JUDGMENT OF THE COURT

20 June 2008[*]

(Compulsory insurance for civil liability in respect of motor vehicles – Directives 72/166/EEC, 84/5/EEC and 90/232/EEC – compensation for non-economic injury – conditions for State liability – sufficiently serious breach)

In Case E-8/07,

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 Oslo tingrett (Oslo District Court), Norway, in a case pending before it between

Celina Nguyen

and

The Norwegian State, represented by Justis- og politidepartementet (the Ministry of Justice and the Police)

concerning the interpretation of the EEA Agreement, with particular reference to the following Acts referred to in Annex IX:

– 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 Directive");

– the Act referred 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 Directive");

[*] Language of the Request: Norwegian

– 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 Directive");

(hereinafter collectively the "Directives" or the "Motor Vehicle Insurance Directives").

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Ola Mestad (ad hoc), Judges

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– the Plaintiff, represented by Christian Lundin, advokat;

– the Defendant, represented by Karin Fløistad, advokat, Office of the Attorney General (Civil Affairs), acting as Agent;

– the Kingdom of Belgium, represented by Liesbet Van den Broeck, Attaché with the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent;

– the EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Senior Officer, and Florence Simonetti, Officer, Department of Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Nicola Yerrell, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by advokat Tom Sørum, the Defendant, represented by its Agent Ketil Bøe Moen, the EFTA Surveillance Authority, represented by its Agent Bjørnar Alterskjær and the Commission of the European Communities, represented by its Agent Nicola Yerrell, at the hearing on 16 April 2008,

gives the following

Judgment

I Facts and procedure

1 By a reference dated 14 September 2007, registered at the Court on 17 September 2007, Oslo tingrett made a request for an Advisory Opinion in a case pending before it between Celina Nguyen (hereinafter the "Plaintiff") and the Norwegian State, represented by the Ministry of Justice and the Police (hereinafter the "Defendant").

2 The Plaintiff lost her husband and two children in a road traffic accident on 8 December 2002. The Plaintiff herself was only slightly injured physically, but has suffered from psychological afflictions since the accident. The driver of the car which caused the accident was intoxicated.

3 By judgment of 7 June 2005, Halden tingrett (Halden District Court) sentenced the driver to one year and six months in prison for *inter alia* manslaughter, driving intoxicated, and for having inflicted a considerable psychological injury upon the Plaintiff. The driver was also ordered to pay the Plaintiff a redress of NOK 400 000 (about EUR 48 000) for non-economic injury. According to the reference, redress is not punishment, but a civil form of liability in tort law which is to compensate for non-economic injury ("pain and suffering"). Redress can be awarded in both criminal and civil proceedings. The precondition is that the person having caused injury acted with qualified fault.

4 The person having caused the injury to the Plaintiff has not paid the redress. The redress awarded to the Plaintiff can not be claimed from the insurance company covering the person having caused the injury since Norwegian law explicitly excepts redress from the compulsory insurance coverage.

5 On 11 September 2006, the Plaintiff filed a lawsuit before Oslo tingrett against the Defendant with a claim for compensation for incorrect implementation of the Motor Vehicle Insurance Directives. The Plaintiff argues that it is contrary to the Directives to except redress from the insurance coverage and that the breach is sufficiently serious to entail State liability under the conditions set out in the case

law of the EFTA Court. On this basis, she claims compensation, corresponding to the redress that has not been paid out to her.

6 Oslo tingrett decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

1. *Is it compatible with the Motor Vehicle Insurance Directives to except redress for non-economic loss ("pain and suffering") from the compulsory insurance system under national law?*
2. *If the question is answered in the negative: is an exception from the insurance coverage as mentioned in question 1, a sufficiently serious breach of the Motor Vehicle Insurance Directives to be able to entail State liability?*

II Legal background

National Law

7 The duty to carry insurance for injury caused by motor vehicles is regulated by the Norwegian Automobile Liability Act of 3 February 1961 (*lov 3. februar 1961 om ansvar for skade som motorvogner gjer (bilansvarslova)*, hereinafter the "Automobile Liability Act"). The Act establishes that injured parties have a claim for compensation from the insurance company for property damage and personal injury which is caused by a motor vehicle. Liability is not conditioned upon fault of the driver or others. The injured party can claim compensation directly from the insurance company as a matter of strict liability. Section 4 of the Automobile Liability Act reads:

> *When a motor vehicle causes injury, the injured party may claim compensation from the insurance company with which the vehicle, pursuant to chapter IV, is insured, even if no one is to blame for the injury.*

8 The insurance covers economic loss. In addition, it shall cover permanent injury compensation but not redress. This follows from Section 6 *(Assessment of the compensation)* of the Act, which regulates how the insurance payment is to be determined. The Section reads:

> *The compensation is assessed according to general rules on torts except as otherwise provided.*
>
> *The Act applies also to compensation for permanent injury under Section 3–2 of the Torts Act of 13 June 1969 No 26, but not to compensation (redress) for non-economic injury.*
>
> …

9 According to the request from the national court, Section 6, first paragraph establishes that the amount of compensation is determined according to ordinary

rules of compensation found in the Torts Act of 13 June 1969 No 26 (*skadeserstatningsloven 13. juni 1969 nr. 26,* hereinafter "the Torts Act"). Section 3–1, first paragraph of the Torts Act states:

> *Compensation for personal injury shall cover the injury sustained, loss of future earnings and expenses which the personal injury is presumed to cause the injured party in the future.*

10 In addition to covering the economic loss, the insurance company shall cover permanent injury compensation if under the Torts Act the general conditions for this are fulfilled. This follows from Section 6, second paragraph of the Automobile Liability Act. Permanent injury compensation is not compensation for economic loss, but an amount which is to compensate for reduced quality of life. The basic condition is that lasting and significant medical injuries have been inflicted upon the injured party.

11 Section 6, second paragraph of the Automobile Liability Act prescribes that the compulsory road traffic insurance does not cover redress for non-economic injury ("pain and suffering"). It is this exception which the case pending before Oslo tingrett relates to.

12 Redress comes into question if the person who caused the injury did so intentionally or with gross negligence. Redress is awarded and the redress amount is determined on the basis of an overall assessment of what is reasonable under the circumstances. Thus, injured parties or their survivors do not have any absolute claim to redress, but in practice redress is normally awarded if the conditions for it are fulfilled. Redress is regulated in Section 3–5 *(Compensation (redress) for non-economic injury)* of the Torts Act, which reads:

> *Anybody who intentionally or by gross negligence has*
>
> *(a) caused personal injury …*
>
> *may, regardless of whether permanent injury compensation is paid under Section 3–2 or standardised compensation is paid under Section 3–2a, be ordered to pay the victim such non-recurrent amount as the court finds reasonable in compensation (redress) for inflicted pain and suffering and for other offence or injury of a non-economic kind. …*
>
> *Anybody who intentionally or by gross negligence has caused another person's death may be ordered to pay to the spouse, common-law spouse ["samboer"], children or parents of the deceased such redress as mentioned in the preceding paragraph.*

13 In its request, Oslo tingrett states that it is clear that redress, in addition to having a function of individual deterrence, also has the purpose of providing compensation to the injured party for burdens inflicted.

EEA law

14 Article 1(2) of the First Directive reads:

> *"[I]njured party" means any person entitled to compensation in respect of any loss or injury caused by vehicles;*

15 Article 3(1) of the First Directive reads:

> *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.*

16 Article 1(1) and 1(2) of the Second Directive reads:

> 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; where more than one victim is involved in a single claim, this amount shall be multiplied by the number of victims,*
>
> …

17 Article 1 of the Third Directive reads:

> *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.*
>
> …

18 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 insofar as is necessary for the reasoning of the Court.

III Findings of the Court

The first question

19 By the first question, Oslo tingrett in substance asks whether it is compatible with the Motor Vehicle Insurance Directives to except redress for non-economic injury ("pain and suffering") from the compulsory insurance system under national law.

20 The Plaintiff maintains that it follows from the wording and the aim of the Directives that liability for redress towards the Plaintiff must be covered by the compulsory liability insurance. The Plaintiff also argues that all civil liability in respect of the use of motor vehicles must be covered by insurance, and refers in that regard to the judgment of the Court of Justice of the European Communities in Case C-348/98 *Ferreira* [2000] ECR I-6711 (hereinafter "*Ferreira"*).

21 The Defendant concludes from the wording and the aim of the Directives that redress for non-economic injury falls outside their scope. The Defendant points to the special character of the institution of redress under Norwegian tort law. The Defendant stresses that although the institution has a compensatory function, its primary character is of a penal nature. The Defendant does not argue that the classification under national law is in itself decisive for the assessment of whether redress falls under the Directives or not. Civil liability is an autonomous concept under the Directives. In the Defendant's view, the characteristics of the institution of redress under Norwegian law do, however, support its interpretation of the scope of the Directives.

22 The Kingdom of Belgium, the EFTA Surveillance Authority and the Commission of the European Communities argue in favour of the Plaintiff's view.

23 As a preliminary point, the Court recalls that the Motor Vehicle Insurance Directives are designed to ensure the free movement of motor vehicles normally based within the EEA and of persons travelling in those vehicles, and to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where within the EEA the accident has occurred (see Cases E-1/99 *Finanger* [1999] EFTA Ct. Rep. 119 (hereinafter "*Finanger"*), at paragraphs 25-27; E-7/00 *Helgadóttir* [2000-2001] EFTA Ct. Rep. 246 (hereinafter "*Helgadóttir*"), at paragraph 28 and C-537/03 *Candolin* [2005] ECR I-5745 (hereinafter "*Candolin*"), at paragraph 17).

24 The Directives do not seek to harmonise the rules of the EEA States governing civil liability (see *Helgadóttir*, at paragraph 30 and *Ferreira*, at paragraph 23). Therefore, as EEA law stands at present, the EEA States are free to determine the rules of civil liability applicable to road traffic accidents. However, the EEA States must exercise their powers in this field in compliance with EEA law. National provisions governing compensation for road accidents cannot therefore deprive the Directives of their effectiveness (see for comparison *Candolin*, at paragraph 27 and 28).

25 Moreover, the EEA States must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the Directives (see for comparison Case C-356/05 *Farrell* [2007] ECR I-3067, at paragraph 33 and *Ferreira*, at paragraph 29).

26 The Court notes that the Directives do not contain any explicit provision excepting an institution such as the one at issue from their scope. Article 1(2) of the First Directive which defines the concept of "injured party" refers to "any loss or injury caused by vehicles" and Article 1(1) of the Second Directive and Article 1 of the Third Directive refer, in particular, to "personal injuries" in defining what shall be subject to compulsory insurance. The wording encompasses any type of loss or injury irrespective of whether it is economic or non-economic, and does not therefore support the finding that the latter falls outside the scope of the Directives.

27 In light of the above, Article 3(1) of the First Directive, read in conjunction with Article 1(1) and 1(2) of the Second Directive and Article 1 of the Third Directive, must be interpreted as covering both economic loss and non-economic injury such as pain and suffering. A different interpretation would run counter to the aim of ensuring free movement and guaranteeing victims comparable treatment irrespective of where within the EEA the accidents occur, cf. paragraph 23 above.

28 Redress such as the one at issue in the main proceedings by its nature gives a person the right to obtain compensation from another person and as such constitutes a form of civil liability. In this regard, it is irrelevant whether redress under national law may have a penal character and whether the penal character is primary or secondary to the compensatory function of the institution. It follows from *inter alia Ferreira* that although the Directives are not intended to require the adoption of a particular type of liability, they require that all civil liability in respect of the use of motor vehicles be covered, irrespective of whether the liability is based on fault or on risk. Any other interpretation would deprive Article 3(1) of the First Directive, as developed and amended by the Second and the Third Directives, of its intended effect to protect the victims of road-traffic accidents by means of compulsory civil liability insurance (see also for comparison Case C-166/02 *Viegas* [2003] ECR I-7871, at paragraphs 21 and 22).

29 In light of the above, the answer to the first question must be that it is not compatible with the First, Second and Third Motor Vehicle Insurance Directives to except redress for non-economic injury ("pain and suffering"), which is a form of civil liability, from the compulsory insurance system under national law.

The second question

30 By the second question, Oslo tingrett in substance asks whether excepting redress for non-economic injury ("pain and suffering") from the compulsory insurance coverage constitutes a sufficiently serious breach of the Motor Vehicle Insurance Directives to be able to entail State liability.

31 In cases of violation of EEA law by a Contracting Party, the Contracting Party is obliged to provide compensation for loss and damage caused to individuals and

economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, (hereinafter "*Sveinbjörnsdóttir*"), at paragraphs 62–69 and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240 (hereinafter "*Karlsson*"), at paragraphs 25 and 37–48, are fulfilled.

32 It is, in principle, for the national court to assess the facts of the case, and to determine whether the conditions for State liability for breach of EEA law are met. The Court may nevertheless indicate certain circumstances and considerations which are for the national court to take into account in its evaluation (see *Karlsson*, at paragraph 36).

33 As regards the condition for liability that the breach of EEA law 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 *Karlsson*, at paragraph 38 and *Sveinbjörnsdóttir*, at paragraphs 68 and 69).

34 Furthermore, if a breach of EEA law has persisted despite settled case law from which it is clear that the conduct in question constitutes an infringement, the breach will be sufficiently serious (see *Karlsson*, at paragraph 40). In this regard, the Court notes that in *Ferreira* the Court of Justice of the European Communities ruled that the Member States must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the Directives (see paragraph 29 of the judgment). In the context of the case before the national court, it is undisputed that Norway has maintained a rule excepting redress for pain and suffering from the compulsory insurance coverage despite the fact that redress is a form of civil liability.

35 Consequently, the Court concludes that maintaining the rule excepting redress for non-economic injury ("pain and suffering") from the compulsory insurance coverage under Norwegian law constitutes a sufficiently serious breach of EEA law to entail State liability, provided that the other conditions for State liability as laid down in the Court's case law are fulfilled.

36 In light of the above, the answer to the second question must be that excepting redress for non-economic injury ("pain and suffering"), which is a form of civil liability, from compulsory insurance coverage under national law constitutes a sufficiently serious breach of EEA law to be able to entail State liability.

IV Costs

37 The costs incurred by the Kingdom of Belgium, 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 a step in the proceedings pending before Oslo tingrett, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by *Oslo tingrett* hereby gives the following Advisory Opinion:

1. **It is not compatible with the First, Second and Third Motor Vehicle Insurance Directives to except redress for non-economic injury ("pain and suffering"), which is a form of civil liability, from the compulsory insurance system under national law.**

2. **Excepting redress for non-economic injury ("pain and suffering"), which is a form of civil liability, from compulsory insurance coverage under national law constitutes a sufficiently serious breach of EEA law to be able to entail State liability.**

Carl Baudenbacher Thorgeir Örlygsson Ola Mestad

Delivered in open court in Luxembourg on 20 June 2008

Skúli Magnússon
Registrar

Carl Baudenbacher
President