



SUPREME COURT OF NORWAY

On 15 February 2019, the Supreme Court composed of the justices Matningsdal, Indreberg, Noer, Falch and Høgetveit Berg gave judgment in

HR-2019-318-A, (case no. 18-128574SIV-HRET), civil case, appeal against judgment:

A

(Counsel Tom Sørum)

v.

Gjensidige Forsikring ASA

(Counsel Merete Anita Utgård)

- (1) Justice **Noer**: The case concerns the question whether an event company is liable for injuries a woman sustained while taking part in a tour with one of the company's RIB boats.
- (2) A's friends arranged a bachelorette party for her on 6 May 2015. As a surprise for the bride to be, they had booked a RIB tour with the company FjordEvents AS, with B as skipper. The tour took place on the fjord, from Stavanger, in an eight-meter long RIB (rigid inflatable boat) for 12 people.
- (3) A was taken by a friend to the fish market in Stavanger where the other participants were waiting. B gave the group a briefing on the tour and on how to act. He urged those with back pains or other physical afflictions to notify him, so that they could sit at the back of the boat where the impact is smaller. Being the main person, A was encouraged to take a seat at the front, which she did. Wearing rescue suits, the group left shore in relatively calm waters.
- (4) After about five-ten minutes at a modest pace, B speeded up. Shortly after, they were approaching the ferry *Tauferga*. B slowed down again, and steered the boat behind the ferry and into the stern waves it produced. At a good distance from the ferry, he accelerated and speeded into the waves, which are stated to have been about a meter high. According to information presented, the RIB could reach a speed of up to 60 knots, but during this ride, it maintained a speed below 30 knots – around 55 kilometres per hour.

- (5) A has explained that she felt as if they took off after hitting the first wave and that the impact was very powerful. She felt a fracture in her back, and after they had passed another two waves, she collapsed. The tour was stopped, and A was hospitalised. It was discovered that she had sustained a compression fracture, and she was diagnosed with S22.0 fracture of thoracic spine. After three days in hospital, she was discharged to her home and recommended to continue with normal activities, while avoiding heavy lifts during the first six to eight weeks. She was on sick leave for three weeks. In posterity, she has had various difficulties and an estimated medical disability rating between 14 and 36 percent. She has now been granted a full disability pension.
- (6) FjordEvents was insured in Gjensidige Forsikring ASA. A claimed compensation from the insurance company, but Gjensidige refused. Then A brought an action against Gjensidige by a writ of summons to Stavanger District Court on 19 May 2016.
- (7) On 23 June 2017 Stavanger District Court found in favour of A:
- "1. Gjensidige Forsikring ASA is liable under the general insurance agreement.
 2. Gjensidige Forsikring ASA will pay costs to A of NOK 130 000 – one hundred and thirty thousand.
 3. The date of performance for item 2 is 2 – two – weeks of the service of the judgment."
- (8) Gjensidige appealed to Gulating Court of Appeal that, with a 2-1 vote, found in favour of the company in the claim for compensation. The judgment, given on 16 May 2018, reads:
- "1. Judgment is given for Gjensidige Forsikring ASA.
 2. Costs in the district court are not awarded.
 3. Costs in the court of appeal are not awarded."
- (9) A has appealed to the Supreme Court against the findings of fact and the application of the law. The Supreme Court's Appeals Selection Committee decided on 14 September 2018 to allow the appeal against the application of the law. The appeal against the findings of fact was not referred.
- (10) The appellant, A, contends:
- (11) The legal basis for the claim is section 418 of the Maritime Code. According to the preparatory works, it must be determined whether due care has been taken within the meaning of tort law. The claim must be based on the level of due care that one ought to expect in the relevant area of life.
- (12) The court of appeal has not placed sufficient weight on the fact that it concerns a commercial activity where participation is based on voluntariness in light of the information provided by the event company.
- (13) Through the information provided, FjordEvents had created a legitimate expectation that the tour would not involve any risk of personal injuries. The information could be found on the company's website, and it was given through contact prior to the event and on site.
- (14) In commercial activities where the participants themselves have little or no control over the risk exposure, stricter requirements of due care apply. The risk of injuries during a RIB ride

exceeds the risks of everyday life. The event company is thus obliged to react to and remove that risk, or provide special warnings. In this case, information should have been provided on the danger of speeding through stern waves, and rehearsals should have been carried out in the RIB to prepare the participants for the conditions. A, who knew nothing about the RIB tour beforehand, should have been offered individual guidance.

- (15) It cannot be expected that the passengers publicly share information about their health situation; such information may be sensitive.
- (16) The Regulations on the duty of disclosure are so vague that they give limited guidance with regard to the assessment of due care. Also, the provision that warnings must be given prior to extraordinary situations was not followed. Nor the requirement under section 405 of the Maritime Code to speed in such a way that the passengers' safety was met in the case at hand when – completely unnecessary and without a warning – the skipper thrust into stern waves at a high speed.
- (17) A has neither accepted the risk nor contributed to her injury, and there is no causality between the conduct, if any, for which A can be criticised and the injuries incurred.
- (18) A has submitted this prayer for relief:

- "1. **Items 1 and 2 of the district court's judgment are to be upheld.**
- 2. **Gjensidige Forsikring ASA is to pay A's costs in the court of appeal and in the Supreme Court.**

- (19) The respondent, *Gjensidige Forsikring ASA*, contends:
- (20) The skipper B and FjordEvents have complied with all applicable regulations. The company had general routines that more than meet the requirements of such activities, and B briefed the participants in accordance with the RIB Regulations. B is an experienced skipper and acted professionally. There was nothing extraordinary, neither with the steering nor with the waves.
- (21) The event company's requirements of due care are strict, and the company must do its utmost to minimise the risk of accidents. However, the safety requirements must be considered in conjunction with the nature of the activity. One cannot expect to avoid waves or to be warned before the boat drives into rough sea. These are effects of the normal risk associated with the activity that the injured person must be deemed to have accepted. Moreover, warnings are impractical due to the noise from the boat and the sea, and the boat's movement.
- (22) A could not sustain the normal impact of such rides. However, since B had duly briefed the passengers, it was up to A to act in accordance with the instructions provided.
- (23) A must also be deemed to have contributed to her injuries by not notifying the skipper of her neck problems and reduced bone density. She could have done so without sharing sensitive health information. If she had, she would have been placed at back of the boat where the impact is much smaller than at the front. A is also to be blamed for not bending her knees when the boat hit the waves.
- (24) Gjensidige Forsikring ASA has submitted this prayer for relief:

- "1. The appeal is to be dismissed.
2. Gjensidige Forsikring ASA is to be awarded costs in the Supreme Court."

(25) *My view on the case*

(26) The question is whether FjordEvents is liable for negligence. The causality between the alleged negligence and the injury and the adequacy of the loss are also disputed. But that is not a part of the case at hand.

(27) A carrier transporting paying passengers by ship is liable for injuries sustained by the passengers under section 418, cf. section 401 of the Maritime Code. The provision itself does not contain a liability norm, but refers to the Athens Regulation (EC) No. 392/2009, implemented into Norwegian law by Act of 7 June 2013 No. 30. Article 1 of the Regulation establishes that liability for carriage of passengers is governed by the rules of the Athens Convention 1974, as amended in 2002 and included in Annex I. Article 3 (2) of the Convention sets out that the carrier is liable for personal injuries caused by the *fault or neglect of the carrier*. Exceptions apply for shipping incidents, where the company as a starting point is liable regardless of culpability. However, in our case we are not dealing with a shipping incident, see Article 3 (5) (a). The said Article 3 (2) reads:

"For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect shall lie with the claimant."

(28) The duty of care is further described in maritime legislation. Section 132 of the Maritime Code sets out that the navigation and management of the ship must accord with good seamanship, see also sections 14 and 19 subsection 1 (b) of the Ship Safety Act. Section 151 of the Maritime establishes the shipping company's (the "reder's") liability for fault or neglect of any person performing work in the service of the ship. Section 405 sets out that the carrier "shall ... safeguard the carriage of the passengers ... and otherwise take due care of the interests of the passengers".

(29) The preparatory works to the Act on the implementation of the Athens Convention into Norwegian law establishes that the condition for damages is still general negligence, in line with what was set out in section 418 of the former Maritime Code, cf. Proposition to the Storting (bill) 54 LS (2012-2013) chapter 4.3. This means that requirements of due care exist based on what the injured party may reasonably expect from the activity on the relevant area, see section 2-1 subsection 1 of the Compensatory Damages Act. Although the issue of liability before the Supreme Court thus is based on the provision of the Maritime Code, whereas the court of appeal decided the case based on section 2-1 of the Compensatory Damages Act, the assessment will mainly be the same.

(30) With legal basis in the Ship Safety Act, Regulations on the operation of vessels carrying 12 or fewer passengers etc. of 24 November 2009 have been adopted - also referred to as the *RIB Regulations*.

(31) Section 4 of the Regulations imposes the shipping company to make a "security management system". This must include a description of risks associated with the activity and plans and measures to reduce the risk.

- (32) Section 5 of the Regulations is headed "Safety briefing", and provides rules on the duty to inform the participant before the tour. The provision reads:
- "(1) **The shipping company must ensure that the passengers receive a briefing on safety immediately prior to departure. The briefing must be adjusted to the purpose of the tour and contain the following as a minimum:**
 - a) **Use of rescue tools.**
 - b) **Use of safety equipment.**
 - b) **How to react in cases of emergency.**
 - c) **Special situations that may occur during the tour.**
 - (2) **Pregnant persons, as well as persons with back, neck or pelvis problems or similar afflictions, must be informed in particular of the risks associated with vessels operating with speeds above 20 knots."**
- (33) Before being adopted, the Regulations were subject to several discussion rounds. The Norwegian Maritime Directorate suggested for safety considerations a speed limit of 30 knots for the boats, see letter from the Directorate of 16 January 2008. This was strongly criticised. Following a lengthy process, the idea of a speed limit was dropped in favour of rules on the provision of a safety briefing before departure, see section 5 from which I have already quoted.
- (34) Recently, the Maritime Directorate proposed new RIB Regulations, see consultation paper of 18 December 2018. The paper states that the current regulations "on most areas seem to function according to its purpose and maintain at the same time an acceptable level of safety for those on board". No speed limit is proposed for the RIBs, nor any amendments to the passenger briefing requirement.
- (35) The Regulations' requirements for safety systems and briefing of RIB tour participants must be seen in light of this being commercial adventure tourism with clear elements of risk. RIBs are light-built vessels with large motors that may operate at high speeds. The activity distinguishes itself from sports and more traditional outdoor life where the determination of acceptable risk must take into account the activity's social benefit, see the Supreme Court judgment in Rt-2008-184 *Skipping rope* paragraph 33. As opposed to in alpine slopes, where the risk is largely dependent on one's own actions, the risks involved in RIB tours is largely dependent on the conduct of the skipper.
- (36) At the same time, RIB tours are typically marketed as speedy adventures at sea. And this speed experience must, indeed, be assumed to be the motivation for booking such tours. A certain acceptance of the risk lies in the knowledge that the tour is different from a "normal cruise on the fjord". But this is of course not the same as acceptance of negligence.
- (37) In aggregate, these conditions call for a strict duty of care for commercial players within this industry, see the Supreme Court judgment in Rt-2000-1991 *Alpine slope I* on page 1994. It must be a requirement that the companies give thorough and clear instructions in advance, and that the steering takes place in a manner that does not create more risk of injury than what is necessary and acceptable, all things considered. Moreover, it must be taken into account that the activity is sought by people with varying physical and mental attributes, and with differing levels of skills and experience. This applies in particular when the company – like here – markets the tours as suited for bachelor and bachelorette parties and similar groups. It is required that the companies adjust the event to the participants and reviews the routines if injuries or accidents occur.

- (38) In the individual assessment of due care, it is also essential which information the participants have received in advance. The passenger's expectations and conduct will, of course, depend on what they learn before the tour.
- (39) I will now turn to the question whether FjordEvents can be held liable for fault or neglect. I mention that strict liability has not been asserted – irrespective of culpability. Damages can thus only be granted if the injuries are due to the fault or neglect of the company or its employees.
- (40) The assessment must start with an examination of whether the company and the skipper have complied with the regulations governing the activity. Here, I endorse Hagstrøm and Stenvik *Erstatningsrett* [Tort law] 1st edition, page 76, setting out the following:
- "One may generally say that norms of conduct, where such exist, will be the natural starting point for the culpability assessment. If the injuring party has acted contrary to a norm of conduct, he will often be regarded as having acted negligently. If on the other hand the injuring party has complied with applicable norms of conduct in the area, his will normally be regarded as having acted with due care."**
- (41) As mentioned, section 4 of the Regulations requires that the company has a security management system. FjordEvents has prepared an HES plan, which introductorily reads:
- "Several of the company's products have a potentially high risk exposure. This applies in particular to the maritime activities connected to RIB ...**
- The management has prepared a risk analysis for the company's risk-exposed products. The purpose is to uncover any elements of danger that may entail a risk, review possible consequences thereof and implement precautionary measures."**
- (42) The plan also contains a point-by-point description of the risks involved in RIB tours as well as guidelines on how the company's employees must act to minimise the risk of accidents. Included are instructions on the type of information the passengers must receive before the tour, guidelines for steering through stern waves produced by larger vessels and steering with abrupt movements and acceleration. The passengers may not use their phones onboard, as that will prevent them from holding on to the handles, and any one seated at the back for health reasons must never sit there alone. While not required under the RIB Regulations, the company has fixed a maximum speed of 30 knots when there are passengers onboard.
- (43) The internal guidelines clearly meet the Regulations' safety management requirements.
- (44) FjordEvents's general practice also seems to be in accordance with the RIB Regulations and the HES plan. The company received an unannounced visit by the Maritime Directorate in April 2013. No errors were disclosed, and it was concluded that the company has a well-functioning safety system. Likewise, the majority of the court of appeal described the company as "a serious and professional player within sea and fjord rafting with a large focus on safety".
- (45) I will now turn to B's conduct. B is an experienced RIB skipper. According to information provided, he has taken passengers on around 700-800 rides, during which stern waves have been hit without any injuries being sustained.

- (46) Since the Supreme Court has refused to hear the appeal against the findings of fact, this ruling must be based on the facts found proven by the majority of the court of appeal. The course of action is described as follows in the court of appeal's judgment:

"The majority concludes that B went through the safety routines before starting the ride with the participants. He complied with the routines, including the instructions in the applicable regulations for this kind of boats. He steered the boat in accordance with the company's own guidelines with a maximum speed of 30 knots. Furthermore, he steered the boat through stern waves of approximately 1 meter in accordance with the company's routines for that activity. It has not been substantiated that he was not in control when riding the waves. In accordance with HES instructions, he kept a good distance from the ferry before hitting them. B did not find that there was anything special with the ride and the riding of the waves. It was an ordinary ride. The majority finds it proven that nothing extraordinary or unexpected took place with regard to how the boat hit the waves."

- (47) The majority also concludes that it must have been clear to the participants that they would ride waves and that participation involved a certain risk. Before departure, B told the passengers to notify him of any back problems or other physical afflictions, so that they could be seated at the back. He also told the passengers to hold on to the handles with both hands in front of them, and stand up and lightly bend their knees whenever the boat hit the waves. The majority of the court of appeal assumes that A received the same information as the others.
- (48) A had had neck problems and her bone density was somewhat reduced. However, this was never communicated to B.
- (49) Although there is no mention in the RIB Regulations of adjusting the information and the trip to the participants' conditions, that must clearly be the practice. B was thus obliged to take individual considerations suited to the passengers. In the case at hand, it has some significance that A – the bride to be and main person – did not know beforehand that she was going on a RIB ride. Thus, it must be expected that B was confident that she was voluntarily taking part and understood what the tour involved.
- (50) In our case, there is no evidence that A received any particular information. But she told B that she did not like strong wind in her face. Thus, she expressed a certain reluctance, yet she chose to participate. Moreover, she followed the skipper's instruction to be seated at the front of the boat since she was the main person. A and the other women were in their early forties and seemed to be of good health, and B, as mentioned, was not familiar with A's physical afflictions.
- (51) I add that one of the other participants had given notice in advance that she had problems with her back. According to information provided, she was well looked after by B and placed at the back of the boat.
- (52) A contends that B, upon her inquiry, should have informed the participants of a former accident that took place during a RIB tour arranged by the company, which lead to an injury similar to that in the case at hand. The person concerned had not told the skipper about his back problems, but took a seat at the front all the same. No damages were subsequently claimed from FjordEvents. As far as I understand, there have been no other accidents connected to the company's activities. I can thus not see that the company had a duty to give information on this incident.

(53) A has also contended that B should have let the participants rehearse how to stand up when riding the waves, with both hands on the handles and with bent knees. It has been stressed that this is essential to prevent injuries. This view has been presented for the first time before Supreme Court. The court of appeal has thus not dealt with the manner in which the instructions were given. Since the Supreme Court is to base its ruling on the facts found proven by the court of appeal, I cannot include this in the assessment of liability. I add however that the instruction was not difficult – the point was that the passengers were to stand up with their knees bent each time the boat hit the waves.

(54) I will now turn to the RIB ride itself. The accident occurred, as mentioned, when B steered into waves of around one meter. The speed was high, but not exceeding 30 knots. The riding of stern waves as described here is reportedly a normal part of RIB tours. At the outset, the riding behind the ferry cannot be described as an unexpected and extraordinary risk, even when seen in light of the briefing the passengers had received in advance, see the Supreme Court judgment in Rt-2000-1991 *Alpine slope I*.

(55) A has however held that B should have warned the passengers before hitting the first wave, so that they could prepare for what was about to happen. The court of appeal assessed it as follows:

"The majority does not agree that it was negligent of FjordEvents/B not to give a special warning when they were about to hit the stern waves, and that the briefing given in advance on how to handle waves must be regarded as sufficient to maintain the participants' safety when participating in RIB tours. Giving warnings before hitting waves of one meter or more, will not in practice be feasible during a RIB tour with the concept under which the company operates. This is not a requirement the injured party could reasonably have made as a participant. Moreover, it would be difficult to give secure warnings during the ride because of noise from the motor and from the sea."

(56) I mainly endorse what the court of appeal writes. Admittedly, it would have been possible to slow down and signal that the boat was about to hit stern waves. And it is clearly sensible that the skipper ensures that the passengers gradually adjust to the speed and the waves. But it is a fact that B did reduce the speed before turning the boat and accelerating into the waves. Considering the purpose of the ride, and B's navigation, the situation ought to have been easy to foresee. The passengers sitting at the front of the RIB, among them A, were also those with the best view of the sea in front of them. B was seated in the middle of the boat, and as pointed out by the court of appeal, signalling to those at the front would have been hard due to the noise from the motor and the sea.

(57) Against this background, I cannot see that neither B nor FjordEvents has violated regulations applicable for this type of RIB tours. Nor have other acts been demonstrated beyond what the passengers could reasonably expect when choosing to come along. Here, like in other situations, people may be injured without it being possible to identify a specific negligent act causing it. And although the requirements of due care are strict, it is not so that any deviation from optimal conduct means that negligence giving rise to damages has been demonstrated.

(58) The appeal is not successful. According to the main rule in section 20-2 subsection 1 of the Dispute Act, A is to cover the counterparty's costs in the case. However, I have concluded that there are weighty reasons for making an exemption from this principle in accordance with section 20-2 subsection 3 (c). The case is highly significant for A's welfare, and Gjensidige has obtained clarification on issues of principle related to liability for this type of activities.

Also, A succeeded in the district court and lost, with dissenting votes, in the court of appeal. Hence, I will not alter the court of appeal's ruling on costs.

(59) I vote for this

J U D G M E N T :

1. The appeal is dismissed.
2. Costs in the Supreme Court are not awarded.

(60) Justice **Høgetveit Berg:** I agree with the justice delivering the leading opinion, Justice Høgetveit Berg, in all material respects and with his conclusion.

(61) Justice **Falch:** Likewise.

(62) Justice **Indreberg:** Likewise.

(63) Justice **Matningsdal:** Likewise.

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

J U D G M E N T :

1. The appeal is dismissed.
2. Costs in the Supreme Court are not awarded.