



## ADVISORY OPINION OF THE COURT

17 November 1999\*

*(Motor Vehicle Insurance Directives – driving under the  
influence of alcohol – compensation for passengers)*

In Case E-1/99

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Norges Høyesterett (Supreme Court of Norway) for an Advisory Opinion in the case pending before it between

**Storebrand Skadeforsikring AS**

and

**Veronika Finanger**

on the interpretation of the Agreement on the European Economic Area (hereinafter the “EEA Agreement”), with particular reference to the following Acts referred to in Annex IX to the EEA Agreement:

- the Act referred to in point 8 of Annex IX (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, hereinafter the “First Motor Vehicle Insurance Directive”);

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Language of the request for an Advisory Opinion: Norwegian.

- the Act referred to in point 9 of Annex IX (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, hereinafter the “Second Motor Vehicle Insurance Directive”);
- the Act referred to in point 10 of Annex IX (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, hereinafter the “Third Motor Vehicle Insurance Directive”);

(hereinafter collectively the “Directives” or the “Motor Vehicle Insurance Directives”).

#### THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson and Carl Baudenbacher (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

- the Appellant, Storebrand Skadeforsikring AS, represented by Counsel Emil Bryhn and Tron Gundersen (hereinafter the “appellant”);
- the Respondent, Veronika Finanger, represented by Counsel Erik Johnsrud (hereinafter the “respondent”);
- the Government of Iceland, represented by Einar Gunnarsson, Legal Officer, External Trade Department, Ministry of Foreign Affairs, acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice;
- the Government of Liechtenstein, represented by Christoph Büchel, Director of the EEA Coordination Unit, and Beatrice Hilti, Officer of the EEA Coordination Unit, acting as Agents;
- the Government of Norway, represented by Stephan L. Jervell, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

- the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs Department, and Helga Óttarsdóttir, Officer, Legal & Executive Affairs Department, acting as Agents;
- the Commission of the European Communities, represented by John Forman and Christina Tufvesson, both Legal Advisers of the Legal Service of the Commission of the European Communities, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the appellant, the respondent, the Government of Iceland, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 30 September 1999,

gives the following

### **Advisory Opinion**

#### *Facts and procedure*

- 1 By a reference dated 23 June 1999, registered at the Court on 28 June 1999, Norges Høyesterett (Supreme Court of Norway), made a Request for an Advisory Opinion in a case brought before it by the appellant against the respondent.
- 2 On 11 November 1995 in Nord-Trøndelag, Norway, the respondent was injured in a traffic accident. She was a passenger in a car which drove off the road. The cause of the accident was the reduced driving ability of the driver, due to the driver being under the influence of alcohol. As a result of the accident, the respondent was left 60 per cent medically disabled and 100 per cent occupationally disabled. The third-party motor vehicle liability insurance was with the appellant.
- 3 The respondent sued the appellant, claiming compensation for the personal injuries she suffered in the accident. The basis for the claim was the Norwegian Act of 3 February 1961 relating to compensation for injury caused by a motor vehicle (the Automobile Liability Act - *bilansvarsloven*). According to section 15 of that Act, the owner of a motor vehicle subject to registration shall insure it “[f]or cover of insurance claims pursuant to chapter II.” Under section 4 in chapter II, the main rule is that, when a motor vehicle causes injury, the injured party is entitled to compensation from the insurance company with which the vehicle is insured, regardless of whether anyone is to blame for the injury.

- 4 The appellant rejected the claim of the respondent. The legal basis for refusing to pay compensation to the respondent was section 7, third paragraph, litra b of the Automobile Liability Act, which states *inter alia* that the injured party may not obtain compensation if he or she knew or must have known that the driver of the vehicle was under the influence of alcohol.
- 5 In a judgment of 21 September 1998, Frostating lagmannsrett (Frostating Court of Appeal) concluded that the accident occurred due to the driver's being under the influence of alcohol and that the respondent knew that the driver was under the influence of alcohol.
- 6 The appellate court noted that the main rule in section 7, third paragraph, litra b of the Automobile Liability Act is that the injured party is not entitled to compensation in those cases which fall within the scope of the provision. The court concluded, however, that section 7, third paragraph, litra b was contrary to EEA law. The provision was set aside pursuant to section 2 of Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA) etc. (the EEA Act – *EØS-loven*). Pursuant to section 7, first paragraph of the Automobile Liability Act, Frostating lagmannsrett reduced the compensation to be paid to the respondent by 30 per cent as a consequence of her having mentally contributed to the drive and her knowing that driving in a car under the prevailing conditions would entail a considerable safety risk. The appellant appealed the judgment to Høyesterett.
- 7 Høyesterett decided to submit a Request for an Advisory Opinion to the EFTA Court on the following question:

*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 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

## *Legal background*

### *1. EEA law*

9 The question referred by Høyesterett concerns the interpretation of various articles of the First, Second and Third Motor Vehicle Insurance Directives.

10 Article 3(1) and 3(2) of the First Motor Vehicle Insurance Directive read as follows:

“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 (...).”

11 Article 1(1) and 1(2) of the Second Motor Vehicle Insurance Directive read as follows:

“1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:

- in the case of personal injury, 350 000 ECU where there is only one victim (...).”

12 Article 2 of the Second Motor Vehicle Insurance Directive reads as follows:

“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.

Member States shall have the option - in the case of accidents occurring on their territory - of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

2. In the case of vehicles stolen or obtained by violence, Member States may lay down that the body specified in Article 1(4) will pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article; where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.  
(...).”

- 13 Article 1, first paragraph of the Third Motor Vehicle Insurance Directive reads as follows:

“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 (...).”

## *2. National law*

- 14 Section 7 of the Norwegian Automobile Liability Act, contained in Chapter II of the Act with the caption “compensation for which the insurance company is responsible”, reads as follows:

“§ 7 (when the injured party has contributed to the injury)

If the injured party has intentionally or negligently contributed to the injury, the court may reduce the compensation or set it aside entirely, except in cases when the injured party has exhibited only slight negligence. In the decision, regard shall be had to the conduct demonstrated by both sides and the circumstances generally.

If a motor vehicle causes injury while immobile and the injury did not occur in connection with the stopping or starting of the vehicle, the court may reduce the compensation or set it aside entirely, even if the injured party has exhibited only slight negligence.

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

a) knew that the vehicle had been taken from its lawful owner by a criminal act, or

b) knew or must have known that the driver of the vehicle was under the influence of alcohol or another intoxicant or narcotic (cf. section 22, first paragraph of the Road Traffic Act). The specific rule enunciated herein does not apply, however, if it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence as aforementioned.

An injured driver of the motor vehicle which caused the injury may not obtain compensation, unless there are special grounds for doing so, if he knew or must have known that the vehicle was being used in connection with a criminal act.”

### *Arguments of the parties*

- 15 The *appellant*, supported by the *Government of Iceland* and the *Government of Norway*, is of the opinion that a distinction must be drawn between conditions for liability and insurance cover. The Directives do not impose requirements as to the content of national law governing liability, but rather are to be construed as regulating insurance cover when conditions for compensation are present. Therefore, they relate only to insurance cover, not to liability. The Directives concern only situations in which the right to compensation is already established under a Contracting Party’s national law. This follows especially from the headings and the wording of the Directives in several places.
- 16 The appellant argues that, accordingly, the consideration of protection of victims goes no further than to ensure that a person who has a claim against a person who has caused injury gets that claim satisfied. The Directives’ objective of protection does not go so far as to confer a claim on a victim of a motor vehicle accident against a person who has caused injury and/or his insurance company.
- 17 With respect to the objective of the Directives, *viz*, facilitation of the free movement of persons within the European Economic Area, the appellant argues that the fact that the conditions for liability for compensation may vary between Member States is not a hindrance to the free movement of persons, since only a small group of passengers is affected.
- 18 The appellant, the Government of Iceland and the Government of Norway propose to answer the question of Høyesterett in the negative.
- 19 The *Government of Liechtenstein* argues that the exclusion of insurance liability as set out in the Directives is exhaustive. Therefore it is incompatible with EEA law to provide for a passenger who sustains injury by voluntary 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 was under the influence of alcohol at the time of the accident.

- 20 The *respondent* is of a different opinion and refers in particular to the wording of Article 3(1) of the First Motor Vehicle Insurance Directive and to Article 1, first paragraph of the Third Motor Vehicle Insurance Directive. An ordinary linguistic understanding of these provisions supports the proposition that the Directives impose requirements for national legislation on insurance cover of liability for compensation. This, in the view of the respondent, is also in line with the goal of ensuring a high level of consumer protection as referred to in the twelfth and thirteenth recitals of the preamble to the Third Motor Vehicle Insurance Directive.
- 21 In the view of the *EFTA Surveillance Authority*, the scope of the Motor Vehicle Insurance Directives cannot vary according to the classification of the rules concerning liability and insurance in the Contracting Parties' national legal systems. In particular, the EFTA Surveillance Authority argues that the qualification of a rule under national law cannot preclude an examination as to whether it is compatible with the Directives. Therefore, Article 3(1) of the First Motor Vehicle Insurance Directive, seen in the light of Article 1 of the Third Motor Vehicle Insurance Directive and Article 2(1) of the Second Motor Vehicle Insurance Directive, must be interpreted so as to preclude a national rule according to which there is no obligation for the insurer to pay compensation if the passenger knew or must have known that the driver was under the influence of alcohol at the time of the accident.
- 22 The *Commission of the European Communities* refers to the Directives and argues that it follows from their whole rationale that compensation to the victims of car accidents should be guaranteed in all cases of accidents. The Court of Justice of the European Communities ("ECJ") has confirmed this interpretation in Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829. The Commission concludes that the Directives preclude a national statutory provision according to which there is no obligation for the insurer to pay compensation to a passenger who sustains injuries unless there are special grounds for doing so, if the passenger knew or should have known that the driver of the vehicle was under the influence of alcohol at the time of the accident.
- 23 The respondent, the EFTA Surveillance Authority and the Commission of the European Communities propose to answer the question of Høyesterett in the affirmative.

#### *Findings of the Court*

- 24 The *Court* notes that the main argument of the *appellant*, the *Government of Iceland* and the *Government of Norway* is that the Motor Vehicle Insurance Directives do not deal with rules relating to personal liability but only with insurance. That argument may appear to find support in the titles of the Directives and the wording of the provisions, in particular in the First Motor



Vehicle Insurance Directive. However, further analysis of the texts, including the preambles to the Directives, is required.

- 25 The overall purpose of the Motor Vehicle Insurance Directives is to facilitate the free movement of goods and persons and to safeguard the interests of persons who may be the victims of accidents caused by motor vehicles (first and second recitals of the preamble to the First Motor Vehicle Insurance Directive). In particular, the goal of the Motor Vehicle Insurance Directives is to ensure the free movement of motor vehicles and of persons travelling in those vehicles (third recital of the preamble to the First Motor Vehicle Insurance Directive). To that end, the Motor Vehicle Insurance Directives aim at ensuring that “the national law of each Member State should (...) provide for the compulsory insurance of vehicles against civil liability, the insurance to be valid throughout Community territory” (eighth recital of the preamble to the First Motor Vehicle Insurance Directive).
- 26 The purpose of the Second Motor Vehicle Insurance Directive is to further reduce disparities between the laws of the Member States in the field of motor vehicle insurance since, as is stated in the third recital of the Second Motor Vehicle Insurance Directive “these disparities have a direct effect upon the establishment and the operation of the common market”. Consequently, the Second Motor Vehicle Insurance Directive establishes, as already stated, *inter alia* minimum amounts for which insurance is compulsory (Article 1). The fifth recital of the preamble to the Second Motor Vehicle Insurance Directive emphasizes that these amounts must “guarantee victims adequate compensation irrespective of the Member State in which the accident occurred”.
- 27 Lastly, the Third Motor Vehicle Insurance Directive aims at eliminating “any uncertainty concerning the application of the first indent of Article 3(2) of Directive 72/166/EC” (sixth recital of the preamble), according to which Member States shall take all appropriate measures to ensure that the contract of insurance also covers any loss or injury which is caused in the territory of those States. Thus, “a high level of consumer protection should be taken as a basis” (thirteenth recital of the preamble) and liability shall be covered “for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle” (Article 1).
- 28 The Court concludes from the foregoing that the Motor Vehicle Insurance Directives have established the principle of compulsory third-party insurance in return for a single premium throughout the European Economic Area. In view of the aim of ensuring protection, which is stated repeatedly in the Motor Vehicle Insurance Directives, Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and amended by the Second and Third Motor Vehicle Insurance Directives, must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive, see also Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829. That judgment states at paragraph 24 that “a compulsory insurance contract may not provide that in certain cases, in particular

where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. (...)”.

- 29 Even if the main text of the First Motor Vehicle Insurance Directive focuses on insurance coverage, that Motor Vehicle Insurance Directive has been supplemented by the Second and Third Motor Vehicle Insurance Directives in such a way that the three Motor Vehicle Insurance Directives, taken as a whole, provide for limits on the extent to which insurers may rely on contractual clauses or national statutory provisions on liability for compensation to exclude certain situations from insurance coverage altogether. Consequently, the distinction between provisions on personal liability and insurance cover is not decisive in the case at hand. The arguments submitted by the appellant, the Government of Norway and the Government of Iceland on this point must, therefore, be rejected.
- 30 The appellant, supported by the Government of Norway, has argued subsidiarily that the restrictive effects on the free movement of goods and persons are too uncertain and indirect, such that the national rule in question must be deemed incapable of hindering the free movement of goods and persons. The Government of Norway has referred to case law of the ECJ concerning Article 30 of the EC Treaty (now, after amendment, Article 28 EC), in particular Case C-379/92 *Peralta* [1994] ECR I-3453, and Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; and to case law of the EFTA Court concerning Article 11 of the EEA Agreement: Case E-5/96 *Ullensaker kommune and others v Nille AS* [1997] EFTA Court Report 30.
- 31 With respect to this argument, the Court merely notes that it is stated in the third recital of the preamble to the Second Motor Vehicle Insurance Directive that major disparities in the extent of the obligation of insurance cover do, in fact, affect in a relevant way the establishment and operation of the common market. Furthermore, the objective of ensuring the free movement of goods and persons is not the only one pursued by the Directives and, consequently, the possible limited effects with regard to this objective are not decisive.
- 32 With regard to the goal of ensuring that the victims of motor vehicle accidents receive comparable treatment irrespective of where in the European Economic Area the accident occurs, the Court notes that in most of the Contracting Parties a passenger is fully covered by insurance even if the driver is intoxicated. This means that, in those States, passengers who become victims of motor vehicle accidents caused by intoxicated drivers obtain treatment which is significantly more favourable than the respondent would obtain under the Norwegian provision in question in the case at hand. This disparity may jeopardize the aim of the Motor Vehicle Insurance Directives and lead to a distortion of competition between motor vehicle insurers in different Contracting Parties that is not compatible with the aim of establishing a homogeneous European Economic Area.

- 33 The appellant, supported by the Government of Iceland and the Government of Norway, points out that Article 2 of the Second Motor Vehicle Insurance Directive contains an exception to the principle of compulsory insurance cover for passengers and argues that the provision should not be interpreted as being exhaustive. In the view of the Court, it is sufficient to state that Article 2 is an exception to a general rule and so must be interpreted narrowly (see Case E-5/96 *Ullensaker kommune and others v Nille AS* [1997] EFTA Court Report 30, at paragraph 33). Any other conclusion would jeopardize the overall goal of the Motor Vehicle Insurance Directives, *viz*, to ensure that all passengers are, as a rule, covered.
- 34 Submissions have been made about the possibility of reducing compensation as a consequence of contributory negligence. The Court limits itself to stating that a reduction of compensation due to contributory negligence must be possible in exceptional circumstances. However, the principles set out in the Motor Vehicle Insurance Directives must be respected. A finding that a passenger who passively rode in a car driven by an intoxicated driver is to be denied compensation or that compensation is to be reduced in a way which is disproportionate to the contribution to the injury by the injured party would be incompatible with the Directives.
- 35 The Court notes that no provisions of EEA law other than those discussed need to be examined before the question put by Høyesterett can be answered.
- 36 The answer to the question referred must therefore be that it is incompatible with EEA law (Council Directive 72/166/EEC of 24 April 1972, Second Council Directive 84/5/EEC of 30 December 1983, 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.

#### *Costs*

- 37 The costs incurred by the Government of Iceland, the Government of Liechtenstein, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by Norges Høyesterett by the reference of 23 June 1999, hereby gives the following Advisory Opinion:

**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.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Delivered in open court in Luxembourg on 17 November 1999.

Gunnar Selvik  
Registrar

Bjørn Haug  
President