



SUPREME COURT OF NORWAY

J U D G M E N T

given on 4 May 2021 by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Aage Thor Falkanger
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Espen Bergh

HR-2021-955-A, case no. 20-160019SIV-HRET
Appeal against Gulating Court of Appeal's judgment 4 September 2020

A	(Counsel John Christian Elden)
v.	
B	(Counsel Marie Nesvik)

(1) Justice **Ringnes:**

Issues and background

- (2) This case questions which country's law is applicable for a claim for aggravated damages after a sexual assault on board a Bahamas-registered cruise ship in international waters.
- (3) The assault took place on board the cruise ship X during the night before 1 July 2016. The ship was then present in international waters in the Mediterranean.
- (4) A and the aggrieved person – B – met in one of the ship's bars/night clubs. When the bar closed around 3.30 a.m., they left together to deck 15, where they sat down in a lounge suite. Both were intoxicated, and B was highly intoxicated. While seated in the lounge suite, A committed sexual acts on B for a period of approximately 45 minutes. Because she was intoxicated and/or asleep, she was not conscious and incapable of resisting the acts.
- (5) On 23 July 2019, A was indicted for violation of section 292 cf. section 291 cf. section 5 of the Penal Code. The grounds for indictment read as follows:
- “The night before Wednesday 1 July 2016 between 3 a.m. and 5 a.m. on board the cruise ship ‘X’ in international waters, he inserted one or more fingers into B’s vagina. Then he inserted his penis into her vagina. B was incapable of resisting the acts because she was asleep and/or highly intoxicated.”
- (6) A is a Norwegian citizen, but has been domiciled in Thailand. He arrived in Norway on 16 July 2019, and was then charged and remanded in custody. The aggrieved person B is a citizen of the USA.
- (7) By Bergen District Court's judgment 7 October 2019, A was sentenced to three years of imprisonment. A deduction of 88 days was granted for time spent in custody on remand. In addition, he was ordered under section 3-5 cf. section 3-3 of the Damages Act to pay NOK 150 000 in aggravated damages to B. The choice of law with regard to the aggravated damages was not at issue.
- (8) Gulating Court of Appeal handed down a judgment on 4 September 2020, sentencing A to two years and six months of imprisonment, with a deduction of 97 days for time spent in custody on remand. One of the professional judges dissented and found that it had not been sufficiently proven that the assault involved intercourse.
- (9) During the closing arguments, the defence counsel questioned whether Norwegian law was the correct choice for the claim for aggravated damages. The Court of Appeal held that Norwegian law was applicable, and its majority set the damages at NOK 150 000. The dissenting professional judge found that intercourse had also not been sufficiently proven for the civil claim, and that the guiding norm of NOK 150 000 in aggravated damages was therefore not applicable. Item 2 of the judgment's conclusion reads:

“A will pay aggravated damages of NOK 150 000 to B within two weeks of service of this judgment.”

- (10) A has appealed the civil claim to the Supreme Court. The appeal challenges the application of law and the procedure. The Supreme Court's Appeals Selection Committee has granted leave to appeal limited to the application of law to the choice-of-law issue.
- (11) The hearing has been held by video conference in accordance with section 3 of Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

The parties' contentions

- (12) The appellant – *A* – contends:
- (13) The claim for aggravated damages must be governed by the law of the country where the damage, or the wrong, occurred. The place of wrong is the flag country – The Bahamas. It is not correct to apply the Irma Mignon formula, as the Court of Appeal has done. The “war crimes judgment” in Rt-2011-531 concerned a claim for aggravated damages for war crimes where the defendant had been prosecuted in Norway under the rule of Norwegian universal jurisdiction, see section 12 subsection 1 (4) (a) of the Penal Code 1902. This distinguishes it considerably from the case at hand.
- (14) In the alternative, both the Irma Mignon formula and Article 4 (3) of the EU Regulation Rome II must have the result that Bahamian law is applicable. This is not in conflict with *ordre public*, and section 3-5 of the Damages Act is not directly applicable on an international level.
- (15) A requests the Supreme Court to rule as follows:

“Item 2 of the conclusion of the Court of Appeal's judgment is set aside.”
- (16) The respondent – *B* – contends:
- (17) The Court of Appeal has applied the law correctly. The choice of law must be made in accordance with the Irma Mignon formula, which is the basic rule in Norwegian law. The case is most strongly connected with Norway. The same result will follow from Article 4 (3) of Rome II.
- (18) It is not a fixed rule that the law of the place of wrong applies to claims for aggravated damages after sexual assaults. The key source of law is the “war crimes judgment” in Rt-2011-531, where the choice of law is largely transferable to the case at hand.
- (19) In the alternative, section 3-5, cf. section 3-3, of the Damages Act is applicable in the capacity of an internationally directly applicable legal rule on protection of victims of sexual assault.
- (20) B requests the Supreme Court to rule as follows:

“The appeal is dismissed.”

My opinion

Legal starting points

- (21) In the Supreme Court ruling HR-2019-1929-A (Propiedades) paragraphs 24–26, the legal starting points for the choice of law under Norwegian international private law are described as follows:
- “(24) The choice of law is traditionally based on the so-called Irma Mignon judgment included in Rt-1923-II-58, where the following is stated on page 60:
- ‘When deciding which country’s rules to apply, one is ... mainly obliged to base the decision on general principles of law and the nature of the circumstances in question... For my part, however, I believe it is natural to start with the consideration that a circumstance should be judged on the basis of the law in the country with which it is most closely connected, or where it most naturally belong.’
- (25) In other words, the connection issue must be considered based on the closeness to “the circumstance” dealt with in the case.
- (26) This approximate choice-of-law rule has been maintained in subsequent case law, although the development suggests that the choice-of-law issue should be decided under firmer rules. In the Supreme Court judgment in HR-2016-1251-A paragraph 27, it is formulated as follows:
- ‘The starting point for the choice of law is – where the issue is not regulated by any law, custom or other firmer rules – to find the country with which the case, after an overall assessment, is most strongly connected (the Irma Mignon formula). If the choice-of-law issue is not governed by Norwegian law, there may be reason also to apply EU choice-of-law rules laid down in Rome I and II. I refer to Rt-2009-1537 paragraphs 32 and 34 and Rt-2011-531 paragraphs 29 and 46 on the Irma Mignon formula and the application of Rome I and II in Norwegian law...’.
- (22) These starting points are maintained in the Supreme Court ruling HR-2019-2420-A. Paragraph 24 reads:
- “The tendency in recent times has, however, shifted towards more fixed rules developed for various legal areas or groups of legal issues. The individual rule is often based on what in most cases gives a result that corresponds to the country with which the individual circumstance is most closely connected. In this context, emphasis is placed on the choice-of-law solutions in EU law, although Norway is not formally bound by them. The Irma Mignon formula’s area of application is thus reduced only to apply where it is not possible to establish a more fixed rule for the relevant type of legal issue. Here, I refer to the Supreme Court ruling HR-2017-1297-A (Bergen Bunkers) paragraphs 72–74 with further references.”
- (23) As mentioned, our case concerns a claim for aggravated damages for non-economic loss by a sexual assault on board a cruise ship in international waters. The ship is registered in The Bahamas and sails under the flag of this country. The wrongdoer – the appellant – contends that the claim must be governed by the law of the flag country, because the wrong occurred on board the ship. The injured party – the respondent – contends that the applicable law must

be determined in accordance with the *Irma Mignon* formula, and that the case is most strongly connected with Norway because the claim for aggravated damages is decided by Norwegian courts simultaneously with the criminal case, and because the wrongdoer is a Norwegian citizen.

- (24) Tort claims are normally governed by the law of the place where the wrong occurred – *lex loci delicti*, see Rt-2009-1537 (the bookshop judgment) paragraph 33 and Rt-2011-531 (the war crimes judgment) paragraph 29.
- (25) First, it should be noted that the place of wrong may be difficult to identify when the effect of the wrong occurred somewhere else, see paragraph 33 of the bookshop judgment. This could for instance be the case for pollution damage and product liability. In connection with violation of a person's integrity such as sexual assault, it must be assumed that the wrong occurs when the act is committed, although somatic and psychological effects may develop and last over time. I therefore find that, in our case, the place of effect coincides with the place of wrong. A similar conclusion was made in the war crimes judgment paragraph 45.
- (26) I will now turn to the choice of law, and start by assessing whether the basic rule of the law of the place of the wrong is a "fixed rule" for claims for aggravated damages during a criminal case, with the effect that the *Irma Mignon* formula, demanding an individual assessment, is not applicable.

The law of the place where the wrong occurred – lex loci delicti

- (27) I will start with the Supreme Court judgment in the war crimes case in Rt-2011-531. This case involved a claim for aggravated damages arising from criminal acts. The wrongdoer had been sentenced to eight years of imprisonment for 13 violations of section 223 of the Penal Code – deprivation of liberty. As a member of the paramilitary organisation HOS, he had detained and contributed to the confinement of 13 persons in the Dretelj camp in Bosnia-Herzegovina. The detainees, who were all Serbs, were subjected to brutal violence, sexual assault, in addition to humiliation, fear and intimidation, see paragraph 2 of the judgment.
- (28) After thoroughly discussing whether the law of the place of wrong is applicable, Justice Matheson states in paragraph 44 that "one should be reluctant to determine which law applies to claims for aggravated damages filed during a criminal case based on the rule generally applicable to tort claims". The Supreme Court concluded that applicable law for the claims for aggravated damages was to be determined in accordance with the *Irma Mignon* formula.
- (29) The claim for punishment in the war crimes case was pursued based on the Norwegian universal jurisdiction rule, which is currently found in section 5 subsection 4, cf. subsection 3, of the Penal Code. This distinguishes the war crimes case from the case at hand, where the Penal Code is applied in accordance with the special personal jurisdiction rule in section 5 subsection 1 (a), cf. (9). According to this provision, the Penal Code is applicable to sexual assault and other specific serious violations of someone's integrity committed outside Norwegian territory by a Norwegian citizen or person domiciled in Norway.
- (30) The key elements of the Supreme Court's reasoning in the war crimes judgment are, however, not limited to cases where the basis for prosecution in Norway is universal jurisdiction, but deal more generally with the choice of law for claims for aggravated damages filed during a

criminal case in a Norwegian court. In my view, the judgment has a significant transfer value to our case, which also concerns a claim arising from a serious violation of a person's integrity.

- (31) In paragraph 31, Justice Matheson accounts for the factors justifying application of the law of the place of the wrong in connection with tort claims. He stresses the consideration of fairness and the potential wrongdoers' need to foresee, to the extent possible, their potential liability.
- (32) The consideration of foreseeability suggests that potential wrongdoers should be able to adjust their actions to the rules of the country of residence. In this context, it should be noted that a choice-of-law rule based on *lex loci delicti* allows for adjusting insurances to the law of the country of residence. The considerations of fairness and predictability further suggest that the injured party's claim for damages should not depend on the wrongdoer's possible connection with the foreign country.
- (33) However, these considerations have little relevance or impact when the wrongdoer wilfully has abused and seriously injured another person, see paragraph 44:

“... The considerations of fairness and predictability, which otherwise justify application of the law of the country where the wrong occurred for such claims, do not, in my view, have the same relevance or impact where the wrongdoer wilfully has abused and seriously injured another person. Such a wrongdoer is unlikely to adjust his or her actions to applicable rules on damages in a liability situation. The consideration of predictability is not relevant in such cases. And should the risk of liability nonetheless be assessed by the wrongdoer prior to this type of actions, the assessment would not be eligible for protection when deciding the choice-of-law issue.”
- (34) In my opinion, the same considerations should be observed in cases involving aggravated damages for sexual assault.
- (35) Another consideration generally suggesting that the law of the place of wrong applies, is that of a country's sovereignty, that each country must be entitled to exercise authority in its own territory and abide by its own rules. The Supreme Court applied this principle in the “Augusta judgment” in Rt-1906-165, on page 166.
- (36) This sovereignty interest must, however, be balanced against the special interest on Norway's part in claims for aggravated damages in cases like ours being governed by Norwegian law. Through section 5 subsection 1 (a), cf. (9), of the Penal Code, the legislature has signalled that Norwegian interests are prominent when a sexual offence is committed abroad by a Norwegian citizen. In the preparatory works to the provision, Proposition to the Odelsting no. 22 (2008–2009) page 276, the Ministry stated:

“In the Ministry's view, there is a need to maintain jurisdiction over the most serious sexual offences committed abroad by Norwegian citizens or persons domiciled in Norway. The sexual offences listed in section 12 (3) (a) of the Penal Code 1902 are serious violations of someone's integrity where prosecution should not depend on the legislation of the country where the offences were committed. This jurisdiction is therefore proposed to be maintained in the new no. (9) to section 5 subsection 1 of the Penal Code 2005. This also applies to human trafficking under section 257 of the Penal Code 2005. Out of consideration for the Council of Europe Convention on the Protection of Children against Sexual Exploitation, the jurisdiction is extended also to cover section 305 on sexually offensive conduct directed at a child under 16 years of age and

section 306 on arranging a meeting to commit sexual abuse. When these provisions are included, the same should apply to section 304 on sexual acts towards children under the age of 16. According to the proposed new no. (9) to section 5 subsection 1 of the Penal Code 2005, all provisions on sexual abuse against children will thus be covered by Norwegian criminal legislation also when it has been committed abroad by Norwegian citizens or persons domiciled in Norway.”

- (37) The reason for this rule on criminal jurisdiction is transferable to the choice of law for claims for aggravated damages arising from such acts. Although the claim for aggravated damages is a civil action, it is closely connected with the criminal case, both because it is a condition under section 3-5, see section 3-3, of the Damages Act that acts listed in section 291 of the Penal Code have been committed, and because the acts are pursued simultaneously with the claim for punishment pursuant to section 3 of the Criminal Procedure Act.
- (38) Furthermore, it should be noted that liability for aggravated damages distinguishes itself from traditional liability as it also contains a penal element. I refer to Rt-2010-1537 paragraph 19, stating that “[a]ggravated damages also have a non-economic function as it expresses societal discontent with the injurious act”. In support of this, the following is set out in the war crimes judgment in Rt-2011-531, paragraph 36:
- “The description shows that liability for aggravated damages distinguishes itself from traditional liability, as it not only arises from the need of remedy, but just as much from the need of reaction and a strong signal that such acts are utterly unacceptable.”
- (39) Norway has also ratified conventions to facilitate compensation of victims of assault. In paragraph 38 of the war crimes judgment, a reference is made to the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983, under which the States are obliged to introduce schemes for compensating these victims. Of particular interest to the case at hand, is the Council of Europe Convention on preventing and combating violence against women and domestic violence – the Istanbul Convention – ratified by Norway on 2 June 2017. According to Article 30, Norway is obliged to “take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention”.
- (40) In other words, Norway is obliged under international law to establish systems to ensure that victims of sexual assault and violence may claim compensation from the perpetrator. As a starting point, this is best achieved by applying Norwegian rules on damages when the claim is to be decided by a Norwegian court.
- (41) The factors I have now discussed also support the Supreme Court’s view in the war crimes judgment paragraph 44: One should not be too quick to determine the applicable law for civil action during a criminal case based on the rule generally applicable to tort claims – *lex loci delicti*.
- (42) So far, my view can be summarised as follows: The law of the country where the wrong occurred, applied by the Supreme Court as the basic choice-of-law rule in connection with tort, is not a “fixed” rule for claims for aggravated damages arising from serious violations of someone’s integrity filed during a criminal case.
- (43) The applicable law must consequently be determined pursuant to the basic rule in Norwegian international private law – the *Irma Mignon formula*.

- (44) As mentioned, when determining the applicable law, the rules of EU law are emphasised, even though Norway is not formally bound by them. In my view, the rules in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), will in this case not have any other result than the one I have described.
- (45) The basic rule in Article 4 (1) is that the law of the country where the direct damage occurred – *lex loci damni* – applies to non-contractual obligations. As mentioned, the place of wrong and the place of effect coincide in our case. It is pointed out in legal literature that the application of this rule is unclear when the wrong has not occurred in a country's territory, but on a vessel in international waters, see Bogdan and Hellner, *Svensk internationell privat- och processrätt* [Swedish international private and procedural law], 9th edition, 2020, page 385.
- (46) Under any circumstance, it follows from Article 4 (3) that exceptions can be made from the basic rule “[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply”. The background for this provision is explained as follows in paragraph 14 of the Preamble:
- “The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an ‘escape clause’ which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.”
- (47) In this context, I also note the statement in the Commission’s proposal, COM (2003) 427, that the application of the basic rule may well be inappropriate where the situation has only a “tenuous” connection with the country where the damage occurs.
- (48) It is therefore somewhat uncertain whether the basic rule is applicable to wrong occurred on board a ship in international waters. In any case, the basic rule in Article 4 (1) is not absolute. As I will return to with regard to the Irma Mignon formula, our case is “clearly more connected” with Norway than with The Bahamas. The conditions in Article 4 (3) are thus met.

With which country are the circumstances most strongly connected?

- (49) The Irma Mignon formula emerged from the Supreme Court ruling in Rt-1923-II-58. It implies that the applicable law is determined “taking as a starting point that a circumstance should preferably be assessed based on the law of the country with which it is most strongly connected”. As expressed in the war crimes judgment in Rt-2011-531 paragraph 50, the choice of law is

“... not bound to predetermined and fixed connection factors. A choice of law based on connection stems from a specific analysis and elastic assessment of each circumstance. The purpose is to identify the country with which the incident is most strongly and closely connected.”

- (50) As mentioned, the injured party's claim for aggravated damages arises from the sexual assault committed on board the cruise ship. The connection to The Bahamas is of a rather formal nature and is due to the ship being registered in the country's ship register. No other factors than the ship's flag connect the case to The Bahamas. Neither the wrongdoer nor the injured party is domiciled there. The relationship with Bahamian law is remote and from the parties' points of view, I dare say, rather coincidental and tenuous.
- (51) According to Article 92 of the Convention on the Law of the Sea of 1982, the flag country has exclusive jurisdiction on the high seas, see the Supreme Court judgment HR-2016-1251-A (Eimskip) paragraph 36. However, I cannot see that this is crucial for the assessment made under Norwegian law of the country with which the circumstance is most strongly connected.
- (52) The wrongdoer's Norwegian citizenship links the case to Norway. Furthermore, the fact that the claim for aggravated damages has been decided in a Norwegian court during criminal proceedings governed by Norwegian law, creates a connection between the claim and Norway, which also implies that the case is most strongly connected with our country.
- (53) I also refer to my previous comment that Norway has an interest in victims of sexual assault being ensured aggravated damages, and that this aim is best fulfilled if Norwegian law is applied when the case is heard by Norwegian courts.

Conclusion

- (54) Against this background, I find that Norwegian law is applicable to the respondent's claim for aggravated damages. The Court of Appeal has applied the law correctly, and the appeal must be dismissed.
- (55) The appellant has not succeeded, and I vote for the following

J U D G M E N T :

The appeal is dismissed.

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| (56) | Justice Bergh: | I agree with Justice Ringnes in all material respects and with his conclusion. |
| (57) | Justice Arntzen: | Likewise. |
| (58) | Justice Falkanger: | Likewise. |
| (59) | Justice Matningsdal: | Likewise. |
- (60) Following the voting, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.