the Supreme Court held that: "In principle, at road intersections and crosswalks, entering the roadway by a pedestrian may not come as a surprise to drivers" Furthermore, in a judgment of 21 January 1987, V KRN 485/86, [in:] K.J. Pawelec, *Zarys..., op. cit.*, p. 115; the Supreme Court stated that: "The disclosed evidence demonstrates that striking a victim at a designated crosswalk was a consequence of grossly careless driving by the accused, in particular maintaining excessive speed when approaching the crosswalk as well as failing to adjust to limited visibility at the scene of the event (no lighting) and to difficult road conditions". (cf. judgment of the Supreme Court of 7 January 1981, V KRN 366/80, OSNPG 1981, no. 8, item 90; judgment of the Supreme Court of 22 August 1979, V KRN 177/79, [in:] K.J. Pawelec, *Zarys..., op. cit.*, p. 116; judgment of the Supreme Court of 22 August 1979, V KRN 146/79, Lex no. 1621644; judgment of the Supreme Court of 8 November 1974, IV KRN 45/74, [in:] R.A. Stefański, *Przestępstwa i wykroczenia drogowe w orzecznictwie SN. 1970-1996*, Warszawa 1997, p. 134; judgment of the Supreme Court of 22 August 1979, V KRN 177/79, [in:] K.J. Pawelec, *Zarys..., op. cit.*, p. 116; judgement of the Supreme Court of 18 June 1996, V KRN 31/96, [in:] K.J. Pawelec, *Zarys..., op. cit.*, p. 117; judgment of the Supreme Court of 4 July 1995, II KRN 71/95, "Prokuratura i Prawo" 1996, no. 1, p. 11; decision of

the Supreme Court of 12 January 2010, IV KK 225/09, KZS 2010, no. 7-8, item 27).

A bit more liberal and much more realistic views of the Supreme Court could be noted since 1996. Namely, in its judgment of 7 November 1996, II KKN 90/96, "Prokuratura i Prawo", 1997, no. 4, p. 97 with a gloss by R.A. Stefański, the Supreme Court formulated the thesis that the mere fact of a pedestrian staying curbside, especially in urban traffic conditions, does not constitute a circumstance requiring the driver to lose trust in this fellow traffic participant. Irrational behavior of a pedestrian, incompatible with the elementary road traffic rules, in principle constitutes an unpredictable excess (cf. decision of the Supreme Court of 25 May 2006, IV KK 417/05, KZS 2006, no. 12, item 16; decision of the Supreme Court of 6 February 2013, V KK 264/12, Lex no. 1293867). In all fairness, it must be said that the Supreme Court realistically approached this issue, especially in terms of determining the so-called excessive speed for driving at night (more on this topic: K.J. Pawelec, *Zarys..., op. cit.*, p. 108-115 and the literature and case-law cited therein).

Returning to the glossed provisions of the decision, the following two issues should be pointed out. The thesis expressed by the Supreme Court is made up of two parts. The first part refers to drivers approaching pedestrian crosswalks and it consists of a general rule. The second sentence indicates the need for certain safety maneuvers to be undertaken by the driver, reflecting the road conditions and situation, and closely related to the speed. The Supreme Court has therefore recognized the old truth that the road situation created by the driver is the one he/she will have to deal with, especially in terms of having enough time to carry out a particular defensive manoeuvre after noticing and identifying the danger. However, this hazard must result from foreseeable and perceivable situations. The defensive reaction does not necessarily mean a breach of safety rules, as it is often undertaken instinctively, without reflection and determining better driving variants. Therefore, in determining factual findings, psychophysical and psychological evaluations can be of great help, and they can be requested especially in matters related to the response to atypical behavior. This postulate *de lege lata* can be applied especially in the face of increasingly used construction of objective ascription of responsibilities, which does not have to be versatile as regards the cases involving road accidents (more on this topic: K.J. Pawelec, *Obiektywne przypisanie czy uniwersalna koncepcja w sprawach o wypadki drogowe?*, PD 2016, no. 6, p. 39-46 and the literature and case-law cited therein).

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