

### RIGHT OF RECOURSE IN MOTOR INSURANCE AND DRIVING UNDER THE INFLUENCE OF DRUGS

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- Supreme Court of Justice ruling standardising jurisprudence no. 10/2024. of 15 July 2024, case no. 3489/17.5 T8STR.E1-A

On 15 July 2024, the Supreme Court of Justice published ruling standardising jurisprudence no. 10/2024, dated 23 May, case no. 3489/17.5 T8STR.E1-A, in the *Diário da República* (Official Gazette) no. 135, series I, concerning the claim of the motor vehicle insurer against a driver who accused the consumption of psychotropic drugs, with the following summary:

«Article 27/1 c) of Decree-Law 291/2007 of 21 August, stipulates that "to acknowledge the insurer's right to reimbursement for compensation paid to the injured party, the insurer must assert and demonstrate that the driver was operating the vehicle while impaired by psychotropic substances, which diminished his physical and mental capacity to drive safely, and that this impairment must be confirmed through a medical and/or expert evaluation."».

This is an extremely important and complex issue, as are many of those relating to the return of motor insurance. Recently there have been judgments in different directions, in particular the landmark judgment of the Supreme Court of 25 March 2021, case no. 313/17.2T8AVR.P1.S10.

The key question is what the insurer has to prove if it wants to recover from the driver responsible for the use of narcotics, other drugs or toxic products.

While it seems clear that the insurer must allege and prove that the driver has consumed them, it is doubtful whether proof of any kind of consumption, dosage or amount (whether or not it exceeds any kind of legal limit - in this case 10 times less) is sufficient for this purpose, and whether or not, in terms of causation, it is irrelevant that such consumption or dosage influenced or caused the accident. Relatedly, there is also debate about the nature of the presumption of causation in Article 27/1 c) of Decree-Law 291/2007 of 21 August, e.g. whether it is a presumption *iuris tantum* or *iuris et de iure*. Other questions then arise that are intertwined with these.

The problem of alcohol consumption has been resolved to a greater extent: the legislator has clearly established that the insurer's right of recourse only arises if the driver is driving with a blood alcohol level higher than that legally permitted, which is determined by the provisions of article 81 of the Portuguese Highway Code ("Código Estrada"). This is determined by the provisions of Article 81 of the Portuguese Highway Code (hereinafter "PHC"), which sets a maximum limit of 0.5 g/l of blood, above which administrative offences with gradually higher fines are envisaged (Article 81/6 *ibid.*), or even criminal offences (Article 292 of the Portuguese Penal Code).

When it comes to the consumption of narcotics and other drugs or toxic products, the problem is somewhat different. Firstly, because Article 27/1 c) of Decree-Law 291/2007 does not require, in this case, consumption at a "rate (...) higher than legally permitted". Secondly, because even if it did, it's not clear what those limits would be: bridging the gap with the Portuguese Highway Code, it's worth noting that Article 81/5 considers a driver to be under the influence of psychotropic substances if, "after an examination carried out under the terms of this Code and complementary legislation, they are considered to be so in a medical or expert report". Ordinance no. 902-B/2007 of 13 April, unlike Ordinance no. 1006/98 of 30 November, which it repealed, no longer clearly establishes the concentrations that would allow a positive conclusion to be drawn on the influence of narcotics or psychotropic substances in the blood, but only the limit above which the urine test is considered positive, without mentioning the minimum concentration of psychotropic substances in the blood test,

which, according to the Supreme Court, is the only relevant test for the purposes of Article 81/5 of the PHC.

The Supreme Court also notes, in the light of medical studies and various legal experiences, that there is no consensus on the amount of psychotropic drugs in the blood capable of determining a “state of influence”. As it states, «the Portuguese legislator has not (yet) established minimum limits in the blood for psychotropic substances, and has not adopted the rule of a “minimum threshold” from which it can be inferred that the driver was driving under the influence of those substances, in a “state of influence”. In the end, this obvious lack of definition prevents (...) the concrete determination of a minimum limit (as is the case with drink-driving) from which it is possible to presume a reduction in driving capacity, this determination being dependent on a case-by-case, medical or expert assessment, to be carried out on a case-by-case basis.»

The Supreme Court also employed the analogy of recourse against a driver found to have consumed alcohol to bolster its verdict, echoing an argument previously utilized by the Lisbon Court of Appeal in its decision dated September 15, 2022, case number 5424/20.4T8SNT.L1-2: «Just as the consumption of alcohol is not enough for the insurer to have a right of recourse against the driver, since a blood alcohol level higher than the legally permitted level is required (...), neither is the consumption of narcotics (...) enough for this right of recourse to be realised, since it must be proven that this consumption had a negative influence on the driver's ability to drive.»

Assessing the success of the ruling is premature, particularly as we near legislative reform in this sector, mandated by the transposition of Directive (EU) 2021/2118 of 24 November (VII Motor Insurance Directive), which was due on 23 December the previous year.

In any case, this appears to be a prime example of the dialectic between legislation and case-law, in a domain that the former may have inadvertently left to the latter. As a result, there has been a curious return to a perspective similar to the one that prevailed before the 2007 intervention, particularly in cases involving drivers under the influence of alcohol (refer to, among many, the judgment of the Supreme Court of Justice on the uniformity of case-law no. 6/2002 of 28 May, case no. 3470/2001).

An interpretation that aligns more closely with the fundamental framework of private law and civil liability, thus being less punitive.

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