



RESEARCH ARTICLE

The Components to Be Considered in The Evaluation of Disability Rate Related to Traffic Accident in The Light of The Supreme Court's Decisions

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Abstract:

Objective: Traffic accidents can cause liability in terms of both criminal and compensation law. Forensic medicine specialists have a great role in the assessment of permanent sequelae and disability rates associated with these sequelae. In this study, we aimed to evaluate the issues to be taken into consideration by examining the Supreme Court's decisions of reversals about disability reports related to traffic accidents.

Materials and Methods: The decisions were searched in Supreme Court Decision Search Portal by using the concepts of legal regulations which are used in the evaluation of disability rate and "traffic accident" as keywords. The Supreme Court of Decisions of Reversals for disrupting the Decisions about the disability rate reports related to traffic accidents taken by the first-instance courts were researched.

Results: 376 decisions of Reversal of 17th Civil Chamber of the Supreme Court were reached. The issuance of reports according to the statute/regulation which was not in effect at the date of the unjust act was the most frequent (n=262, 69.7%) ground. Then, contradictory rates among the received reports, uncertainty/impenetrability about which statute/regulation is based in the report, spelling errors, not taken a disability report for the basis of the provision and the problems related to the causal link were determined respectively.

Conclusion: Disability reports should be understandable, reasoned and in accordance with the relevant legislation. Reports that are not prepared in accordance with the legislation in force, not justified properly, have the problems about causality, conflicting and unsuitable for inspection may cause loss of rights, prolongation of the trial process.

Keywords: Supreme Court, Decision of Reversal, Ground, Disability Report, Traffic Accident.

Öz:

Amaç: Trafik kazaları hem ceza hukuku hem de tazminat hukuku açısından sorumluluk doğurabilmektedir. Kalıcı sekellerin ve bu sekellere bağlı maluliyet oranlarının değerlendirilmesinde, Adli Tıp uzmanlarına büyük görevler düşmektedir. Bu araştırmada; trafik kazalarına bağlı maluliyet raporları hakkında Yargıtay'ın bozma kararları incelenerek, göz önünde bulundurulması gereken hususların değerlendirilmesini amaçladık.

Gereç ve Yöntem: Trafik kazası sonucu meydana gelen maluliyet oranı hesaplamalarında kullanılan yasal mevzuat ve "trafik kazası" kavramları anahtar kelime olarak kullanılarak, "Yargıtay Karar Arama İnternet" adresinden ulaşılan kararlar tarandı. Yargıtay'ın trafik kazasına bağlı maluliyet oranı raporlarında, ilk derece mahkemelerince alınan kararları bozma nedenleri araştırıldı.

Bulgular: Yargıtay 17. Hukuk Dairesi'nin 376 bozma kararına ulaşıldı. Haksız fiilin gerçekleştiği tarihte yürürlükte olmayan tüzüğe/yönetmeliğe göre rapor düzenlenmesinin en sık (n=262, %69,7) bozma nedeni olduğu görüldü. Bunu sırasıyla; alınan raporlar arasında çelişkili oranlar olması, hangi tüzüğün/yönetmeliğin esas alındığının belli olmaması/analayışlamaması, yazım hatası olması, hükme esas alınacak maluliyet raporu alınmaması ve illiyet bağı ile ilgili sorunların izlediği saptandı.

Sonuç: Maluliyet raporlarının; anlaşılır, gerekçeli ve ilgili mevzuata uygun olarak düzenlenmesi esas olmalıdır. Yürürlükteki mevzuata uygun olarak düzenlenmemiş, uygun şekilde gerekçelendirilmemiş, illiyet bağı konusuna dikkat edilmemiş, çelişki bulunan ve denetime elverişli olmayan raporlar hak kayıplarına, yargılama sürecinin uzamasına neden olabilmektedir.

Anahtar Kelimeler: Yargıtay, Bozma Kararı, Gerekeç, Maluliyet Raporu, Trafik Kazası

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The principles outlined in the Declaration of Helsinki were followed in our study, and since this is a internet research, no ethics committee approval was not obtained.

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1. Introduction

Disabilities caused by traffic accidents, which have been frequently encountered in Turkey, cause liability in terms of criminal and compensation law. In the Article 54 of the Turkish Code of Obligations numbered 6098, physical damages caused by injury, disablement, illness and/or mental disorder as a result of unlawful acts are classified either as the damages originating from treatment costs, loss of earnings and the decrease of work performance and/or incapacity to work, or as the damages driven by a downturn in economic outlook. In case of an alleged incapacity to work as a result of an unjust act and any demand created for it, it is required to identify whether there is any disability and, if any, at what ratio it is. In Turkey, those who lose their bodily functions due to a traffic accident and/or assert such a claim are in need of reports submitted by the Departments of Forensic Medicine, the Institutes of Forensic Sciences and/or forensic specialists for their claims to compensation by way of either courts or pre-court settlements (1-3). However, there occur some problems during the preparation of these reports. In accordance with the decision of the Grand National Assembly of the Supreme Court, which was published in the Official Gazette dated February 18, 2012 and numbered 28208, it appears that the 17th Civil Chamber of the Supreme Court conducts an appellate review particularly for the decisions of traffic accident-related (compensation-insurance) incidents. In this light, it is argued that the examination of the decisions taken within the scope of the seventeenth civil chamber seems to play a guiding role in the identification and resolution of problems.

The present research aims at identifying the key points that are supposed to be considered while compiling a disability report and thereby contributing to provide standardization by examining the disability reports-related decisions of reversal of the 17th Civil Chamber of the Supreme Court.

2. Materials and Methods

The corpus of all decisions of the Supreme Court regarding the the 17th Civil Chamber's reports of the ratio of disability caused by traffic accidents, which have been accessed and retrieved from "<https://karararama.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/>" by filtering the search results between October 1 and 15, 2019, was investigated. During the examination, we searched for the key phrases of "Social Insurance and Health Care Code", "Regulation on the Determination of Work Force and Occupational Loss Ratio", "Regulation on the Disability Determination Services", "Regulation on Disability Criteri-

on Classification and Health Board Reports to Be Issued to the Disabled", "Highway Motor Vehicles Compulsory Liability Insurance", "Disability Ratio", "Traffic Accident", "Disablement" and "Traffic Insurance Policy". Some other phrases such as a liability ratio in an accident, an actuarial calculation, immaterial compensation, a statute of limitation, a discount rate of compensation and insufficient research by a court were left out of the scope during the examination.

3. Results

It has been found out from the examination that there are 376 decisions of reversal that belong to the 17th Civil Chamber of the Supreme Court. All the decision that were retrieved by means of the abovementioned phrases were included in the scope. Considering the distribution of the decisions by year, it appeared that there is one decision of reversal (0.2%) in 2010, four (1.1%) in 2013, 30 (8.0%) in 2014, 33 (8.8%) in 2015, 49 (13.0%) in 2016, 83 (22.1%) in 2017, 112 (29.8%) in 2018 and 64 (17.0%) in 2019 (including the search results found out until the date of examination).

In 278 (73.9%) decisions out of a total of 376, it has been found out that the following statement of the Supreme Court General Assembly dated June 17, 2015, docketed no. 2013/17-2423, decision no. 2015/1661 has been emphasized: "*In case of an alleged work force loss as a result of an unjust act and any kind of demand created for it, it is required to identify a temporary and permanent incapacity for work. This is supposed to be conducted by a specialists committee to be set up by the Institute of Forensic Sciences and/or the Departments of Forensic Sciences affiliated to university hospitals in consideration of the complaints of the person who asserts any reduction of incapacity for work and the provisions of the regulation in force at the time when an unjust act is performed...*". It has further turned out that, on the basis of this emphasis, disability reports are required to be delivered by a committee of specialists formed of the Institute of Forensic Sciences and/or the Departments of Forensic Sciences affiliated to university hospitals in consideration of the complaints of the person who claims any reduction of incapacity for work.

The grounds indicated in the decisions of reversal have been given in Table 1. There were indicated several grounds for reversal in 79 (21.0%) decisions out of the total amount of decisions. Based on this, the most frequent ground in 262 (69.7%) decisions appears to be the preparation of the report by reference to a regulation not in force at the time. It appeared in 98 court judgements out of those 262 decisions of reversal that a medical board report

of disability was received on the basis of the judgement. However, it has also turned out that there is an emphasis made by the Supreme Court on this report that a disability report is required to be prepared by reference to the Social Insurance and Health Care Code, the Regulation on the Determination of Work Force and Occupational Loss Ratio and the Regulation on the Disability Determination Services. It has appeared in 103 decisions based on the judgement of the First Instance courts that the disability report was prepared in accordance with the Social Insurance and Health Care Code, whereas four decisions were given by reference to the Regulation on the Determination of Work Force and Occupational Loss Ratio. However, those decisions were reversed on the ground that the reports were prepared by reference to the regulations not in force at the time when a given unjust act was performed. There appeared no detailed explanation for the decision of reversal in 57 decisions. It has been found out that there is no decision that refers to the fact that the percentage of medical disability is supposed to be determined in consideration of the starting date of a given insurance policy.

The second most common ground for a decision of reversal, corresponding to a total of 88 (23.4%) decisions of reversal, concerns the presence of contradictory ratios presented in the reports. It has appeared in 57 decisions of reversal that the lower court made people to receive the medical board report of disability, whereas there appear at least two disability reports in 39 decisions of reversal, one of which is the medical board report of disability, which is considered as a basis by the First Instance Court. It has been further found in 7 decisions that there were two reports prepared by reference to the First Instance Court's "Medical Board Report of Disability" and "Social Insurance and Health Care Code" and/or "Regulation on the Determination of Work Force and Occupational Loss Ratio" (regulated at the time when the accident took place). However, it has been noticed that, although the report based on the judgement was prepared in accordance with the regulation/code in force on the accident date, the decision was reversed due to the incompatibility in the ratio of disability between it and the Medical Board Report of Disability that was previously received. It has been indicated in the decision of reversal of the Supreme Court that the report based on a judgement is supposed to be received by reference to the regulation in force at the time when an unjust act takes place. It has been further emphasized that there is a considerable incompatibility in the ratio of disability between the other reports and the report prepared in accordance with the regulation in force at the time when an unjust act takes place, and there is a need to explain the underlying reason behind such an incompatibility.

4. Discussion and Conclusion

In Turkey, the number of the accidents involving casualties or personal injury corresponded to 65,748 in 2002 and 186,532 in 2018, and it shows an increase over the years (4). Moreover, the existing literature on disability reports, which has been surveyed within the scope of this research, demonstrates, on the one hand, that traffic accidents constitute the most common reason for preparing a report and, on the other that disability reports keep increasing in number over the years (5, 6). As Kaya et al. point out, the number of applicants for the preparation of a disability report in 2011 was 50 cases, whereas it corresponded to 114 cases in 2014 (7). The increase in the number of the decisions of reversal regarding the disability reports of the Supreme Court's seventeenth civil court appeared to be in conformity with the rise in number of traffic accidents on the one hand and the number of disability reports on the other.

Disability reports are likely to be prepared upon official and individual requests. The fact that no disability report takes place in the decisions of the Supreme Court (n=23; 6.1%) is among the leading reasons underlying a decision of reversal. Therefore, it is deemed significant to determine a given case by reference to a disability report even if there appears no permanent disability in traffic accidents involving personal injury.

Another point to consider in the examined decisions relates to where to receive an aforementioned report and by whom it is supposed to be compiled. It has been found that those decisions most often emphasize to receive a disability report submitted by the Institute of Forensic Sciences and the specialists committee in the Departments of Forensic Sciences at universities (73.9%). This emphasis is also in line with the grounds which have been summarized in Table 1 as "*the submission of a report by an inappropriate/non-specialist expert, the use of a report prepared abroad and receiving a report submitted by a private company and prepared on an individual appeal by a plaintiff*". It appeared in the decision numbered 2016/7686, decision no. 2016/8233 that the lower court's decision was reversed on the grounds that "*In regard to the conditions of a concrete case, a given health board report is inappropriate for being considered a basis for justification since a disability report is prepared by means of unilateral evidences upon an individual request by a plaintiff without considering the evidences submitted by a defendant*". The abovementioned decisions put emphasis on the fact that, in place of scientific opinions delivered

upon an individual request, the reports that are submitted upon an official request by those who are entitled as experts in a given field and/or by the Expertise/Expert Institute are supposed to be taken a basis for justification

by courts. This emphasis points out that the Institute of Forensic Sciences and the Departments of Forensic Medicine play assume a significant responsibility in respect of the submission of a disability report.

Table 1. Grounds in the Decisions of Reversal Regarding the Disability Reports of 17th Civil Chamber of the Supreme Court

	Grounds	n*	%
1	Preparation of the report by reference to the regulation/code not in force at the time when an unjust act is performed	262	69.7
2	Presence of incompatible ratios in the reports	88	23.4
3	Submission of a report in which there is vagueness about which code/regulation is considered as a basis and there is a typo in a regulation to which the report refers	37	9.8
4	Absence of a disability report to be based on	23	6.1
5	Presence of causality problems (<i>discrepancy among sequelae, on which reports are based, lack of justification about the ratio, lack of a causal link between the given sequelae and the incident, consideration of the disorders prior to the incident</i>)	22	5.9
6	Lack of any evaluation about permanence	5	1.3
7	Other Grounds (<i>preparation of a report without any medical inspection despite a demand for an inspection, preparation of a report without any medical document, inability to eliminate complaints against the reports, no indication of the duration of healing, a longer duration of temporary incapacity for work compared with the date of inspection on which permanent incapacity for work is calculated</i>)	5	1.3
8	Submission of a report inappropriate for a supervision due to such reasons as its being a certificate of inspection compiled by a private company and received on an individual appeal by a plaintiff	4	1.1
9	Submission of a report by an inappropriate/non-specialist expert	3	0.8
10	Consideration of a report prepared abroad as a basis	2	0.5
11	Preparation of a report without a medical examination/with regard to medical history	2	0.5
12	Incompatibility of a report (<i>discrepancy between the right and left side</i>)	2	0.5

* Given that there appear several grounds in some decisions of reversal, the total number of decisions surpass the amount of decisions of reversal (n=376). So, the overall percentage turns out to be greater than 100%.

The most frequent reason behind a decision of reversal by the Supreme Court is the preparation of the report by reference to a regulation/code not in force at the time when an unjust act is performed (69.7%). Recurring legislative amendments following the Social Insurance and Health Care Code dated 22.06.1972 (such as Regulation on the Determination of Work Force and Occupational Loss Ratio dated 11.10.2008; Regulation on Disability Criterion Classification and Health Board Reports to be Issued to the Disabled dated 30.03.2013; Regulation on the Disability Determination Services dated 03.08.2013;

the Highway Motor Vehicles Compulsory Liability Insurance dated 14.05.2015; Legislation on a determination of disability for adults/special needs for children 20.02.2019) usually make it challenging to follow up the legislation. Therefore, it is suggested that the Official Gazette is supposed to be skimmed through on a daily basis or regularly in order to make it simpler to follow the latest developments with regard to forensic medicine. This research further proposes that the presence of the statement about which regulation is to be considered as a basis while preparing a given report in the letter of request would

clear up many problems in this matter. However, there is most often no clause in a letter of request to refer to a certain regulation. That point is also indicated in a thesis where only 23 (11.2%) out of a total of 205 letters of intent for a disability report have a statement about the use of a given regulation as a basis during the preparation of a report (8). Though it is suggested that to refer to a given regulation to be taken as a basis on a cover letter makes it simpler to prepare a report, it seems not without its challenges. In some cover letters, in accordance with the lawyers of two parties, there appears a statement suggesting that “*a newly dated regulation should be taken into consideration*” and, thereby, an evaluation is supposed to be made in line with this regulation, even though it is evidently not in force at the time when a given case takes place. It contradicts the statement “*then-current*” suggested in the Supreme Court’s decisions. Moreover, considering the reports as a basis, which were prepared by reference to the newly-dated regulation not in force at the time when a given case occurred, seems to give rise to some other disorders.

It seems obvious that there are some problems in the matter of which regulation should be taken into account while preparing a report where a ratio of traffic accident-related disability is calculated. In this sense, it can be suggested that the table compiled by the researchers of this study by means of the data obtained from the Supreme Court’s decisions seems to make it easier to calculate a ratio of disability following a traffic accident (see Table 2) (9).

As was enforced by the Article A.5.c in the “General Conditions” part of the Highway Motor Vehicles Compulsory Liability Insurance (KMAZMSS), which came into force on June 01, 2015, and were published in the Official Gazette dated May 14, 2015, numbered 29355, the reports which used to be prepared for the permanent disability calculations had been issued by reference to the “Regulation on Disability Criterion Classification and Health Board Reports to be Issued to the Disabled”. However, the Supreme Court’s decision numbered 2019/40, published in the Official Gazette dated October 9, 2020 and numbered 31269, has given rise to a noticeable change in the field of Clinical Forensic Medicine in terms of the calculation of disability and the regulation of disability reports, which are significant constituents of the process. Even after the Supreme Court’s decision entered in force, the clause taking place in the first sentence of the Article 90 in the Highway Traffic Law numbered 2918, which notes that “*...and in the general conditions prepared within the framework of this Article*”, was deemed unconstitutional and were rescinded. Since then, the Regulation on the Disability Determination Services

has become effective in the traffic accidents that took place between September 01, 2013 and February 20, 2019. Considering that the Article C.11 suggests that “*these general conditions are applied to the contracts drawn up after an enforcement date*”, it seems requisite to take into account the starting date of a given insurance policy while determining a disability ratio due to a traffic accident. However, among the examined decisions of reversal that belong to the Supreme Court’s seventeenth civil court, there appears no decision of the Supreme Court, which informs us about whether to use the legal regulation in force at the time when a given case took place or the regulation in force at the time when a given insurance policy starts to prevail. Besides this, though there is no decision that suggests taking into account the starting date of a given insurance policy in determining the ratio of disability in the Supreme Court’s decisions, the decision taken by İzmir Regional Court of Justice’s eleventh civil chamber (dated June 27, 2019, File No. 2018/2685 and Decision No. 2019/850) points to issuing a disability report “*by reference to the regulation in force at the time when an insurance policy starts to prevail*”. Moreover, it turns out that the Supreme Court’s decisions of reversal of the cases regarding the compensation for financial damage in a traffic accident and the compensation for loss of support stipulate the use of the legislation in force at the time when the Highway Motor Vehicles Compulsory Liability Insurance starts to prevail (*the Seventeenth Civil Chamber’s decision dated June 19, 2017, numbered E.2016/13434 K.2017/6894; another decision dated May 31, 2017, numbered E.2016/13345 K.2017/6134; and the other decision dated October 31, 2017, numbered E.2017/1541 K.2017/9897*). Likewise, no decision of the Supreme Court has been detected with regard to the Legislation on a Determination of Disability for Adults, in force as of February 20, 2019 and “*The Legislation of a Determination of Special Needs for Children*” since both have recently entered into force.

Among the grounds for a reversal, the second place belongs to “*the presence of incompatible ratios in the reports*”. It can be argued that perhaps the most significant reason of it is the fact that a court file consists of several reports issued by reference to different regulations. Most particularly, the fact that the regulation related to a disability, utilized in order to benefit from social rights especially during the time slot when it first came into effect, was also employed in calculating the ratio of disability from traffic accidents following an legislative amendment, led to discrepancies in the ratios given in the reports. Put it another way, the ratio calculation made by reference to different regulations may led to the calculation of diverse ratios of disability for the same sequelae a person has

from the same traffic accident. It also appears that a given sequela takes place in one regulation while it has no correspondence in another (*for instance; scar tissues, tibia/fibula fractures healed well without any complication, angulation of fibula, loss and fractures in bone tissues that form the backup structure of the face, displaced fractures in extensions of the spine, a risk of epilepsy and so on.*). Moreover, there is a difference in the method of evaluation (*for instance; a remarkable difference made by age and occupation in the ultimate evaluation*). All these constitute other grounds related to a regulation.

Besides regulation-related grounds, several other underlying reasons behind the discrepancies among the reports examined constitute (i) the consideration of some disorders that have no causal link to the subject matter of a case, (ii) the disregard to whether the disorder caused by a given case is permanent or the preparation of a report during the healing process, (iii) not conducting a physical examination that shows a given person's latest situation, preparing a report in accordance with statements and a

medical history, not doing the required examination. Each ground listed above also takes place in the Supreme Court's grounds for reversal (Table 1).

To summarize, in case that forensic specialists prepare their reports particularly by making reference to a particular regulation that they are based on while evaluating a given case, their reports become elaborate (their report should have no typo and no discrepancy between the right and left side), they declare their justification, they consider the matter of permanency and they consider the all causal links to a given case by conducting the patient's inspection and other required examinations, it can be surmised that all these will considerably contribute to the shortening of lawsuit processes. Just as the preparation of disparate reports due to such various reasons as pointed out above results in extending the prosecution process so it leads people lose their confidence in specialists. All things considered, it is of great importance to submit reports prepared in consideration of all kinds of components indicated in the present research.

Table 2. Legislations to be Considered While Determining the Disability Ratio Due to a Traffic Accident

Date of the Accident	Legislation
Before 11.10.2008	Social Insurance and Health Care Code
11.10.2008 – 31.08.2013	Regulation on the Determination of Work Force and Occupational Loss Ratio
01.09.2013 – 19.02.2019	Regulation on the Disability Determination Services
As of 20.02.2019 until now	Legislation on a determination of disability for adults/ Legislation of a Determination of Special Needs for Children (one of them is applied in consideration of being either an adult or child at the time of the accident)

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