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Actio directa and Indirect Consequences of Damage in the Conflict-of-law Perspective[1]

Introduction

Claims for damage suffered as a result of the indirect violation or rights and interests are the subject matter of an increasing number of disputes in judicial practice.[2] At the same time, for many years, this question has been subject to an extensive debate in the academic literature.[3] The concept, not without simplification, referred to as "indirect damage" can be traced not only to family relationships. Resolution with regard to the desirability of compensating indirect victims is relevant not only from the point of view of the consequences of medical malpractice or traffic accidents, but it also applies to other types of events capable of inflicting indirect damage. One example is the loss suffered by shareholders when the value of their shares plummets as a result of damage caused to a company.[4]

The problems of persons indirectly injured are considered in many European and non-European jurisdictions as the traditional doctrine of compensation for damage

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[2] See, instead of many: judgments of the Polish Supreme Court (SC) of 9.08.2016, II CSK 719/15, OSNC 2017, no. 5, item. 60; and of 10.02.2017, V CSK 291/16, LEX no. 2329480; judgment of the Court of Appeal in Gdańsk of 6.11.2014, I ACa 508/14, LEX no. 1649223; judgment of the Court of Appeal in Rzeszów of 26.01.2021, I ACa 461/19, Legalis no. 2538782; judgment of the circuit court in Włocławek of 22.06.2017, I Ca 84/17, Legalis no. 2025876.

[3] See, instead of many: B. Lanckoroński, *Odpowiedzialność za tzw. szkody pośrednie w polskim prawie cywilnym* [in:] *Odpowiedzialność odszkodowawcza*, ed. J. Jastrzębski, Warszawa 2007; M. Wałachowska, *Wynagrodzenie szkód deliktowych doznanych przez pośrednio poszkodowanych na skutek śmierci albo uszkodzenia ciała lub rozstroju zdrowia osoby bliskiej*, Warszawa 2014; W. Popiołek, *Odpowiedzialność spółki dominującej za "szkodę pośrednią" wyrządzoną przez spółkę zależną* [in:] *Rozprawy z prawa prywatnego i notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, eds. A. Dańko-Roesler, A. Oleszko, R. Pastuszko, Warszawa 2014.

[4] M. Pannert, *Roszczenie odszkodowawcze z tytułu obniżenia wartości akcji*, FP 2014, vol. 24, no. 4.

and is based on the directly injured party. At the same time, this subject matter constitutes an element that is regulated differently in contemporary national legal systems.[5]

The evolution of the scope of compensation for damage is reflected in the Polish legal system. The Code of Obligations of 1933[6] and Art. 166[7] offered an appropriate amount of money to immediate family members of a deceased person as compensation for moral harm suffered by such parties. On the other hand, in post-war literature and judicial practice, it was argued that death of an immediate family member cannot be a source of financial benefits, and its compensation is inappropriate from a moral perspective.[8] Such rigorous position was not met with approval in society and, as a consequence, in 2008, Art. 446 § 4 of the Civil Code was introduced,[9] which permits claims of immediate family members in the event of the death of an immediate family member.

Apart from claims asserted by immediate family members arising from death of the directly injured party, one should distinguish claims arising in relation to the detriment to health of an immediate family member. In that spirit, by an amendment of 2021,[10] the provision of Art. 446(2) of the Civil Code was introduced under which in case of causing severe and permanent bodily injury or health disorder resulting in the impossibility of establishing or continuing a family relationship, the court may award to immediate family members of the injured party an appropriate amount of money as monetary compensation for the harm suffered. The introduction of this provision was to remove a stark contradiction between the positions expressed by the Supreme Court in the resolutions of 27 March 2018 and 22 October 2019.[11] The legislator's in-

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5 E. Bagińska, *Modele regulacji zadośćuczynienia za śmierć osoby bliskiej w wybranych krajach europejskic*h [in:] *Zadośćuczynienie po nowelizacji art. 446 Kodeksu cywilnego na tle doświadczeń europejskich*, eds. Z. Strus, K. Ortyński, J. Pokrzywniak, Warszawa 2010.

6 Regulation of the President of the Republic of 27 October 1933 – Code of Obligations (Dz. U. no. 82, item. 598).

7 Under Art. 166 of the Code of Obligations, the court could award to immediate family members of the injured party whose death was a consequence of causing bodily injury or health disorder, or to an institution designated by such immediate family members, an appropriate amount of money as compensation for the moral harm suffered by the immediate family members,

8 See resolutions of the SC of 29.01.1957, I CO 37/56, OSNC 1958, no. 1, item. 2 and of 15.12.1951, C 15/51, PiP 1952, issue 2, p. 817.

9 Act of 30 May 2008 amending the Act – Civil Code and certain other Acts (Dz. U. no. 116, item. 731).

10 Act of 24 June 2021 amending the Act – Civil Code (Dz. U. item. 1509).

11 In the resolution of 27 March 2018 (III CZP 60/17, MoP of 2018 no. 8, p. 387), the Supreme Court held that compensation for harm can be awarded to immediate family members of the injured party who, as a result of a tort, suffered a severe and permanent detriment to their health. On the other hand, in the resolution of 22 October 2019 (I NSNZP 2/19, MoP of 2019 no. 23, p. 1250), it was concluded that immediate family members of an injured party who, as a result of a tort, suffered severe and permanent health disorder are not entitled to monetary compensation under Art. 448 of the Civil Code. For more, see: A. Paleczna, *Glosa do uchwały Składu Siedmiu Sędziów Sądu Najwyższego – Izba Kontroli Nadzwyczajnej i Spraw Publicznych z dnia 22 października 2019 roku, sygn. I NSNZP 2/19*, "Wiadomości Ubezpieczeniowe" 2020, no. 4.

tervention proves how important it is to delimitate the basis of and boundaries to compensatory liability.[12]

The results of comparative law research lead to the conclusion that provisions permitting compensation to indirect victims as a result of the death of an immediate family member can be found in a number of national jurisdictions.

In the light of the circumstances presented above, in cross-border matters, one should consider – which is the main purpose of this article – the question of the law applicable to civil law liability for the death of a person, with special emphasis put on the aspect of unifying conflict-of-law provisions under the Rome II Regulation. From this perspective, one should also analyze the direct compensatory claim against the insurer of the person responsible for damage (*actio directa*).

1. Direct claims for damages against the insurer (*actio directa*)

In the context of increasing road traffic in Europe, and an increasing number of traffic accidents of international status, claims for damages formulated by indirect victims necessitate an analysis of the admissibility of asserting such claims directly against the insurer of the person responsible for damage (*actio directa*).[13]

The question of admissibility and the legal framework applicable to *actio directa* is, under Art. 18 of the Rome II Regulation,[14] in the sphere of interest of two different legal systems, namely the law applicable to the insurance contract (law applicable to contractual obligations designated under the norms of the Rome I Regulation, including choice of law admissible under Art. 7 of the Rome I Regulation[15]) and the law applicable to the event being the source of the obligation to redress damage (law applicable to non-contractual obligations designated under the norms of the Rome II Regulation).[16] The law applicable to non-contractual obligations resolves questions concerning the

[12] Although adoption of Art. 446(2) CC was to end the discussion about compensating a detriment suffered by indirectly injured persons in consequence of detriment to their health, this was not the case.

[13] In the literature, it is indicated that *actio directa* constitutes a legal construction of a tortious and contractual nature. So: E. Kowalewski, *Ubezpieczenie odpowiedzialności cywilnej. Funkcje i przemiany*, Toruń 1981, p. 184; H. Möller, *De la double nature de laction directe* [in:] *Etudes offertes à Monsieur le Professeur A. Besson*, Paris 1976. See also: M. Fras, *Kolizyjnoprawna problematyka umów ubezpieczenia komunikacyjnego*, "Europejski Przegląd Sądowy" 2007, no. 7, pp. 16–18; *idem*, K. Pacuła, *Umowa ubezpieczenia obowiązkowego w prawie prywatnym międzynarodowym* [in:] *System prawny ubezpieczeń obowiązkowych. Przesłanki i kierunki reform*, eds. E. Kowalewski, W. Mogilski, Toruń 2014.

[14] Under the cited provision, a person suffering damage may assert a claim for damages directly against the insurer of the responsible person if such possibility is provided for in the law applicable to the non-contractual obligation or in the law applicable to the insurance contract. See the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), EUR-Lex-32007R0864-EN.

[15] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), EUR-Lex-32008R0593-EN.

[16] M. Pazdan [in:] *idem*, *Prawo prywatne międzynarodowe. Komentarz*, Legalis 2018, paragraph 2.

existence and content of the perpetrator's obligation, while the law applicable to contractual obligations resolves questions concerning the rights and obligations of the parties to an insurance contract. The provision uses a connector formulated as an equivalent (complete) alternative, which means that none of the applicable jurisdictions gains priority over the other one.[17]

The *actio directa* construction is admissible when it is known to any of the competing legal systems.[18] However, the admissibility of such a construction must be distinguished from the pursuit of the law applicable to the assessment of the insurer's liability. Such an assessment, in turn, depends on the qualification of *actio directa* as either a contractual or non-contractual (tortious) claim.[19]

A parallel direct claim against the insurer is established under Art. 9 of the Hague Convention on the Law Applicable to Traffic Accidents.[20] According to the provision cited, the possibility of a direct claim depends on the legal regime adopted in the country where the perpetrator's vehicle was registered, in the country where the accident took place, and, finally, in the country whose law is applicable to the insurance contract of the holder of the motor vehicle the use of which caused the damage.[21] Bearing in mind the principle expressed in Art. 28, the Regulation gives way to the provisions of the Convention, whereby both Art. 18 of the Regulation and Art. 9 of the Convention are decisive when it comes to actions against the insurer since it is the law applicable to non-contractual (tortious) obligations that decides about the existence and content of the injured party's claim against the perpetrator and against the insurer.[22]

Returning to the regime under Art. 18 of the Rome II Regulation, a number of doubts arise as to the scope of the conflict-of-law rule, which does not relate directly to the prerequisites and other elements of the legal construction of *actio directa*. In this spirit, a restrictive conception has been developed according to which the scope of the norm covers only *actio directa*. In the same way, the prerequisites, content, and scope of a claim should be assessed under the law applicable to contractual obligations arising under the insurance contract covering the risk of the event causing damage.[23] However, according to a second conception, aspiring to ensure uniformity to

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17 So CJEU in the judgment of 9.09.2015, C-240/14 Eleonore Prüller-Frey *v.* Norbert Brodnig and Axa Versicherung AG, ECLI:EU:C:2015:567; K. Ludwichowska, *Prawo właściwe dla roszczenia poszkodowanego w wypadku samochodowym do ubezpieczyciela OC sprawcy szkody*, "Zeszyty Naukowe – Uniwersytet Ekonomiczny w Poznaniu" 2009, no. 127, p. 353.

18 P. Huber, I. Bach, *Die Rom II VO, Kommissionsentwurf und aktuelle Entwicklungen*, IPRax 2005, p. 15.

19 F. Seatzu, *Insurance in Private International Law. A European Perspective*, Oxford–Portland 2003, p. 121.

20 Convention on the Law Applicable to Traffic Accidents, done at the Hague on 4 May 1971 (Dz. U. of 2003 no. 63, item. 585).

21 D. Maśniak, *Transgraniczny system ochrony ofiar wypadków drogowych*, Warszawa 2010, p. 343.

22 For more, see: K. Pacuła, *Roszczenie bezpośrednie poszkodowanego przeciwko ubezpieczycielowi (actio directa) w prawie prywatnym międzynarodowym*, "Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie" 2015, no. 1(11), p. 113 *et seq.*

23 G. Hohloch [in:] *Handkommentar BGB*, ed. Erman, [np] 2011, p. 6797.

actio directa, the scope of the conflict-of-law rule under Art. 18 of the Rome II Regulation covers the entire regime applicable to the claim. From this perspective, the rule will cover not only the admissibility but also the conditions (modality), i.e., the prerequisites, the content, and the scope of *actio directa*.[24]

The question must be asked as to which legal system will apply when *actio directa* is known both to *lex causae* and to the law applicable to the insurance contract but the regimes differ in each jurisdiction. Despite the lack of an express provision, the decision in this regard should be left to the injured party. However, once the choice is made, it will be binding for any questions that make up the structure of the legal institution discussed. This is the case as it would be inadmissible to create a hybrid combining elements drawn from both legal frameworks coming into question.[25] An opinion was expressed in the literature that the court should, *ex officio*, apply the jurisdiction more favorable to the injured party.[26]

2. Florin Lazar *v.* Allianz SpA – factual situation

In the context of the problems under discussion, special attention must be paid to the judgment of the Court of Justice of 10 December 2015, C-350/14, in Florin Lazar *v.* Allianz SpA.[27] The request for a preliminary ruling involved the interpretation of Art. 4(1) of the Rome II Regulation.

The request was made in a dispute between F. Lazar, resident in Romania, and the Italian insurance company Allianz SpA for compensation of material and non-material damage suffered by the plaintiff as a consequence of his daughter's death in a traffic accident. The order for reference indicated that F. Lazar, a Romanian national, sought compensation for material damage and for non-material damage that he suffered upon the death of his daughter, a Romanian national, habitually resident in Italy, as a result of an accident that occurred in Italy and was caused by an unspecified vehicle. The road accident occurred on 18 May 2012. The Guarantee Fund for Victims of Traffic Accidents pointed to the insurance company Allianz SpA as the designated insurance firm. The injured party's mother and grandmother participated in the case as interveners, both being Romanian nationals habitually resident in Italy. They sought

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[24] Among the arguments for adopting such a solution, it is pointed out that Art. 18 uses an alternative of connections. Moreover, the limitation of the scope of Art. 18 of the Rome II Regulation to the assessment of admissibility of *actio directa* raises doubts in a situation when the law applicable to the insurance contract does not provide for *actio directa*. See A. Junker, *Das internationale Privatrecht der Straßenverkehrsunfälle nach der Rom II – Verordnung*, "Juristen Zeitung" 2008, H. 4, p. 179.

[25] M. Pazdan [in:] *idem*, *Prawo prywatne międzynarodowe…*, paragraph 9.

[26] D. Jakob, P. Picht [in:] *Europäisches Zivilprozess- und Kollisionsrecht*, vol. 1, München 2011, p. 979; P. Stone, *EU Private International Law*, [np] 2006, p. 374.

[27] Judgment of the Court of Justice of the European Union of 10.12.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:802.

compensation for material and non-material detriments suffered as a consequence of the victim's death.

In the opinion of the referring court, since the plaintiffs sought compensation for material and non-material detriment suffered as a result of death of a family member, it had to be established if the loss and harm suffered amounted to damage in the understanding of Art. 4(1) of the Rome II Regulation or if they constituted an indirect consequence of a tort in the understanding of that provision.

The Italian court with jurisdiction *ratione materiae* had doubts if the claim should be examined under Italian substantive law or according to Romanian law. Although Art. 4(1) of the Rome II Regulation provides that, subject to special rules, the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs "irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur." In Italian law damage caused by the death of a family member is damage suffered directly by the aggrieved family member and takes the form of violation of such individual's personal interests. Therefore, compensation for non-material damage, payable to family members under Arts. 2043 and 2059 of the Italian Civil Code, constitutes the plaintiff's own claim (*iure proprio*). However, this method of constructing claims available to indirect victims is not typical to jurisdictions of other Member States of the EU. The problems of the right to obtain compensation as one of "indirect consequences" of the primary tort (traffic accident) in the understanding of the Rome II Regulation remains all the more relevant in light of the Court's case-law under the Brussels I Regulation.[28]

The answer to the question discussed will be provided by the substantive law that should be applied by the referring court to resolve the question of the occurrence of and the possibility to redress the damages invoked before the court by the plaintiff habitually resident in Romania.

In these circumstances, the Court of first instance in Trieste (Tribunale di Trieste) decided to stay the proceedings and referred questions to the Court of Justice of the EU for a preliminary ruling. Finally, the Court of Justice held that Article 4 of the Rome II Regulation must be interpreted to determine the law applicable to a non-contractual obligation arising from a road traffic accident as meaning that the damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State, must be classified as the "indirect consequences" of that accident, within the meaning of that provision.

[28] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, p. 1, special edition in Polish, Chapter. 19, v. 4, p. 42, hereinafter referred to as "Brussels I Regulation").

3. Harm of close persons as "indirect damage" in the understanding of Art. 4(1) of the Rome II Regulation

Discussion about the law applicable to claims for damages available to indirectly injured parties has been held in the existing doctrine of private international law and in judicial practice.[29] As justly noted by Advocate General Nils Wahl in the opinion of 10 September 2015,[30] in light of a diversity of conflict-of-law rules designating the law applicable to non-contractual obligations, the need was recognized for harmonization in that regard. Another argument for such consolidation is the aspiration to guarantee a certain level of predictability of the applicable law. The legal regime provided in the Rome II Regulation, as emphasized in the opinion, makes a compromise between the implementation of the postulate of legal certainty (by introducing permanent connectors) and the willingness to preserve certain flexibility (for example, if the application of connectors led to inappropriate consequences). At the same time, the legal regime discussed is a continuation of previous solutions that applied in private international law.

Special attention should be paid at this point to the determination of the substantive law applicable to the claim. There are, in fact, major differences when it comes to the qualification, nature, and scope of indirect damage. By way of example, as far as the group of injured parties is concerned, one can distinguish between three models of persons entitled to assert a claim: half-open, closed, and open.[31] A similar discrepancy is observed in relation to the basis for asserting claims by deriving them from a special provision, from a general provision, or by way of creative interpretation given by the judiciary. Such claims may be available to the injured party as the party's independent claims or as rights derivative from the deceased person. In Italian law, damage suffered as a result of death of an immediate family member constitutes directly suffered damage. This, in turn, means that the obligational relationship between a member of the deceased person's family and the person found guilty of inflicting the damage is independent from the obligational relationship between the deceased and such responsible party.[32]

The Rome II Regulation, in Art. 4(1) provides for a permanent connector in the form of the country in which the damage occurs (*locus damni*). The law of the country where the damage occurs is neutral, which is conducive to striking an equilibrium between the parties and to increase the predictability of decisions, as far as legal certainty is concerned. This implements Recital 16 of the Rome II Regulation. However, if the con-

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[29] See M. Pilich, *Prawo właściwe dla zadośćuczynienia za śmierć osoby bliskiej w unijnym prawie kolizyjnym – wprowadzenie i wyrok Trybunału Sprawiedliwości z 10.12.2015 r., C-350/14, Florin Lazar przeciwko Allianz SpA*, "Europejski Przegląd Sądowy" 2021, no. 4, pp. 55–56, and case-law cited therein.

[30] Opinion of Advocate General Nils Wahl of 10.09.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:586, paragraphs 19 and 20.

[31] For more, see: E. Bagińska, *Modele regulacji zadośćuczynienia*…, pp. 56–58.

[32] Opinion of Advocate General Nils Wahl of 10.09.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:586, paragraph 37.

sequences of applying the permanent connector lead to random outcomes, one can resort to the law applicable in the country of habitual residence (Art. 4(2) of the Rome II Regulation) or to the law of another country when the tort is manifestly more closely connected with that country.[33]

In the opinion, the Advocate General paid attention to two positions. The former, supported by the Austrian government is based on the assumption that material and non-material damages suffered by family members of a person deceased in another Member State would not have to constitute indirect consequences of the harmful event in the understanding of Art. 4(1) of the Rome II Regulation. Then, the claim of indirectly injured persons would be subject to the law of the country in which the damage suffered by the family members occurred, that is the country of their habitual residence, unless, under Art. 4(3) of the Rome II Regulation, it is demonstrated as evident from all the circumstances of the case that there is a manifestly stronger connection with another country. According to the latter position, represented in particular by the Commission and interveners, damages suffered in the country of their habitual residence by immediate family members of the person deceased as a result of a traffic accident which took place in the country where the competent court is seated should be treated as indirect consequences of the damage suffered by the direct victim of the accident. The term "country in which the damage occurs" should relate to the place where the damage was caused, that is to the place where the traffic accident occurred.[34]

4. "Place in which the damage occurs" in the understanding of Art. 4 of the Rome II Regulation

In the context of the above, key importance is attached to the consideration of what should be understood as the "place in which the damage occurs," as this determines the law applicable to the claims of indirectly injured persons. A useful reference in this regard, and also for the differentiation between indirect and direct damage, is the case-law under the Brussels I bis Regulation.[35]

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[33] The connector of the law of the country in which the damage occurs reflects the current understanding of compensatory liability, in which the compensatory function comes to the fore, and less and less importance is paid to repression. It is not without significance that the connector allows to designate the law applicable to complex torts characterized by geographical separation of the place of the event causing the damage and the place where the damage occurred. See opinion of Advocate General Nils Wahl of 10.09.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:586, paragraphs 23, 29, 30.

[34] Opinion of Advocate General Nils Wahl of 10.09.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:586, paragraphs 40 and 41.

[35] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), EUR-Lex-32012R1215-EN.

Special attention should be paid to the judgment of the Court of Justice of 11 January 1990 in Dumez France *v.* Tracoba.[36] Two parent companies domiciled in France filed a claim for damages against banks domiciled in Germany. The parent companies traced the damage suffered to the declaration of bankruptcy of some of their subsidiaries domiciled in Germany. The cause for the declaration of bankruptcy of the subsidiary companies was termination by the above-mentioned banks of the agreements for loans granted to the subsidiaries for the implementation of a project. Against the background of such facts, the subject of considerations was understanding of the expression "place where the harmful event occurred" from the perspective of Art. 7(2) of the Brussels I bis Regulation (former Art. 5(3) of the Brussels Convention). In reference to the nature of damage, the Court of Justice admitted that the damage specified by the parent companies was only an indirect consequence of the financial losses incurred in the first place by their subsidiaries as a consequence of terminating the loan agreements. The Court held in this regard that "the damage suffered constitutes only an indirect consequence of the loss primarily suffered by other legal persons directly affected by the damage which occurred at a place other than the place where the indirectly affected party sustained a later damage." As a result, the "place where the harmful event occurred" will be the country in which the event giving rise to tortious liability directly exerted harmful influence on the primarily injured party.

In the judgment of 30 November 1976 delivered in Handelskwekerij G.J. Bier B.V. *v.* Reinwater Foundation,[37] the subject of considerations was whether the concept "place in which the damage occurred" refers to a place in which financial detriment was suffered by indirectly affected parties. The Court of Justice concluded that it should be understood exclusively as the place in which the harmful event giving rise to tortious liability actually led to its direct consequence in the form of damage sustained by the directly injured party.[38]

In the judgment delivered in Marinari case of 19 September 1995,[39] the Court of Justice held that the term "place where the harmful event occurred" in the understanding of Art. 5(3) of the Brussels Convention can refer at the same time to the place where the damage occurred and place where the harmful event occurred; however, it cannot be interpreted broadly so as to include any places in which negative consequences might arise from an event that had already caused actual damage in another location. As a result, this expression cannot be interpreted to include the place where the

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[36] Judgment of the Court of Justice of the European Union of 11.01.1990 in Case C-220/88 Dumez France *v.* Tracoba, EUR-Lex-61988CJ0220-EN.

[37] Judgment of the Court of Justice of the European Union of 30.11.1976, C 21/76, Handelskwekerij G.J. Bier B.V. *v.* Reinwater Foundation, EU:C:1976:166.

[38] It was explained that the place where the primary damage occurred is usually strictly connected with the other prerequisites of liability. Cf. Judgment of the Court of Justice of the European Union of 7.03.1995, C68/93, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd *v.* Presse Alliance SA., EU:C:1995:61.

[39] Judgment of the Court of Justice of the European Union of 19.09.1995, C-364/93, Antonio Marinari *v.* Lloyds Bank plc and Zubaidi Trading Company, ECR 1995 I-02719.

injured party suffered material damage derivative from the primary damage occurring in another Contracting Party and sustained there by the same party.

In the literature, an argument deployed for qualifying a detriment suffered by immediate family members as direct damage is the nature of such non-contractual obligation. In fact, the creditor pursues a claim following from the creditor's own harm, and not that from another person's.[40]

It seems that the most important argument in the discussion about the law applicable to the redress of damage suffered by immediate family members relates to the compensation of detriment by the insurer and by the perpetrator. Depending on the habitual residence of the immediate family members asserting a respective claim, the court would have to apply, with potentially different consequences, legal provisions from jurisdictions of several countries.[41] A situation might happen in which the event examined by the court is severed into several legal relationships subject to different jurisdictions depending on the interested parties' habitual residence.[42] This, in turn, could translate into the amount of cover or the above-mentioned range of persons entitled to seek compensation.

Legislative history also supports the argument about the non-separation of indirect and direct damage. The report accompanying the proposal for the Rome II Regulation indicates that the provision assumes as the basic rule designation of the law of the country in which the direct damage occurred or may occur.[43] It was explained in the report that the place where the direct damage occurred is the place of the accident, regardless of possible material and non-material damages taking place in another country. By contrast, the place in which indirect damages were sustained is irrelevant to the establishment of applicable law.

As far as traffic accidents are concerned, many Member States, including Poland, apply the Hague Convention, which designates as applicable law *lex loci delicti commissi*, without the possibility of choice of another law by the parties, which would introduce other connectors than those provided for in Art. 4 of the Rome II Regulation. As mentioned above, the Convention takes precedence over the provisions of the Rome II Regulation. However, it should be pointed out that considerations on the determination of the law applicable to claims of indirect victims will have an impact on interpretation of Art. 3 of the Hague Convention. This is the case since a usual consequence of a traffic accident will be immediate occurrence of consequences in the form of direct damage.

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40 M. Pilich, *Prawo właściwe*…, p. 55.

41 M. Wałachowska, *Prawo właściwe dla roszczeń osób pośrednio poszkodowanych*, GSP 2022, vol. 53, no. 1, p. 104.

42 Opinion of Advocate General Nils Wahl of 10.09.2015 in Case C-350/14 Florin Lazar *v.* Allianz Spa, ECLI:EU:C:2015:586, paragraph 74.

43 COM(2003) 427 final version of 22 July 2003, p. 12, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF [accessed: 2022.04.21].

Conclusions

The position presented by the Court of Justice aims to grasp all consequences of an event as one detriment, compensation for which should be subject to one substantive law. Ultimately, the Court of Justice, with a view to preventing the severance of the law applicable to non-contractual obligations, made an autonomous qualification intended to ensure the predictability and certainty of resolutions. This decision perpetuates the view about such an application of European Union law that enables the efficient operation of the European system in the area of judicial cooperation. An advantage of such a method of determining the applicable law is its simplicity and the implementation of the postulate to strive for predictable resolutions.

On the other hand, one should agree with the views expressed in the literature calling into question the interpretation given by the Court of Justice and the ensuing risks. First of all, the interpretation could be impractical in situations when, as a result of an accident, damage was caused to a third party in the form of mental shock. The Court's position may also lead to different interpretations depending on whether the claim is intra-national or cross-border, or from the practice of applying the Rome II Regulation in individual countries.[44] Additionally, the Court did not take advantage of the other conflict-of-law rules under Art. 4 of the Rome II Regulation although the same considerations of legal certainty and the unity of the law applicable to non-contractual obligations point to their application.[45]

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44 For more, see: M. Wałachowska, *Prawo właściwe*…, p. 106.

45 M. Pilich, *Prawo właściwe*…, p. 57.

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Summary

Aneta Paleczna

Actio directa and Indirect Consequences of Damage in the Conflict-of-law Perspective

The problems of indirect victims are considered in many European and non-European jurisdictions because of the fact that the traditional doctrine of compensating damage is based on the directly injured person. The question of determining the law applicable to civil law liability for human death in cross-border matters becomes all the more crucial. In this context, special attention should be paid to the judgment of the Court of Justice of 10 December 2015, C-350/14, Florin Lazar *v.* Allianz SpA, in which it was concluded that the law applicable in such situations is the law of the country where the direct damage occurred and was suffered by the directly injured party. In addition, claims for damages formulated by indirectly injured persons require

analysis in the context of their assertion directly against the insurer of the person responsible for the damage (*actio directa*).

Keywords: indirect damage; law applicable to claims of indirectly injured persons; *actio directa*.

Streszczenie

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***Actio directa* a pośrednie następstwa szkody w aspekcie kolizyjnoprawnym**

Problematyka osób pośrednio poszkodowanych jest rozważana w wielu jurysdykcjach europejskich i pozaeuropejskich ze względu na to, że tradycyjna doktryna kompensacji szkody opiera się na osobie bezpośrednio poszkodowanej. Tym większego znaczenia nabiera ustalenie właściwości prawa dla cywilnoprawnej odpowiedzialności za śmierć człowieka w sprawach o charakterze transgranicznym. Na tym tle na szczególną uwagę zasługuje wyrok Trybunału Sprawiedliwości z dnia 10 grudnia 2015 r., C-350/14 w sprawie Florin Lazar przeciwko Allianz SpA, w którym przyjęto, że do tego zagadnienia należy zastosować prawo miejsca wystąpienia szkody bezpośredniej, poniesionej przez bezpośrednio poszkodowanego. Roszczenia odszkodowawcze formułowane przez osoby pośrednio poszkodowane wymagają również analizy w kontekście dopuszczalności kierowania ich bezpośrednio przeciwko ubezpieczycielowi osoby ponoszącej odpowiedzialność za szkodę (*actio directa*).

Słowa kluczowe: szkoda pośrednia; prawo właściwe dla roszczeń osób pośrednio poszkodowanych; *actio directa*.