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UNINTENTIONALITY IN POLISH CRIMINAL LAW

Abstract. Unintentionality is still a relevant research problem in Polish criminal law. This article is a modest attempt to answer the key questions of unintentionality, i.e. how the volitional and cognitive element is shaped in each form of unintentionality; whether unconscious unintentionality has such elements at all, or whether it is a facade of the subjective side and leads, in fact, to objective responsibility; how to correctly draw the line between conscious and unconscious unintentionality, and what the boundary between unintentionality and intentionality in general looks like.

Keywords: unintentionality, conscious unintentionality, unconscious unintentionality, subjective side

NIEUMYŚLNOŚĆ NA GRUNCIE POLSKIEGO PRAWA KARNEGO

Streszczenie. Nieumyślność pozostaje wciąż aktualnym problemem badawczym na gruncie polskiego prawa karnego. Niniejszy artykuł stanowi skromną próbę udzielenia odpowiedzi na kluczowe dla nieumyślności pytania, tj. jak kształtuje się element wolicjonalny i poznawczy w każdej z form nieumyślności; czy nieświadoma nieumyślność w ogóle posiada takie elementy, czy też stanowi fasadę strony podmiotowej i prowadzi w istocie do odpowiedzialności obiektywnej; jak prawidłowo wyznaczyć granicę między nieumyślnością świadomą i nieświadomą, oraz jak wygląda granica między nieumyślnością, a umyślnością w ogóle.

Słowa kluczowe: nieumyślność, świadoma nieumyślność, nieświadoma nieumyślność, strona podmiotowa

1. INTRODUCTION

Unintentionality, as one of the two fundamental forms of the subjective side, is still a relevant research problem in the Polish science of criminal law. This relevance is connected not only with subsequent research and papers concerning the issue of unintentionality, but mainly with the lack of conclusive answers as to the essence of the types of unintentionality, i.e. conscious and unconscious unintentionality. This article will make another attempt to answer the question

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about what actually is covered by the labels of conscious unintentionality and unconscious unintentionality. The considerations in this article will centre around two key theses. The first one is that conscious unintentionality in Polish criminal law is more than an anticipation of the possibility of committing a criminal act combined with the lack of intent. The second one, on the other hand, concerns unconscious unintentionality and assumes that, although it is based on the lack of anticipation of the possibility of committing an act and the absence of a volitional attitude towards that act, it can be considered as a full-fledged form of the subjective side. With the theses indicated, there are, of course, a number of partial research problems, i.e. how the volitional and cognitive element is shaped in each form of unintentionality, whether unconscious unintentionality has such elements at all, or whether it actually leads to objective liability, how to draw the line between conscious and unconscious unintentionality, and what is the boundary between unintentionality and intentionality in general. The primary method used for the considerations presented in this article will be the dogmatic-legal method, and, additionally, the theoretical-legal and comparative-legal methods. The findings on the types of unintentionality in Polish criminal law have been, to some extent, juxtaposed with constructs known in common law – recklessness, negligence, or wilful blindness.

2. AN UNINTENTIONAL CRIMINAL ACT

According to the provisions of Article 9 § 2 of the Polish Criminal Code (CC), a criminal offence is committed unintentionally if the perpetrator, without intending to commit it, commits it due to non-compliance with carefulness required in given circumstances, although he/she has foreseen or might have foreseen the possibility of its commission. On the basis of the quoted provision, therefore, there is no doubt that the first condition for unintentionality is the lack of intention. Thus, based on the information on intent contained in Article 9 § 1 of the CC, it should be concluded that an offender who commits an act unintentionally does not want to commit it and does not agree to commit it. However, this lack of intention is not yet a complete description of the volitional element of unintentionality. This element has to be relativised to the cognitive element, which, firstly, is shaped differently in both forms of unintention – conscious and unconscious, and, secondly, in the case of conscious unintentionality, it seems to go beyond the constituent elements sentenced in the content of Article 9 § 2 of the CC.

3. THE COGNITIVE ELEMENT IN CONSCIOUS UNINTENTIONALITY

How does the cognitive element in conscious and unconscious unintentionality look like? With regard to conscious unintentionality, Article 9 § 2 of the CC requires that the perpetrator foresees the possibility of committing the act. However, an analogous requirement is also formulated for intentionality under Article 9 § 1 of the CC. Thus, an automatic conclusion arises that the cognitive element of conscious unintentionality is identical as in intentionality – the perpetrator foresees the possibility of committing a prohibited act. This automatic conclusion, however, upon further reflection, should give way to another finding. If the perpetrator committing his/her act unintentionally does not intend to commit the act, i.e. does not want to commit it and does not agree to commit it, a rather peculiar situation arises in which the perpetrator, not intending to commit the act, but at the same time being aware of the possibility of its commission, does not refrain from behaviour leading, as a consequence, to the realisation of the elements of the prohibited act (Kowalewska-Łukuć 2015, 116). It seems that the missing piece in the puzzle of the perpetrator's cognitive and volitional processes in this case is his/her assumption that he/she will be able to avoid committing the act. In short, this assumption seems to be the only rational explanation of why the perpetrator, being aware of the possibility of committing a prohibited act, but not intending to do so, finally commits it. I have argued in favour of this thesis *in extenso* in one of my earlier works (Kowalewska-Łukuć 2015, 117–118). It can only be mentioned here once again that it is also supported by the theory of cognitive dissonance (Kowalewska-Łukuć 2015, 117) and by the findings of the criminal interpretation developed by W. Patryas (Patryas 1988, 125).

Moreover, looking at the construction of conscious unintentionality outlined this way, it is possible to note its certain similarity to the construction of recklessness functioning in the common law system. In the USA, Section 2.02 of the Model Penal Code states that

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

In British criminal law, on the other hand, R v. G and Another, a key judgment in understanding the essence of recklessness, pointed to the requirement of subjective awareness on the part of the offender of the risk and the unreasonableness of his/her action in the context of the circumstances known to him/her (Regina v. G and another 2003). Incidentally, it may be noted that there are doubts in common law about the subjective/objective nature of risk awareness, as well as the role of risk

awareness in general (Crosby 2008; Stark 2020; Greenberg 2024). Nevertheless, the essence of recklessness seems to coincide with the cognitive element of conscious unintentionality in Polish criminal law outlined above. Ignoring, or even negating, the perpetrator's recognised possibility of committing a criminal act becomes even clearer if one embeds it in the construct of so-called wilful blindness from common law. The essence of the construct of wilful blindness, regardless of its precision in individual rulings (Glichrist 2021, 417; Simons 2021, 656), assumes the existence of anticipation by the offender that a criminal act might be committed and the deliberate avoidance of full verification of that possibility (Simons 2021, 656).

It also appears that a significant part of the Polish criminal law doctrine, although without further justification, goes beyond the *expressis verbis* prediction of the possibility of committing a prohibited act indicated in Article 9 § 2 of the CC in defining the cognitive element of conscious unintentionality. As M. Budyn-Kulik points out, "Conscious unintentionality is supposed to consist in the fact that the perpetrator foresaw the possibility of committing a prohibited act. However, he or she did not intend to commit it and therefore presumed to avoid it" (Budyn-Kulik 2023). A. Zoll also consistently stands for the position that the perpetrator commits a criminal act in conscious unintentionality as a result of an assumption that it can be avoided, and this assumption is an element of the subjective side (Zoll, Art. 9 2004). At the same time, however, Zoll claims that there is no need to articulate this cognitive element of unintentionality in the regulation of Article 9 § 3 of the CC. The presumption of the perpetrator to avoid committing a criminal act as a constitutive element of conscious unintentionality is also mentioned by A. Grzeskowiak (2023) and J. Giezek (2012, 136).

Thus, since the cognitive element of conscious unintentionality does not consist in the perpetrator's anticipation of the possibility of committing a prohibited act, but also in the perpetrator's assumption that he/she will manage to avoid committing the act, it cannot be reasonably argued that this element is identical in the case of conscious unintentionality and in the case of eventual intent, or intentionality in general. Indeed, there is a major difference in this element, and this difference is precisely the assumption made by the consciously unintentional perpetrator that the commission of the act will nevertheless be avoided. Moreover, since this presumption is a real element of the subjective side of conscious unintentionality and the element which differentiates it from intentionality, it should appear in the Code regulation concerning an act committed consciously unintentionally, i.e. in Article 9 § 2 of the CC. Such a postulate was already formulated by T. Przeslawski (2008, 208), it was also put forward by me with the proposal for the new formulation of Article 9 § 2 of the CC (Kowalewska-Łukuć 2015, 145)[1], and by Ł. Pohl (2016,

[1] The reformulated version of Article 9 § 2 of the CC would take the following form: "A prohibited act is committed unintentionally if the perpetrator, without intending to commit the act, nevertheless commits it as a result of failing to take the precaution required under the given

430). In the light of the above signalled views of the doctrine as to the elements constituting the cognitive element of conscious unintentionality, it seems that these postulates have not lost their relevance.

4. THE VOLITIONAL ELEMENT OF CONSCIOUS UNINTENTIONALITY

Turning to the volitional element of conscious unintentionality, it must be stated that the volitional attitude of the perpetrator committing a prohibited act in conscious unintentionality must consist in the intention not to commit the act. As it literally appears from Article 9 § 2 of the CC, the perpetrator does not have an intention to commit a prohibited act, i.e. he/she does not want to commit it and does not agree to commit it. Furthermore, as it results from the considerations above, the perpetrator additionally supposes that the commission of the act can be avoided and it is this circumstance which allows him/her to undertake or continue his/her behaviour. If this is how the cognitive and motivational processes of the perpetrator are formed, then he/she must precisely want not to commit the criminal act (Pohl 2016, 430).

5. UNCONSCIOUS UNINTENTIONALITY

The difference between conscious unintentionality and the intention, or intentionality in general, is thus marked in both elements of the subjective side, i.e. both the volitional element and the cognitive element. However, the question of how the cognitive element and the volitional element are shaped in the second variety of unintentionality, i.e. in unconscious unintentionality, still requires consideration. As it follows from the provisions of Article 9 § 2 of the CC, a perpetrator who commits an act with unconscious unintentionally does not foresee the possibility of committing it at all. However, for the existence of an unconsciously unintentional act, it is necessary to state that such a possibility could have been foreseen by the perpetrator. The question of how to understand the possibility of such foreseeing remains the subject of a still current dispute in the Polish penal science, in which two fundamental positions as to the nature of this possibility have been outlined.

According to the first of these positions, the circumstance whether the perpetrator could have foreseen the possibility of committing a prohibited act should not only be considered objectively, but should also be based on the individual capacity of the perpetrator. As J. Lachowski, representing this position,

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circumstances, even though he/she foresaw the possibility of committing the act but presumed that he/she would avoid committing the act, or could have foreseen such a possibility."

points out, "(…) the criterion of a standard which is authoritative under the given circumstances should be the starting point for further considerations. The result of reasoning on the basis of such a criterion should be verified by an individualising criterion" (Lachowski, Art. 9, 2023). This criterion, then, should consist of the individual characteristics of the offender, which are not, however, linked to the genesis of his/her decision to engage in risky behaviour. That genesis is, in fact, already linked to guilt (Lachowski 2016, 411–414). Circumstances that constitute the individual capacity of a given perpetrator to foresee the possibility of committing a criminal act can, therefore, be decisive not only at the level of guilt, but also at the level of the subjective side, in the form of unconscious unintentionality. The circumstances which determined the existence or absence of such a capacity are a matter of the subjective side. On the other hand, the circumstances that relate to why the offender did not make use of such an existing capacity are a matter of fault (Lachowski 2016, 412). Moreover, as argued by J. Lachowski, reducing unconscious unintentionality to an objective foreseeability of committing a prohibited act means, *de facto*, a prohibited act without a subjective side, limited only to the fulfilment of elements of an object character. Unconscious unintentionality ceases to be a form of the subjective side; rather, it becomes, as objective foreseeability, an element of objective attribution (Lachowski 2016, 407–408).

A similar position is taken by K. Burdziak, who indicates that

> [o]n the other hand, in the case of the possibility of committing a criminal offence, one may theoretically expect the perpetrator to behave in accordance with the law, unless the genesis of his or her decision to commit a given act indicates that such an expectation would be unjustified and, consequently, that the decision to commit a given act was justified – then, e.g., Article 28 § 1 of the Criminal Code is applied and the perpetrator's guilt is also excluded (Burdziak 2021, 139).

Burdziak, therefore, like Lachowski, links the genesis of the perpetrator's decision on a given behaviour – which turned out to be a criminal act committed in unconscious unintentionality – with the layer of guilt. On the other hand, the other "individual characteristics of the perpetrator which are not directly related to the genesis of his/her decision" (Burdziak 2021, 139) determine the assessment of capacity to foresee referred to in Article 9 § 2 of the CC.

The second position, considering that the capacity of the perpetrator to foresee the possibility of committing the act should be assessed objectively, is consistently represented by A. Zoll. He indicates that it is necessary to separate the subjective features of a prohibited act from guilt (Zoll 2016). This position is also supported by other representatives of the Kraków school of criminal law, who point out that the question of whether or not the perpetrator could have foreseen the possibility of committing a criminal act is not a structural element of unintentionality (Małecki 2015, 15). Similar conclusions are reached by K. Lipinski, who indicates that

"foreseeability – like the violation of rules of conduct with a legal good – may be perceived as a precondition for norming, common to both intentional and unintentional types, and therefore cannot constitute an exclusive, constructive feature of unintentionality" (Lipiński 2020, 268).

Considering the possibility of foreseeing the commission of a criminal act – mentioned in Article 9 § 2 of the CC – as an objective category is intended, then, to make it possible to accurately distinguish the subjective elements related to the perpetrator and his/her act, which are related to the layer of guilt. This is related, *inter alia*, to the meaning of the construction of an error under Article 28 § 1 of the CC (Barczak-Oplustil 2016, 382). As M. Malecki points out, the question of the excusability of an error regarding a circumstance constituting the characteristic of a prohibited act is, *de facto*, a question of whether a specific perpetrator, with specific characteristics and under specific conditions, could have foreseen that he/she would be performing the objective characteristic of the prohibited act, *ergo* that he/she would commit the prohibited act (Małecki 2015, 47).

6. SUBJECTIVE OR OBJECTIVE FORESEEABILITY?

Referring to the two positions outlined above, inevitably somewhat briefly, and attempting to prove the accuracy of one of them, it has to be stated that J. Lachowski is right in stating that reducing unintentionality to the objective foreseeability of committing a prohibited act would have to mean the absence of any psychological processes in the perpetrator, and thus, *de facto*, the absence of the subjective side of his/her act (Lachowski 2016, 407). At the same time, however, the recognition that the perpetrator's capacity to foresee the possibility of committing a prohibited act should be viewed subjectively leads inevitably to the introduction on the subjective side elements characteristic for the layer of guilt. J. Lachowski argues that such a situation is not at all inevitable, as the individually (subjectively) understood capacity to foresee the commission of a prohibited act may be established on the basis of circumstances occurring on the part of a specific perpetrator, but not related to the genesis of his/her decision of will (Lachowski 2016, 414).

It seems, however, that the division of individual circumstances into those related and those not related to the offender's decision is a task from the category of extremely challenging ones. An exemplary division of circumstances into those deciding about the subjective side in the form of unconscious unintentionality and those deciding about guilt is illustrated by J. Lachowski, who uses the lack of adequate knowledge of the perpetrator, stating that

> [if] the perpetrator does not have such knowledge which would allow him/her to foresee certain consequences, it means that he/she could not foresee them. It must be stressed, however, that in a situation where the perpetrator did not have the knowledge that would have allowed him/

> her to foresee the prohibited act, it becomes necessary to consider whether he/she had the possibility of acquiring such knowledge. If such a possibility existed, it means that the offender was in a position to foresee the criminal act. The reasons for the failure to acquire knowledge which the offender could have acquired are a different matter. (Lachowski 2016, 412)

The approach behind this example should probably be understood in such a way that at the level of the subjective side one can establish certain facts: (1) the perpetrator did not foresee the possibility of committing the criminal act; (2) the reason for the lack of foresight was the lack of specific knowledge and (3) the perpetrator had the possibility of acquiring this knowledge. On the basis of these facts, the conclusion arises that the perpetrator could have foreseen the possibility of committing the prohibited act. Then, at the level of assessing the act of this offender in terms of guilt, the previously established facts are evaluated, taking into account the subjective circumstances related to the genesis of the offende's decision. This is the stage where a conclusion has to be made that the perpetrator's failure to take advantage of the opportunity to acquire knowledge was justified or not, based on a finding of what the reasons for not acquiring this knowledge were. However, it is not difficult to see that fact no. 2, which is significant for the establishment of the subjective side – and within it the subjectively understood capacity to foresee the possibility of committing a prohibited act – is, in fact, a finding concerning the genesis of the perpetrator's decision. If he/she did not foresee the possibility of committing a prohibited act and committed it as a result of his/her failure to take the precaution required under the circumstances, and at the root of his/her decision on the behaviour was the lack of specific knowledge (fact no. 2), it is this lack of knowledge that is the key factor in the decision of the perpetrator's will. Furthermore, fact no. 3, i.e. the finding that the perpetrator had the opportunity to acquire the knowledge in question, already contains an element of assessment which inevitably leads us to the layer of guilt – the issue of the allegation against the perpetrator and the existence or absence of an excuse for the perpetrator's behaviour (Kowalewska-Łukuć 2019, 216). Doubts about the example presented by J. Lachowski are also expressed by K. Lipiński, who, referring to the analysed example, points to what follows:

> However, the question arises: if we include among the criteria for attributing unconscious unintentionality the subjective possibility of acquiring adequate information to formulate a prediction about committing a crime, do we not contaminate this construction with circumstances belonging to the sphere of subjective justification for the failure to meet the criterion set by the personal standard, thus coming back to a certain genetic defect of individually (subjectively) understood foreseeability? (Lipiński 2020, 257)

It must, therefore, be concluded that the concept which assumes understanding the capacity to foresee the commission of a prohibited act subjectively – although it is very attractive, because it gives to unconscious unintentionality a real cognitive element, positively framed (only in a potential version) – is unacceptable because of the impossibility of reconciling it with the

essence and function of the layer of guilt. However, this argument, according to some, does not necessarily disqualify the concept of subjective unconscious unintentionality. As Ł. Pohl points out that the thesis on the single-function role of the elements constituting the elements of a prohibited act within the structure of an offence is counterfactual (Pohl 2016, 422). One must agree with Ł. Pohl that given circumstances related to the criminal act and its perpetrator are relevant at different layers of the structure of the offence. One example of this is the awareness of the perpetrator of the criminal act. A certain threshold of awareness is necessary in order to conclude that a certain behaviour of the perpetrator in question is an act at all. The perpetrator's consciousness is then treated in a kind of zero-one manner; what matters is whether the perpetrator was conscious (in the sense of being awake) or not at all. Once again, awareness is taken into account at the stage of establishing the elements of the subjective side. Then, the quantitative aspect of such awareness becomes relevant, i.e. whether the perpetrator foresaw the possibility of committing a criminal act. Finally, awareness is also relevant at the level of guilt, where its qualitative aspect, whether it was undisturbed – e.g. by insanity, error, or immaturity – is assessed. Awareness is, therefore, relevant at different levels of the structure of the offence, but each time a different aspect of that awareness is relevant, because a different element of the structure is also subject to assessment (Kowalewska-Łukuć 2019, 154–155). In the case of a criminal act committed with unconscious unintentionality, the subjective capacity of the perpetrator to foresee the possibility of committing the criminal act undoubtedly requires an assessment of the qualitative aspect of the perpetrator's awareness. This, in turn, remains the domain of guilt. On the other hand, the quantitative aspect of that awareness, which characterises the subjective side, seems to be contained in the lack of foreseeing by the perpetrator of the possibility of committing a prohibited act.

Thus, one has to agree with the supporters of an objective approach to the requirement contained in Article 9 § 2 of the CC, concerning the capacity of the perpetrator to foresee the possibility of committing a prohibited act. M. Małecki is right in indicating that

> (…) it is something different to characterise a «prohibited act» committed unintentionally or intentionally, and something different to characterise «unintentionality» and «intentionality». Article 9 § 2 of the Criminal Code, as the initial fragment of this provision expressly states, contains a characterisation of the «entire» prohibited act committed unintentionally, and not only of its fragment in the form of the subjective side (Małecki 2015, 15).

The elements constituting the subjective side in the form of unconscious unintentionality, as defined in Article 9 § 2 of the CC, include the lack of anticipation by the perpetrator of the possibility of committing a prohibited act (cognitive element) and the lack of intention to commit the act, or, in fact, the

lack of any volitional attitude (volitional element). The latter is obvious, as it is impossible to have any volitional attitude towards something completely absent from consciousness. The definition of unconscious unintentionality in Article 9 § 2 of the CC is, therefore, binegative. This does not mean, however, that criminal liability for a criminal act committed in unconscious unintentionality is, *de facto*, responsibility without a subjective side (Tarapata 2015, 85). The cognitive aspect of the subjective side, i.e. the fact that the perpetrator did not foresee the possibility of committing the offence, must be established. On the basis of this finding, the conclusion about the actual absence of the volitional aspect becomes legitimate (Kowalewska-Łukuć 2019, 217).

Therefore, unconscious unintentionality – while assuming that the perpetrator's ability to foresee the possibility of committing a criminal act is objective and not an element of the subjective side – has its structural elements related to the quantitative aspect of the perpetrator's consciousness. Thus, criminal liability for an act committed in unconscious unintentionality is not a liability without a subjective side, nor is it a liability with an objective character. Subjective factors related to the qualitative aspect of the perpetrator's consciousness are taken into account at the layer of guilt.

The perception of unconscious unintentionality as a form of the subjective side, rather than some form of objective liability, is also supported by its comparison with the well-known construction of strict liability in the common law system. In this construction, in both of its varieties (Morse 2004, 400), the cognitive-volitional relation of the perpetrator to the act is not relevant at all. However, referring in the context of unconscious unintentionality to the constructions known in the common law system, it is also necessary to honestly note that its closest formulation, i.e. negligence, is a certain exception to criminal responsibility rather than one of the forms of *mens rea*. At the same time, as in the Polish criminal law science with regard to unconscious unintentionality, negligence is accused of being objective in nature (Greenberg 2021, 490; Lachowski 2015, 98). However, the difference between Polish unconscious unintentionality and, for example, English negligence is that, as A. Greenberg points out, "English law does not actually require negligence to be inadvertent, i.e. that the defendant is unaware of the relevant risk. All negligence requires is that a defendant fails to meet an objective standard, namely that they fail to take precautions against risks that a reasonable person would have" (Greenberg 2021, 492). It can be argued, of course, that reducing unconscious unintentionality to a failure to foresee the possibility of committing a criminal act and, consequently, to the absence of any volitional attitude on the part of the perpetrator towards the act, is, in fact, also some element of criminal liability for carelessness. However, there is no doubt that the binegative view of unconscious unintentionality refers to certain mental processes of the perpetrator, such as his/her state of consciousness.

The binegative approach to unconscious unintentionality also does not entitle the claim that the unintentionality is nothing more than a lack of intent. Conscious unintentionality, as indicated above, in both its cognitive and volitional elements, is not a simple negation of intentionality (Kowalewska-Łukuć 2019, 218). It is also unjustified, if only because of the different formation of the cognitive and volitional elements, to diminish – as some authors do – the relevance of the difference between the two forms of unintentionality (Giezek, Lipiński 2021). Furthermore, it is rightly pointed out by J. Giezek in his other work that conscious and unconscious unintentionality are separated by a fundamental difference in the psychological layer:

> While the first one is based on the assumption that the causal regularity under consideration, which is only probabilistic in nature, will not actualise, we would say about the second one – considering its psychological basis from a purely cognitive perspective – that it is derived from the failure to perceive that the undertaken behaviour is careless (contrary to the applicable rules) or is due to the ignorance of the causal regularity linking this type of behaviour to its negative effect (Giezek 2012, 140).

The division into conscious and unconscious unintentionality may also have practical significance. J. Giezek and K. Lipinski point out that "(…) whether the perpetrator foresaw or merely could have foreseen the consequences of his reckless behaviour does not seem to constitute a relevant basis for differentiating his/her assessment" (Giezek, Lipiński 2021). However, it seems that the circumstance of whether the perpetrator foresaw the possibility of committing the act or did not foresee it, although he/she objectively could have foreseen it, is relevant for differentiating the assessment of his/her act (Greenberg 2024, 352, 362). Using the examples of perpetrators of traffic accidents, one of whom ignored road signs with the speed limit and information about road works, while the perpetrator did not notice these signs at all, it must be stated that, even intuitively, the behaviour of the first of them appears to be more reprehensible.[2] In turn, the degree of the social harmfulness of the act translates into the penalty, because, according to Article 53 § 1 of the CC, the court, in imposing the penalty, must take this degree into account.

[2] In Article 115 § 2 of the CC, among the criteria for assessing the degree of the social harmfulness of an act, there is admittedly no form of unintentionality. The legislator uses the form of intent as such a criterion. It appears, however, that the issue of conscious or unconscious unintentionality on the part of the perpetrator may be connected with the circumstances of committing the act referred to in Article 115 § 2 of the CC. This is because if one understands the circumstances of the commission of the act as its time, place, but also a certain situational context, which includes both subjective and objective circumstances, then the issue of the perpetrator's conscious or unconscious unintentionality also falls within this context.

7. CONCLUSION

Summarising the above considerations, it must be stated that unintentionality differs from intentionality not only in terms of the volitional element, but also in terms of the cognitive element. This difference, in turn, should be reflected in Article 9 § 2 of the CC. Moreover, there is also a difference between the two types of unintentional conduct on the grounds of the cognitive element, where the cognitive element of unconscious unintentionality consists in the offender's failure to foresee the possibility of committing a prohibited act. On the other hand, the capacity to foresee, referred to in Article 9 § 2 of the CC, on the part of the perpetrator, is objective in nature and does not constitute a structural element of unconscious unintentionality as such.

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