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Traffic Accident Expertise in Civil Procedure

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Received: October 28, 2021 Accepted: November 12, 2021 **Abstract:** In the process of compensation for the damage suffered by the aggrieved party as a result of a traffic accident, it is often necessary to provide expertise to determine the cause of the accident, the aggrieved party's contribution to the accident, or increase in the amount of damage. Formally and legally, it is necessary to observe the institute rule of shared responsibility. Shared responsibility is an institute rule that marks the contribution of the aggrieved party to cause damage or to be greater than it would otherwise be. Within the framework of this paper, the model of traffic accident expertise in civil procedure is investigated, primarily from the aspect of the contribution of the inadmissible action of the aggrieved party in the occurrence of the accident or increase of the damage.

Keywords: Traffic accident; Dangerous situation; Cause of traffic accident; Shared responsibility; Contribution to the occurrence of an accident; Increase of the damage.

INTRODUCTION

Liability for damage [4] in traffic is a topic that is always actual, given the number of traffic accidents, the degree of motorization and the number of cases, both judicial and extrajudicial, in regular procedures for damages with insurance companies. The importance of the responsibility of the perpetrator for the damage is highly emphasiszed for the incurred damage in terms of the contribution of the aggrieved party to the damage, observed through the institute of the contribution of the damaged party to the occurrence and/or size of the damage. These are the most common dilemmas in court procedures, which are expressed by judicial authorities when deciding, after the procedure of proving the cause of the traffic accident and the contribution to the occurrence and magnitude of the damage. It is evident that there is a disproportion that can occur in relation to the basic cause of the accident and the contribution to the occurrence and magnitude of the consequences of the accident or the damage suffered by the aggrieved party.

Any guilt established in the previous criminal procedures, does not represent the one and only assumption of liability for the damage caused, when it comes to civil procedures. The court is bound by the provisions of Article 12 of the LCP to the decision of the criminal court regarding criminal liability, but this does not prevent the

perpetrator (his insurer) from proving the contribution on the part of the aggrieved party in the civil procedures. The established responsibility in the misdemeanor procedure does not bind the civil court, but it shifts the burden of proof from the aggrieved party to the perpetrator.

In cases when it is necessary to analyze the existence of several causes that lead to the accident, ie when it is not possible to determine with certainty which of the actions primarily led to the accident, and which contributed to the accident, ie the damage was greater than it would otherwise be, a correct analysis of the dynamics of the course of the accident performed by a traffic expert is of crucial importance. The analysis of the behavior of the participants in the accident will give us the answers on the basis of which the court will determine the legally relevant facts and correctly determine the contributions to the occurrence of the accident.

LIABILITY FOR ACCIDENT

Liability for the occurrence of a traffic accident is regulated by the provisions of Article 178 of the Law on Obligations, as a special kind of liability in our law. Although motor vehicles are considered as dangerous things, the law stipulates that liability is determined by the rules on subjective liability based on presumed guilt (Articles 158 to 163 of the Law on Obligations). Guilt exists when the

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perpetrator has caused the damage intentionally or negligently.

The general presumptions of civil liability for damage are considered to be: the existence of damage, the inadmissible act of the perpetrator and the causal connection between the act and the damage that occured.

The questions that the court can answer only after the traffic expertise has been conducted concern the inadmissibility of the behavior of traffic participants and the casual connection between such behavior and the consequences. Here it is important to mention the theory of adequate causality, according to which of all possible existing facts related to the specific cause of damage, legally relevant is only that fact, that cause that is adequate to the damage, and as such (from the Latin Adaequare - equalize) only the cause that matches and corresponds to the specific damage. Which cause will be adequate, typical and expected will depend on each specific situation, and there will be a situation that the one same cause in the case has a legally relevant meaning, and another it will not, but nevertheless the most important thing in evaluating each case is to compare specific behavior of the participants in an accident with behavior that is proper, permissible and customary in the normal course of the events, abstracting any extravagance and irregularity. [6]

Law on the Principles of Traffic Safety in BiH indirectly prescribes the principle of trust [10], as a general principle. First, by a general provision in Article 3, the legislator defines that traffic participants are obliged to respect the provisions of this Law and other regulations in the field of road safety, to develop humane relations between people to protect the health and lives of others, especially children, the disabled, the elderly and helpless persons, and to take care of the protection of the environment, and that they must not obstruct traffic, damage roads, facilities and equipment on the road. According to the traffic rules, starting from Article 25, the law singles out certain groups of traffic participants (children, the elderly, persons with disabilities ...) according to which, due to their characteristics, drivers must pay special attention, ie the principle of distrust or limited trust. Also, the legislator singles out certain traffic situations (access to the pedestrian crossing, on the part of the road where children are moving, vehicles moving next to public transport vehicles, when vehicles are moving behind vehicles transporting children ...) in which an exception is made of the principle of trust. With this kind of separation, the legislator emphasized when the driver must pay special additional, ie when special attention is necessary (defensive driving). Argumentum a contrario, in all other cases drivers can be sure that all participants will act in accordance with the law (principle of trust).

The Law on Traffic Safety on the Roads of the Republika Srpska, in Article 4, explicitly prescribes the obligation to avoid dangerous situations caused by improper behavior of other participants in traffic.

Based on the above legal provisions, we can see what questions we have to answer during the trial, and thus the task of a traffic expert in civil procedures is defined.

The task of the expert should be to, based on the available documentation in the file and possible visit to the scene of the accident, perform an analysis and declare the participants in the accident; road, traffic signals and weather; possible injuries to the participants; vehicle damage; traces of a traffic accident; vehicle speed and dynamics; and to make a time-space analysis of the possibility of avoiding the accident (immediately before and at the time of the accident); as well as to analyze the manner of occurrence of the accident and the compatibility of the collision process and the resulting damage.

From the task set in this way, for determining the guilt and shared responsibility that is the topic of this paper, the most important factor is certainly the temporal-spatial analysis in which the expert has his essential role during the procedure. The expert witness is the one who, based on the available documentation in the file (in accordance with the principle of the parties), will first determine how one of the participants in the accident has behaved, and then he will make an analysis of the possibility of avoiding the accident.

Starting from the definition of a dangerous situation, on this occasion it is necessary to emphasize that the action by which the driver creates a dangerous situation must be impermissible. As an example of this case, it may be best to cite the collision of a left turn in relation to the impermissible speed of a vehicle moving from the opposite direction.

The provisions of the Vienna Convention also define the obligation of drivers to pass other vehicles, ie not to continue driving or maneuvering if this would force drivers of other vehicles (moving in accordance with the law) to suddenly change the direction or speed of their vehicles. This solution is also accepted by our law. [5] Thus, the priority to the right is not an absolute right, but is, in accordance with the principle of trust, limited to situations in which the driver invoking that right moves in accordance with the law.

The action of the aggrieved party can be the cause of the harmful event, the contribution in the occurrence or the contribution in the consequence.

SHARED RESPONSIBILITY

Shared responsibility is regulated by the provisions of Articles 192 and 205 of the Law on Obligations of the RS/FBiH.

Shared liability means the liability of several persons for the occurrence of a harmful event or for a contribution in the amount of damage. An aggrieved party who has contributed to the damage occurring or to be greater than it would otherwise be, is entitled only to a proportionately reduced compensation.

When deciding in procedures for compensation for damage from traffic accidents, it is necessary to assess which behavior of the aggrieved party is improper from the point of view of the occurrence of the harmful event and/or increase in the damage he suffered.

Shared responsibility must be distinguished from joint and several liability. Joint and several liability is the liability of several persons for the same damage in which those persons are liable to third parties on the principle of all for all, and then in possible recourse litigation regulate their mutual relations and contributions in the making. Joint and several liability can be shared, but also the exclusive responsibility of one of the participants. Solidarity is manifested outwardly and does not go down the inner relationship of the person.

In the case of shared responsibility in civil procedures, the relationship between the aggrieved party (plaintiff) and the perpetrator is primarily important, ie the contribution of the aggrieved party to the occurrence or amount of damage. The perpetrator cannot invoke the contribution of third parties, but as a rule such persons should, as joint and several debtors, be invited as interveners in the litigation. Such a decision also arises from the provisions of Article 178, paragraph 4 of the Law on Obligations.

TRAFFIC ACCIDENTS TYPE: VEHICLE-PEDESTRIAN

In a collision between a vehicle and a pedestrian, the rules on strict liability apply because the vehicle is considered a dangerous thing in relation to the pedestrian (Articles 173 and 174 of the Law on Obligations). The burden of proving the existence of elements for release from liability is on the owner of the motor vehicle (Article 177 of the Law on Obligations). The pedestrian proves only the causal connection between the damage and the dangerous thing (vehicle).

When determining the responsibility and possible shared responsibility, it is primarily necessary to analyze the admissibility of the actions of all participants in the accident.

The provisions of Law on the Principles of Traffic Safety in BiH stipulate that pedestrians are allowed to cross the road at a distance of more than 100 meters from the pedestrian crossing, overpass or underground crossing, provided that the pedestrian is obliged to cross the road carefully and by the shortest route, after making sure that it can do it in a safe way, that is, to miss vehicles moving on the road.

The driver has an obligation to pay attention to a pedestrian who is on the road or steps on the road or expresses an intention to step on the road, but he has no obligation to expect that the pedestrian will not miss him. The pedestrian has no right to expect the driver to miss him. If visibility or clearness is reduced or disabled,

the driver is not obliged to expect pedestrians to enter or cross the road. [10]

When the claim of the injured pedestrian or the claim of the family of the injured pedestrian is observed, then it is necessary to determine by using the traffic expert procedure in civil procedures:

- admissibility of actions of participants in the accident,
- responsibility for the occurrence of a dangerous traffic situation that preceded the traffic accident.
- individual contributions to the occurrence of a traffic accident,
- the possibility of avoiding a traffic accident.

It is first necessary to observe the micro location of the traffic accident and the modes of movement of vehicles and pedestrians at the time of the dangerous situation or traffic accident.

- direction of vehicle movement,
- direction of pedestrian movement,
- mode of movement of vehicles and pedestrians,
- vehicle and pedestrian speeds,
- positions of vehicles and pedestrians in timespace analysis.

In order to perform a quality analysis of a traffic accident, in the expert procedure, it is necessary to keep in mind the criteria defined on the basis of mutual trust [1] between drivers and pedestrians, in accordance with the provisions of Law on the Principles of Traffic Safety:

- 1. if the traffic at the marked pedestrian crossing is regulated by light traffic signs for pedestrians, the pedestrian is obliged to act according to these signs,
- if the traffic at the marked pedestrian crossing is not regulated by light traffic signs, but the vehicle traffic is regulated by light traffic signs for vehicles or signs given by authorized persons, pedestrians may cross the road only as long as they are allowed to cross the road with a given sign,
- 3. if the traffic at the marked pedestrian crossing is not regulated by light traffic signs or signs given by an authorized person, before entering the pedestrian crossing, the pedestrian is obliged to pay attention to the distance and speed of the approaching vehicle.
- 4. if the traffic at the marked pedestrian crossing is not regulated by light traffic signs, or signs given by an authorized person, the driver is obliged to stop the vehicle in front of the pedestrian crossing, to pass pedestrians crossing or entering the pedestrian crossing, or unequivocally show intention to cross the pedestrian crossing.
- 5. before entering the pedestrian crossing, the pedestrian is obliged to pay attention to the dis-

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tance and speed of the vehicle [2] approaching him.

With the proper movement of pedestrians (1-5), his contribution to the occurrence of a traffic accident is excluded, especially having in mind the fact that the vehicle is a "dangerous thing" in the hands of the driver.

In the case of improper behavior of pedestrians in the above circumstances (1-5), which basically caused the accident, the driver's contribution to the resulting consequence is measurable in the amount of difference between the possessed or collision speed and the safe or allowed speed of the vehicle in a particular traffic situation.

The consequence of a traffic accident is directly proportional to the product of the mass and square of the speed of the vehicle consumed in the collision, or the amount of kinetic energy in the collision with a pedestrian:

$$E_{K} = \frac{mV_{S}^{2}}{2}$$

The relationship between vehicle collision speed and the probability of pedestrian death is shown in Table 1.

Table 1. Dependence of pedestrian mortality and speed

Collision speed km/h	Pedestrian mortality%
30	10
40	20
50	40
60	80
80	100

In the presented case, the consequences for pedestrians are directly dependent on:

- collision characteristics,
- shape and construction of the vehicle;

In the case of traffic accidents with pedestrians outside the pedestrian crossing, there are different approaches in expertise, and therefore court judgments are different. In these cases, there is no harmonized position, primarily of the traffic profession. The practice of the competent courts is also different.

Accordingly, it is necessary to emphasize the following legal norms [5] of Law on the Principles of Traffic Safety:

Article 9, Paragraph 1

- item 15) road is a part of the road surface intended primarily for vehicle traffic,
- item 74) a sidewalk is a specially arranged traffic area intended for the movement of pedestrians,

which is not at the same level with the driveway, or is separated from the driveway in another way,

Comment: All others (including pedestrians) have to behave in a legally prescribed manner. The legislator separates the areas intended for the movement of vehicles and pedestrians.

Article 28

- 1. the driver is obliged to pay attention to pedestrians who are on the road or entering the road during driving.
- 2. when approaching a marked pedestrian crossing, the driver must drive the vehicle with special caution and drive at such a speed that he can stop the vehicle in front of the pedestrian crossing if necessary.
- 3. on the part of the road on which children move, or on which traffic signs on children's participation in traffic are placed, the driver is obliged to drive with special caution and with such speed that he can stop the vehicle in case of need.

Comment: With this article, the legislator limits the principle of trust towards pedestrians moving on the road, in the immediate vicinity of the pedestrian crossing and towards children as a special category of participants.

Article 105

- 1. As a rule, pedestrians must not move and stay on the road.
- 2. If a pedestrian moves on the road, he must move as close as possible to the edge of the road, and very carefully and in a way that does not interfere with or prevent vehicle traffic.

Comment: With this provision, the legislator explicitly obliges pedestrians to pay special attention in cases when they move on the surface intended for the movement of vehicles.

Article 108

- 1. A pedestrian is obliged to cross the road and the bicycle path carefully and by the shortest route, after he is convinced before entering the road that he can do so in a safe manner.
- While driving on the road, a pedestrian must not use a mobile phone or have headphones in both ears.
- 3. On a road that has marked pedestrian crossings or specially built crossings, ie pedestrian crossings, when crossing the road, the pedestrian is obliged to move through these crossings or passages, if they are not more than 100 meters away from it.

Article 110

1) A pedestrian who intends to cross the road in a place where there is no marked pedestrian crossing must not enter the road if by doing it he interferes vehicle traffic.

Comment: Having in mind the stated provisions [5] of Articles 105, 108 and 110 and the definition from Article 9, paragraph 1, item 15, it can be concluded that the driver or vehicle outside the pedestrian crossing is on the road with priority of movement [1] in relation on the pedestrian.

Any change in the mode of movement of the vehicle (braking, acceleration, change of traffic lane ...) caused by the behavior or entry of pedestrians on the road, is caused by the consequences of pedestrian failure.

If a traffic accident occurs in the given circumstances, then it can be reliably concluded that the traffic accident occurred as a consequence of a dangerous situation caused by improper behavior of pedestrians. In this regard, from the aspect of traffic technical expertise, in the collision of vehicles and pedestrians outside the pedestrian crossing, the dangerous situation that precedes the collision is always caused by the impermissible behavior of pedestrians.

If the speed of the vehicle is within the allowed limits, then the traffic accident is basically caused by the behavior of pedestrians, who are entering the road and thus causing a dangerous situation. An exception to this rule occurs when traffic participants are children, the disabled, the blind, the elderly and the helpless perons, which the law classifies as a special group of road users to whom the "principle of limited mutual trust" applies. In these cases, it is necessary to analyze whether the driver paid special attention, because there may be the fault of the driver even in the cases when he was moving at the allowed speed and if he could notice the movement of pedestrians from those groups in time. The legislator decided to limit trust due to the special characteristics of these participants.

If the speed of the vehicle is higher than allowed, then the driver's contribution to the accident can be discussed. Namely, if the speed of the vehicle at the moment of the dangerous situation is higher than allowed, and the safe speed is lower than allowed, then there is a contribution of the driver of the traffic accident, the size of which is significant in litigation.

If the speed of the vehicle at the time of the dangerous situation is higher than allowed, and the safe speed is also higher than allowed, then there is a shared responsibility that depends on the amount of speeding. [9]

In order to make a correct court decision, in the event of a collision between a vehicle and a pedestrian outside a pedestrian crossing, it is assumed that the vehicle is always in an advantage over the pedestrian [5].

Within the stated statement, it is possible to form different forms of opinion:

- If the speed of the vehicle is within the allowed limits, then the traffic accident is basically caused by the behavior of pedestrians, entering the road and thus causing a dangerous situation that led to the occurrence of a traffic accident. On the driver's side, the possibility of avoiding an accident should be appreciated.
- If the speed of the vehicle at the time of the dangerous situation is higher than allowed, and the speed at which it could avoid an accident is less than or equal to the maximum allowed, then the existence of the driver's contribution to the consequences of the accident should be determined.
- If the speed of the vehicle at the time of the dangerous situation is higher than allowed, and when moving at the maximum speed on the road section the accident could be avoided, then there is a shared responsibility, which depends on the size of the speed.

These rules must be respected when making a decision for the sake of legal certainty and equality in the judiciary. It is especially important to look at the real state of affairs in the right way, devoid of emotion towards any of the participants. Law is most just when it is in its pure form. As soon as we start leaning to one side, be it a pedestrian or a driver, we will lose the purpose of the right.

If we blame the driver because on the road surface where the law gives him the right of precedence, he hits a pedestrian whom he could not objectively foresee, whom he could not avoid and if he could not eliminate the consequences in any way, we will rudely deny the provisions of Article 177 Law on Obligations.

In situations where a pedestrian comes to the driver from the left side of the road, a dangerous situation does not arise at the moment when the pedestrian steps from the left edge of the road. If the moment when a dangerous situation occurs is taken into the consideration, as the moment when the driver sees a pedestrian on the left side of the road and then has the obligation to expect that the pedestrian may move incorrectly, it would mean that all traffic participants should expect improper behavior of all other participants, which would be contrary to the applicable principle of "mutual trust" for such situations. Traffic would be impossible under such conditions. For this reason, the moment of occurrence of a dangerous situation is the moment when it is indisputable that the pedestrian will step into the traffic lane in which the vehicle is moving, or when the pedestrian is (in cases of pedestrians walking) no more than 0.7 meters inside the traffic lane in which the vehicle is moving [7]. This interpretation of the term road is necessary for the normal flow of traffic. If we imagine a situation in which a driver in the far right lane brakes and stops to miss a pedestrian who enters the left lane outside the pedestrian crossing

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in places where there are two or more lanes, it is clear why the legislature favors vehicles.

TRAFFIC ACCIDENTS OF TYPE: VEHICLE-VEHICLE

In traffic accidents involving two vehicles, liability for damage is assessed according to the rules of subjective liability (Article 178 of the Law on Obligations). The provisions of Article 154, 158 and 178 regulate guilt. As a rule, the guilt is on the side of the driver whose action was inadmissible and which preceded the collision, ie caused a traffic accident.

In a trials for traffic accidents in civil procedures, the contribution of the aggrieved party is determined as a contribution to the occurrence of the accident or a contribution as a result of a traffic accident (192. Law on Obligations).

In the case of a conflict of two demeanors, one of which is impermissible (deprivation of priority, noncompliance with the sign, movement on an impermissible surface, etc.). the expert witness should start from the situation that such an action is the cause of a dangerous situation, and that on the part of other traffic participants he appreciates the possibility of avoiding an accident (conflict of rights and wrongs). On the other hand, if two or more actions of the participants in the accident are allowed individually, then it is necessary to analyze which of the actions was started first.

On the example of the speed of the vehicle, it will be explained how the expert should analyze whether speeding is the cause of the accident, the contribution in the occurrence or the contribution in the consequence (increased damage).

During the time-space analysis of the traffic accident, the expert will primarily determine the collision speed of the vehicle, and then determine where the vehicles were at the time of the dangerous situation, ie when there is a possibility that the participants' paths intersect at the same time. If it determines that one of the vehicles was moving at a speed higher than the maximum allowed speed, it will perform an analysis of how the speed affected the accident, by using the maximum allowed vehicle speed for the section of the road instead of the speed. Therefore, the expert witness will compare the specific behavior of the participants in the accident with the behavior that is correct, permissible and usual in the regular course of events.

Depending on the results of the analysis, the expert may come to the following conclusions:

- speed is the cause of the accident, if at the maximum allowed speed, without the reaction of the driver there would be no conflict with another vehicle, or if another vehicle would complete its operation without coming to the conflict zone;
- speed is a contribution to the occurrence of an

- accident, if at the maximum allowed speed the driver could avoid the occurrence of an accident by braking (the court will assess the contribution according to all the circumstances of the case);
- speed is a contribution in the amount of consequences, if at the maximum allowed speed the driver could not avoid the accident by braking, and there is more damage than would occur when driving at the maximum allowed speed;

For example, if the aggrieved party's vehicle came into contact at a speed of 80 km/h and the maximum speed is 50 km/h, the question arises as to what extent the difference in kinetic energy of 30 km/h contributed to the resulting consequence.

The kinetic energy consumed in the collision is a direct consequence of the growth of the velocity square, which directly affects the consequences of the traffic accident, which is presented in Figure 2.

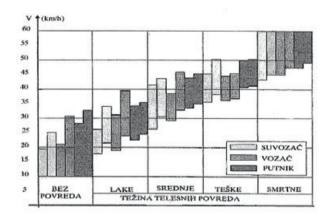


Figure 2. Consequences of a traffic accident depending on the collision speed of the vehicle;

Given that this is a complex consequence of material and non-material damage, such expertise should be combined or interdisciplinary, within the competence of a traffic, mechanical and medical expert.

As shown in the example of speed, the expert will act in the same way when analyzing any action that is a possible cause of the accident.

CONCLUSION

As part of determining the responsibility for the occurrence of a traffic accident, we must first determine the permissibility of the behavior of the participants and separate the causes of the accident and the consequences in the amount of damage. Each action of the participants needs to be analyzed individually and in connection with other actions. In assessing each case, it is necessary to compare the specific behavior of the participants in the accident with the behavior that is correct, permissi-

ble and usual in the regular course of events, abstracting from any extraordinary and irregularity.

Shared responsibility must be distinguished from joint and several liability. Joint and several liability is the liability of several persons for the same damage in which those persons are liable to third parties on the principle of all for all, and then in possible recourse litigation regulate their mutual relations and contributions in the making.

In the event of a collision between a vehicle and a pedestrian, the rules on strict liability apply. The burden of proving the causal connection is on the pedestrian, and proving the grounds for discharge is on the driver.

If a traffic accident occurs during the unauthorized movement of pedestrians on the road outside the pedestrian crossing, then the traffic accident occurred as a consequence of a dangerous situation caused by improper behavior of pedestrians. From the aspect of traffic-technical expertise, in the collision of vehicles and pedestrians outside the pedestrian crossing, the dangerous situation that precedes the collision is always caused by the illicit behavior of pedestrians. In order to make a correct court decision, in the event of a collision between a vehicle and a pedestrian outside a pedestrian crossing, it is assumed that the vehicle is always in an advantage of movement over the pedestrian.

Within the stated statement, it is possible to form different forms of opinion:

- If the speed of the vehicle is within the allowed limits, then the traffic accident is basically caused by the behavior of pedestrians, entering the road and thus causing a dangerous situation that led to the occurrence of a traffic accident. On the driver's side, the possibility of avoiding an accident should be appreciated.
- If the speed of the vehicle at the time of the dangerous situation is higher than allowed, and the speed at which it could avoid an accident is less than or equal to the maximum allowed, then the existence of the driver's contribution to the consequences of the accident should be determined.
- If the speed of the vehicle at the time of the dangerous situation is higher than allowed, and when driving at the maximum speed on the road section the accident could be avoided, then there is a shared responsibility, which depends on the size of the speeding.

In traffic accidents involving two vehicles, liability for damage is assessed according to the rules of subjective liability. In the trial for traffic accidents in civil procedures, the contribution of the aggrieved party is determined as the contribution in the occurrence of the accident or the contribution as a result of the traffic accident. In the case of a conflict of two behaviors, one of which is impermissible, the expert witness should start

from the situation that such an action is the cause of the dangerous situation, and appreciate the possibility of avoiding an accident (conflict of rights and wrongs) on the part of other traffic participants. On the other hand, if two or more actions of the participants in the accident are allowed individually, then it is necessary to analyze which of the actions was started first.

Depending on the results of the space-time analysis, the expert may come to the following conclusions regarding the speed of the vehicle:

- speed is the cause of the accident, if at the maximum allowed speed, without the reaction of the driver there would be no conflict with another vehicle, or if the other vehicle would complete its action without coming to the conflict zone;
- speed is a contribution to the occurrence of an accident, if at the maximum allowed speed the driver could avoid the occurrence of an accident by braking (the court will assess the contribution according to all the circumstances of the case);
- speed is a contribution in the amount of consequences, if at the maximum allowed speed the
 driver could not avoid the accident by braking,
 and there is more damage than would occur
 when driving at the maximum allowed speed;

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