

## Accidents at work – a qualitative study on the main procedural vicissitudes in Portuguese case law

Glória Rebelo, António R. Almeida

<sup>1</sup> Iscte-Instituto Universitário de Lisboa, Centro de Estudos sobre a Mudança Socioeconómica e o Território (DINÂMIA'CET), Lisboa, Portugal. Universidade Lusófona-Centro Universitário de Lisboa. E-mail: Gloria\_Rebelo@iscte-iul.pt ORCID: 0000-0002-7596-7238; <sup>2</sup> Legal advisor at the Universidade Europeia. ORCID: 0000-0002-9128-7144

**Abstract:** The issue of accidents at work linked to the protection of occupational safety and health has been an international political concern for decades. Despite various advances, statistics on accidents at work (fatal and non-fatal) still show a relatively high incidence in some EU countries, particularly in Portugal. Occupational safety and health issues are at the centre of European social policies and national public policies. The aim of this article is to identify, based on an analysis of Portuguese case law, the most frequent issues relating to accidents at work in the courts. Jurisprudence was analysed and collecting summaries of 330 judgments from the higher courts, the main themes on accidents at work discussed at judicial level in Portugal were identified. This study reveals information that will be important for political decision-makers and social partners in responding to and preventing this important labour problem. It was possible to identify, in terms of frequency, six groups of descriptors (and their respective sub-themes) specifically related to the procedural vicissitudes of accidents at work in Portuguese courts: 'Proof' (with 55 frequencies); 'Liability, reparation and services' (68 frequencies); 'Compliance guarantee' (63 frequencies); 'Labour Accident Fund' (26 frequencies); reporting an accident at work (11 frequencies) and 'Prescription and forfeiture' (7 frequencies). The main conclusion/recommendation of this study is that, considering the gap in the literature on the subject, further research is needed into the procedural vicissitudes inherent in labour accident lawsuits in Portugal.

**Keywords:** Accidents at work, health and safety at work, judicial protection; procedural vicissitudes, public policies.

## Acidentes de trabalho - um estudo qualitativo sobre as principais vicissitudes processuais na jurisprudência portuguesa

**Resumo:** A questão dos acidentes de trabalho associada à segurança e à proteção da saúde no trabalho tem sido uma preocupação política internacional desde há décadas. Apesar de vários desenvolvimentos, as estatísticas sobre acidentes de trabalho (mortais e não mortais) ainda revelam uma incidência relativamente elevada em alguns países da UE, especialmente em Portugal. As questões de segurança e saúde no trabalho estão no centro das políticas sociais europeias e das políticas públicas nacionais. O objetivo deste artigo é identificar, com base numa análise da jurisprudência portuguesa, as questões mais frequentes relacionadas com os acidentes de trabalho nos tribunais. Analisou-se a jurisprudência e, através da recolha de sínteses de 330 acórdãos de tribunais superiores, identificaram-se as principais questões sobre acidentes de trabalho debatidas a nível judicial em Portugal. Este estudo revela informação que será importante para os decisores políticos e parceiros sociais na resposta e prevenção deste importante problema laboral. Foi possível identificar, em termos de frequência, seis grupos de descritores (e respetivos subtemas) especificamente relacionados com as vicissitudes processuais dos acidentes de trabalho nos tribunais portugueses: "Prova" (com 55 de frequência); "Responsabilidade, reparação e benefícios" (68 de frequência); "Garantia de cumprimento" (63 de frequência) "Fundo de Acidentes de Trabalho" (26 de frequência); "Reporte de acidente de trabalho" (11 de frequência) e "Prescrição e caducidade" (7 de frequência). A principal conclusão/recomendação deste estudo é que, considerando o gap existente na literatura sobre o tema, importa prosseguir investigação sobre as vicissitudes processuais inerentes aos processos judiciais sobre acidentes de trabalho em Portugal

**Palavras-chave:** Acidentes de trabalho, segurança e saúde no trabalho, tutela judicial, vicissitudes processuais, políticas públicas.

## 1. Introduction

One of the biggest labour problems in the world, due to its scale and impact, is accidents at work. Despite significant regulation, accidents at work are a sadly regular occurrence and their human and financial consequences are very significant (ILO 2014; Nenonen 2014; ILO 2023; ILO 2024). Therefore, one of the biggest challenges for governments in different countries remains to identify vulnerabilities in the protection and redress system and develop more effective ways of understanding and limiting their occurrence, as well as strengthening the protection of workers in the event of accidents at work due to human and organisational causes. Although it has not received the most attention in Portuguese doctrine, the subject of accidents at work and occupational illnesses is - due to its impact - one of the most important labour issues in Portugal and as Romano Martinez stresses, “the subject of accidents, in practice, occupies perhaps 50% of the labour law issues raised. (...) Despite the practical impact of this issue, it is not dealt with in labour law textbooks, but only in studies aimed at legal practitioners, particularly in commentaries on the laws that regulate accidents at work” (Romano Martinez, 2019, p. 845).

This justifies the choice of this object of study: on the main procedural vicissitudes of accidents at work through a qualitative study. This article partially analyses the results of an analysis carried out at the invitation of the General Workers' Union (UGT) - one of the main trade union centres in Portugal, founded in 1978 and comprising 76 unions and 3 federations - in order to draw up a study on accidents at work and occupational illnesses in Portugal entitled: 'What ordeal do workers have to go through to have their rights enforced? (UGT, 2022). The purpose of which is to identify the judicial mechanisms for protection and redress in the area of accidents at work and occupational illnesses, through an analysis of High Court judgements.

Studying the procedural vicissitudes - the subject of this article - was thus one of the central aspects of this wide-ranging study. Portuguese jurisprudence has held that accidents at work are those that occur at the workplace, during working hours or are related to them. Occupational health and safety law can be broadly defined as the set of legal rules aimed at preventing accidents and health problems. Therefore, the purpose of this article was, from a theoretical framework, to carry out research and, thus, to identify the main problems faced by workers who are victims of these accidents when they seek legal protection in the context of accidents at work and occupational illnesses. Starting with a theoretical framework on the subject of accidents at work and occupational diseases in Portugal, we researched and identified Portuguese case law rulings – from the Supreme Court of Justice and the Courts of Appeal – on accidents at work, from 2011 to the end of 2021. From the summaries of these judgments, the most referenced descriptors in Portuguese case law on accidents at work were identified.

So, this article is organised as follows: after this introduction that justifies the study, the second section presents the legal framework of this issue in Portugal, highlighting the importance of case law and analyses national and international literature. It is argued that the aim of this article is, on the basis of this theoretical framework, to identify the main problems related to this issue that come before the Portuguese courts. The third section presents the methodology, highlighting the importance of categorisation by descriptors in the analysis technique used. In the fourth section, the main results are presented and analysed, describing the position of Portuguese jurisprudence in relation to the main procedural vicissitudes discussed in court. These results refer to a set of 330 judgements,

dating from 2011 to 2021, and show the position of Portuguese case law on the subject. To finish, a discussion and conclusions are made about the results obtained.

## **2. Literature, legal framework and jurisprudence**

In Portugal, the legislation and regulation of occupational health and safety services has been the subject of public policy instruments since the "Strategic Concertation Agreement for 1996-1999", approved on 20 December 1996, as well as the "Agreement on Working Conditions, Hygiene and Safety at Work and Combating Accidents", signed on 9 February 2001 (MTSSS, 2017, p. 276).

Since the last decade of the 19th century, Portugal has adopted legislation aimed at protecting the safety and health of women and children at work and in certain sectors perceived as high risk. Thus, the Decree of 14 April 1891 "regulated, for the first time, the field of OSH for a particularly vulnerable group of workers: male minors under 16 and female minors under 21, including, in addition to the minimum age for admission, a set of rules of a preventive nature (...)" (Roxo, 2011, p. 27). The characterisation of the fundamental right to Health and Safety at Work has served to identify distinctive features of the legal and institutional framework, "namely in terms of its scope and purpose (...), the way in which action is taken to prevent occupational risks and even the type of regulation and standardisation chosen (...)" (Roxo, 2011, p. 45).

Law no. 83 of 24 July 1913 regulated liability for accidents at work and it was only with Decree 5637 of 10 March 1919 that "this system was generalised, with compulsory insurance against accidents" (Monteiro Fernandes, 2010, p. 36). With the Constitution of 1933 and the National Labour Statute in force, it will also be worth mentioning" Law 194 of 27 July 1936 on the regime for accidents at work and occupational diseases, which was repealed in 1965" (Monteiro Fernandes, 2010, p. 38).

And the legal references produced shortly afterwards at international level were adapted, "and which constitute the current legal framework for safety and health at work: ILO Convention No. 155 of 1981 on the safety and health of workers and the working environment and Council Directive 89/391/EEC of 12 June 1989 on the promotion of safety and health at work" (Ibidem).

As mentioned, with the dual aim of ensuring the well-being and productivity of workers, occupational health and safety has been regulated for decades. But there have been major changes with the globalisation movement and the resulting international competition, as well as the expansion of the tertiary sector and the feminisation of the workforce, given women's massive access to employment (ILO, 1984; ILO, 1989; ILO, 1998; ILO, 2002). In addition, the nature of health problems at work has changed, with concerns emerging around musculoskeletal disorders and mental health (ILO, 2010; ILO, 2015; Hämmäläinen et al., 2017).

In addition, in this new digital context, one of the major challenges will be to monitor the impact of the increase in normal working hours on occupational illnesses and accidents, and in particular the negative effects of burnout (Rebelo & Roxo, 2019). It should be noted that digitalisation is rapidly changing the world of work (OECD, 2016; Rebelo, Simões & Salavisa, 2020) and requires up-to-date responses in the field of occupational safety and health (WHO/ILO, 2016; Weil, 2019; WHO, 2019; Weil, 2020; WHO, 2020).

As some authors point out, we should think of the contribution of a safety management model from three dimensions: from the perspective of reducing personal

injury events; from the perspective of the human-machine interface and system reliability; and from the perspective of the framework with broader systemic factors (Reason, 1997). Effective risk management requires the application of different measures aimed at different levels of the system, at the same time and at all times (idem).

### 3. Methodology

Through an analysis of the content of Portuguese case law judgments, we sought to highlight the spirit of the law enforcer, analysing their content and thus revealing main procedural vicissitudes in Portugal. The analysis technique used involved a manual categorization of the case law descriptors most frequently referenced in the summaries of the judgments and one of the positive aspects of this methodological experiment was that it made it possible to identify the main issues linked to the subject of accidents at work that have been discussed in Portuguese courts recently. The limitations in implementing this methodology lie, above all, in the fact that it leaves out the analysis of all the extra-judicial steps taken by workers or their families to claim the legal protection in question, which are necessarily left unassessed in this analysis.

Thus, the theoretical-conceptual framework was drawn up; then information was collected on Portuguese case law on the subject over a decade; then the results obtained on line were analysed, and the descriptors in question were categorised for the purposes of the analysis; finally, the analysis following the general framework of the object of study was drawn up, pointing out recommendations in order to deepen this subject.

The specific time period studied was 2011-2021, i.e. the content of Portuguese higher court judgments was analysed for a decade, from January 2011 to December 2021. The research was carried out using the Juridical-Documentary databases on jurisprudence on the internet (<https://www.dgsi.pt/>).

Once this information had been obtained from the 330 judgments, it was categorised. The categorisation tasks involved classifying the descriptors contained in the summaries of the judgments into groups. There are various terms used to describe this type of marking task depending on the sub-theme under analysis, such as, for example, the concept of accident at work; de-characterisation of the accident; types of incapacity or liability for the accident.

The research methodology does not include quantitative aspects or a statistical analysis of the data, since the aim was to gather information on a qualitative basis, trying to identify – through the transcription of the interviewees' speeches – the obstacles that hinder women's career progression. As Santos Silva and Madureira Pinto (1986, p. 17) point out, given the complexity of social facts, it is necessary to study them in their entirety, and it is 'essential to realise that they are not watertight compartments' and 'are deeply interconnected'. It was therefore an option for the research to base the examination on content analysis as a technique for interpreting the content of all types of documents.

The descriptors in question were categorised for analysis purposes and grouped (descriptor groups) by theme, thus facilitating the systematisation of the analysis of the thematic explored in this article. The procedural vicissitudes of accidents at work in Portuguese courts are presented and analysed and the results were organised taking in consideration 10 descriptors. In this paper, only six main groups are focused, specifically related to: Proof; Liability, reparation and services; Guarantee of compliance; Reporting an accident at work; Labour Accident Fund and Prescription and forfeiture.

#### 4. Results

The aim of this study was not to carry out a socio-demographic characterisation of the workers who were victims of accidents at work, nor to identify the type of occupation of the workers or the areas/regions of activity, although this analysis could be carried out in future research. This article partially analyses the results of an analysis carried out at the invitation of the General Workers' Union (UGT), in order to draw up a study on Accidents at Work and Occupational Diseases in Portugal entitled: "What ordeal do workers have to go through to have their rights enforced?", the purpose of which was to identify the judicial mechanisms for protection and redress in the field of accidents at work and occupational diseases by analysing the Judgments of the Higher Courts made for the UGT in 2021.

Based on research into the case law of the Portuguese higher courts (STJ - Supreme Court; TRC - Coimbra Court of Appeal; TRP - Oporto Court of Appeal; TRL - Lisbon Court of Appeal; TRG - Guimarães Court of Appeal; and TRE - Évora Court of Appeal) on the subject of accidents at work, we sought to gather information on the various procedural vicissitudes involved in exercising judicial protection. In total, 330 judgments were identified and analysed.

The analysis of these judgements was based on an objective search for categorisation by descriptors indicated in the summaries of the judgments. The categorisation resulted from the identification of the descriptors in each judgment. In the overall analysis, 10 groups of descriptors were considered: the concept and scope of accidents at work; non-compliance with health and safety rules; incapacity due to accidents at work; enforcement of rights (conciliatory phase and litigation phase); proof liability, compensation and benefits; guarantee of compliance; Reporting an accident at work; labour accident fund; prescription and forfeiture (Table 1).

**Table 1 – Categorisation by groups of descriptors and themes and sub-themes**

Groups of descriptors by identified themes	Sub-themes identified
1. The concept and scope of accidents at work	Concept and scope of accident at work (place and time of work); Mischaracterization of accident at work; Causation link; Travel accident/ in itinere; Accident at work and temporary employment contract; General principles, good faith and prevention of professional risks; Accident at work and economic dependence (extension); Illness and accident at work; accident at work and part-time employment contract; Socially relevant interests; Accident at work and suicide; Accident at work and suspension of employment contract.
2. Non-compliance with health and safety rules	Failure to comply with the rules and the employer's fault; Failure to follow the rules and gross negligence; Fall from height; Exclusive fault of the victim; Civil Construction.
3. Incapacity due to accidents at work	Permanent (absolute and partial) incapacity for work; Disability review; Temporary disability; Disability table; athological predisposition and disability; Challenge of incapacity; Permanent disability benefit.
4. Enforcement of rights (conciliatory phase and litigation phase)	Competence; Conciliation; Litigation phase and jurisdiction; Principles; Nullity of the sentence; Third party intervention; Passive legitimacy; Factual basis; Acquittal of the request; Transaction.
5. Proof	Documentary proof; Testimonial proof; Expert proof; Proof by presumption; Confession; Burden of proof.

Groups of descriptors by identified themes	Sub-themes identified
6. Liability, compensation and benefits	Liability and right to compensation; enforcement of third party rights; Compensation for non-pecuniary damage; aggravation of liability; Benefits in kind; Liability for high disability benefit; Calculation and payment of benefits; Remuneration and benefits; Reflex damage; Insurance contract; Internal regulations; Treatment and recovery for working life right of recourse against the Motor Guarantee Fund.
7. Guarantee of compliance	Payment of pensions and compensation; provisional pension; Determination and calculation of pensions; Bonus factor; Redemption/payment of pensions; Revision (updating and aggravation) of pensions; Interest on arrears; Revitalisation procedure; Guarantee of payment; Payment of insurance; Assistance to third parties roof.
8. Reporting an accident at work	Rights of beneficiaries and successors; Rights of beneficiaries and abuse of rights; Social Security Institute.
9. Labour accident fund	FAT liability; Insolvency; Application of the law in time.
10. Prescription and forfeiture	Prescription; forfeiture.

Source: UGT (2022).

The main focus of this article is to analyse the procedural matters identified in the descriptors. Once the 10 groups have been categorised, the present article only considers the results of the themes (and sub-themes) relating to groups 5 to 10, as shown in Table 2, taking in consideration the objectives mentioned before. In other words, were analysed the themes of proof (group 5), liability, repair and services (group 6), compliance guarantee (group 7), reporting an accident at work (group 8), issues related to the labour accident fund (group 9) and prescription and expiry (group 10). In total, 230 judgments were identified and analysed for this article (Table 2).

**Table 2 – Categorization of groups (and subthemes) of descriptors contained in the summaries of the judgments of the Portuguese Courts of Appeal and the Supreme Court of Justice.**

Descriptors group (II)	Total Frequency	Sub-themes	Frequency
5. Proof	55	Burden of proof	23
		Expert evidence	19
		Proof by presumption	7
		Testimonial evidence	3
		Documentary evidence	2
		Confession	1
6. Liability, repair and services	68	Insurance contract	25
		Aggravation of liability	19
		Compensation for non-pecuniary damage	5
		Responsibility and right to compensation	3
		Calculation and payment of instalments	3
		instalments in kind	2
		Responsibility for high disability benefit	2
		Retribution and benefits	2
		Internal rules	2
		Treatments and recovery for active life	2

Descriptors group (II)	Total Frequency	Sub-themes	Frequency
6. Liability, repair and services (cont.)		Enforcement of third party rights	1
		Reflex damage	1
		Right of return against the Automobile Guarantee Fund	1
7. Compliance guarantee	63	Payment of pensions and compensation	16
		Determination and calculation of pensions	12
		Bonus factor	12
		Pension redemption/payment	7
		Insurance payment	6
		Provisional pension	3
		Review (updating and worsening) of pensions	3
		Late payment interest	1
		Revitalization process	1
		Deposit to guarantee payment	1
		Third person assistance	1
8. Reporting an accident at work	11	Rights of beneficiaries and successors	7
		Beneficiary rights and abuse of rights	3
		Social Security Institute	1
9. Labour Accident Fund	26	Responsibility of the Labour Accident Fund	23
		Insolvency	2
		Application of the law over time	1
10. Prescription and expiry	7	Expiry	4
		Prescription	3

#### 4.1. Proof

Regarding the group of descriptors “proof” – the following subthemes were identified: documentary proof; testimonial proof; expert proof; proof by presumption; confession; burden of proof. In this group of descriptors, the subtheme “burden of proof” was the most frequent subtheme in 23 Judgments, followed by the subtheme of “expert proof” in 19 Judgments (Table 2).

With regard to the sub-theme “documentary proof”, Portuguese case law recognises that documents are only means of proving facts that have been alleged, and that it is not enough to attach supporting documents to the claim, which must be the subject of a specific claim. In this matter too, it is understood that a private document only provides full proof of the statement it embodies, and is documentary proof to be freely assessed by the court in relation to the employer.

With regard to expert proof, it is understood that it is subject to the free assessment of the judge. The issues dealt with by the medical board are essentially technical in nature, and medical experts are best placed to give their opinion on them, and the judge should only diverge from their opinions when he or she has certain elements that allow him or her to do so. It should be noted that cases of aggravated liability require medical expertise and, if more evidence is needed, the expertise can only be carried out by a medical board.

Considering “proof by presumption”, case law has held that an injury found at the place and time of work is presumed to be the result of an accident at work, and that it is necessary to establish a presumption of causality between the accident and its consequences, but that this presumption does not relieve the injured parties or their

beneficiaries of the burden of proving that the event itself caused the injuries, which is their burden. With regard to “the burden of proof”, case law has held that the party claiming entitlement to increased benefits is responsible for proving the facts of the violation of safety rules and the causal link between that violation and the accident. The beneficiaries of the right to compensation for accidents at work and the insurers have the burden of alleging and proving the facts likely to show that the accident was the employer's fault or that it resulted from the employer's failure to comply with safety, hygiene and health rules at work, as well as alleging and proving the necessary causal link between the employer's conduct or failure to comply with these rules and the accident.

**Table 3 - Group of descriptors ‘Proof’**

Sub-theme	References
Documentary proof	TRP Judgement of 22-06-2020, 3113/18.9T8PNF.P1); STJ Judgement of 30-06-2011, 640/06.4TUGMR.P1.S1 - 4th Section.
Testimonial evidence	STJ Judgement of 4-03-2021, 146/18.4T8FAR.E1.S1; STJ Judgement of 11-02-2015, 1301/10.5T4AVR.C1.S1- 4th Section; TRL Judgement of 11-03-2015, 218/12.3TTTVD.L1, 4th Section.
Expert proof	STJ Judgement of 4-03-2021, 146 /18.4T8FAR.E1.S1; TRP Judgement of 20-09-2021, 1346/19.0T8PNF-B.P1; TRL Judgement of 16-06-2021, 3133/16.8T8PDL.L1-4 ;TRL Judgement of 26-05-2021, 76/20.4T9PDL.L1-4; TRG Judgement of 23-09-2021, 375/20.5T8BCL.G1; TRE Judgement of 23-04-2020, Proc. 70/18.5T8STC-B.E1; STJ Judgement of 4-03-2021, 1146 /18.4T8FAR.E1.S1; TRG Judgement of 18-03-2021, 4276/18.9T8BRG.G1; STJ Judgement of 01-03-2018, 6586/14.5T8SNT.L1. S1 (Review) - 4th Section; STJ Judgement of 04-07-2018, 1165/13.7TTBRG.G2.S1 (Review) - 4th Section.
Proof by presumption	Judgement of the TRP of 09-03-2020. Proc. 3789/15.9T8VFR.P1.; Judgement of STJ of 16-09-2015 Appeal no. 112/09.5TBVP.L2.S1 - 4th Section; STJ Judgement of 15-10-2014 Appeal no. 2315/10.0TTLSB.L1.S1 - 4th Section; STJ Judgement of 05-11-2014 Appeal no. 560/08.8TTVRL.P1.S1- 4.ª Section; Judgement of the STJ of 30-01-2013 Appeal no. 697/07.0TTBCL.P1.S1 - 4.ª Section; Judgement of the STJ of 22-01-2015 Appeal no. 481/11.7TTGMR.P1.S1 - 4th Section; STJ Judgement of 16-09-2015 Appeal no. 112/09.5TBVP.L2.S1 - 4th Section.
Confession	STJ Judgement of 16-06-2016 Case 774/11.3TTFAR.E1.S1 (Revised) - 4th Chamber.
Burden of Proof	TRE Judgement of 11-11-2021, 3138/16.9T8STR.E; STJ Judgement of 25-10-2018, 92/16.0T8BGC.G1.S2 (Review - 4th Section; STJ Judgement of 01-06-2017, 919/11.3TTCBR-A.C1.S1 (Review - 4th Section) ; STJ Judgement of 01-06-2017, 919/11.3TTCBR-A.C1.S1 (Review - 4th Section); STJ Judgement of 06-07-2017, 1637/14.6T8VFX.L1.S1- (Review - 4th Section) ; TRE Judgement of 3-10-2016, 164/14.6T8TMR.E1 ; STJ Judgement of 03-03-2016, 568/10.3TTSTR.L1.S1 (Review - 4.ª Section); STJ Judgement of 16-09-2015, 112/09.5TBVP.L2.S1 - 4.ª Section; STJ Judgement of 02-04-2014, 1328/10.7T4AVR.C1.S1, 4.ª Section; STJ Judgement of 09-07-2014, 572/10.1TTSTB.L2.S1 - 4.ª Section; STJ Judgement of 29-10-2014, 1083/05. 2TTLSB.L2.S1 - 4th Section; STJ Judgement of 05-11-2014, 560/08.8TTVRL.P1.S1- 4th Section; STJ Judgement of 19-11-2014, 177/10.7TTBJ.L2.S1 - 4th Section; STJ Judgement of 29-10-2014, 1083/05.º 177/10.7TTBJS.E1.S1- 4.ª Section; STJ Judgement of 21-03-2013, 191/05.4TTPDL.P1.S1 - 4.ª Section; STJ Judgement of 19-06-2013, 1217/07.2TTCBR.C2.S1 - 4th Section; STJ Judgement of 19-06-2013, 1294/04.8TTLRA.C1.S1 - 4th Section; STJ Judgement of 29-10-2013, 138/10.6TTVRL.P1.S1 - 4th Section; STJ Judgement of 02-12-2013, 4734/04.2TTLSB.L2.S1 - 4th Section; STJ Judgement of 15-02-2012, 223/07.1TTCLD.L1.S1 - 4th Section; STJ Judgement of 22-06-2011, 71-A/1990.P1.S1 - 4th Section ; STJ Judgement of 16-11-2011, 817/07.5TTBRG.P1.S1 - 4.ª Section; STJ Judgement of 15-12-2011, 222/03.27TTLRS-A.L2.S1 - 4.ª Section.

Source: UGT (2022).



## 4.2. Liability, reparation and benefits

In the group of descriptors “liability, reparation and benefits” the following sub-themes were identified for analysis: liability and the right to reparation; enforcement of third party rights; compensation for non-pecuniary damage; aggravation of liability; benefits in kind; liability for high disability benefit; calculation and payment of benefits; retribution and benefits; reflex damage; insurance contract; internal regulations; treatment and recovery for working life right of recourse against the Motor Guarantee Fund. In this group of descriptors, the sub-theme “insurance contract” was the most frequent sub-theme in 22 judgments analysed, followed by the sub-theme “aggravation of liability” in 19 judgments and the sub-theme “compensation for non-pecuniary damage” in 5 judgments. In this group of descriptors, Portuguese case law takes the view that the special process arising from an accident at work is the proper process in which to discuss the determination of the entity responsible for the accident.

With regard to the sub-theme of “aggravated liability”, case law has held that the employer's aggravated liability presupposes two requirements: that the employer has a duty to observe certain rules on safety, hygiene and health at work, and a causal link between the violation of safety rules at work and the accident at work.

It is also considered that when the employer transfers its liability to the insurance company, only the insurance company should be held liable for the already recognised consequences of the accident at work that killed the victim. It has also been considered that compulsory insurance for accidents at work places two obligations on the insurer: to send the policyholder notice of payment of the premium and to send the General Labour Inspectorate monthly lists of contracts terminated for non-payment of the insurance premium. Still on the “insurance” sub-theme, it is understood that when the remuneration declared for the purpose of the insurance premium is lower than the actual remuneration, the insurer is liable for that remuneration and the employer for the difference. It is also understood that the insurer, when granting an insurance contract for accidents at work, will always be liable for the guaranteed minimum monthly salary.

**Table 4 – Descriptor group “Liability, reparation and benefits”**

Sub-theme	References
Liability and the right to reparation	TRC Judgement of 05-11-2019, 2027/17.4T8LRA.C1 ; TRE Judgement of 24-09-2019, 564/15.4T8EVR.E1 ; STJ Judgement of 30-05-2012, 611/05.8TTPRT.P1.S1- 4th Section.
Enforcement of third party rights	STJ Judgement of 28-10-2020, 1482/16.4T8VCT-A.G1.S2 (Exceptional review - 4th Section).
Compensation for non-pecuniary damage	TRP Judgement of 23-06-2021, 2019/20.6T9PNF.P1; TRP Judgement of 21-10-2021, 3765/16.4T8VFR.P1; TRC Judgement of 15-12-2021, 401/21.0T8LRA.C1; STJ Judgement of 29-02-2012, 165/07.0TTBGC.P1.S1 - 4th Section; STJ Judgement of 17-03-2016, 338/09.1TTVRL.P3.G1.S1 (Revised - 4th Section).
Aggravation of liability	TRL Judgement of 08-02-2017, 1855/11.9TTLSB.L1 4th Section; STJ Judgement of 22-06-2017, 905/05.2TTLSB.L1.S1 (Revised - 4th Section); STJ Judgement of 06-05-2015, 220/11.2TTTVD.L1.S1 - 4th Section; STJ Judgement of 06-05-2015, 220/11.2TTTVD.L1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 19-06-2013, 1294/04.8TTLRA.C1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 02-12-2013, 4734/04.2TTLSB.L2.S1 - 4. <sup>a</sup> Section; STJ Judgement of 29-10-2013, 402/07.1TTCLD.L1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 02-12-2013, 4734/04.2TTLSB.L2.S1 - 4th Section; STJ Judgement of 20-06-2012, 279/07.7TTBJA.E1.S1- 4th Section ;STJ Judgement of 28-11-2012,

Sub-theme	References
Aggravation of liability (cont.)	43/08.6TTVRL.P1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 04-05-2011 199/07.5TTVCT.P1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 18-05-2011, 414/06.2TTVFX-4. <sup>a</sup> Section; TRP Judgement of 21-10-2020, 2634/15.0T8VFR.P1 ; TRP Judgement of 07-05-2018, 2795/15.8T8PNF.P1; TRP Judgement of 23-03-2015, 773/12.8TTMTS.P1 ; STJ Judgement of 11-05-2017, 1205/10.1TTLSB.L1.S1 (Revised - 4th Section); STJ Judgement of 14-01-2015, 644/09.5T2SNS.E1.S1 - 4th Section; STJ Judgement of 15-02-2012 223/07.5T2SNS.E1.S1 - 4th Section; STJ Judgement of 26-10-2011, 247/05.3TTLMG.P1.S1 - 4th Section.
Benefits in kind	TRP Judgement of 15-12-2021, 3007/16.2T8MAI.P1; STJ Judgement of 17-12-2014, 1159/10.4TTMTS.C1.S1 - 4th Section.
Liability for high disability benefit	TRP Judgement of 28-10-2013, 413/10.0TTVRL.P1; STJ Judgement of 31-10-2018, 359/15.5T8STR.L1.S1- (Revised - 4th Section).
Calculation and payment of instalments	TRP Judgement of 07-12-2018., 242/14.1T4AGD.P1; TRP Judgement of 30-05-2018, 20692/17.0T8PRT-A.P1; TRP Judgement of 05-05-2014, 779/11.4TBPNF.P1.
Remuneration and benefits	STJ Judgement of 13-04-2011, 216/07.9TTCBR.C1.S1- 4th Section; STJ Judgement of 30-03-2011, 4581/07.0TTLSB.L1.S1- 4th Section.
Reflex damage	STJ Judgement of 30-05-2012, 159/05.0TTPRT.P1.S1- 4th Section.
Insurance contract (contract, premium, amendment)	TRP Judgement of 20-09-2021, 9696/19.9T8VNG.P1; TRP Judgement of 13-07-2021, 2481/20.7T8VNG-A.P1; TRP Judgement of 15-12-2021, 2517/18.1T8PNF.P1; TRP Judgement of 20-09-2021, 9696/19.9T8VNG.P1; TRP Judgement of 04-09-2020, 2436/18.1T8VFR.P1; STJ Judgement of 11-07-2012, 443/06.6TTGDM.P2.S1- 4th Section; TRP Judgement of 04-09-2020, 2436/18.1T8VFR.P1; TRP Judgement of 05-06-2015, 401/09.9TTVFR.P1; STJ Judgement of 11-07-2012, 443/06.6TTGDM.P2.S1- 4th Section; TRP Judgement of 07-12-2018, 242/14.1T4AGD.P1.; TRP Judgement of 20-05-2013, 412/09.4TTVRL.P1; STJ Judgement of 17-12-2014, 1159/10.4TTMTS.C1.S1 - 4th Section; STJ Judgement of 12-01-2012, 57/08.6TTBCL.P1.S1 - 4th Section; STJ Judgement of 12-01-2012, 421/06.5TTFIG.C1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 11-07-2012, 443/06.6TTGDM.P2.S1- 4. <sup>a</sup> Section; STJ Judgement of 21 April 2016, 401/09.9TTVFR.P1.S1 - (Revised - 4th Section); STJ Judgement of 11-02-2015, 620/11.8TTLSB.L1.S1- 4th Section; STJ Judgement of 02-04-2014, 1328/10.7T4AVR.C1.S1, 4. <sup>a</sup> Section; STJ Judgement of 12-01-2012, 57/08.6TTBCL.P1.S1 - 4. <sup>a</sup> Section ; STJ Judgement of 12-01-2012, 421/06.5TTFIG.C1.S1 - 4. <sup>a</sup> Section; STJ Judgement of 12-10-2011, 3074/06.7TTLSB.L1.S1 - 4. <sup>a</sup> Section; TRP Judgement of 11-11-2013, 640/09.2TTVNF-A.P1.; TRL Judgement of 29-05-2019, 17050/16.8T8SNT.L1, 4th Section; STJ Judgement of 21-11-2011; STJ Judgement of 11-02-2015, 620/11.8TTLSB.L1.S1- 4th Section.
Internal regulations	STJ Judgement of 12-10-2011, 3074/06.7TTLSB.L1.S1. - 4th Section.
Treatment and recovery for working life	TRP Judgement of 27-04-2020. Proc. 236/14.7TTVRL-B.P10; Judgement of the TRL of 11-04-2018, 18911/15.7T8SNT.L1.
Right of recourse against the Motor Guarantee Fund	TRP Judgement of 17-06-2014, 10/06.4TBOVR.P1.

Source: UGT (2022).

### 4.3. Compliance guarantee

In the group of descriptors “compliance guarantee” the following sub-themes were identified for analysis: payment of pensions and indemnities; provisional pension;

determination and calculation of pensions; bonus factor; redemption/payment of pensions; revision (updating and aggravation) of pensions; interest on arrears; revitalisation process; guarantee of payment; payment of insurance; assistance to third parties. In this group of descriptors, it can be seen that the sub-theme "payment of pensions and indemnities" was the most analysed sub-theme in 16 judgments, followed by the sub-theme "determination and calculation of pensions" and the sub-theme "bonus factor", both in 12 judgments.

In this group case law has considered that the rights to reparation benefits and other guarantees provided for in Law 98/2009, of 4 September, fall within the field of unavailable rights, i.e. they relate to matters that are not available to the parties. The right to compensation for damage resulting from accidents at work is of an unwaivable nature, as it has underlying interests of public order and an eminent social purpose. The compensation and pensions provided for in this law are calculated according to the nature of the disability, which is determined in accordance with the national disability table, as well as the annual salary of the injured party at the time of the accident.

In addition, for the purposes of compensation for accidents at work, it has been considered that benefits received that are regular over time constitute retribution, thus implying the idea of their frequency and continuity. It should be noted that the pension due for permanent incapacity for work due to accident at work is intended to compensate for the loss of the occupational patient's general earning capacity, which means that what matters is the remuneration to which the worker would have been entitled under normal circumstances and not the remuneration he received as a result of some abnormal circumstance that led to his loss. With regard to the sub-theme of "provisional pension", the case law analysed considers that the LAF's obligation to pay a provisional pension is based on the fact that, at the time it is awarded, it does not know which entity will be responsible for compensating for the damage caused by the accident, given the limited information available in the case file at that time. The lifetime pension, on the other hand, is set to protect the victim "against fate". With regard to compensation for road traffic accidents and accidents at work, it is understood that compensation is not cumulative but rather complementary, so that those responsible for repairing damage arising from accidents at work are exempt from paying compensation to compensate for the same damage already repaired by those responsible for road traffic accidents. As for the bond to guarantee payment, the case law analysed considers that the employer who has not transferred his liability to the insurance company is obliged to provide a bond to guarantee payment to the injured party or to the legal beneficiaries of the pensions to which they are entitled, with a bank guarantee being one of the admissible forms for providing the bond. This guarantee is intended to ensure the future payment of the pension.

With regard to the legal regime for the payment of insurance premiums, case law takes the view that the insurer has two fundamental obligations: to send the policyholder notice of the payment of the premium and to send the Labour Conditions Authority monthly lists of contracts terminated for non-payment of the insurance premium. It is also understood that if the parties exclude certain benefits from the scope of the labour accident insurance contract, such a stipulation is valid, but the employer is still obliged to pay them.

#### **4.4. Reporting an accident at work**

With regard to this group of descriptors "Reporting an accident at work" the following sub-themes were identified: rights of beneficiaries and successors; rights of beneficiaries and abuse of rights; Social Security Institute. In this group of descriptors, the sub-theme

"rights of beneficiaries and successors was the most analysed in 7 Judgments, followed by the sub-theme "rights of beneficiaries and abuse of rights" in 3 Judgments and "Social Security Institute" in one Judgment. In this group of descriptors, the sub-theme "beneficiaries' and successors' rights" of the Judgments analysed shows that the recognition of the right of ascendants to a pension, arising from the death of the injured party, is an outgrowth of the right to maintenance, so that two requirements must be met: the regularity of the injured party's contribution to the support of the ascendants; the need for this contribution on the part of the beneficiaries". The case law analysed considered that one of the functions of Social Security – within the objectives it pursues – is to substitute itself for the entity that pays income from work when its beneficiaries are deprived of it due to an eventuality that is part of the right to the scheme of benefits corresponding to the protection of the general system and that it is up to Social Security to provisionally ensure the protection of the beneficiary.

#### **4.5. Labour Accident Fund**

With regard to the group of descriptors "Labour Accident Fund (LAF)" the following sub-themes were identified: liability of the LAF; insolvency; application of the law over time. In this ninth group of descriptors, the sub-theme "Liability of the Workers' Compensation Fund" was the most analysed, in 23 judgments, followed by the sub-theme "Insolvency" in 2 judgments and the "application of the law in time" in only one judgment. In this group of descriptors, it was understood that the LAF anticipates a provisional pension or indemnity, on account of the amounts that will be arbitrated in the end. The LAF is responsible for guaranteeing the payment of benefits due for accidents at work whenever, for reasons of economic incapacity objectively characterised in insolvency proceedings or equivalent proceedings, they cannot be paid by the entity responsible. The LAF is responsible for paying benefits for permanent incapacity or death and compensation for temporary incapacity established by law which cannot be paid by the liable entity due to economic incapacity objectively characterised in bankruptcy or equivalent legal proceedings. The Public Prosecutor's Office is responsible for ensuring that the LAF intervenes in the respective action. In the "insolvency" sub-theme, it was held that when the employer responsible for repairing the accident is declared insolvent and extinct, without having transferred its liability to the insurance company, and attaches documents showing this, these facts should be considered proven and, as such, the LAF should be ordered to pay the pension due to the beneficiary.

#### **4.6. Prescription and forfeiture**

With regard to the group of descriptors "prescription and forfeiture" the following sub-themes were identified: prescription and expiry. The sub-theme "Forfeiture" was identified in 4 judgements and the sub-theme "Prescription" in 3 judgements.

With regard to the sub-theme "Prescription", the case law analysed concludes that the periodic instalments of the right to a pension which fall due successively during the period in question are subject to the five-year limitation period. As for the sub-theme "Forfeiture", it is understood that the right of action for damages arising from an accident at work only begins with the formal communication of the discharge to the injured party and, furthermore, that in the context of actions for compensation for damages arising from an accident at work, the right of action – as they are unavailable rights – is assessed by the court of its own motion and can be invoked at any stage of the proceedings.

## 5. Discussion and Conclusions

The obligation to prevent health and safety risks at work is enshrined in the Portuguese Constitution and is based on the protection of the right to human dignity and the guarantee of decent working conditions, covering not only physical and mental health, but also job security. It translates not only into the obligation to prevent accidents, but also to provide material assistance and fair compensation to victims of accidents at work. The Portuguese legal framework not only considers the employer's responsibilities in guaranteeing good working conditions and training for workers, but also establishes a wide range of requirements in terms of occupational health and safety.

The aim of strengthening the protection of health and safety at work is central to the Portuguese legal system, this article collected information on the subject of accidents at work in Portuguese case law (Courts of Appeal and Supreme Court of Justice) between 2011 and 2021. The descriptors contained in the summaries of the judgments were categorised and the sub-themes per descriptor were identified. This collection and subsequent systematisation of the content of the judgments (and their content) made it possible to identify, describe and interpret the content of these texts, making it possible to understand their meanings at a level that goes beyond ordinary reading.

The first result of our research confirms Romano Martinez's (2019) findings, since although there is a large body of case law on accidents at work in Portugal, we identified a gap in the literature as to which topics are most discussed in terms of procedural vicissitudes in Portuguese case law.

It should be noted that of the 330 judgments analysed – and especially with regard to the descriptors most identified in the summaries of the judgments – it was possible to arrive at relevant results on the subject of accidents at work and the various procedural vicissitudes inherent in the exercise of judicial protection. Analysing these results led to some conclusions.

Thus, the case law analysed has taken the view that the employer must plan the work in such a way as to identify and prevent the risks, as well as ensuring the safety measures that are indispensable and adequate to prevent the risks, through collective or individual protection. The Portuguese case law considers that it is not enough for the employer to have behaved culpably or failed to comply with the rules of safety, hygiene and health at work for them to be held aggravatedly liable for the consequences of the accident, and it is also necessary to prove the causal link between this behaviour or failure to comply and the accident.

From the analysis of the subject of “proof”, in particular “documentary proof”, case law analysed here has recognised that “documents are only means of proving the alleged facts, and the attachment of documents proving the allegation is not enough, and these must be the subject of a specific complaint. In this matter too, it is understood that a particular document only fully proves the statement it contains, constituting documentary proof to be freely assessed by the court in relation to the employer. “Expert proof”, on the other hand, is subject to the free judgement of the judge. With regard to proof by presumption, case law takes the view that an injury sustained at the place and time of work is presumed to be the result of an accident at work, and that it is necessary to establish a presumption of causality between the accident and its consequences, but that this presumption does not, however, relieve the injured parties or their beneficiaries of the burden of proving that the fact itself caused the injuries.

With regard to the burden of proof, case law has held that this lies with the party claiming the right and the beneficiaries of the right to compensation for an accident at work. The onus is on the insurers to allege and prove the facts likely to demonstrate that the accident was attributable to the employer or that it resulted from the employer's failure to comply with the rules on safety, hygiene and health at work.

Portuguese case law considers that the special procedure arising from an accident at work is the appropriate procedure to discuss the determination of the entity responsible for the accident. With regard to the sub-theme of "aggravated liability", it considers that the employer's aggravated liability presupposes the combination of two requirements: the employer's duty to observe certain safety, hygiene and health rules at work and the causal link between the violation of safety rules at work and the accident at work. With regard to the sub-theme "insurance", it was held that when the remuneration declared for the purposes of the insurance premium is lower than the actual remuneration, the insurer is liable for that remuneration and the employer for the difference. Case law has considered that rights to compensation and other guarantees fall within the field of unavailable rights. The right to compensation for damages resulting from accidents at work is of an unwaivable nature, as it is based on interests of public order and an eminently social purpose. The compensation and pensions provided for in this law are calculated according to the nature of the disability, which is determined in accordance with the national disability table, as well as the annual salary of the injured party at the time of the accident.

As to compensation for traffic accidents and accidents at work, it is understood that the compensation is not cumulative but rather complementary.

With regard to "participation in accidents at work", the sub-theme "rights of beneficiaries and successors" states that the recognition of the right of ascendants to a pension, resulting from the death of the injured party, is an emanation of the right to maintenance, which is why two requirements must be met for this purpose: the regularity of the injured party's contribution to the support of the ascendants and the need for this contribution on the part of the beneficiaries.

The Portuguese case law analysed considered that one of the functions of Social Security is to substitute itself for the entity that pays employment income when its beneficiaries are deprived of it due to the occurrence of an eventuality that is part of the right to the benefits regime corresponding to the protection of the general regime and that it is up to Social Security to provisionally ensure the protection of the beneficiary. It is understood that the LAF anticipates a provisional pension or compensation, on account of the amounts that will be arbitrated in the end. Portuguese case law also takes the view that the LAF is responsible for guaranteeing the payment of benefits due for accidents at work whenever, for reasons of economic incapacity objectively characterised in insolvency proceedings or equivalent proceedings, they cannot be paid by the liable entity. According to the case law analysed, it is up to the Public Prosecutor's Office to ensure that the LAF intervenes in the respective action. Finally, with regard to the group of descriptors "prescription and limitation", the sub-theme of prescription in the case law analysed concludes that the periodic instalments of the right to a pension which fall due successively during the period in question are subject to the five-year limitation period. As for the sub-theme "limitation period", it is understood that the limitation period for the right of action for damages arising from an accident at work only begins with the formal communication of the discharge to the injured party and also that in the context of actions for compensation for damages arising from accidents at work, the limitation period for the right of action –

since these are unavailable rights – is assessed by the court of its own motion and can be claimed at any stage of the proceedings.

Besides more, the case law stresses that the Portuguese Labour Conditions Authority's supervision of accidents at work must be central, as must the monitoring of damage resulting from accidents at work and the processes of professional rehabilitation and reinsertion. On the other hand, this body should have access to more information on accidents at work and health and safety conditions at work. Moreover, the importance of occupational safety and health services in terms of technical support for employers, their workers and their representatives, as well as occupational safety and health activities, should be emphasised.

It should be mentioned that despite the results achieved, this study has limitations, which, as we have mentioned, lie above all in the fact that it fails to analyse all the extrajudicial steps taken by workers or their families to claim the legal protection in question, which necessarily remain to be assessed in this analysis. Furthermore, given that the aim of this study was not to carry out a socio-demographic characterisation of the workers who were victims of accidents at work, nor to identify the type of occupation of the workers or the areas/regions of activity, this could be an enriching analysis to be carried out in future research.

Finally, the main conclusion/recommendation of this study is that, considering the gap in the literature on the subject, further research is needed into the procedural vicissitudes inherent in labour accident lawsuits in Portugal.

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