Judgement of the Supreme Court dated 28 October 2005

Veronika Finanger

Counsel: Mr Tom Sørum

against

The State represented by the Ministry of Justice

Counsel: Ms Fanny Platou Amble on behalf of the Attorney General

Amicus curiae National Association for Road Traffic Victims

Counsel: Mr Tom Sørum

(1) Ms Justice **Gussgard**: The issue in this case is whether the State is liable in damages for the wrongful transposition into Norwegian law of the EU Motor Vehicle Insurance Directives in connection with Norway's accession to the Agreement on the European Economic Area (hereinafter the "EEA Agreement").

(2) Prior to Norway's accession to the EEA Agreement on 1 January 1994, a comprehensive review of Norwegian legislation was carried out in order to make the statutory amendments that were necessary to comply with the Agreement. Proposition to the Odelsting no. 79 for 1991-92 (Ot.prp. no. 79(1991-92)) states at page 1 that this task included the transposition into Norwegian law of the Main Part of the EEA Agreeement comprising 129 articles, 49 protocols and 22 annexes, and approximately 1300 legislative acts referred to in the annexes. The EU Motor Vehicle Insurance Directives were amongst the legislative acts that were considered, that is the First Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, the Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and the Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

(3) As a consequence of the review, certain amendments were made to the Motor Vehicle Liability Act, see the discussion in Ot.prp no. 72 (1991-92) at pages 76-77. One of the provisions that was considered was the provision in section 7 subsection 3 (c) of the Motor Vehicle Liability Act relating to insurer's liability towards a passenger in circumstances where the driver is under the influence of alcohol or other intoxicating substances. This provision was not amended in connection with the review. However, another provision was repealed and the numbering in the provision was changed and section 7 subsection 3 (c) become section 7 subsection 3 (b) following statutory amendment no. 113/1992. The provision provides as follows:

> "The injured party may not obtain compensation, unless there are special grounds for doing so, if he voluntarily drove or allowed himself to be driven in the motor vehicle which caused the injury even though he
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> (a) …
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> (b) knew or must have known that the driver of the vehicle was under the influence of alcohol or other intoxicant or narcotic (see the Road Traffic Act section 22 subsection 1). The specific rule enunciated herein does not apply, however, if it must be assumed that the injury would have occurred even if the driver had not been under the influence as aforementioned."

(4) On 11 November 1995, A, who was born in 1978, was seriously injured in a road traffic accident. She was a passenger in a car driven by a driver had a blood alcohol level of approx 1.2 per thousand. It is not disputed that there was causation between the influence of alcohol and the accident, or that A knew that the driver was under the influence of alcohol. As a result of the accident, A was left 100 per cent occupationally disabled.

(5) A claimed compensation from the insurance company Storebrand Skadeforsiking AS pursuant to section 4 of the Motor Vehicle Liability Act. The insurance company rejected the claim by reference to section 7 subsection 3 (b). A then filed a legal action against Storebrand with the Inderøy District Court and claimed that she was entitled to payment under the motor vehicle insurance. The District Court awarded her compensation for economic loss pursuant to the exception in section 7 subsection 3

(b), but reduced the award by 50 % on account of her contribution to the injury. The relationship to EEA law was not discussed.

(6) Both A and Storebrand appealed against the judgement of the District court. The Frostating Court of Appeal held that the limitation of liability in section 7 subsection 3 (b) of the Motor Vehicle Liability Act was an exemption rule and, as such, incompatible with the EU Motor Vehicle Insurance Directives. The provision was set aside pursuant to section 2 of Act No. 109/1992 – the EEA Act. The Court of Appeal reduced the compensation to be paid to A by 30 per cent pursuant to the Motor Vehicle Liability Act section 7 subsection 1.

(7) Both parties appealed against the judgement of the Court of Appeal to the Supreme Court. During the preparatory proceedings, the judge in charge decided to submit the following question to the EFTA Court pursuant to section 51 of the Courts of Justice Act:

> "Is it incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury?"

(8) Following an oral hearing, the EFTA Court delivered an Advisory Opinion, E-1/1999, on 17 November 1999, and stated, inter alia, as follows:

> "It is incompatible with EEA law (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles for a passenger who sustains injury by voluntarily driving in a motor vehicle not to

be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."

(9) The Supreme Court, sitting in plenary, pronounced judgement in the case on 16 November 2000, reported in Rt-2000-1811, Finanger I. The Supreme Court found unanimously that section 7 subsection 3 of the Motor Vehicle Liability Act was an exception from insurance that was incompatible with the Motor Vehicle Insurance Directives. The provision was also incompatible with the Directives because the compulsory motor vehicle insurance did not cover the driver's personal liability.

(10) There was dissent as to how to deal with the incompatibility with the Directives. The majority – 10 justices – held that it was not possible to interpret the wording of section 7 subsection 3 (b) of the Motor Vehicle Liability Act to bring it in conformity with the EEA Directives. The minority – five justices – held that EEA law must be given precedence over domestic law so that the domestic provision was inoperative. In accordance with the majority vote, Storebrand was held not liable for A's claim for compensation under the insurance. – I mention that section 7 subsection 3 (b) of the Motor Vehicle Liability Act has been amended following the Supreme Court's judgement.

(11) On 15 December 2000, A filed a civil action with the Oslo District Court against the State represented by the Ministry of Justice. A alleged that the State was liable in damages and was obliged to pay the compensation to which she would have been entitled - if section 7 subsection 3 (b) had not existed - pursuant to section 6 of the Motor Vehicle Liability Act, reduced by 30 per cent on account of her contribution to the injury pursuant to section 7 subsection 1. The parties agree that the compensation payable by the State shall be reduced as aforementioned if the State is held to be liable. On 22 August 2001, the National Association for Road Traffic Victims declared accessory intervention in support of A.

(12) On 13 March 2003, the Oslo City Court passed the following judgement (TOSLO-2000-10919):

"1. The State represented by the Ministry of Justice is liable in damages towards A and is obliged to pay the compensation she would have been entitled to following the road traffic accident on 11 November 1995 pursuant to the Motor Vehicle Liability Act section 6, reduced by 30 % in accordance with the Motor Vehicle Liability Act section 7.

2. The State represented by the Ministry of Justice shall within two weeks pay the legal costs of A and the National Association for Road Traffic Victims in the amount of NOK 712 070. If payment is delayed, interest shall be payable from the due date until payment is made in accordance with the Act relating to default interest. "

(13) The State, represented by the Ministry of Justice, appealed against the judgement of the District Court to the Borgarting Court of Appeal which, on 14 January 2005 (LB-2003-11705) delivered the following judgement:

" 1. The case against the State represented by the Ministry of Justice shall be dismissed.

2. No award as to costs for the proceedings before the District Court or the Court of Appeal."

(14) The judgement was passed with dissenting votes. One of the judges in the Court of Appeal found that the inadequate transposition of the Directives into Norwegian law rendered the State liable.

(15) A has appealed against the judgement of the Court of Appeal to the Supreme Court. In her appeal, she asked the Court to request an advisory opinion from the EFTA Court pursuant to the Courts of Justice Act section 51. The Appeals Selection Committee of the Supreme Court did not find grounds for submitting such a request. On 30 March 2005, the Chief Justice decided that the case in its entirety should be heard by the Supreme Court sitting in plenary, see section 4 cf. section 3 of the Act of 25 June 1926 no. 2.

(16) At the start of the appeal proceedings, Ms Justice Coward, Ms Justice Bruzelius and Ms Justice Øie raised questions regarding their impartiality. On 13 September 2005, the Court decided by way of interlocutory order (HR-2005-01441-A) that they should not participate in the appeal proceedings.

(17) *The appellant - A, with the support of the amicus curiae, the National Association for Road Traffic Victims* – has submitted as follows:

(18) It follows as a matter of EEA law that the State is liable in damages for the loss that A has suffered as a consequence of the incorrect transposition into Norwegian law of the EU Motor Vehicle Insurance Directives. Alternatively, the State is liable as a matter of Norwegian domestic law.

(19) Two errors were made in connection with the implementation, as evidenced in the judgement of the Supreme Court in Finanger I. After discussing the wording and purpose of the three Motor Vehicle Insurance Directives, the Supreme Court held that the special rule in section 7 subsection 3 (b) of the Motor Vehicle Liability Act could not be upheld for passengers. The provision was deemed to be an exemption from insurance that was incompatible with the Directives. This is error no. 1. The Court also found incompatibility because the passengers' claim for compensation against the driver was not fully covered by insurance. The rule in section 7 subsection 3 (b), which entitles passengers to compensation if special grounds apply, does not apply to the driver's liability. This liability could be reduced pursuant to the ordinary rule on contributory negligence in section 5-1 of the Compensation Act, which gives passengers stronger protection. Thus, where the driver but not the insurer is held liable, there is a gap in the insurance of the passenger's claim for compensation. This is error no. 2.

(20) There are three conditions for State liability in EEA law. The parties agree that both the condition that the Directives must be intended to confer rights on individuals and the condition that there must be a direct causal link between the breach and the injury sustained are satisfied. The disagreement between the parties relates only to the condition that the incorrect transposition of the Directives must be "sufficiently serious" to entail liability.

(21) The substance of this condition has been defined in a number of decisions, among others in the judgement of the EFTA Court in case E-4/01 Karlsson. All the circumstances of the case must be considered, where the most important factors are the clarity and precision of the rule that has been infringed, the measure of discretion left to the national authorities, whether the infringement was intentional or involuntary and whether any error of law is excusable or not.

(22) The requirement that an infringement must be "sufficiently serious" must be understood in EEA law in the same way as in EU law. The State's submission that the threshold for liability in EEA law is higher than in EU law is unfounded.

(23) The reason why "sufficiently serious" is a matter for assessment, is that national authorities have a margin of discretion to choose how to transpose community law into national law. Where there is a margin of discretion regarding transposition, it is relevant to make a comparison with the liability in damages in community law. The issue will then be whether the State "has manifestly and gravely disregarded the limits on the exercise of its powers", see Karlsson at paragraph 38. The position is different if Member States have no margin of discretion – as is the case in the transposition of the Motor Vehicle Insurance Directives, and there will more easily be a "sufficiently serious" infringement if EEA law is not properly transposed. An important factor in the assessment will be whether the State's interpretation is justifiable. The mere breach of unambiguous provisions in a directive will normally meet the criteria of a sufficiently serious infringement. If the provision is unclear, a central issue will be whether the interpretation was contrary to the objective of the provision. Mistake of national law is not a relevant excuse for the State. A relevant consideration when considering whether the criterion is satisfied will be the consequence of the error for the persons who are affected.

(24) When considering whether the infringement is intentional or involuntary, it must be possible to attach weight to memoranda prepared in connection with the government's handling of the transposition of the directive. The State has submitted such memoranda prepared by the legislation department of the Ministry of Justice. The memoranda show that those who were involved with the transposition of the Motor Vehicle Insurance Directives assumed that section 7 subsection 3 (c) was incompatible with the Directives as far as passengers were concerned. Notwithstanding, the provision was upheld because it was wrongly considered to be a rule on contribution to damage, not an exemption rule.

(25) Read altogether, and in view of the recitals, the Directives leave no room for doubt that section 7 subsection 3 (b) of the Motor Vehicle Liability Act could not be upheld as a rule on contribution to damage.

(26) The second mistake relates to the lack of insurance for the driver's personal liability. It is evident from both the wording and the objective of the Directives that the driver's liability towards his or her passengers must be covered by insurance. This is a minimum requirement, without any exception for cases of drink-driving. As an overriding general rule, the personal liability of the driver in cases that fell within the scope of section 7 subsection 3 would not be covered by insurance, and there is therefore a breach of the Directives. This question is not discussed in the preparatory works to the transposition of the Directives, Proposition to the Odelsting no. 72 (1991-1992), nor is it discussed in the internal memoranda of the legislation department of the Ministry of Justice. A potentially erroneous assessment of Norwegian law cannot be relevant for the State's liability in damages pursuant to EEA law. This error, too, constitutes grounds for liability.

(27) In its assessment of whether the inadequate implementation of the Directives is "sufficiently serious", the majority of the Court of Appeal has partly attached weight to irrelevant considerations. This includes emphasis on the extraordinary circumstances surrounding the legislative burden as a consequence of Norway's ascension to the EEA Agreement, and emphasis on the fact that the Motor Vehicle Liability Act on certain points gives the victim better protection than required by the Directives.

(28) In the alternative, it is submitted that the State is liable in damages pursuant to internal Norwegian law. The State is liable for unlawful administrative actions even where the action is taken by the Storting (parliament). The main rule in Norwegian law is that the State is strictly liable for unlawful administrative action. Violation of EEA law is an unlawful administrative action. Liability for the State in these circumstances is based on a presumption that EEA law has a form of direct effect in Norwegian law. A submits that there is authority for such a mild form of direct effect since the Directives apply in the relationship between the state and citizens, but not among the citizens themselves. A referred to the State's obligation to implement legislative acts pursuant to Article 7 of the EEA Agreement, which is established by statute in section 1 of the EEA Act. The State cannot claim excusable ignorance of the law. In any event, there was no ignorance of the law in the present case. Liability is also justified on the grounds of public policy.

(29) A and the National Association for Road Traffic Victims have entered the following prayer for relief:

> 1. The State, represented by the Ministry of Justice, is liable in damages and is obliged to pay the compensation to which A would have been entitled pursuant to section 6 of the Motor Vehicle Liability Act, reduced by 30 %.
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> 2. The State, represented by the Ministry of Justice, shall pay A's legal costs before the District Court, with the addition of interest from two weeks after the service of the District Court's judgement until payment is made.
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> 3. The State, represented by the Ministry of Justice, shall pay A's legal costs before the Court of Appeal, with the addition of interest from two weeks after the service of the Court of Appeal's judgement until payment is made.
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> 4. The State, represented by the Ministry of Justice, shall pay A's legal costs before the Supreme Court, with the addition of interest from two weeks after the service of the Supreme Court's judgement until payment is made."

(30) *The State, represented by the Ministry of Justice*, has submitted as follows:

(31) There are no grounds for liability in damages for the State, either in EEA law or in general principles of the Norwegian law of damages. The case is of great principle importance for the scope of the State's liability for the incorrect transposition of its obligations in international law. The question whether there are grounds for imposing liability must be determined by reference to the sources of law that were available in 1991-1992, not in 2000 when the Supreme Court passed judgement in the Finanger I case.

(32) In case no. E-9/97 Sveinbjörnsdóttir, later confirmed in case E-4/01 Karlsson, the EFTA Court has held that the Contracting Parties to the EEA Agreement are obliged to pay compensation for loss suffered by an individual as a consequence of breach of the obligations in the EEA Agreement. The State accepts the position taken by the EFTA Court. The more detailed conditions for liability appear, inter alia, in the Advisory Opinion in the Karlsson case. At paragraph 38, the criterion "sufficiently serious" is construed so as to require that the State has "manifestly and gravely" failed to fulfil its obligations.

(33) Both the Court of Justice and the EFTA Court have imposed a high threshold; see e.g. the decision of the Court of Justice in case no. C-329/93 British Telecom. If the conditions for liability are lenient, the State may be tempted to over-fulfil its implementation obligations for fear of liability, which in turn would impede the legislative process.

(34) The threshold for State liability for breach of EEA law is slightly higher than for breach of EC law. The rules on liability are motivated by the objective of efficiency, which has a more limited scope within the EEA than within the EU. Support for this view is to be found in paragraph 30 of the Karlsson case.

(35) The threshold for liability is the same for directives that give national legislators a wide margin of discretion and in cases where there are doubtful questions of interpretation. The State recalled, inter alia, the decisions in C-392/93 British Telecom and C-319/96 Brinkman. Liability can only be imposed if the interpretation is clearly irrelevant and is evidently contrary to the wording or purpose of the directive. The assessment must be made on the basis of the criteria laid down in the practice of the Court of Justice and the EFTA Court. There are no grounds for giving weight to concrete or general considerations of reasonableness.

(36) The error in transposition of the Directives in 1992 was made by the legislative authority, the Storting. The issue in the case is whether the Storting's adoption of the legislation, in the light of the authoritative objective sources of law that were available in 1992, constitutes a grave and manifest breach of Norway's obligations in EEA law pursuant to the Motor vehicle Insurance Directives. The obligation to transpose in Article 7 of the EEA Agreement is an obligation of result. It is a generally accepted principle that the manner in which the State organises its EEA tasks is irrelevant for the content of its EEA obligations.

(37) Since the subject of discussion is the Storting's interpretation of EEA law, neither the preparatory works to the legislation nor the internal case documents of the legislation department of the Ministry of Justice are of interest. In their consideration of the question of liability, the Court of Justice and the EFTA Court have relied exclusively on generally available sources of law. If, however, the Supreme Court finds reason to rely on internal ministerial case documents, the State submits that the documents demonstrate that a loyal attempt was made to

transpose the Directives. They do not reveal a lack of thoroughness in the preparation of the legislation.

(38) In 1992, it was natural to understand the Directives such that the liability that the Norwegian system was required to cover was the insurer's liability pursuant to the compensation scheme in Chapter IV of the Motor Vehicle Liability Act. The question, then, is whether it was gravely and manifestly incorrect of the legislator to believe that the Directives permitted the imposition of a causal requirement in the form of the contributory negligence rule in section 7 subsection 3 (b) of the Motor Vehicle Liability Act. Following a statutory amendment in 1985, this provision had been viewed in Norway as a rule on contribution to injury. As a starting point, the Directives allow states to regulate the causal requirement. It is not reasonable to expect that the legislator in 1992 should have foreseen that the EFTA court eight years later would find that the rule must be considered to be an unauthorised exemption from insurance. In the State's view, the subsequent case law of the EFTA Court and the Court of Justice is somewhat fragmentary and, in any event, shows that the question has been uncertain. Moreover, that the question was uncertain is evidenced by the fact that as late as in the fifth Motor Vehicle Insurance Directive, 2005/14/EC, it was considered expedient to include a provision to directly regulate this issue. Weight must also be attached to the fact that several other Member States have shared Norway's interpretation of the Directives.

(39) Nor was it obviously or clearly wrong in 1992 to assume that section 7 subsection 3 (b) could be upheld, even though it meant that the driver's personal liability in damages would not be fully covered by insurance. The Directives are complicated and unclear. The problem for the Norwegian authorities was not the understanding of the Directives but their application to the Norwegian rules. The Directives appeared to be more adapted to a national system that only imposed personal liability on the driver, not a system like the one in Norway, which includes a special insurance scheme directly for the benefit of the victim. The Directives do not require a supplementary personal tort feasor liability, and if this had been repealed there would have been no wrong done there. With a scheme like the Norwegian scheme, it was justifiable to assume that there was no requirement that the tort feasor's personal liability must be fully covered by insurance.

(40) It is particularly noteworthy that this aspect was not discussed in the oral proceedings before the EFTA Court or in its Advisory Opinion. Nor is the problem discussed in legal theory. It was first raised when the case was heard by the Supreme Court in 2000. This was undoubtedly due to the Court of Justice's judgement in case C-348/98 Ferreira. The Supreme Court's interpretation of the requirements of the Directives in Finanger I is debatable, and it is questionable to what extent this interpretation has been followed up in subsequent Court of Justice decisions. The problem was not raised in the judgment in case C-537/03 Candolin. When considering whether there are grounds for liability, it is also relevant that Finland (in Candolin) and Portugal (in Ferreira) must have been guilty of the same misunderstanding as Norway as regards insurance coverage for the driver's personal liability.

(41) The conclusion must be that the State's interpretation neither lacked relevance nor was obviously contrary to the wording and objective of the Directives.

(42) The State denies that it can be held liable as a matter of internal Norwegian tort law on the grounds of unlawful administrative action. A prerequisite for such liability is violation of a substantive rule of law, or violation of a procedural rule of law for the protection of individuals. In this case, the substantive rule of law was not implemented into Norwegian law, see Finanger I. There is no general rule of law that imposes on the Storting (the parliament) an obligation to implement international law obligations. Article 7 of the EEA Agreement does not grant rights that can be invoked by individuals. The State referred to legal theory, particularly Finn Arnesen in TfR 1997 page 633 ff, and to a judgement of the Swedish Supreme Court delivered on 26 November 2004. In any event, liability presupposes that the State has been negligent, whilst in the present case the State was excusably in mistake of the law.

(43) The State, represented by the Ministry of Justice, entered the following prayer for relief:

> "The judgement of the Court of Appeal shall be upheld."

(44) **I find that** the appeal must be upheld.

(45) The EEA Agreement contains no provisions on the State's liability for failure to transpose or defective transposition of an EEA directive. The first question that must be answered in this case is therefore whether there is authority for such liability.

(46) The first time the EFTA Court expressed its opinion on the question of authority for State liability was in case E-9/97 Sveinsbjörnsdóttir. The Court of Justice had ruled that the EU Member States were liable for damage caused by such breach, and viewed this liability as a principle that was inherent in the treaty system, with particular emphasis on considerations of efficiency. I refer to case C-6/90 Francovich and to case C-46/93 Brasserie du Pècheur, where the conditions under which a Member State may incur liability for damage cause to individuals by a breach of Community law are defined in more detail.

(47) The EFTA Court first noted that "there is no explicit provision in EEA law establishing a basis for State liability on account of incorrect adaptation of national legislation," see paragraph 46. In the absence of an express provision, it was necessary to consider whether such a State obligation can be derived from the stated purposes and the legal structure of the EEA Agreement, paragraph 47. The EFTA Court recalled the objectives of the EEA Agreement in paragraphs 48 and 49, and in paragraphs 50 and 51 referred to the fourth and fifteenth recitals of the Preamble to the EEA Agreement, which read:

> (No. 4) "CONSIDERING the objective of establishing a dynamic and homogenous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;"
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> (No. 15) "WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;"

(48) At paragraph 58-60, the EFTA Court stated:

> "58 The Court notes that the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area. Therefore, the proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights thus intended for their benefit.
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> 59 The Court concludes from the foregoing considerations that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 Maglite [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.
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> 60 The Court finds that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive."

(49) The Court concluded as follows in paragraph 62:

> "62 It follows from all the forgoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible."

(50) This view was reiterated in case E-4/01 Karlsson.

(51) In Rt-2000-1811 Finanger I, the Supreme Court stated that great importance should be attached to an advisory opinion of the EFTA Court. The reason for this is that the EFTA States have found cause to establish the court with a view to reaching and maintaining a common interpretation and application of the EEA Agreement, that the application of sources of law within the EEA can differ from national law, that the EFTA Court on account of its special insight ought to be able

to express itself with considerable authority, and that the procedure of the EFTA Court grants other agencies within EFTA and the EU the opportunity to be heard on issues that are raised.

(52) I agree with these views. I also find the arguments of the EFTA Court on state liability convincing, with the weight that is given to the fundamental objectives of homogeneity, equal treatment of individuals/legal persons and protection of their operations. I endorse the view that there is a presumption of State liability in the EEA Agreement, and that section 1 of the EEA Act, which implemented the main part of the EEA Agreement into Norwegian law, must be interpreted so as to include such liability. I note that the State has expressed the same view and that the Supreme Court of Island came to the same conclusion in the Sveinbjörnsdóttir case.

(53) The next question relates to the substance of this principle of liability that is established in EEA law and justified by the purpose and nature of the EEA Agreement. What are the conditions that must be fulfilled in order to give rise to State liability for defective implementation of a directive?

(54) Three conditions for liability for compensation are laid down in the EFTA Court's Advisory Opinion in the Sveinbjörnsdóttir case at paragraph 66, and later in the Karlsson case at paragraph 32. Firstly, the directive in question must be intended to confer rights on individuals, the content of which can be clearly identified from the provisions of the directive. Further, the breach on the part of the States must be "sufficiently serious", and there must be a direct causal link between the breach of the State's obligation and the loss and damage suffered by the injured party.

(55) The Karlsson case at paragraph 38 contains a short description of the substance of the requirement that the breach of the State's obligation pursuant to EEA law must be "sufficiently serious".

> "As regards the condition that the breach must be sufficiently serious, the Court has already held that this depends on whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers. In order to determine whether this condition is met, the national court hearing a claim for compensation must take

into account all the factors that characterise the situation before it. Those factors include, inter alia, the clarity and precision of the rule infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable (see Sveinbjörnsdóttir, at paragraphs 68 and 69)."

(56) The EFTA Court formulated the three conditions in exactly the same way as the Court of Justice had already formulated the conditions for liability for EU Member States for similar breaches. This can be seen from a number of decisions, e.g. case no. C-56/93 Brasserie du Pêcheur. I can find no reason why the conditions for liability that Norway has taken upon itself in the EEA Agreement should be judged differently, and I endorse the EFTA Court's view in this respect. Whether or not the conditions are fulfilled in a particular case is for the national courts to decide. I generally agree with the EFTA Court's more detailed remarks on the requirement that the breach must be "sufficiently serious", although I will revert to the "manifest and grave" criteria later on.

(57) The uniform formulation of the conditions for liability does not necessarily mean that the substance of the conditions is entirely the same on all points and in all contexts. The State has also argued that the threshold for liability under EEA law is higher than under EC law, and has referred to the Karlsson case at paragraph 30, which states:

"The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive."

(58) The State has argued that one of the main justifications for the principle of State liability is the objective of efficiency and that this objective has a more limited scope within the EEA than within the EU. In the State's view, liability within the EEA should therefore be more lenient. I do not agree. When a directive applies within both the EC and the EEA, decisive weight must be given to the objective of homogeneity and the expectation of all States and their citizens that the directive

will be followed up. The directives in question in the present case are directives that confer certain rights on individuals, and the State's liability shall ensure that the rights are real. It appears therefore unreasonable that the legal protection of these rights should be legally different for citizens of EU and EEA States. In my view, the objectives behind the principle of State liability under EEA law indicate that it has the same scope and is on the same level as liability under EC law. The decisions of the Court of Justice in this area are therefore of considerable interest.

(59) As regards the condition that the breach must be sufficiently serious, the parties disagree on both the substance of the standard to be applied and the application of the standard in the present case. One of the controversial issues is whether, pursuant to the practice of the Court of Justice, there can be said to be a fundamental difference as a matter of compensation law between breach of directives that grant national authorities a power of political/economic discretion in connection with the transposition, and the situation where there is no or only a narrow degree of discretion. I will now look more closely at the implications of this difference.

(60) The quotation from paragraph 38 of the Karlsson case shows that the degree of discretion is one of the factors to be taken into account in the assessment of liability. The reason for this emphasis under EC law is the position that the Court of Justice has taken on the similarity between the non-contractual liability of community institutions pursuant to Article 215 of the Treaty, and the corresponding liability for Member States. In my view, the relevance of the power of discretion is important to the decision in the present case, and I find reason to cite paragraphs 41-47 in case C-46/93 Brasserie du Pêcheur, which state:

> "(41) First, the second paragraph of Article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.
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> (42) Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of

the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

(43) The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

(44) Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

(45) The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6).

(46) That said, the national legislature - like the Community institutions - does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in Francovich and Others relates, Article 189 of the Treaty places the Member State under an

obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

(47) In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation."

(61) As I read this, it is clear that if the Member States are given a margin of political/economic discretion in the implementation of the directive, the threshold for liability is high – the breach must be manifest and grave. The liability corresponds in principle to the liability of the Community institutions, where respect for the freedom that a legislative organ must have is absolutely paramount. The possibility of liability must not unduly inhibit the institutions in the proper exercise of their duties in this area, which calls for a restrictive attitude to the question of liability. Where no such freedom of discretion exists, which can also be the case for the Community institutions, the policy considerations that suggest a restrictive attitude do not carry the same weight, and the threshold for liability is lower. If there were no such distinction, it would be unnecessary to emphasise the different situations for States as strongly as the Court of Justice does here.

(62) The fact that liability is more restrictive in directives that grant no margin of discretion is supported by case C-5/94 Lomas where, at paragraph 28, it is stated with regard to such directives that the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. Case C-127/95 Nordbrook refers both to the "manifest and grave" criteria, and to the fact that the Court of Justice has stated that a mere infringement may be sufficiently serious in circumstances where there is no or only considerably reduced discretion. The same applies to case C-178/94 Dillenkofer, C-140/97 Rechberger, case C-424/97 Haim and case C-150/99 Stockholm Lindöpark. As I understand these cases, particular emphasis is given to the lack of discretion in the statements on liability.

(63) I understand this to mean that there is an important distinction for the State's liability for damages between, on the one hand, the breach of a directive that grants the State political or economic discretion and, on the other hand, breach of a directive that does not or only marginally opens for such discretion. In the first case, considerable emphasis is given to the legislative freedom of the State which requires the exercise of discretion, whilst in the other case greater emphasis is given to efficient implementation and regard to those affected by the breach of the directive, which justifies a lower threshold for liability. Although the criterion "manifest and grave" applies, it is more easily satisfied in the second alternative. In any case, a condition for liability is that the breach can be characterised as "sufficiently serious". This is clear, inter alia, from Stockholm Lindöpark, where the finding that a mere infringement may be sufficient for liability is coupled with a precondition that the wording of the directive is unambiguous.

(64) Just how clear and precise the wording of a directive is will always be important and often decisive. I refer to the EFTA Court's discussion of the factors that are relevant, and to the Court's statement that "all the factors that characterise the situation before it" must be taken into account. Thus, the establishment of liability depends upon the exercise of a composite discretion. One of the relevant factors is the existence of any fault, but the existence of fault is not a condition for liability, see Brasserie du Pêcheur paragraph 79, which states that "the obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order." The threshold must not be set so high as to make liability illusory. If that were the case, it would not fulfil its purpose.

(65) In order to substantiate the assertion that liability shall not be imposed lightly – that the threshold for liability in general is high – the State has, in particular, referred to two decisions, case C-392/93 British Telecom and case C-319/96 Brinkmann. In the State's opinion, the wording of the directives in question in these two cases was extremely clear and the State was granted no discretion. The Court of Justice does not appear to have been in any doubt that there was an inconsistency, but still did not find reason to impose liability.

(66) In my opinion, it is not possible to derive from these two cases that the threshold for liability is particularly high for directives that do not grant a power of discretion to the national authorities. In British Telecom, the Court stated at paragraph 43 that Article 8(1) of Council Directive 90/531/EEC, to which the case related, was imprecisely worded and reasonably capable of bearing the interpretation given to it by the State "in good faith" and on the basis of arguments which were "not entirely devoid of substance". The resulting interpretation was deemed to be not manifestly contrary to the wording and purpose of the directive. I add that in his Opinion on the case at paragraph 37, the Advocate General had stated that Article 8 was a provision "whose substance can far from be described as clear and unambiguous". Three other countries had arrived at the same interpretation. The Court's assessment of the deficiency must, in my opinion, be decisive. I cannot see that the case supports the assertion of a particularly high threshold for liability. Nor in my view does the Danish Brinkmann case support the State's view in any particular degree. The directive in question, which related to taxation, defined what was to be deemed to be cigarettes and what was deemed to be smoking tobacco. The case concerned rolls of tobacco which could be smoked as cigarettes if they were inserted into special cigarette paper tubes or ordinary cigarette paper. Although the Danish authorities had erroneously classified the product as a cigarette, the Court did not find grounds for imposing liability. I do not find the case particularly sensational. The product did not exist when the directive was issued, and Finland and the Commission had interpreted the directive in the same way as the Danish authorities.

(67) Many of the judgements that I have mentioned, where the Court of Justice has stated that the mere infringement of Community law may be sufficient for liability, are delivered after British Telecom and Brinkmann, which goes to show that the threshold for liability for the deficient transposition of directives that do not grant any discretion to the State cannot be as high as the State submits.

(68) It must then be a matter for the courts to consider the individual case on the basis of the practice available at any given time.

(69) I now move on to consider whether the State is liable in damages towards A.

(70) In the Supreme Court case in Rt-2000-1811, Finanger I, the Court found that section 7 subsection 3 (b) of the Motor Vehicle Liability Act, as it was worded then, was incompatible with the EU Motor Vehicle Insurance Directives. The Directives were not properly transposed in connection with the review of Norwegian legislation that took place in connection with Norway's ascension to the EEA Agreement. I cannot see that anything has happened subsequently to indicate that the view of the Directives taken by the Supreme Court was wrong. In general, the Supreme Court's view was confirmed by the Court of Justice in case C-537/03 Candolin.

(71) As far as the substance of the Directives and the Supreme Court's view of the substance is concerned, I find it appropriate to refer quite extensively from the first voting justice's speech. In part II paragraph 2 of the speech, it is stated with regard to the first Motor Vehicle Insurance Directive, inter alia:

> "The preamble to the first Motor Vehicle Insurance Directive – Council Directive 72/166/EEC of 24 April 1972 – states that an essential condition for achieving a common market is to bring about the free movement of goods and persons between the Member States of the European Union. For this purpose, the Directive requires the national law of each Member State to provide for compulsory insurance of vehicles that is valid throughout Community territory.
>
> Article 3 (1) and (2) of the Directive contain the following provisions:
>
> 1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.
>
> 2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers - according to the law in force in other Member States, any loss or injury which is caused in the territory of those States…"
>
> This Directive requires only that the civil liability that the driver of a motor vehicle may incur is covered by insurance. The injured parties that may be

entitled to compensation and the injuries covered are to be determined by the law of the individual Member States, in respect of which the Directive does not lay down any conditions."

(72) Thereafter, the first voting justice refers to the preamble to the second Motor Vehicle Insurance Directive, Council Directive 84/5/EEC of 30 December 1983. The purpose of the second Directive was to extend the obligation of insurance cover to include liability incurred in respect of damage to property, and to ensure that compulsory insurance guaranteed victims adequate compensation irrespective of the Member State in which the accident occurred. Further, the preamble records that the members of the family of the insured person, driver or any other person liable should be afforded "protection comparable to that of other third parties, in any event in respect of their personal injuries". These requirements were laid down in Articles 1 and 2 of the Directive. I will quote further from the first voting justice's speech, and start from the citation of Article 2(1) of the Directive:

"1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:

- persons who do not have express or implied authorization thereto, or

- persons who do not hold a licence permitting them to drive the vehicle concerned, or

- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.

However, the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen."

Article 3 of the Directive limits further the power to exclude certain persons from insurance. Article 3 states:

> "The members of the family of the insured person, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 1 (1) shall not be excluded from insurance in respect of their personal injuries by virtue of that relationship." "

(73) With regard to the third Motor Vehicle Insurance Directive, the first voting justice states:

> "According to the preamble, the purpose of the *third* Motor Vehicle Insurance Directive – Council Directive 90/232/EEC of 14 May 1990 – is to guarantee the victims of motor vehicle accidents "comparable treatment irrespective of where in the Community accidents occur". The preamble states, amongst other things, that there are "gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States", and that "to protect this particularly vulnerable category of potential victims, such gaps should be filled". Consequently, Article 1 first paragraph of the third Directive provides:
>
> "Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle."
>
> Thus, following this Directive, the position is that exclusion from insurance for personal injuries to passengers is only permitted for passengers in stolen vehicles in the circumstances described in Article 2 (1) second paragraph of the second Directive."

(74) In my view, the State must be held liable in damages towards A both on the basis of what under the appeal proceedings was referred to as error no. 1 and on the basis of error no. 2. I will explain my views on both alternatives and start with error no. 1, which the Supreme Court primarily considered in Finanger I. The position must be considered on the basis of the sources of law available and in force at the date of the accident, although these were no different from the sources of law in 1992 when the task of transposing the Directives took place.

(75) I mention by way of introduction that the State must be viewed as a whole with regard to the international obligations implicit in the EEA Agreement. This is also stated in Brasserie du Pêcheur at paragraph 34. The question of liability in damages cannot therefore be related to the Storting alone as tort feasor, but to the whole legislative process.

(76) The State has at A's request produced internal memos from the handling of the Motor Vehicle Insurance Directives in the legislation department of the Ministry of Justice, but denies that these memos are relevant to the issue of liability in EEA law. I disagree. Although the obligation in EEA law is an obligation of result, one element in the assessment of whether the State has acted with intent or negligently is whether the legislative procedure has been sound and proper. The memos are admissible as evidence of fact. Whether such memos are evidence of what the legislature has meant by the statutory provisions is another question. In that situation, weight cannot be attached to such memos, which are not publicised.

(77) Error no. 1 was that the State in connection with the transposition of the Motor Vehicle Insurance Directives assumed that section 7 subsection 3 (c) of the Motor Vehicle Liability Act could be upheld under the Directives, since the provision was deemed to be a rule on contribution.

(78) A memo from the legislation department dated October 1991 states that the Directives did not give authority "to make provision for the exemption of claims from passengers" in the circumstances described in section 7 subsection 3 (c), and that the provision would have to be amended or repealed. The passenger's contribution to the injury would then be regulated by the general contribution rule in section 7 subsection 1. Thus, in the initial phase, the legislation department deemed the provision to be an exemption rule, not a contribution rule.

(79) However, the Ministry of Transport was not very happy about abolishing section 7 subsection 3 (c). By telefax dated 15 November 1991 to the Ministry of Justice in Denmark, the Ministry asked for an opinion as to whether the rule in section 7 of the Motor Vehicle Liability Act regarding the victim's contribution to the injury could be deemed to be compatible with the community rules on motor vehicle insurance. In a brief response dated 27 November 1991, the Danish Ministry of Justice replied that the purpose of the Directives was not to harmonise the rules on

civil liability, and that the question of passengers' contribution would continue to be determined by national law. After this response was forwarded to the Ministry of Justice in Norway, the legislation department prepared new memos, where it was assumed that section 7 subsection 3 (c) could be deemed to be a contribution rule, "although it is certainly a strict rule". The legislation department referred to the letter from the Danish Ministry of Justice, but also stated that neither the letter nor a subsequent conversation with the executive officer at the Danish Ministry "gave reason to believe that they had studied section 7 subsection 3 (c) thoroughly". In concluding that section 7 subsection 3 (c) could be deemed to be a contribution rule, the legislation department attached particular weight to the requirement of a causal relationship between the injury and the driver's intoxication. Proposition to the Odelsting no. 72 (1991-1992), which included among other things proposals for the amendment of the Motor Vehicle Liability Act as a consequence of the EEA Agreement, was submitted to the parliament based on this view. It states at page 77, inter alia:

> "The present subsection 3 (c) relates to the limitation of the driver's and the passengers' right to compensation in circumstances where the driver of the vehicle was under the influence of alcohol or other intoxicant or narcotic. Subsection 3 (c) second sentence provides that this special rule does not apply if it must be assumed that the injury would have occurred even if the driver had not been intoxicated. This means that there is a requirement of a causal relationship between the injury and the driver's intoxication. It is also a condition for exclusion of liability that the passenger knew or must have known that the driver was under the influence. Thus, the rule in subsection 3 (c) is no more than a rule on contribution to damage, although it is indeed stricter than the general contribution rules in subsection 1. On this basis, the Ministry is of the view that the EEA rules do not prevent the rule being upheld, see the draft of subsection 3 (b)."

(80) In Finanger I part II at paragraph 5, the first voting justice starts by noting that the ordinary rules on contribution by the injured party are regulated by the national law of damages. Thereafter, he describes the Ministry's reasoning for maintaining the provision as a contribution rule; the passage that I have just cited. As regards his own view, the first-voting justice stated that the provision was formulated so

that "it is obvious to see it as an exemption from the motor insurance's area of coverage". The EFTA Court had concluded that it could not be upheld as a contribution rule, and the first-voting justice relied on the Advisory Opinion.

(81) In my view, the provision is an exemption rule. It states the general rule on exemption from insurance – "may not obtain compensation" – in cases where the injured party knew or must have known that the driver of the vehicle was under the influence of alcohol or other intoxicant or narcotic, provided there was a causal connection between the influence and the injury. The rule differs from an ordinary contribution rule. There is no requirement that the passenger had any liability for the car accident actually happening; the rule is based on an "accept of risk" point of view. The ordinary, concrete, discretionary assessment of how the contribution ought to influence the question of liability does not apply here. The exception for cases where special grounds apply, limits the scope of the exemption rule, but does not alter its character.

(82) The Motor Vehicle Insurance Directives do not grant national authorities a margin of political or economic discretion with regard to the requirement of insurance for passengers. The purpose was to pave the way for a common market with free movement, and one of the means was to achieve security for the survivors of road traffic accidents. Claims for compensation were to be covered by insurance, irrespective of the country in which the accident occurred. The development from the first to the third Directive shows that a strong degree of protection was intended, so that the various exemption rules that existed in certain countries were forbidden. Notwithstanding, there was no intention to intervene in the individual States' regulation of the personal liability owed by the driver of the vehicle towards his or her passengers.

(83) Error no. 2 consists first and foremost of a misinterpretation of a Norwegian statutory provision. As already mentioned, during the initial phase of the preparation of the statute, section 7 subsection 3 (c) was assumed to be an exemption rule. It was also evident that if it was an exemption rule it would be incompatible with the Directives. This is clear from the internal memos of the legislation department of the Ministry of Justice, and implicit in the passage from the Proposition to the Odelsting no. 72 (1991-92) cited above.

(84) Although the classification of the rule could be considered debatable, it cannot in my view be invoked as an element in the State's favour. The State must bear the risk of the wrongful interpretation of a national rule of law. Case C-178/94 Dillenkofer is of particular interest in this respect, where it is stated, at paragraph 53: "It is settled case-law that a Member State may not rely on provisions, practices or situations prevailing in its own internal legal system to justify its failure to observe the obligations and time-limits laid down by a directive."

(85) I also mention that the Court of Appeal in Finanger I, before the EFTA Court's Advisory Opinion was obtained, found the rule to be an exemption rule. The same view was argued by the Government of Liechtenstein, the EFTA Surveillance Authority and the European Commission in the proceedings before the EFTA Court. The Government of Island supported the Norwegian Government's view.

(86) Pursuant to the second Directive, passengers in stolen vehicles – but no other persons – could, in certain circumstances, be excluded from insurance for their compensation claims. There can be no doubt that this Directive, viewed together with the other two, regulates exclusively those persons that can be excluded from insurance. The exception for passengers in stolen vehicles appears to be an exemption rule, and the former section 7 subsection 3 (c) can at least to a certain degree be compared to this rule. Both apply to situations where there are particularly strong considerations of public policy. The second Directive indicates that these special circumstances were considered, but an exception for cases where the driver was intoxicated – a notorious problem in all countries – was not included. The seventh paragraph of the preamble to the second directive is also of interest in the present case and states, inter alia: "it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident". The reference here is to personal liability, and the aim is to limit the application of exclusion clauses. The provision in section 7 subsection 3 (b) does not satisfy this – the limitation applies to third parties.

(87) The State has argued that error no. 1 occurred as a consequence of lack of clarity as to how the Directives were to be interpreted in light of the Norwegian system of motor vehicle liability where, in practice, liability in damages rests with the

insurance companies. Motor vehicle insurance is both a third-party insurance for the driver and an accident insurance for the victims. The State's view has been that the Directives only cover situations where the victim could claim damages pursuant to national law, and relates this liability to the insurance companies' liability. The State refers to the fact that other countries have also found the legal position unclear and have misinterpreted the Directives, see C-537/03 Candolin, which concerned a Finnish statutory provision similar in content to section 7 subsection 3 (b), C-129/94 Bernáldez, which related to insurance of a passenger's claim for damage to property in circumstances where the driver was intoxicated, C-348/98 Ferreira and C-166/02 Viegas. The State has also pointed out that the general state of the law under the Directives with regard to the issue of contribution is also uncertain, see the Advisory Opinion of the EFTA Court in the Finanger case at paragraph 34 and in the Candolin case. The fact that it was necessary to clarify the state of the law in a fifth directive – Council Directive 2005/14/EC – is also considered to be relevant.

(88) As regards the fifth Directive, I refer first to the Commission's comments on its objective:

> "This provision is designed to correct any misinterpretation of the Directives and to ensure full cover for all passengers. According to some interpretations in a number of Member States, a passenger may be excluded from insurance cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or any other intoxicating agent. Depriving the passenger of cover in such cases would be in clear conflict with the spirit of the insurance Directives as well as with the case law of the Court of Justice."

(89) Paragraph 15 of the preamble to the fifth Directive reads as follows:

> "The inclusion within the insurance cover of any passenger in the vehicle is a major achievement of the existing legislation. This objective would be placed in jeopardy if national legislation or any contractual clause contained in an insurance contract excluded passengers from insurance cover because they knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of the

accident. The passenger is not usually in a position to assess properly the intoxication level of the driver. The objective of discouraging persons from driving whilst under the influence of intoxicating agents is not achieved by reducing the insurance cover for passengers who are victims of motor vehicle accidents."

(90) The judgements relied upon by the State emphasise that although the regulation of the system of liability is a matter for the individual state, the wording and objectives of the Directives must be respected and exemptions are prohibited unless they are permitted pursuant to the Directives. In my opinion, statements in Candolin and Bernáldez indicate that a an exemption rule of the kind in the present case was clearly contrary to the aim in the directives of ensuring protection – an aim which in Bernáldez at paragraph 18 is "stated repeatedly in the directives". There is nothing in the fifth Directive that indicates that the Directives were considered to be imprecise, and the Commission expressly disassociated itself from the interpretation applied by "a number of Member States".

(91) My conclusion so far is as follows: The wording and objectives of the three Motor Vehicle Insurance Directives from 1972, 1983 and 1990– when viewed together – clearly show that there was no justification for excluding from insurance passengers who had allowed themselves to be driven by a driver who was intoxicated. There was no margin of discretion that allowed for an exemption and the misconception whereby section 7 subsection 3 (c) was classified as a rule on contribution to damage rather than an exemption rule was not an excusable mistake of law.

(92) I furthermore disagree with the majority view in the Court of Appeal that weight can be attached to the fact that exceptional circumstances prevailed when the Directives were transposed since legislation in Norway was subject to a comprehensive review as a consequence of Norway's accession to the EEA Agreement. The State must bear the risk that directives are properly transposed into Norwegian law. On the other hand, the economic circumstances of the person or persons who are or will be affected by the State's error is not a relevant consideration to the issue of liability.

(93) In my view, error no. 1 is sufficiently serious to justify liability in damages for the State.

(94) I turn now to consider error no. 2, which concerns the driver's personal liability towards his or her passengers pursuant to general principles. My interpretation of the Directives is that also this liability must be covered by insurance. I refer in this connection to paragraph 21 of the Viegas case, which reads as follows:

> "It follows that, although it did not intend to require the adoption of a particular type of liability, the Community legislature did, on the other hand, certainly intend to require that all civil liability in respect of the use of motor vehicles be covered, irrespective of whether it was based on fault or risk. Contrary to what was contended by the Portuguese and German Governments, those Member States which provide for a number of types of civil liability applicable to road-traffic accidents cannot restrict the protection under the Second Directive to one or some of those types but must extend it to all types."

(95) Section 4 of the Motor Vehicle Liability Act grants the injured party a right to make a claim for compensation for the injury suffered directly against the insurance company with which the vehicle is insured irrespective of whether someone is to blame for the injury. The insurer's liability can be reduced or may lapse pursuant to section 7 subsection 1 and, in 1995, the relevant exception in section 7 subsection 3 (b) also applied.

(96) The personal liability of an intoxicated driver is an ordinary liability in negligence. If the injured party has contributed to the injury, the compensation can, as a general rule, be reduced or may lapse at the discretion of the court pursuant to section 5-1 of the Damages Act of 13 June 1969. A person who allowed herself to be driven in a car by a driver who she knew was intoxicated might therefore have a claim for damages against the driver notwithstanding that section 7 subsection 3 (b) excused the insurance company of liability. Thus, in 1995, not all personal injuries were covered by statutory compulsory insurance – there was a "gap" in the insurance coverage.

(97) Error no. 2 relates to this gap. In Finanger I, the Court records that the driver of the car was liable to A pursuant to general principles of the law of damages, with a

possible reduction on the grounds of contributory negligence pursuant to section 5-1 of the Damages Act. The first-voting judge held that incompatibility with the Directives could also be justified on the grounds of the coexisting personal liability.

(98) In my opinion, it is natural to interpret Article 3 of Council Directive 72/166/EEC so that there was a condition already in this first Directive that if the national law provided for liability, then the liability towards passengers must be covered by insurance, see e.g. Bernáldez paragraph 18. In any event, the third Directive states in plain text that liability for personal injury to all passengers shall be covered by insurance, subject only to one exception related to passengers in stolen vehicles.

(99) The State has submitted that the problem was caused not by the interpretation of the Directives but by their application with regard to Norwegian legislation. The State has also submitted that since the Directives do not require a coexisting personal liability whatsoever, the Norwegian system must be defensible since it in any event grants the injured party better protection than what is required.

(100) I cannot see that the wording of the Directives is unclear as regards the issue in the present case, and I find the State's arguments difficult to follow. The wording refers to "insurance" to "cover liability for personal injuries to all passengers". The objective was a compulsory system of insurance to cover liability. The preamble to the third Directive emphasises that, "in certain Member States", there are gaps in the compulsory system of insurance, and the Directive aims "to protect this particularly vulnerable category of potential victims". The question that should have been raised was therefore whether there was such a gap in Norwegian law. I add that the first Directive defines an "injured party" as "any person entitled to compensation in respect of any loss or injury caused by vehicles".

(101) Based on this, it does not appear particularly logical to me that the State could limit itself to considering whether its obligations under the Directives were fulfilled with regard to the strict liability owed by insurance companies when in Norwegian law the driver of the vehicle obviously has a personal liability towards his or her passengers. The driver's personal liability is wider than the liability owed by insurance companies and, in my opinion, one cannot rule out the

possibility that personal liability can have practical importance for a passenger in drink-driving cases, depending on the financial circumstances of the driver.

(102) The fact that the Norwegian insurance system for personal injury is so extensive that the personal liability of the driver is rarely of practical importance may explain why error no. 2 was made, but it cannot exempt the State from liability.

(103) The Norwegian insurance system satisfies some areas covered by the Directives, but this cannot absolve the State from liability in areas where the Directives have not been transposed. The error must be considered separately with regard to each relevant element of liability, see case C-140/97 Rechberger. Nor is it relevant that the driver's personal liability could have been abolished without violating the Directives all the while this was not done, see case C-166 Viegas paragraph 21.

(104) My conclusion it that the State is liable in damages to A also on account of error no. 2. There is no ambiguity in the Directives that can absolve the State of liability. The same applies with regard to the fifth Directive. It is true that error no. 2 was not given particular attention until the appeal proceedings before the Supreme Court sitting in plenary in Finanger I. The EFTA Court did not deal with the question in its Advisory Opinion, nor is the issue covered directly in Candolin, which concerned a similar statutory regulation to that in Norway. This may be due to the way the questions to the EFTA Court were formulated. In the Finanger case, the question to the EFTA Court related to section 7 subsection 3 (b). Bearing in mind the Court's view on the Directives, there was no occasion to raise the issue of the relationship between insurance and personal liability.

(105) Although it is not necessary for the result in the present case for me to consider A's alternative submission that the State is liable in damages on the grounds of unlawful administrative action in national Norwegian law, I find that I ought to comment upon it. In my opinion, the submission must be dismissed. The Supreme Court sitting in plenary in Finanger I found that section 7 subsection 3 (b) of the Motor Vehicle Liability Act applied between the parties to the case, and A cannot therefore submit that there is a breach of a substantive internal statutory rule of law. A's submission is that the State has not complied with its obligations pursuant to the EEA Agreement to implement the Directives correctly. This obligation is laid down in section 1 of the EEA Act. I cannot see, however, that section 1 of the

EEA Act can lead to almost strict liability for the State in such cases if there is a wrongful or erroneous transposition into Norwegian law. The liability that arises out of the EEA Agreement is transposed into Norwegian law by section 1 of the EEA Act. The Act does not establish any additional liability.

(106) Nor do I find that there is authority for such liability in general unwritten principles of the law of damages. As already mentioned, the State has assumed a liability pursuant to the EEA Agreement and the EEA Act. This liability has been given real substance. I find it reasonable that a precondition for the State having assumed liability in EEA law is that this liability shall be exhaustive in the area of law in question.

(107) The judgement of the District Court shall be affirmed.

(108) The appeal has been successful. A has claimed legal costs for the proceedings before all courts and the claim is allowed, see section 180 cf. section 172 subsection 1 of the Civil Procedure Act. Affirmation of the judgement of the District Court includes the order for costs. A has claimed NOK 383 517 for the proceedings before the Court of Appeal, including disbursements of NOK 9 288 and VAT of NOK 74 229. Compensation interest comes in addition. A has claimed NOK 711 525 for the proceedings before the Supreme Court, including disbursements of NOK 74 797 and VAT of NOK 136 728. The total bill of costs for the proceedings before the Court of Appeal and the Supreme Court amounts to NOK 1 100 000.

(109) I vote for the following judgement:

1. The judgement of the District Court shall be affirmed.

2. The State, represented by the Ministry of Justice, shall, within 2 – two – weeks from the date of service of this judgement, pay to A her legal costs for the proceedings before the Court of Appeal and the Supreme Court totalling 1 100 000 – one million one hundred thousand – kroner, together with ordinary default interest calculated pursuant to section 3 subsection 1 first sentence of the Act relating to interest on overdue payments etc from the due date until payment is made.

(110) Mr Justice **Tjomsland**: I have arrived at the same conclusion as the majority of the Court of Appeal, and find that the claim for compensation against the State must be dismissed.

(111) I agree with the first-voting justice that the State can, subject to certain conditions, be liable in damages in EEA law for the failure to transpose or the defective transposition of EU directives, and that the substantive conditions for such liability are the same in EEA law and EU law. To a large extent, I also agree with the first-voting justice's description of the conditions for such liability. However, I attach slightly less weight than her to whether the Member States can be said to have had a margin of discretion to choose how the directive in question shall be transposed into national law.

(112) I find it appropriate to emphasise that the condition that the breach must be "sufficiently serious" – according to my understanding of the case law of the Court of Justice – implies that the breach must always be "manifest and grave" in order for liability for failure to transpose or defective transposition of a directive to be imposed. In formulating the condition in this way, the Court of Justice has fixed a high threshold for civil liability. Another issue altogether is that the threshold will normally be crossed if there is a breach of a clearly formulated directive, or a directive that has become clear and precise as a consequence of the case law of the Court of Justice. Thus, if a directive indisputably grants citizens clear rights, and a Member State has not ensured the necessary transposition, there will be a sufficiently serious breach which must also be characterised as a manifest and grave violation, see the judgement of the Court of Justice dated 18 January 2001 in Stockholm Lindöpark AB against Sweden at paragraph 40 with further references. I also refer to the Advocate General's opinion in case C-46/93 Brasserie du Pêcheur, to which the first-voting justice has referred, at paragraph 84:

> "In the final analysis, I consider that, for our purposes, there can be considered to have been a manifest and serious breach where:
>
> (a) obligations whose content is clear and precise in every respect have not been complied with;

(b) the Court's case-law has provided sufficient clarification, either by an interpretation given in a preliminary ruling or by means of a judgment pursuant to Article 169, of doubtful legal situations which are identical or, in any event, similar to that at issue;

(c) the national authorities' interpretation of the relevant Community provisions in their legislative activity (or inactivity) is manifestly wrong."

(113) The case law of the Court of Justice has differentiated between cases of failure to transpose EU obligations and deficient transposition of such obligations. Deficient transposition covers both the situation where legal rules are laid down in connection with transposition of the directive that violate EU law, and the situation where the Member State wrongfully finds it unnecessary to amend the legislation in force. The latter situation arose in the present case. As the first-voting justice has described, the provisions of the Motor Vehicle Liability Act were reviewed in light of the three Motor Vehicle Insurance Directives in connection with Norway's accession to the EEA Agreement. The review resulted in the amendment of some of the provisions of the Motor Vehicle Liability Act, but not the provision with which the present case is concerned.

(114) The question of liability on the grounds of wrongful transposition caused by mistake of law came before the Court of Justice for the first time in case C-392/93 British Telecom. The case concerned transposition into national law of Directive 90/531 which, amongst other things, laid down conditions for procurement procedures in the telecommunications sector. The Directive did not cover all telecommunications services, and the UK parliament laid down in legislation which companies were to be covered. British Telecom, which was one of the companies named in the legislation, claimed that the Directive required the authorities to transpose the criteria laid down in the Directive for the companies that were to be covered, but that the companies should not be named in the legislation. The Court of Justice held that the UK government had erred in its interpretation of the Directive on this point.

(115) As I see it, the issue was largely the same as in the present case. The three Motor Vehicle Insurance Directives are so-called minimum directives, and define the minimum insurance protection for the victims of road traffic accidents. The

Member States have quite different motor vehicle liability systems, and the Directives are not meant to impede continued diversity in this field. However, like in the British Telecom case, the Directives lay down limits for the legislative freedom of the Member States, and the question that the Supreme Court considered in Finanger I was whether these limits were violated when section 7 subsection 3 (c) of the Motor Vehicle Liability Act was not abolished in connection with Norway's accession to the EEA Agreement.

(116) The judgement in the British Telecom case contains remarks of general relevance to the basis of liability, more particularly to the threshold for liability in the situation in question. The Court of Justice held that the directive was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which were not entirely devoid of substance. In my view, the judgement is also relevant because it provides an indication of what is required for an interpretation to be deemed to be doubtful. If one reads paragraphs 24 to 29 of the judgement, which concern the interpretation of the directive, the Court of Justice does not appear to have meant that the wording and objectives gave room for doubt. It has been submitted that the requirements for liability imposed by the Court of Justice in a number of subsequent cases have been less strict than in the British Telecom case. However, in these cases, the Court of Justice has not found the interpretation of the directives to be doubtful. The fact that the Court of Justice has stated in a number of cases that the mere infringement of Community law may, and I emphasise *may*, be sufficient to establish the existence of a sufficiently serious breach does not, in my view, imply that a lower threshold has been applied in these cases.

(117) The first-voting justice has placed particular emphasis on the distinction between cases where Member States have a margin of discretion as to how the directive in question shall be transposed into national law, and cases where transposition involves the application of rules. The decisions to which the first-voting justice has referred show that this distinction can in the circumstances be an important factor in the overall assessment that has to be made in order to determine whether the Member State in question is liable in damages. Notwithstanding, it is appropriate to emphasise that there is subtle transition between the exercise of discretion and the application of rules, as the British Telecom case shows. The most important

issue in this connection, however, is that the same threshold for liability applies both to the transposition of an unclear and imprecise provision of a directive – with which the State is obliged to comply, and to transposition of a directive pursuant to which the State is granted a power of political/economic discretion. In my opinion, this is apparent from paragraphs 55 and 56 of Brasserie du Pêcheur, which read as follows:

> "As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."

(118) In his opinion on the case, the Advocate General wrote with regard to this situation as follows:

> "In contrast, where the Member States have a broad margin of discretion and/or the relevant law is doubtful and has not yet been considered by the Court, even in regard to similar facts, it is impossible for the approach to be different. Simply on an abstract level, it must in fact be considered that in such cases it will be very difficult to find that the limits set to the States' action have been manifestly and gravely disregarded, all the less where this is equated, as in the Article 215 case-law, with *virtually arbitrary* conduct."

(119) I now move on to look more closely at the two factors which, according to the Supreme Court in Finanger I, explained why it was in breach of the EC Motor Vehicle Insurance Directives to uphold the provision in section 7 subsection 3 (b) of the Motor Vehicle Liability Act.

(120) The question is whether the relevant parts of the Directives were "imprecise", and whether the interpretation that Norway relied on when transposing the Directives was manifestly contrary to the wording or objectives of the Directives. Since the sources of law had not changed since Norway's accession to the EEA Agreement on 1 January 1994, it seems practical to assess the situation at that point in time, as indeed the first-voting justice has done. It should, however, be borne in mind that many legal issues that appear rather obvious after they have followed the paths chosen by the Supreme Court or an international court would previously have appeared difficult and doubtful.

(121) I will first deal with the situation that, in connection with Norway's accession to the EEA Agreement, the legal advisor at the Ministry of Justice considered section 7 subsection 3 (c) to be a rule relating to the victim's contribution to the damage rather than an exemption from insurance. The first-voting justice has described the internal considerations that took place within the Ministry of Justice at the time. It appears that after the provision was initially considered to be an unlawful exemption from insurance, the Ministry subsequently found – after a renewed and independent assessment – that the provision was a rule on contribution. Further, the correspondence between the Norwegian Ministry of Transport and the Danish Ministry of Justice was not a decisive factor for the Norwegian Ministry of Justice in its decision. I cite the comments of Legal Adviser Berg, where he explains his view to which the Ministry gave its support:

> "Our opinion thus far has been based on a view that section 7 subsection 3 (c) is such a rule. However, I have come to the conclusion that we have attached too little weight to the meaning of subsection 3 (c) second sentence, which was added by a statutory amendment of 21.6.85.
>
> This provision contains a requirement of causation between the intoxication and the damage. Further, it is a condition for loss of compensation that the passenger knew or must have known that the driver was intoxicated. Thus, it must be possible to say that section 7 subsection 3 (c) is no more than a rule on contribution to damage, although it is certainly a strict rule – see separate memo on this issue from MV.

> There can be no doubt that the EC rules do not prohibit rules on contribution to damage. Contribution is not mentioned in the Directives, but that fact can obviously not be interpreted as a prohibition against such rules. Another way of putting it, like in the letter from the Danish Ministry of Justice dated 27.11.91, is that the Directives do not aim to harmonise the rules on civil liability.
>
> This letter was written after the Ministry of Transport, which was not very happy about abolishing subsection 3 (c), asked for an opinion from the Danish Ministry of Justice. Neither the letter nor a subsequent conversation that MV has had with the executive officer at the Danish Ministry give reason to believe that they had studied section 7 subsection 3 (c) thoroughly. But the letter corresponds with the view that I have described above: that the Directive only prohibits general exemptions from insurance/liability and not rules on contribution to damage (notwithstanding that they are strict)."

(122) The Ministry followed up this view in Proposition to the Odelsting no. 72 (1991-1992), where the provision in the former section 7 subsection 3 was considered in light of the Directives. The Ministry found that the provision in the former section 7 subsection 3 (b), which stated that an injured party had no right to compensation when the vehicle was used in connection with a criminal offence, had to be abolished. The Ministry found that the provision in subsection 3 (c) – the current subsection 3 (b) – was a rule that required causation between the damage and the driver's intoxication, and that it was also a condition for loss of compensation that the injured party knew or must have known that the driver was intoxicated. Thereafter, the Ministry wrote:

> "Thus, the rule in subsection 3 (c) is no more than a rule on contribution to damage, although it is indeed stricter than the general contribution rules in subsection 1. On this basis, the Ministry is of the view that the EEA rules do not prevent the rule being upheld, see the draft of subsection 3 (b)."

(123) In the judgement in Finanger I, the Supreme Court discussed in detail the relationship between exemptions from insurance and rules on the victim's contribution to damage, see part II paragraph 5 of the first-voting justice's speech, where it is stated as follows:

> "The ordinary rules on the victim's contribution to damage form part of the "system of civil liability" which is regulated by national law, and the Directives do not require these rules to be harmonised. In Proposition to the Odelsting no. 72 (1991-1992) at page 77, the Ministry states that the rule in section 7 subsection 3 (b) – formerly subsection 3 (c) – of the Motor Vehicle Liability Act, "is no more than a rule on contribution to damage, although it is indeed stricter than the general contribution rules in subsection 1". This view can be justified on the grounds that the provision requires causation between the driver's intoxication and the damage, and that the victim knew or must have known that that driver was intoxicated. In the consideration of whether there are "special grounds" for awarding compensation, an important feature will be whether the victim can be reproached for having driven with an intoxicated driver. In my opinion, however, the provision is formulated in such a way that it is equally reasonable to view it as an exemption from motor insurance. In the judgement reported in Rt-1997-149, the majority of the Supreme Court held – in relation to a different problem – that it was not unreasonable to interpret the current provision in section 7 subsection 3 (b) as a "limitation in the area of risk covered by the insurance".

(124) The first voting justice added that the Advisory Opinion of the EFTA Court must be understood to mean that the rule in section 7 subsection 3 (b) of the Motor Vehicle Liability Act was not a rule on contribution which is regulated by national law, but an exemption from insurance in breach of the Directives. The first-voting justice could not see that there was reason to depart from the EFTA Court's Advisory Opinion on this point.

(125) I mention that the question for the legislator in connection with Norway's accession to the EEA Agreement was not which exceptions the Motor Vehicle Insurance Directives allowed for, but how to draw the distinction between unlawful exemptions from insurance and lawful rules on the victim's contribution to the damage. In view of the way in which this question is discussed by the Supreme Court in Finanger I, where it is expressly stated that it is "equally reasonable" to view the rule as an exemption from insurance as a rule of tort on contribution to damage, it is difficult to submit that the legislator's interpretation was manifestly wrong. It is alien to me to assert today that the question was more

obvious at the time when the Directives were transposed into Norwegian law than the Supreme Court considered it to be in Finanger I. The features that are mentioned in the preparatory works in support of the view that the rule was a strict rule on contribution are, in my view, clearly relevant. – I add in this connection that the submission that the legislator has misinterpreted the former provision in section 7 subsection 3 (c), is unfounded. To my knowledge, there has never been any doubt about how this provision is to be understood. The position was that the legislator meant that, in relation to the Motor Vehicle Insurance Directives, the provision must be viewed as a rule on contribution to damage. The Supreme Court – having submitted the question to the EFTA Court – did not agree.

(126) As explained in the Proposition to the Odelsting, the former provision in section 7 subsection 3 (c) was of a different nature to the former provision in section 7 subsection 3 (b), which concerned persons who drove or allowed themselves to be driven in a vehicle that "was being used in connection with a punishable act". Whilst the latter provision, which does not require causation between the injury and the fact that the vehicle was being used in connection with a punishable act, was quite clearly an exemption from insurance, the provision in the former section 7 subsection 3 (c) had several features in common with a traditional rule on contribution. – The judgement reported in Rt-1997-149, to which the Supreme Court refers and where a majority of three justices held that it was "not unreasonable" to understand the provision as a "limitation in the area of risk covered by the insurance", was not available at the time and concerned a different problem. The judgement was pronounced with dissenting votes and I mention in that connection that I, in my dissenting opinion, characterised the provision as "a distinct and strict rule on contribution".

(127) It is relevant to the issue of liability that there was no judgement of the Court of Justice at the relevant time which shed light on the interpretation of the relevant parts of the Directives. It is also relevant that several other Member States relied on the same interpretation as the Norwegian legislator did. It is particularly noteworthy that – following the Advisory Opinion of the EFTA Court in the Finanger case – the Court of Justice dealt with this issue in relation to the comparable provisions in Finland in a judgement that was pronounced as recently as 30 June 2005, C-537/03 Candolin. In Candolin, several Member States

submitted that the former legal provision in Finland, which was abolished in 2003, was not incompatible with the Motor Vehicle Insurance Directives.

(128) I add that an express prohibition against this kind of provision was incorporated into the fifth Motor Vehicle Insurance Directive as recently as earlier this year. The fifth Directive aims, amongst other things, to "fill gaps and clarify certain provisions of the Directives, thereby ensuring increased convergence as regards their interpretation and application by the Member States." The Commission recorded that some interpretations have maintained that passengers who knew or should have known that the driver of the vehicle was under the influence of alcohol or other intoxicating agent, "might be excluded from cover". The Commission added that "such an interpretation has even been included in some Member States' national legislation." The Commission rejected this interpretation and concluded: "It is therefore important to clarify this point of the Directives along the lines of the doctrine established by the Court of Justice." I find it difficult to interpret this in any other way than a reference to the judgements of the Court of Justice that have been pronounced after Norway's accession to the EEA Agreement. The first case concerning the Motor Vehicle Insurance Directives was case C-129/94 Bernaldez, which was pronounced in 1996. – Both the Candolin case and the amendments to the Fifth Motor Vehicle Insurance Directives are, in my view, arguments that support the view that the interpretation relied upon by the Norwegian legislator in connection with Norway's accession to the EEA Agreement could not have been manifestly wrong.

(129) It has been submitted that the Norwegian legislator must at least have been aware of the possibility that the provision in section 7 subsection 3 (b) of the Motor Vehicle Liability Act could have been problematic in relation to the EEA rules on motor vehicle liability and that it was therefore more in line with Norway's EEA obligations to abolish the provision. In my opinion, the imposition of liability on this basis would be too tight a restraint on legislative freedom. It is apparent that the legislator wanted the rule in section 7 subsection 3 (b), not least in order to promote road safety. Having concluded that, in my opinion, it was reasonable to consider the rule to be a rule on contribution to damage that did not violate the Motor Vehicle Insurance Directives, the legislator cannot, in my opinion, be expected to have abolished the rule in order to avoid the risk of violation.

(130) I turn now to the issue that the provision in section 7 subsection 3 (b) meant that the driver's personal liability was not covered by insurance. The majority in Finanger I refer to this matter in brief in an addendum to Part II paragraph 6, which contains the conclusion. The majority states:

> "On the basis of the parties' legal arguments, I add that the driver of the vehicle has a liability towards A according to general principles of compensation law, possibly with a reduction in compensation for contributory negligence in accordance with section 5-1 of the Damages Act. The EFTA Court's finding of incompatibility can also be justified on the grounds that such a personal liability exists."

(131) This matter is not mentioned in the Proposition to the Odelsting or in the internal memos that have been submitted in the case. The matter for discussion in these documents was whether the system of liability in the Motor Vehicle Liability Act satisfied the requirements of the Directives. There is no reason to believe that the Ministry was unaware or had forgotten that the driver over a motor vehicle has personal liability towards his or her passengers in addition to the insured third-party liability pursuant to the Motor Vehicle Liability Act. The legislator has obviously assumed that the insurance cover in the Motor Vehicle Liability Act was sufficient to comply with the Directives.

(132) In my opinion, it is particularly relevant that this question was never raised in the period of time between Norway's accession to the EEA Agreement and the Supreme Court's judgement in Finanger I. It was not raised in legal theory. It is noteworthy that Nils Nygaard, in his comprehensive article "Motor Vehicle Liability, Drink-Driving and the EEA, Rt-1997-149" (*Bilansvar, promillekjøring og EØS, Rt-1997-149*), published in the commemorative volume to Per Stavang (*Festskrift til Per Stavang*) only deals with the question whether the system of third-party motor insurance liability satisfies the terms of the Directives. Nor was the question raised in the request for an advisory opinion to the EFTA Court, and the Advisory Opinion does not cover the question – notwithstanding that A submitted the relevant facts. It is also relevant that the question does not appear to have been raised by other countries where the legal situation is similar on this point to the situation in Norway. This applies, for instance, to Finland, where

drivers are also personally liable towards their passengers; see the description of the facts in Candolin at paragraph 12. I add that as recently as in case C-166/02 Viegas, to which the first-voting justice refers, both the German and Portuguese Governments contended that in Member States with more than one system of civil liability for injury caused by a motor vehicle, it was sufficient if insurance covered only one of them.

(133) The factors that I have referred to here show, in my opinion, that this question could not have been as obvious as the first-voting justice states at the time of Norway's accession to the EEA Agreement. I will state my reasons in more detail:

(134) The liability that has to be covered by insurance pursuant to Article 3(1) of the first Directive is "civil liability in respect of the use of vehicles". The liability that has to be covered pursuant to the third Directive is liability for "personal injuries … arising out of the use of a vehicle". As already mentioned, the European countries have adopted quite different systems of insurance and civil liability in this area. The Norwegian Motor Vehicle Liability Act applies to "injury which motor vehicles cause to person or property", and its scope is therefore in principle similar to the scope of the Directive. In both cases, the cause of the injury is identified as a motor vehicle and not a person. This is also underlined by the liability that insurers have for non-insured vehicles; see section 16 of the Act.

(135) The EU Directives do not require the driver or any other person to have a personal liability in addition to the insured liability that satisfies the Directives. It is up to the individual Member States to decide whether they want such a system of liability. There is no special system of compensation in Norway for injuries caused by motor vehicles which supplements liability for third-party motor insurance pursuant to chapter 2 of the Motor Vehicle Liability Act. The system of third-party motor insurance establishes a direct cause of action for the victim against the insurer. The personal liability referred to in section 11 for "the owner or person in charge of a motor vehicle, or any person who accompanies the vehicle" does not have its authority in the Motor Vehicle Liability Act but in "the ordinary rules of compensation". Thus, the personal liability we are talking about here is not actually motor vehicle liability but the application of general principles of compensation law – primarily based on negligence – which applies to all kinds of

corporate and individual activities. Also others – for instance manufacturers and car repair shops – can conceivably be liable in damages on the basis of general principles of compensation law for injury caused by a motor vehicle. Another issue altogether is that liability beyond that covered by third-party motor insurance plays an insignificant role in practice.

(136) On this basis, there are in my view relevant arguments of substantial strength in support of the approach adopted by the Norwegian legislator, namely to concentrate attention on the special system of liability laid down in the Motor Vehicle Liability Act for third-party motor insurance. This approach was questioned for the first time during the Supreme Court's hearing of Finanger I. One might ask whether the view in Finanger I would have been the same if the liability that was wider than the third party insurance was the car-owner's or the passenger's liability, rather than the liability of the intoxicated driver. Norway was not alone in its approach. It is clear from the account of the case law that both the first-voting justice and I have given that several other countries must have had the same approach to this question. – I have concluded that this situation does not justify liability for the State either.

(137) It remains for me to consider A's submission that the State is liable in damages pursuant to national law. I agree with the first-voting justice that this submission cannot succeed, and I also agree with the reasons she has given for this finding.

(138) Mr Justice **Aasland**: I agree on the whole with the reasons and the result arrived at by the second-voting justice, Justice Tjomsland.

(139) Mr Justice **Rieber-Mohn**: Likewise.

(140) Ms Justice **Stabel**: Likewise.

(141) Mr Justice **Stang Lund**: I agree on the whole with the reasons and the result arrived at by the first-voting justice, Ms Justice Gussgard.

(142) Mr Justice **Oftedal Broch**: Likewise.

(143) Mr Justice **Flock**: Likewise.

(144) Mr Justice **Matningsdal**: Likewise.

(145) Mr Justice **Skoghøy**: Likewise.

(146) Mr Justice **Utgård**: Likewise.

(147) Mr Justice **Støle**: Likewise.

(148) Chief Justice **Schei**: Likewise.

(149) After voting, the Supreme Court pronounced the following

JUDGEMENT:

1. *The judgement of the District Court shall be affirmed.*

2. *The State, represented by the Ministry of Justice, shall, within 2 – two – weeks from the date of service of this judgement, pay to A her legal costs for the proceedings before the Court of Appeal and the Supreme Court totalling 1 100 000 – one million one hundred thousand – kroner, together with ordinary default interest calculated pursuant to section 3 subsection 1 first sentence of the Act relating to interest on overdue payments etc from the due date until payment is made.*