sciendo

Ius Novum

2023, vol. 17, no. 1, pp. 24–38

BREAKING A CAR WINDOW TO RESCUE A CHILD OR ANIMAL LOCKED INSIDE: A DOGMATIC ANALYSIS OF THE LEGAL GROUNDS FOR EXCLUDING CRIMINAL LIABILITY

KRZYSZTOF WALA*

DOI 10.2478/in-2023-0002

Abstract

The purpose of the article is to analyse possible grounds, within the criminal sphere, for legalisation of behaviour involving damage to someone else's property motivated by the desire to save a child or an animal left in a locked warming car. It is quite common to treat this type of event as one matching the features of the state of superior necessity. However, such an approach may raise some doubts of a dogmatic nature. From the point of view of the statutory shape of the existing countertypes, one can look for the possibility of assuming in such cases (when the owner of the damaged property and the perpetrator of leaving a living creature in such conditions is the same person) the occurrence of an assault justifying, after meeting all the required conditions in the form of directness, lawlessness and reality, taking steps within the right to necessary defence. The adoption of such a concept has its own tangible practical significance, as it makes it unnecessary to refer to the principle of subsidiarity and proportionality, which guarantees broader protection from criminal liability for those who damage other people's property in order to take out a living creature left in a locked car in a situation of danger to its life or health.

Keywords: state of superior necessity, necessary defence, countertype, danger, assault, intense excesses, extensive excesses, child, animal, damage to property

* PhD, Assistant Professor, Department of Criminal Law and Criminology, Faculty of Law and Administration, Maria Curie-Skłodowska University in Lublin (Poland), e-mail: krzysztof.wala@mail.umcs.pl, ORCID: 0000-0002-9773-3926.

Each summer the media remind us how dangerous leaving a child or an animal unattended in a locked car is. It is a commonly known fact that cars are warming very fast in such conditions, which poses a direct threat to people and animals locked even for a relatively short period, e.g. for the time of shopping. However, numerous appeals are not always successful and such situations still, which should be regretted, keep occurring in the surrounding social reality. Such a state automatically raises a question about the way in which one should behave when they see a child or an animal left in a warmed car. From the point of view of criminal law, the question first of all is whether the potential act of breaking a car window and rescuing a person/animal endangered may constitute grounds for criminal liability for the commission of an offence of damage to somebody else's property under Article 288 § 1 or § 2 PC (when the value of the window exceeds PLN 500[1]), or a misdemeanour under Article 124 § 1 MC (when the value of the car window does not exceed PLN 500[2]). After the analysis of the statement made by the Police, the answer seems to be quite obvious: such conduct (in certain circumstances) is treated as an example of the state of superior necessity.[3] Practitioners' opinions, e.g. on law firms' websites or legal advice forums, are similar. Obviously, the message to the public encouraging people to take adequate steps in such circumstances should be absolutely approved of.[4] Without doubt, rescuing the life/health of a man, as well as of an animal, even if it results in damage to somebody's property is socially justified, and thus, as a rule, should not have consequences in the form of criminal liability. At the very beginning, it should be pointed out that the article only aims to assess the criminal law related aspects of such events, and therefore, as a rule, the civil law related aspects are not discussed, because that would require a separate analysis.

A priori, the opinions presented in the area seem to raise no doubts. Indeed, the essence of the state of superior necessity consists in the fact that we sacrifice a certain legal good for the purpose of rescuing another good, under the condition that this conduct is the only objectively existing way of eliminating danger, and the legal good sacrificed does not exceed the value of the good rescued. There are no doubts that leaving a living creature in a warmed car constitutes a danger that must be recognised as real and direct.[5] Also the subjective element is matched, as a rule. Thus, it concerns the aim of a perpetrator's action. The rescuer breaks a car window in order to free a child/animal from it, i.e. in order to eliminate a danger resulting from staying in a warmed vehicle.

---

1 It should be emphasised that after the planned amendment concerning the value of property damaged enters into force, the value limit will be PLN 800. Act of 7 July 2022 amending Act: Penal Code and some other acts (hereinafter referred to as "the 2022 Amendment").

2 PLN 800 after the 2022 Amendment enters in force.

3 The statement made by the spokesman of the National Police Headquarters, insp. M. Ciarka, available at: https://www.wnp.pl/parlamentarny/wydarzenia/komenda-glowna-policji-o-bezpieczenstwie-na-czas-wakacji-w-dobie-epidemii,82581.html (accessed on 1.02.2023).

4 The issue of obligations in this area is discussed later in the article.

5 Obviously, it must be pointed out that not every instance of leaving a child/animal in a car on a hot day will automatically mean posing a direct and real threat to their safety. It would be hard to recognise that e.g. leaving a car by a driver (e.g. a parent) for a short time in order to open a gate or to pay a bill at a petrol station means that.

With regard to the principle of proportionality dividing the state of superior necessity into a countertype or a circumstance excluding guilt, it should be highlighted that in case of rescuing a child from a warmed car by means of breaking a window in it, as a rule, we would deal with a circumstance excluding lawlessness (countertype). It is so because it should be assumed that human life/health is more precious than the ownership rights protected, inter alia, by Article 288 PC. As it a priori seems, as a rule, it should be similarly assumed in case of rescuing an animal, although this may raise some doubts of a dogmatic nature. The problem of evaluating legal goods (their social importance) is certainly a very complex and attitudinal issue. A. Zoll is right to state that the establishment of the hierarchy of legal goods goes far beyond a criminal law expert's competence. The author rightly states that the comparison of various legal goods is based on certain discretion due to the lack of unambiguous and sharp criteria on which such assessment should be based.[6] One criterion for establishing a hierarchy of legally protected values that is indicated is the statutory penalty for an act endangering a given legal good. At the same time, it is rightly pointed out that the use of this criterion requires prudence due to the fact that many offences are related to a complex object of protection.[7] It has its own measurable importance in the context of this discussion. Leaving an animal in a warming car certainly might be classified as an offence of ill treatment of animals (if a perpetrator's premeditation can be proved) in accordance with Article 35 § 1a of the Act on the protection of animals ("APA"). The act carries a penalty of deprivation of liberty for up to three years. On the other hand, damage to a car window, assuming the loss does not exceed PLN 500,[8] constitutes a forbidden act under Article 288 § 1 PC carrying a penalty of deprivation of liberty for a period from three months to five years. Therefore, adopting the above criterion, one can conclude that the right of ownership in relation to a loss exceeding PLN 500[9] is protected by criminal law to a greater extent than the wellbeing of animals.[10] Obviously, in the context of a car window damage, one can tend towards the interpretation of an incident as the case of lesser significance (petty crime) under Article 288 § 2 PC, however, in this case another attitudinal element occurs: this time, in relation to the classification of an actual event. It seems, however, that it is the only direction of interpretation justifying the adoption of the state of superior necessity in such cases as the countertype. The issue is not practically unimportant because if a hierarchy of legal goods is adopted on the basis of the indicator resulting from the statutory penalty, sacrificing the right of ownership (breaking a window) in order to rescue the life/health of an animal, we would deal with a circumstance excluding guilt, which completely changes the criminal assessment of the incident. The recognition

---

6 Zoll, A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982, p. 112.

7 Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne. Część ogólna*, Warszawa, 2016, p. 275.

8 After the 2022 Amendment enters into force.

9 After the 2022 Amendment enters into force.

10 The situation would be different in case of damage not exceeding PLN 500 (PLN 800 after the 2022 Amendment enters into force), because the different sanctions in this case (Article 35 § 1a APA and Article 124 § 1 MC) clearly show that wellbeing of animals is more valuable, thus sacrificing the former in order to rescue the latter would constitute a countertype situation.

that leaving an animal in a warmed car constitutes especially cruel ill treatment does not solve the problem, either, because of the fact that the act carries a similar penalty of deprivation of liberty as damage to property under Article 288 § 1 PC. One can head in a still different direction looking for arguments for the "establishment of countertypes" of such states of superior necessity. A person rescuing an animal from a warmed car rescues not only its wellbeing (life/health) but also the right of ownership of the animal's owner. This creates an interesting situation in which a rescuer simultaneously violates the right of ownership (breaking a car window) and rescues the right of ownership (rescuing an animal from a car) of the same person, provided that the same person is a car owner and an animal owner. In such a case the hierarchy would be based on the value of the loss (made and imminent). If the market value of an animal exceeded the value of a broken window, the state of superior necessity would be a countertype. If the market values were equal or a broken window was more expensive (by nature, as a rule, obviously it would not be), the state of superior necessity might be treated as a circumstance excluding only guilt, although it should be highlighted that the economic value of an animal should not be treated as the only criterion in this hierarchy. Thus, it is evident that, as a matter of fact, approaching such events as a state of superior necessity being a countertype is not so unambiguous as it might seem, and potential assessment in the area may be intuitive in nature. One cannot disagree with A. Zoll, either. Although statutory penalty is undoubtedly connected with abstractive understanding of the level of social harmfulness of a given forbidden act carrying a penalty, one cannot unambiguously state that it directly reflects the scale of this level because sanctions are often influenced by many different factors of political and criminal nature.[11]

Recognising the state of superior necessity in such cases results in the necessity of respecting the principle of subsidiarity. In a nutshell, breaking a car window must be the only way to eliminate danger. It is not possible to indicate unambiguous interpretation of this condition because each event must be assessed *in concreto*. First of all, it is necessary to start acting by checking whether a car is really locked. One can also impose a requirement that a rescuer should look for the car owner (e.g. by informing the security staff of the shopping centre, who can announce information about the problem) before breaking a window. If there are other people around, one may impose a requirement that a rescuer should shout a loud question if there is the car owner nearby. Thus, everything depends on circumstances or the scene of accident. However, the time of reaction is a key determinant, because a delay increases the danger for a child/animal locked in a car. Nevertheless, it can be assumed that the evaluative approach to the implementation of the principle of subsidiarity is a successive inconvenience when somebody refers to the state of superior necessity in such cases.

As a result, a question is raised whether this type of event can be resolved based on other legal constructions. In spite of a rather common assumption of the state of superior necessity in real states under discussion, this case is not so obvious as a priori it can seem. From the dogmatic point of view, one can consider and analyse

[11] Zoll, A., *Okoliczności wyłączające…*, op. cit., p. 112.

the possibility of adopting the exclusion of lawlessness of conduct in such situations based on the normative construction of necessary defence (alter ego defence).

The initial prerequisite for taking steps within the countertype of necessary defence is the occurrence of an assault on whatever good protected by law. There is no statutory definition of the concept of an assault. A. Marek assumes that an assault is a type of human conduct that creates a hazard to a good protected by the law.[12] W. Wolter adopts a similar stance and states that an assault is only human conduct that creates a hazard to a legal good.[13] One should agree with the opinion that the conduct that is an assault may take the form of action as well as omission.[14] It is also rightly indicated that the subjective aspect of an assault concerns both premeditation and involuntariness.[15] It is also important that within necessary defence there is a possibility to defend not only one's own legal good – although, according to some empiric research conducted in the past, such situations dominate in practice[16] – but also legal goods of other people and legal goods of the general public. Only marginally, but it is worth pointing out that unlike in the former legal state (Penal Code of 1969) the legislator is right to make no distinctions stipulating an assault on whatever good protected by the law.[17] This way, criminal law does not narrow the scope of legal goods, an assault on which validates the right to take a defence action.[18]

An assault justifying taking steps within necessary defence must meet three criteria jointly. The first of them is lawlessness. It should be understood as given conduct that is in conflict with the binding legal system.[19] It is indicated in the doctrine that it may concern criminal lawlessness as well as other types of violation of law (e.g. the civil one). It should be highlighted that the requirement of lawlessness of action results in the fact that only a man can be the source of assault, because only human conduct can be assessed from the point of view of its compliance or

---

[12] Marek, A., *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa, 2008, p. 32.

[13] Wolter, W., *Nauka o przestępstwie*, Warszawa, 1973, p. 165.

[14] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne…*, op. cit., p. 261.

[15] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część ogólna. Tom I. Cześć I. Komentarz do art. 1–52*, 5th edition, Warszawa, 2016, Article 25, thesis 17; Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie-Skłodowska*, Lublin, 2013, No. 2, p. 177.

[16] According to the findings of some research into files concerning necessary defence carried out based on the analysis of cases in the period from 1 September 1998 to 1 January 2000, in 72.5% of cases necessary defence occurred only in relation to the protection of one's own legal good, and only in 10.1% of cases necessary defence was related to the protection of someone else's legal good; The remaining cases were related to the protection of both one's own and another person's legal good. Bachmat, P., 'Instytucja obrony koniecznej w praktyce sądowej i prokuratorskiej', *Prawo w Działaniu*, 2008, No. 3, p. 57.

[17] Under Article 22 para. 1 PC of 1969, social goods are distinguished from an individual's goods literally; nevertheless, necessary defence was applicable in relation to each of them. However, § 2 stipulates that necessary defence in particular occurs when a perpetrator acts to restore order or public peace.

[18] Marek, A., Satko, J., *Okoliczności wyłączające bezprawność czynu. Przegląd problematyki. Orzecznictwo (SN 1918-99). Piśmiennictwo*, Kraków, 2000, p. 19.

[19] Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2022, Article 25, thesis 9.

a lack of compliance with the binding legal order. On the other hand, the fault on the part of a perpetrator is of no importance, thus, necessary defence against the conduct of people who cannot be faulted (e.g. non compos mentis persons and minors) is possible.

The second criterion for an assault is its directness. According to A. Marek, directness of an assault should be understood as an immediate hazard endangering a legal good.[20] A. Zoll indicates that the so-called test of attempt may be useful when the occurrence of directness is assessed. As this author points out, like in case of (successful) attempt, an assault is direct when a perpetrator's conduct poses a real threat to a good subject to legal protection.[21]

The last criterion for an assault, which is not directly expressed in a provision but results from the essence of necessary defence, is its reality. Thus, it concerns an objective occurrence of an assault and not just a representation of it created by a defender. The latter case may be assessed in terms of an error concerning a countertype. In this context, the Appellate Court in Wrocław is right to state that a perpetrator's erroneous, imaginary representation of an assault that, in his opinion, justifies the defence of an endangered good may be assessed in the categories of Article 29 PC, which regulates the issue of an error in the circumstances excluding the lawlessness of an act. Such an error excludes the fault of a person acting in the erroneously imagined necessary defence, however, provided that it is justified. A justified error in the circumstances excluding lawlessness of an act is an error that cannot be a reason for allegations that a perpetrator might have avoided it.[22]

Transferring the above comments onto the ground of actual situations under consideration in this paper, it is necessary to try to answer a question whether the conduct of a person leaving a child/animal in a warming car on a hot day meets the above-mentioned criteria. Firstly, one should assess the cases of leaving a child in a car (in the indicated conditions). There should be no doubts that such conduct matches the general framework of an assault. It is due to the fact that this is human behaviour that poses a threat to a good protected by the law (in this case, to a child's life and health). This type of act also contains an element of lawlessness, namely criminal lawlessness. Due to the main theme of the article, it will only outline possible grounds for criminal liability of a person leaving a child/animal in a warmed car because their deeper analysis would require a separate work.

With regard to leaving a child in a car, first of all, it is necessary to draw attention to Article 160 PC. The provision in § 1 defines an offence of exposing a man to a direct hazard of losing life or of serious detriment to health. It is necessary to approve of the opinion expressed by A. Zoll, who states that exposing a man to a hazard referred to in Article 160 §§ 1–3 occurs in case a perpetrator infringes the rules of dealing with another man based on our knowledge and experience, rules developed to determine the level of threat tolerated because of the weight of action undertaken. As this author highlights, a perpetrator must violate the rule

[20] Marek, A., in: *Kodeks karny. Komentarz*, 5th edition, Warszawa, 2010, Article 25, thesis 16.

[21] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 25, thesis 19.

[22] Judgment of the Appellate Court in Wroclaw of 10.07.2019, II AKa 105/19, LEX No. 2726876.

of conduct that protects the safety of human life and health against a threat on the way on which a perpetrator in fact posed it.[23] It may be assumed that leaving a small child alone in a car warming quickly, as a rule, exposes him/her to the danger indicated in the provision. In principle, in such situations we can speak about an aggravated offence specified in Article 160 § 2 PC, where the aggravating circumstance consists in a perpetrator's features in the form of an obligation to care about a person exposed to a hazard determined in § 1. There are no doubts that in such cases, it is a parent or a guardian who leaves a child in a car, i.e. a person who is obliged to take care of a child. It should be added that in case of this offence, the legislator also introduces a clause stipulating penalisation of involuntariness based on Article 160 § 3 PC. However, as it is rightly assumed that an assault justifying necessary defence may be a premeditated act as well as unintentional one, the object of a perpetrator's conduct is in this context not important for the purpose of validating the right to necessary defence.

The lack of possibility of attributing the features of the above-mentioned offence does not automatically deprive this type of conduct of criminal lawlessness. There is also liability for misdemeanour based on Article 106 MC. In accordance with the provision, whoever is obliged to care about or guard a minor under the age of seven or another person unable to recognise or defend against a danger, and lets them stay in circumstances dangerous for human health, is subject to the penalty of a fine or a reprimand. The provision does not mention a threat of the occurrence of consequences specified in Article 160 § 1 PC, but only a danger for human health. And this danger does not have to meet the requirement of directness. As a result, it is reasonable to assume that leaving a child unattended in a car on a hot day may be treated as an example of an act matching the features of this misdemeanour.

On the other hand, with regard to an act of leaving an animal in a warming car, criminal lawlessness of this type of assault can be looked for based on the formerly quoted provision of Article 35 § 1a APA. As the provisions of the statute stipulate, one of the forms of ill treatment of animals is the exposition of a pet or a farm animal to the operation of atmospheric conditions that endanger their life or health (Article 6 § 2 (17) APA). For the occurrence of the offence, it is necessary to indicate premeditation on the part of a perpetrator. It can be assumed that the act of consciously leaving an animal in such conditions would match the features of recklessness (although intention of this act cannot be excluded, which moves the scope of the objective element onto the area of direct intention). It should be emphasised, however, that even in case of the lack of premeditation on the part of a perpetrator, the exclusion of lawlessness of this type of assault will not, what is obvious, occur, but only the features creating the objective element of the offence will be disassembled.

As a matter of formality, it should be reminded that the possible lack of criminal lawlessness does not mean a lack of another form of violation of law (e.g. civil or administrative). Thus, with respect to the act of leaving a small child unattended by a parent, civil lawlessness might be looked for in the provisions of Family and

[23] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 160, thesis 8.

Guardianship Code.[24] On the other hand, in the context of animals, one might indicate Article 1 § 1 APA, which clearly stipulates that a man should protect, respect and look after animals. Therefore, it can be assumed that an act of leaving an animal in a situation that is dangerous for it (even if it were not *in concreto* treated as a form of ill treatment) would constitute a form of lawlessness that is administrative in nature.

With regard to other features of an assault justifying action within necessary defence, directness and reality, it should be assumed that, in case of an act of leaving a child/animal in a warming car, they will also be matched, although obviously, like in case of lawlessness, every actual state should be assessed *in concreto*. As it was indicated at the beginning, not every act of leaving a living creature in a car will constitute a direct threat to its life or health. However, if a perpetrator walks away from a car leaving a child/animal unattended (with no possibility for taking care of them), as a rule, the features seem to be matched. Obviously, it is not possible to determine the required time of leaving a living creature unattended. Some situations will be obvious,[25] others will be relative and whatever attempts to indicate clear criteria seem to be doomed to failure.[26] Thus, as in every case, the state of superior necessity or necessary defence, the implementation of their features must always be referred to a particular event. A. Marek is right to state that, with regard to the directness of an assault, the determination of this prerequisite must be based on the objective assessment of the situation and not on subjective suppositions. The assessment must be carried out *ex ante*, taking into account all circumstances at the time of an event, and not *ex post*, through the prism of the consequences.[27]

Thus, the essence of necessary defence consists in combating an assault that meets the above-listed criteria. According to J. Lachowski, defence must be addressed to a perpetrator of an assault and not any other person. He adds that necessary defence is aimed at "neutralising a perpetrator" of an assault, and not avoiding it.[28] With regard to this statement, it should be said that there are obviously no doubts that necessary defence cannot be addressed to a person who is not a perpetrator of an assault. Nevertheless, it does not seem necessary to aim defence actions directly at a perpetrator, i.e. to aim them against an assailant; it is sufficient to aim them at an assailant's legal goods (including, e.g. his right of ownership, which is of special importance from the point of view of cases analysed based on this paper). Thus, it is about defending against an assault committed by its perpetrator by infringing his legal goods and not necessarily physical combat with him; although in practice

---

[24] In accordance with Article 95 § 1 FGC, parental authority concerns in particular parents' obligation and right to take care of a child and his/her property and to raise them with respect for their dignity and rights.

[25] E.g. an act of leaving a child/animal in a car in the sun on a hot day and going to a shopping centre.

[26] Certainly, important criteria will include e.g. a place where a car is parked (shadowed or exposed to the sunshine), the distance between the parked car and the place where a driver goes and the type of this place (it makes a difference whether he goes to a big shopping centre for a long time or if he pops into a small corner shop close to the parked car).

[27] Marek, A., in: *Kodeks karny…*, op. cit., Article 25, thesis 16.

[28] Lachowski, J., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, 3rd edition, Warszawa, 2020, Article 25, thesis 6.

necessary defence is usually connected with incursion into the bodily integrity of a perpetrator of an assault. It is rightly indicated that defensive measures may be aimed at a perpetrator of an assault and his goods, as well as the measures he uses, i.e. for example one may destroy his weapon or kill his dog that he uses during an assault on a legal good.[29] Thus, within necessary defence, it is possible to infringe only an assailant's right of ownership if the features of his assault result in the need to act this way on the part of a person defending against an assault. Distinguishing necessary defence from superior necessity, I. Andrejew is right to maintain that in case of an action in the state of superior necessity, this action is not delivered against a perpetrator of an assault but against the legal goods of another person. Figuratively speaking, if a defender uses somebody else's cushion to shelter from an assailant, which results in the damage to this cushion, it is a state of superior necessity, *a contrario*, if this cushion belongs to an assailant, a defender's conduct should be considered in terms of necessary defence.[30]

The above comments mean that there are legislatively laid down prerequisites for treating an act of leaving a child/animal in a car in the circumstances in which it can warm quickly as a lawless, direct and real assault on a good protected by the law. Interpreting the essence of necessary defence as a measure consisting in combating an assault matching the above-mentioned features by infringing a legal good owned only by an assailant, one can propose a thesis that the cases under consideration herein should be treated as the implementation of this countertype. If a window in a car is broken in order to rescue a child/animal that are in a situation of direct threat to their life/health, as a matter of fact, such conduct constitutes fighting off an assault resulting from a perpetrator's conduct by sacrificing a legal good owned by a an assailant (a person who left a living creature in such conditions). Obviously, those prerequisites will be met if an owner of a damaged car is a person who left a child/animal in it (in conditions endangering their life/health).

It should be also pointed out, as is indicated in the doctrine, that fighting an assault off within necessary defence is possible throughout the whole period of a hazard to a legal good resulting from an assaulter's conduct. Therefore, the right can be exercised the moment an assaulter actively infringes/directly aims to infringe a legal good as well as when he creates and maintains a state of hazard to a good protected by the law.[31] In the context analysed herein, this observation and, at the same time, the analogy to admissibility of self-defence in relation to persistent offences is of considerable importance, because, as a matter of fact, in the event of leaving a child/animal in a warming vehicle, the perpetrator induces a state of direct persistent threat to the value protected by the law. Discontinuation of this danger by the infringement of an assailant's good (breaking a window in a car) occurring in his absence does not negate the essence of necessary defence.

The assumption that the cases discussed herein should be treated as necessary defence results in rather far-reaching consequences and differences in the relation

---

[29] Góral, R., *Obrona konieczna w praktyce*, Warszawa, 2011, p. 61.
[30] Andrejew, I., *Polskie prawo karne w zarysie*, Warszawa, 1983, p. 170.
[31] Marek, A., in: *Kodeks karny*…, op. cit., Article 25, thesis 13.

to the practice of identifying them as a state of superior necessity. Firstly, rather commonly in the doctrine,[32] as well as in case law,[33] it is assumed that necessary defence, unlike a state of superior necessity, is independent in nature. This means that it can always be referred to when there is an (direct, lawless and real) assault on a good protected by the law and thus a perpetrator's legal good can be infringed even if there are other means of avoiding an assault.[34] A. Zoll presents a bit different conception: he notices relative subsidiarity (relative independence) of necessary defence deriving it from the concept of social profitability as one of the features linking all types of countertype conduct.[35] The conception is sometimes adopted in jurisdiction.[36]

However, assuming the independence of necessary defence, it is necessary to state that a person breaking a car window in order to rescue a child or an animal in such situations does not have to consider whether there are any other objectively available and efficient *in concreto* methods of rescuing a living creature locked in a warming car. It may be assumed that such a solution 'accelerates the proceeding' and provides a stronger sense of legal security to a person rescuing a child/animal in such cases. It is not unimportant for the efficiency of such actions. In other words, the adoption of necessary defence is more favourable for a person reversing a state of hazard (in necessary defence terminology: a person fighting off an assault). He does not have to consider whether there are other forms of rescuing a living creature from a warmed car, and thus is not exposed to a charge of exceeding the limits of actions constituting possible intense excesses (the infringement of subsidiarity in a state of superior necessity).

The assumption of the occurrence of necessary defence in such cases also has a measurable importance in the context of the principle of proportionality. Such a solution would make the above-mentioned current doubts in the area invalid.

---

[32] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne*…, op. cit., Article 25, thesis 13; Marek, A., *Kodeks karny*…, op. cit., Article 25, thesis 7; Krukowski, A., *Obrona konieczna na tle polskiego prawa karnego*, Warszawa, 1965, p. 70.

[33] The Supreme Court in one of its judgments directly indicated that necessary defence, as it results from the content of Article 25 § 1 PC, is independent in nature, and not "relatively independent and subsidiary". However, conventional regulations (Article 2(2)(a) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws of 1993, No. 61, item 284, as amended) indicate that the right to effective defence must not exceed the limits resulting from axiological and humanistic aspects as human life is a good of the biggest value, thus, the regulation of this Convention does not negate the independence of necessary defence as it concerns the issue of proportionality of the method of defence adopted in relation to the hazard of a given assault, which constitutes a separate requirement for the institution of necessary defence approached in a negative way in Article 25 § 2 PC; the Supreme Court ruling of 15.04.2015, IV KK 409/14, OSNKW 2015, No. 9, item 78; also see the Supreme Court judgment of 14.05.1984, II KR 93/84, OSNPG 1985, No. 5, item 63; the Supreme Court judgment of 4.02.1972, IV KR 337/71, OSNKW 1972, No. 5, item 83; the Supreme Court ruling of 27.04.2017, IV KK 116/17, LEX No. 2284193; the Supreme Court judgment of 9.04.2002, V KKN 266/00, LEX No. 52941.

[34] Filar, M., Berent, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, 5th edition, Warszawa, 2016, Article 25, thesis 11.

[35] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 160, theses 51 and 52.

[36] See judgment of the Appellate Court in Kraków of 28.03.2007, II AKa 23/07, KZS 2007, No. 4, item 24.

It is so because on the basis of necessary defence there is a condition of relative proportionality. In a nutshell, a defender may infringe an assaulter's good of a value higher than that of a rescued good, or use a form of defence that is more intense than the force used by an assailant, but he must maintain proportion and prudence in the choice of a defence method. It is also important from the point of view of the cases considered herein because to some extent it also protects a legal interest of the owner of a damaged car (provided he is a perpetrator of the act of leaving a child or an animal in it). If a person fighting off an assault (the one breaking a window) e.g. broke all the car windows unnecessarily or in another way (intentionally) damaged it, which would not be *in concreto* necessary for the purpose of rescuing a child/animal, such conduct might constitute an example of intense excesses – the infringement of a condition of relative proportionality required for the lawfulness of necessary defence.

In the present doctrine of criminal law, the dominating stance is that necessary defence is a right that a defender cannot exercise in case of encountering an assault and not an obligation to fight it off. It is rightly believed that the right of necessary defence is one of fundamental natural and legal human right.[37] By the way, it should be reminded that former opinions about necessary defence noticed *sui generis* obligation to protect legal goods resulting from the theory of substitution referring to a *nota bene* right statement that the state authorities are not always and everywhere able to ensure the protection of legal goods.[38] The reference to this issue seems to be interesting in the cases considered on the basis of the paper. It is true that every person has a statutory (legal) obligation to aid another person whose life and heath is directly endangered (may suffer serious injury). This obligation results from the provision of Article 162 § 1 PC, which penalises the offence of a failure to aid another person.[39] Thus, a person who notices a small child left in a car warming in the sun, on the one hand, has an obligation to provide aid, and on the other hand, he has the right to use measures resulting from the normative construction of necessary defence to fulfil this obligation. This does not mean, however, that in such cases necessary defence becomes an obligation; and this is due to the fact that aid may also be provided in another way than the infringement of an assailant's legal good (his property by means of breaking a car window). The other methods include e.g. notification of appropriate services about an event, which alone means, as a rule, the fulfilment of a legal obligation under Article 162 § 1 PC and, at the same time, does not match any features of whatever forbidden act carrying a penalty, which is a primary prerequisite for quoting whatever countertype construction.

---

[37] Marek, A., *Obrona konieczna w prawie karnym*, Warszawa, 1979, p. 19.

[38] Świda, W., *Prawo karne*, Warszawa, 1978, pp. 144–145.

[39] In accordance with this provision, whoever fails to provide aid to a person in danger of losing life or health or suffers a serious injury although he can provide aid without a risk that he or another person may lose life or health or suffer a serious injury is subject to a penalty of deprivation of liberty for a period of up to three years. On the other hand, in accordance with § 2, whoever fails to provide aid in the form of surgery or in circumstances in which a specialist institution or qualified staff can provide immediate assistance does not commit an offence.

However, the issue may be looked at from a different perspective. One may consider whether, in such cases, there is (or not) a completely different countertype occurring in the form of an action within one's obligations or probably entitlements in line with the principle: what is ordered/allowed cannot be forbidden at the same time. Some prerequisites for the above-mentioned countertype are pointed out in the doctrine. Firstly, there must be a provision ordering or at least allowing for a particular action. Secondly, if this provision makes the performance of a given action depend on certain circumstances or a performer fulfil some conditions, they must indispensably occur. And thirdly, a given action must be within the competence of a given entity and this entity must be competent to deal with a given matter as well as in a given location.[40] Referring these prerequisites to the situation concerning rescuing a small child from a warmed car by breaking a window in it, and applying probably a bit more widening interpretation, however more favourable for a perpetrator, one can state that theoretically they will occur. Article 162 § 1 PC, as it was mentioned above, stipulates the provision of aid to a person who is in danger of losing life or health (being seriously injured). Obviously, the provision does not determine in what way this aid is to be provided. If one interprets this prerequisite narrowly – an action should be determined in statute – then, there is a lack of its implementation and it is hard to speak about this countertype. However, if it is interpreted more widely – as the existence of legal and factual grounds in a given case – it is possible to conclude that the prerequisite will occur (obligation to provide aid to another person and, at the same time, actual place where this person is – a small child locked in a warming car in direct danger of losing life or health, i.e. being seriously injured). One can assume that the second condition will also be fulfilled. There is a circumstance that validates the provision of aid: another person being in danger of losing life or health (being seriously injured). Finally, the third requirement: a person taking steps must be the right one to perform this action, which also seems to validate itself in case of a person noticing a small child in a warming car. However, in the context of reference made to this countertype, what raises many doubts is a statement that obligations being fulfilled within it should be official in nature, which successively leads to a conclusion that only people performing public functions, in particular public officers can adduce this prerequisite. Of course, the acceptance of this requirement causes that an ordinary citizen might not adduce this circumstance excluding lawlessness in such situations. The situation would be totally different in case of police officers called to the scene. Police officers breaking a window in a car in order to rescue a small child would act within the scope of their official duties. On the other hand, it is noticed that the countertype is possible, but only in relation to exercising entitlements, also in relation to persons who do not perform public functions.[41] In conclusion, although theoretically there are grounds for justifying the adoption of a countertype of action within one's obligations/entitlements in such cases, it seems, however, that for guarantee reasons the interpretation should be rejected, simply due to the fact

[40] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne*…, op. cit., p. 291.
[41] Marek, A., *Prawo karne*, Warszawa, 2005, p. 181.

that such events are more similar to other countertypes (necessary defence, state of superior necessity). In addition, attention should be drawn to the fact that a person acting within this countertype, like in case of any other, performs an action that matches the features of a certain type of forbidden acts (in this situation it is damage to property). Thus, exclusion of lawlessness of such conduct should be based on definite legal grounds, determining strict procedure, prerequisites and features of a given entity taking action. However, the above-presented interpretational acrobatics do not seem to fulfil this condition.

The above comments seem to constitute a quite strong argument for treating the cases considered based on this paper in terms of necessary defence. It should be emphasised, however, that the conception has one serious defect: stratification of legislative grounds for the exclusion of liability in twin cases. In practice, if a window in a locked warming car is broken in order to rescue a child or an animal, the case constitutes a countertype of necessary defence only when a perpetrator of an assault is at the same time an owner of a damaged car. In such cases all features of necessary defence are matched (of course, assessment *in concreto* is always necessary). The situation will be different in case somebody else owns this car (e.g. it is a company car, or a hired or leased one) and somebody else is a perpetrator of the act of leaving a living creature in it. Then, due to the fact that not an assailant's but somebody else's legal good (the right of ownership) is sacrificed, as a rule, the conditions for the state of superior necessity will occur. Problems also arise in a situation when an assailant and another person are joint owners of a car; although in such cases it is possible to defend a concept of necessary defence occurrence (indeed, there is an infringement of a legal good of an assault creator) in case of possible damages claimed by the second owner from the co-owner who is an assailant.[42]

It is obvious, what was emphasised in the earlier parts of the paper, that a person acting within the frame of necessary defence is entitled to wider rights and possibilities of acting (lack of subsidiarity, relative proportionality) than the one who acts within the frame of superior necessity. Both normative constructions (necessary defence and superior necessity) can finally lead to the exclusion of criminal liability in case of this type of conduct. The differentiation of their grounds, application and consequences or even structural aspects of this exclusion (legitimation, possible lack of fault depending on the assessment of the proportion of goods: sacrificed and infringed ones in the context of superior necessity) leads to the occurrence of this stratification in such cases.

The above-presented differentiation resulting from the current legal regulations raises one more doubt. A question is asked about the objective element of the conduct consisting in the act of breaking a car window in order to rescue a living creature concerning the issue whether an entity who acts as a rescuer is aware of the scope of features of the act performed. The axis of the problem is the assessment of the ownership of a damaged car. It is hard to require that a rescuer should be able to assess who has the right of ownership he infringes: an assailant (a person who left

[42] The issue of civil liability goes beyond the frames of this paper, thus this possibility is only signalled.

a child/animal in a locked warming car) or a person irrelevant from the point of view of the danger posed. The adoption of *sui generis* general intent, i.e. the intention of action excluding criminal liability within the scope of this measure, which *in concreto* has been implemented, seems to be the simplest solution. In a nutshell, if there are conditions of necessary defence, we presume the existence of the intention to act within the scope of this normative construction, and if there are prerequisites for superior necessity, a rescuer should be attributed an intention to act within its scope. Regardless of doubts concerning the construction of general intent, one should add that in this case this intent does not concern a circumstance influencing attribution of criminal liability (does not concern the features of a forbidden act like e.g. in case of a theft) but a circumstance excluding this liability. Thus, if pragmatism and the practice of justice administration are taken into account, the conception in this context does not only seem to be well grounded but also the only applicable.

Summing up, there are no doubts that rescuing a child/animal left in a warming car by breaking the car window in when a living creature is in danger of losing life or health constitutes socially desired conduct, and a person acting this way should not, as a rule, be subject to criminal liability. Nevertheless, from the legislative point of view, this type of conduct seems to raise certain doubts concerning the area of its legitimisation. For the above-quoted reasons, it seems that this type of actual state should be resolved based on the provisions stipulating necessary defence when the same person is a perpetrator of the act of leaving a living creature and an owner of a damaged car. On the other hand, in case these are different persons, the provisions applicable to the state of superior necessity, as a rule treated as a countertype, should be applied. At the same time, it would be hard to formulate any proposals *de lege ferenda* due to the deeply rooted in tradition and, as a rule, properly developed normative construction of both, in this context, legal constructions concerning necessary defence and superior necessity.

BIBLIOGRAPHY

Andrejew, I., *Polskie prawo karne w zarysie*, Warszawa, 1983.

Bachmat, P., 'Instytucja obrony koniecznej w praktyce sądowej i prokuratorskiej', *Prawo w Działaniu*, 2008, No. 3.

Filar, M., Berent, M., in: *Kodeks karny. Komentarz*, Filar, M. (ed.), 5th edition, Warszawa, 2016.

Góral, R., *Obrona konieczna w praktyce*, Warszawa, 2011.

Krukowski, A., *Obrona konieczna na tle polskiego prawa karnego*, Warszawa, 1965.

Lachowski, J., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, 3rd edition, Warszawa, 2020.

Marek, A., in: *Kodeks karny. Komentarz*, 5th edition, Warszawa, 2010.

Marek, A., *Obrona konieczna w prawie karnym*, Warszawa, 1979.

Marek, A., *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa, 2008.

Marek, A., Satko J., *Okoliczności wyłączające bezprawność czynu. Przegląd problematyki. Orzecznictwo (SN 1918-99). Piśmiennictwo*, Kraków, 2000.

Mozgawa, M., in: *Kodeks karny. Komentarz aktualizowany*, Mozgawa, M. (ed.), LEX/el., 2022.

Mozgawa, M., in: *Prawo karne materialne. Część ogólna*, Mozgawa, M. (ed.), Warszawa, 2016.

Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie-Skłodowska*, Lublin, 2013, No. 2.
Świda, W., *Prawo karne*, Warszawa, 1978.
Wolter, W., *Nauka o przestępstwie*, Warszawa, 1973.
Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1–52*, 5th edition, Warszawa, 2016.
Zoll A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982.

Cite as:

Wala K. (2023) 'Breaking a car window to rescue a child or animal locked inside: a dogmatic analysis of the legal grounds for excluding criminal liability', *Ius Novum* (Vol. 17) 1, 24–38. DOI 10.2478/in-2023-0002