SUPREME COURT OF NORWAY

J U D G M E N T

given on 21 June 2024 by a division of the Supreme Court composed of

Justice Wilhelm Matheson
Justice Per Erik Bergsjø
Justice Espen Bergh
Justice Kine Steinsvik
Justice Thom Arne Hellerslia

HR-2024-1117-A, (case no. 23-149202SIV-HRET)
Appeal against Frostating Court of Appeal's judgment 30 June 2023

Codan Forsikring A/S	(Counsel Joachim Mikkelborg Skjelsbæk)
The Norwegian Motor Insurers' Bureau (intervener) The Norwegian Occupational Injury Insurers' Bureau (intervener)	(Counsel Terje Marthinsen)
v.	
A	(Counsel Trond Alan Walmsnæss Wehn)

(1) Justice **Bergh:**

Issues and background

(2) The case concerns whether Norwegian or Danish law applies in the event of a claim for compensation against a Danish insurance company following an accident in Norway.

(3) A is a Danish citizen and resident in Denmark. He was the driver of a crane truck that tipped over on 6 May 2019 during the construction of wind turbines at Hitra in Norway. At the time of the injury, A was employed by the Danish company BMS A/S, which was engaged to carry out work on Hitra. The crane truck was Danish-registered, owned by BMS A/S and insured with the Danish company Codan Forsikring A/S (Codan) with BMS A/S as policyholder.

(4) A was seriously injured in the accident and was on sick leave for about eight months. He has received compensation in accordance with Danish occupational injury rules. However, the compensation does not cover A's full losses, and he has made a claim for payment against the car insurance company. The insurance certificate states that the insurance in Codan does not provide coverage for injury to the driver of the car. It is possible under Danish law to agree on such an exemption. However, according to the Norwegian Automobile Liability Act, the mandatory insurance must also cover injury to the driver.

(5) A filed a writ in Trøndelag District Court on 2 May 2022, claiming compensation under the Automobile Liability Act. The claim was stated to concern "non-contractual obligations". The District Court decided to hear the choice-of-law issue separately, see section 16-1 second paragraph (b) of the Dispute Act, and handed down a judgment on 16 November 2022, ruling as follows:

> "1. The dispute in case 22-064526TVI-TTRO/TBRE will be resolved in accordance with Norwegian law.
>
> 2. The ruling on the costs is suspended until a judgment on the merits has been handed down in the District Court."

(6) The District Court found that section 6 of the Insurance Choice of Law Act means that Norwegian law is applicable in the case.

(7) Codan appealed against the judgment to Frostating Court of Appeal. Following a hearing, the Court of Appeal handed down a judgment on 30 June 2023 in which the appeal was dismissed. The judgment was not unanimous. The majority, like the District Court, found that the choice of law should be determined under section 6 of the Insurance Choice of Law Act. The minority disagreed, but did not consider the concrete choice of law.

(8) Codan has appealed to the Supreme Court, invoking an error of law. The Norwegian Occupational Injury Insurers' Bureau and The Norwegian Motor Insurers' Bureau have acted as interveners in the Supreme Court.

The parties' contentions

(9) The appellant – *Codan Forsikring A/S* – contends:

(10) The majority of the Court of Appeal has incorrectly concluded that this case must be decided in accordance with section 6 of the Insurance Choice of Law Act, with the effect that the rules of the Norwegian Automobile Liability Act apply. The claim made against Codan concerns non-contractual obligations, and the choice of law must be made in accordance with the conflict-of-law rules that apply to such claims. The Insurance Choice of Law Act applies to contractual relationships.

(11) The Automobile Liability Act has no conflict of law rules. The applicable law must therefore be determined in accordance with ordinary Norwegian rules. Recent case law builds on the principle that if there are more definite rules for the choice of law in a particular area, these rules should be applied. For non-contractual claims, Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) constitutes such more definite rules. Article 4 (2) of Rome II makes exceptions to the general rule in (1) that the law of the country in which the damage occurs applies when both parties have their habitual residence in the same country. This is the situation in the case at hand, which means that that Danish law is applicable. Also in the light of the "Irma Mignon formula", the choice of law must be Danish law.

(12) When Danish law and not the rules of the Automobile Liability Act apply, there is no liability for compensation towards the driver of the car. Codan is therefore not liable.

(13) Codan Forsikring AS asks the Supreme Court to rule as follows:

> "1. Codan Forsikring A/S is not liable.
>
> 2. Codan Forsikring A/S is awarded costs in the District Court, the Court of Appeal and the Supreme Court."

(14) The interveners – *The Norwegian Occupational Injury Insurers' Bureau* and *The Norwegian Motor Insurers' Bureau* – refer to the contentions made by Codan, and emphasises in particular that the consequence of the District Court's and the Court of Appeal's interpretation of the law is that Norwegian law must always be applied by Norwegian courts in the case of compulsory insurance. This cannot be correct and will not produce good or desired results.

(15) The interveners do not claim costs and have not asked for a specific ruling.

(16) The respondent – *A* – contends:

(17) Section 6 of the Insurance Choice of Law Act regulates Codan's obligation to A and entails that Norwegian mandatory rules in the Automobile Liability Act shall be applied.

(18) The Insurance Choice of Law Act implements EEA rules, and the line between contractual and non-contractual obligations must be drawn in accordance with EU law.

(19) Before the Supreme Court, A acknowledges that the injured party's claim for compensation after an accident in principle concerns a non-contractual obligation. However, a distinction must be made between the choice of law for the wrongdoer's liability and the choice of law

for the insurance company's obligation towards the injured party. The claim in this case is that Codan settles the matter in accordance with the insurance contract. This is a contractual obligation, and the conflict of law rules for contractual relationships apply.

(20) In the alternative, A contends that Article 4 (3) of Rome II applies, and that this provision designates Norwegian law.

(21) A asks the Supreme Court to rule as follows:

> "In principle:
> The appeal is dismissed.
>
> In the alternative:
> Costs are not awarded."

My opinion

The rules in the Automobile Liability Act

(22) Following the accession to the EEA Agreement, Norway is bound by the EEA regulations on motor insurance. These regulations previously consisted of several directives, which are now gathered in Directive 2009/103/EC – the Motor Insurance Directive.

(23) The Automobile Liability Act dates from 1961. The background to and content of the Act are described in HR-2021-822-A, paragraphs 38 and 39 as follows:

> "Until the Automobile Liability Act entered into force, Motor Liability was regulated in the Motor Vehicle Act of 20 February 1926. This Act established strict liability for accidents caused by the use of the vehicles. The owner was obliged to provide a guarantee to cover the possible liability for compensation. Such a system based on ordinary liability combined with guarantee or liability insurance is still widespread internationally and forms the basis of the Motor Insurance Directive.
>
> However, the Automobile Liability Act builds on a different structure. The owner of the motor vehicle is obliged to take out insurance based on strict liability that applies directly to the advantage of the injured party, see sections 4 and 15. Because the insurance is neither a traditional accident insurance nor a traditional liability insurance, it was given a new name – traffic insurance."

(24) The relationship between the Automobile Liability Act and the EEA rules is elaborated in paragraph 74:

> "As mentioned, the Norwegian Act is structured in a different way than the EU Directive in that the Act has an overall regulation of liability for compensation and insurance coverage. In principle, the Directive only regulates insurance coverage. The linkage to the compensation rules is that the liability arising from national law must be covered by a motor insurance policy that meets the requirements of the Directive."

(25) In other words, the Automobile Liability Act contains rules on both the conditions for liability and on the obligation to insure. What is regulated is the insurance company's liability directly towards the injured party. This means that the Act differs from the Motor Liability scheme in

other countries, as well as from the Norwegian system in other areas. Most commonly, the wrongdoer is liable for compensation, while the injured party may claim compensation directly from the insurance company when the wrongdoer has taken out liability insurance. In Norway, this is regulated in section 7-6 of the Insurance Contracts Act.

(26) *Liability* is regulated in Chapter II of the Automobile Liability Act. The basic rule in section 4 is that liability covers all damage that a motor vehicle "causes". This includes both personal injury and damage to property.

(27) Originally, the Act contained an exception in section 5 (b) for injury to the driver of the motor vehicle. This exception was removed in 1973. However, EEA legislation allows motor vehicle insurance not to cover injury to the driver, and the Danish Road Traffic Act does not require such insurance to cover the driver.

(28) *The obligation to insure* is regulated in chapter IV of the Automobile Liability Act. Section 15 first sentence reads:

> "A motor vehicle that is registered, or should have been registered, or has a license plate under the Road Traffic Act, must be insured by the owner for all damage covered by chapter II."

(29) The insurance must therefore cover all damage that falls under chapter II, including injury to the driver. The determining factor for whether there is an obligation to insure is, in principle, whether the motor vehicle is subject to registration under the Road Traffic Act.

(30) Requirements for insurance of foreign motor vehicles in temporary use in Norway follow from regulations issued under section 17 subsection 1 (e) of the Road Traffic Act. Section 1 subsection 1 first sentence of Regulations No. 3 of 1 April 1974 on traffic safety, reads:

> "Foreign motor vehicles and motor vehicles subject to special registration shall be insured in accordance with section 15 of the Automobile Liability Act when used temporarily in this country."

(31) In other words, it is a requirement that foreign motor vehicles, also, have insurance that covers the liability that follows from chapter II of the Act.

(32) However, this does mean that a special Norwegian insurance is mandatory. According to section 1 subsection 3 (2) of the Regulations, "proof of motor insurance" includes a vehicle registration certificate or other documentation of the motor vehicle being registered in another EEA country. Within the EEA, the Motor Insurance Directive applies, which sets requirements for the content of such insurance. When a motor vehicle is registered in an EEA country, insurance must be taken out that also covers damage occurring during the use of the motor vehicle in other countries within the EEA area. In this case, it is clear that the insurance taken out with Codan also covered use of the crane truck in Norway.

(33) The Automobile Liability Act and its Regulations thus contain an exhaustive regulation of the obligation to insure a foreign motor vehicle used in Norway. On the other hand, it does not regulate the geographical scope of the rules on liability in chapter II of the Act. This is discussed in its preparatory works to, see Norwegian Official Report (NUT) 1957: 1 page 60:

> "The Committee maintains its decision not to propose any explicit rule on the *territorial* jurisdiction of the Act, but to leave this to ordinary principles of private international law. Generally, the Act only applies to damage that occurs in this country (including Svalbard). However, in exceptional cases, the rules therein – at least in part – might also apply to claims abroad, for instance when it comes to the settlement between a Norwegian policyholder and his Norwegian insurance company, or between a Norwegian car owner and his Norwegian passenger in a contract of carriage most closely connected to Norway ... ."

(34) The formulation "general principles of private international law" must be understood to mean that the Committee built on the premise that the delimitation of which types of damage are so closely connected to Norway that they give rise to liability under the Automobile Liability Act, must be made in accordance with general conflict-of-law rules. The examples mentioned concern the Act's application to damage occurring abroad. However, what is stated must imply that non-statutory conflict-of-law rules will also be decisive when the damage occurs in Norway.

(35) According to the Committee, the rules will only apply in exceptional cases when the damage occurs outside Norway. A natural counterpart is that when the damage occurs in Norway, the Act's compensation rules will normally apply. However, the reference to general conflict-of-law rules means that exceptions may be conceivable also in this context.

(36) As far as I can see, choice-of-law issues were not mentioned in the bill, Proposition to the Odelsting No. 24 (1959–1960). Nor am I aware of any subsequent Norwegian sources of law building on other principles than those highlighted by the Committee. In *Motor Liability*, 3rd edition 2022, pages 50–52, Bjørn Edvard Engstrøm gives an outline of the Act's "territorial jurisdiction" in accordance with what I have pointed out.

(37) Consequently, my basis is that when it follows from section 15 first sentence of the Automobile Liability Act, together with the Regulations, that foreign motor vehicles must have insurance that covers the liability following from chapter II of the Act, this must be understood in the light of the conflict-of-law rules applicable to liability under the Act. This means that the insurance obligation under the Norwegian Act does not cover damage where the conflict-of-law rules lead to the inapplicability of the Norwegian compensation rules.

Section 6 of the Insurance Choice of Law Act

(38) The District Court and the Court of Appeal have based their ruling on the premise that applicable law in this case is determined by section 6 of the Insurance Choice of Law Act.

> "For statutory insurance, all mandatory rules of the country that imposes the obligation to insure shall apply."

(39) The Insurance Choice of Law Act was adopted in connection with Norway's accession to the EEA Agreement. In Proposition to the Odelsting No. 72 (1991–1992) page 19, this is explained as follows:

> "In all countries, the domestic courts are not always to apply the country's own legal rules. The national legal rules on when a matter is to be assessed under foreign law are often referred to as *conflict-of-law rules* or *private international law*. In Norway, the

> conflict-of-law rules are only minimally regulated by law. This is, among other things, the case when it comes to insurance, and legal status in this area is partly unclear. The EEA Agreement contains provisions on the choice of law in insurance contracts in Annex IX, Part I, points 7 and 11 (Article 7 of Council Directive 88/357EEC and Article 11 of Council Directive 90/619EEC). ...
>
> Because of the EEA Agreement, it is necessary to implement these rules in Norwegian law. The most expedient way of doing this is by legislation."

(40) The provisions of the Directive referred to in the Proposition have subsequently been replaced by provisions in Directive 2009/138/EC of 25 November 2009 (Solvency II) and in Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I). Solvency II is covered by the EEA Agreement. Its Article 178 states that Article 7 of Rome I applies to insurance contracts. This has the effect that the rules in Article 7 of Rome I also apply to Norway, although Rome I does not otherwise apply here. Article 7 essentially corresponds to the directive provisions that were in force when the Insurance Choice of Law Act was adopted.

(41) Rome I regulates the choice of law *in contractual relationships*. According to Article 1 (1), it applies to "contractual obligations". It is further set out in the title of Article 7 and the provision itself that it applies to "insurance contracts". The term "contractual obligations" is to be interpreted autonomously within EU law. From what I understand, however, the term essentially has the same meaning as that given to in a general Norwegian understanding.

(42) It follows from section 1 of the Insurance Choice of Law Act that it regulates the choice of law in *insurance contracts*. The wording of the Act is "direct insurance contracts", but I cannot see that the word "direct" implies a distinction of significance for the issue at hand. It appears from the preparatory works that the expression is used to separate insurance contracts from reinsurance contracts, see Proposition to the Odelsting No. 71 (1991–1992) page 65.

(43) If the choice of law is regulated by section 6 of the Insurance Choice of Law Act in this case, it must be because the compensation rules in the Automobile Liability Act are so closely linked to the insurance contract that it becomes expedient to apply the conflict-of-law rules for insurance contracts. What could suggest such a solution is that the Norwegian model for motor insurance, which I have described, is based on a close connection between the obligation to insure and the compensation rules.

(44) Yet, I cannot see that this would be a correct interpretation of the Insurance Choice of Law Act. The general starting point is that a distinction must be made between rules on liability and rules that govern the insurance relationship. The fact that liability insurance involves rules on direct claims that entitle the injured party to submit a claim against the insurance company does not change the fact that this claim is a claim for compensation. This has been taken into account for instance with regard to limitation, see the Supreme Court judgment HR-2023-2252-A paragraph 33 with further references.

(45) In my view, the special arrangement in the Automobile Liability Act cannot give a different solution. Although Motor Liability insurance has some particular features, the Act is based on a distinction between compensation rules and rules on the obligation to insure.

(46) This understanding is supported by the Automobile Liability Act being the Norwegian implementation of the EEA rules on motor liability. As described in my quote from HR-2021-822-A, the EEA regulations are based on a clear distinction between the liability and the insurance coverage. This must naturally have consequences also with regard to choice of law, so that the non-contractual conflict-of-law rules apply to liability, while the contractual conflict of law rules apply to insurance coverage.

(47) The judgment of the European Court of Justice (ECJ) of 21 January 2016 in joined cases C-359/14 and C-475/14 *ERGO Insurance and Gjensidige Baltic* describes such a distinction. The case concerned road traffic accidents. In paragraph 48, the Court states:

> "In addition, the existence and extent of the obligation to compensate the victims at issue in the main proceedings depend, above all, on assessments relating to the road traffic accidents which gave rise to the damage concerned. Those assessments, concerning tort or delict, are foreign to the contractual relationship between the insurers and their respective insured."

(48) A has pointed out that the ECJ, in paragraph 54, simultaneously states the insurer's obligation to compensate the damage arises from a contractual obligation, and that the law applicable to such an obligation must be determined in accordance with Rome I. From what I understand, however, this is based on the mere fact that the actual obligation for an insurance company to compensate the damage – even if this is to be done directly to the injured party – must follow from the insurance contract. I cannot see that this statement, or the judgment in general, may change the interpretation of paragraph 48, which is directly applicable to the issue at hand.

(49) Article 18 of Rome II contains a special regulation of direct actions against the liable insurer. The provision reads:

> "The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides."

(50) As regards the basis for filing a direct claim, this provision gives the injured party a freedom of choice. However, the provision does not regulate the choice of law with regard to the determination of liability, see the ECJ's judgment of 9 September 2015 in Case C-240/14 *Prüller-Frey,* paragraphs 40 and 41.

(51) If the choice of law in this case should be made under section 6 of the Insurance Choice of Law Act, it would, as I understand it, entail an arrangement contrary to what otherwise applies within the EEA. This would be difficult to reconcile with the fundamental considerations underlying the harmonisation of the rules on Motor Liability.

(52) I have thus concluded that the choice of law in this case should not be made under section 6 of the Insurance Choice of Law Act. Then, there is no reason to consider the implications of a possible application of this provision.

The choice of law in this individual case

(53) My view is that the choice of law in the case at hand is regulated by neither the Automobile Liability Act, the Insurance Choice of Law Act nor other Norwegian legislation. The starting point in Norwegian private international law when the choice of law is not regulated by law is described in the Supreme Court judgment Rt-2009-1537 *The bookseller in Kabul*, paragraphs 32 to 34:

> "If the choice of law does not follow from more definite rules, the case must be decided based on the legal rules of the country with which, after an overall assessment, the case is most closely connected (the 'Irma Mignon formula'). In an increasing number of areas of law, however, more definite rules have developed – often based on the 'Irma Mignon formula.
>
> For non-contractual obligations, the main rule is that the case must be decided according to the law of the place of damage – *lex loci delicti*. This does not create any problems in cases where the place of action and the place of effect are in the same country. If the place of action and place of effect are in different countries, the question arises whether the former or the latter is to be regarded as the place of damage. For the EU countries, this is regulated in Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (the Rome II Regulation). The general rule for non-contractual obligations is found in Article 4. Generally, the law of the country in which the damage occurs shall be taken as a basis, see Article 4 (1). Several exceptions are made to this general rule, for example if the harmful act is manifestly more closely connected with another country.
>
> It is clear from Article 3 that the Regulation does not only apply within the EU, but that it also applies to the Member States' relationship with non-Member States. Norway is not bound by the Regulation. However, to the extent that we do not have divergent legislation, the consideration of legal unity suggests that when deciding choice-of-law issues, we emphasise the solution chosen by Member States."

(54) Subsequent case law from the Supreme Court is based on these starting points.

(55) From what I have outlined, the choice of law in this case must be made in accordance with the rules applicable to non-contractual obligations. This is also in line with the basis for the claim presented in the writ. As it appears from what I have quoted from *The bookseller in Kabul*, Article 4 of Rome II will thus be central.

(56) The main rule under Article 4 (1) is that the law of the country in which the damage occurs applies. In the case of Motor Liability, the country in which the damage occurs will usually be the place of the harmful act. The compensation rules in the Automobile Liability Act will thus apply in the vast majority of cases when the accident occurs in Norway. This is the case even if one or more foreign vehicles are involved.

(57) However, Article 4 (2) has a special rule that reads as follows:

> "However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

(58) According to this provision, the law of the parties' *common country of residence* is decisive. Regardless of the place of the accident, the parties' common connection to one particular country will dictate the choice of law. In this case, both A, the owner of the car and Codan are

domiciled in Denmark. The only link to Norway is that the injury occurred here. In my view, Article 4 (2) must imply that A's claim for compensation is regulated by Danish law.

(59) A has invoked Article 4 (3), which states that if the harmful act "is manifestly more closely connected with a country" other than that indicated in paragraphs 1 and 2, the law of that country shall be applied. However, the basis in this case is that Article 4 (2) clearly instructs that Danish law is applicable due to the strong connection with Denmark. The fact that the injury occurred in Norway cannot entail that the harmful act is *manifestly* more closely connected with Norway.

(60) In my view, a choice of law based on Article 4 (2) of Rome II, and thus the connection to Denmark, will also comply with the "Irma Mignon formula", pointing towards the country with which the case has the closest connection after an overall assessment.

Conclusion and costs

(61) Against this background, I have concluded that A's claim for damages against Codan must be decided according to Danish law. The parties agree that this conclusion will have the effect that A is not entitled to compensation and, so that the Supreme Court must find in favour of Codan.

(62) Codan has claimed reimbursement of its costs in all instances. However, I have concluded that there are weighty reasons for exempting A from liability for costs, see section 20-2 subsection 3 of the Dispute Act. I note that the case concerns an issue of principle where A has been successful in two instances. There was good reason to have the case tried, and it involves a claim from a private individual against an insurance company.

(63) I vote for this

J U D G M E N T :

1. Codan Forsikring A/S is not liable.

2. Costs are not awarded.

(64) Justice **Hellerslia:** I agree with Justice Bergh in all material respects and with his conclusion.

(65) Justice **Steinsvik:** Likewise.

(66) Justice **Bergsjø:** Likewise.

(67) Justice **Matheson:** Likewise.

(68) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. Codan Forsikring A/S is not liable.

2. Costs are not awarded.