Lovdata
Supreme Court – Rt-1923-II-58

Instance	Supreme Court – judgment
Date	1923-09-25
Published	Rt-1923-II-58
Keywords	Collision between vessels (the Irma-Mignon-case)
Summary	Shipowner's liability for collision between two Norwegian vessels in foreign territorial waters must be judged according to Norwegian law - not that of the collision site. - Shipowner deemed liable for errors made by a foreign compulsory pilot. - Valuation of the wrecked vessel will be based on Norwegian prices, taking into consideration that the vessel was in England at the time of the accident.
Procedure	L.nr. 19/2 s.
Parties	A/S Cornelius Røe & Co. (attorney Ferdinand Schjelderup) vs Det Bergenske Damskipsselskab (attorney Kristen Johanssen) and Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskap (attorney Hummel Johansen) vs Det Bergenske Damskibsselskab.
Author	Einar Hanssen, Bade, Lie, Motzfeldt, Hambro, City Court Judge Gjessing, Chief Justice Scheel

Extraordinary judge Einar Hanssen: With regards to the subject of this matter and the circumstances in more detail, I refer to Bergen maritime court's judgment dated 19 November 1920. In this judgment, the following was decreed: "Det Bergenske Damskibsselskap should, in relation to Bergen Sjøforsikringsselskap A/S, A/S Wikborgs Assuranceselskap and A/S Cornelius Røe & Co. be free of charge in this matter. Litigation costs are set aside."

The maritime court's judgment has been appealed to the Supreme Court by A/S Cornelius Røe & Co., by writ dated 19 January 1921 and by Bergen Sjøforsikringsselskap A/S and A/S Wikborg Assuranceselskap by writ dated 26 February 1921.

A/S Cornelius Røe & Co. has hereby submitted such statement claim: "That the maritime court's judgment be set aside; that Det Bergenske Dampskibsselskab is ordered to pay A/S Cornelius Røe & Co. compensation a) for the loss of vessel of NOK 90 620 b) for lost freight of NOK 16 000 – and c) for loss of provisions and supplies of NOK 4 646.70, alternatively for items b) and c) compensation as assessed by the court, at the defendants' expense and such that the appellant as regards item b) is not bound by the above stated estimated compensation amount of NOK 16 000, d) for the crew's personal effects NOK 3 268.25 and statutory

interest on the awarded amounts from 15 July 1916 until payment is made – and that Det Bergenske Dampskibsselskab is ordered to compensate A/S Cornelius Røe & Co.'s costs of litigation for the maritime court and the Supreme Court."

Bergens Sjøforsikringsaktieselskab A/S and A/S Wikborgs Assuranceselskap have jointly submitted the following statement of claim: "That the maritime court judgment is set aside, that the defendant is ordered to pay to: 1. Bergen Sjøforsikringsaktieselskab NOK 51 938.11 with 5 per cent interest of NOK 20 000 from 30 September 1916, of NOK 31 402.26 from 23 December 1916 and NOK 535.86 from 28 September 1916 to 21 June 1921 and with 6 per cent interest from that day and until payment is made, and litigation costs for the maritime court and the Supreme Court. 2. A/S Wikborgs Assuranceselskap NOK 15 000 with 5 per cent interest on the amount from 30 September 1916 to 21 June 1921, and by 6 per cent interest from that day and until payment is made, as well as the litigation costs for the maritime court and the Supreme Court."

The defendant, Det Bergenske Damskipsselskab, has submitted the following statement of claim: "Principally: The maritime court's judgment is upheld and the defendant is awarded litigation costs for the Supreme Court from the claimants in solidum. Alternatively: That the defendant is acquitted against payment of: a) the insurance amount of the cargo with statutory interest, b) the crew's personal effects with statutory interest, c) compensation as assessed by the court for damage to the vessel, including provisions and supplies and freight with statutory interest. As compensation for the vessel is believed to reach the level of the insurance amount for comprehensive insurance, no objection is made to item c being divided into the comprehensive insurance amount, for which judgment in kind may be made, and in discretionary compensation in so far and as long as the vessel's value is believed to exceed the insurance amount.

A number of new documents have been submitted before the Supreme Court, which I shall return to later to the extent that they in my opinion may be of relevance to deciding the matter.

The dispute points are in some respects somewhat reduced, as the appellant has not before this court upheld its submission that "Irma's" shipowners were responsible for the pilot's error also under English law, while on the other hand, Det Bergenske Damskibsselskab has not upheld its objection to "Mignon" being considered a total loss.

I have come to a different conclusion than the maritime court. As regards the question of liability for damages itself, it is clear that the collision in this matter was solely caused by errors on "Irma's" side, and that it was "Irma's" compulsory pilot E. C. Burn who was directly responsible for this error.

However, it is disputed whether also "Irma's" shipmaster and lookout were co-responsible for the error. Moreover, it is disputed whether the issue of "Irma's" shipowners' liability for the damage caused by the collision shall be judged under English law or under Norwegian law. And finally, it is disputed whether the shipowners are liable under Norwegian law for errors committed by the compulsory pilot.

I find it reasonable to first deal with the issue of whether English or Norwegian law is applicable to the matter. The Norwegian legislation contains no provision on which country's law shall be applied in determining liability for damage caused by collision. Nor is there, as far as I am aware, any decision

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by the Supreme Court on this question, in respect of a case like the present. In the Supreme Court judgment reproduced in RT-1906-165 it was indeed assumed that the question of whether the owner of a Norwegian

vessel was liable for damage caused by a collision in the Kiel Canal which was caused by an error of the vessel's German compulsory pilot, should be adjudicated under German law. But this opinion was founded by the majority on specific circumstances of the then present case, and in any case that case stood apart from the current matter, in that the damaged vessel was not Norwegian.

The appellant argues that art. 12, subsection 2, no. 2 of the International Convention of 23 September 1910 on Collisions, also ratified by Norway, directly determines that Norwegian law must be applied, as it specifies that a court in a matter of collision shall apply the domestic substantive maritime provisions when all interested parties come from the same State as the court. Even apart from the fact that a convention under Norwegian law does not have direct force of law, I believe, however, that the view put forward by the appellant is incorrect. The term “national law” used in the Convention’s art. 12 is in itself neutral, as the applicable international private law rules in a country are as much a part of national legislation as the country’s substantive civil law rules. On the other hand the fact that the national laws are set against the Convention in this situation could certainly indicate that it refers to the national substantive maritime law rules. However, in my opinion one cannot attach any decisive importance to this comparison. After all, article 12, subsection 2, appears to be a limitation of the scope of the Convention, and it then seems to be outside the natural purpose of this provision if art. 12, subsection 2 no. 2 were to oblige a state to let its courts apply its own substantive maritime law rules on the particular situation covered by the provision. And on my part, I am utterly unable to understand what sensible reason one might have in this convention, which in general does not set out international private law rules (in the prevailing sense of the term), to expressly prohibit a state from allowing its courts to apply foreign substantive maritime law in a matter which must be assumed not to affect any other state’s interest. I therefore believe that the provision must naturally be understood so that it does not impose any restrictions on the Contracting States with regard to the question of which country's law should be applied in the situation that the provision has exempted from the scope of the Convention.

In deciding which state’s rules shall apply, one must then, as far as I understand, essentially resort to building on general legal principles and the nature of the matter in question. What principles one should set for the solution of international private law issues in general has been the subject of much difference of opinion. For my part, however, I find it natural to start with the view that a matter should preferably be judged by the law of the country to which it has its strongest connection, or to which it belongs most closely. It is of course not possible to generally solve all international private law issues from this general consideration, but

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it nonetheless seems to me, that it is sufficient to provide a solution for the present case. After all, the issue concerns a Norwegian shipowner's liability to another Norwegian shipowner for damages caused by the first owner’s vessel colliding with the other owner's vessel. And I think these circumstances must be said to be most strongly tied to Norway, irrespective of the collision taking place in another state’s territorial waters. In my opinion, it is natural to regard the Norwegian Maritime Code such that its provisions for shipowners and also for shipowners' liability are primarily provided with Norwegian vessels in mind and for that matter, it must be considered in accordance with the intention behind the Code that these rules as far as possible apply to the adjudication of matters relating to Norwegian vessels. Furthermore, these are generally the rules which Norwegian shipowners know best and normally comply with. It is surely so that the Maritime Code must be assumed to be based on the presumption that the scope

of its provisions are limited by general international private law rules and that international considerations may lead to a limitation of the provisions' applicability to matters relating to Norwegian vessels. In the present case, where both vessels are Norwegian and likewise all the people whose interests are directly affected by the collision, I, however, do not think one might easily invoke any international consideration against allowing the application of Norwegian law. In support of this view, I believe I may also invoke the abovementioned article 12, subsection 2, no. 2 of the International Convention on Collisions. I namely assume that this provision must at least be given the effect that, based on international considerations there is no objection to a state allowing its courts to apply its domestic law in a case relating to a collision when all the interested parties belong to this state, regardless of where the collision has taken place.

I am aware that the result I have reached, namely that Norwegian law should be applied here, hardly corresponds with our conventional wisdom. As far as I know, those legal authors who have discussed the issue at all, have stated the opinion that a shipowner's liability in respect of a collision shall be assessed according to the law at the site of the collision, without exception being made for the situation that both vessels are domiciled in one and the same foreign state. This doctrine has, however, also been contradicted in Norway, and in foreign literature and case law there are differing opinions on the issue. For my part, I have not been able to find that the reasons generally cited for allowing the collision site's law to apply are decisive in a case like the present.

I shall in this regard point out that what the dispute in the present case is about is solely the issue of shipowner's liability. Regarding the question of under which country's law the issue of whether fault lies with one or the other vessel should be determined, there is no dispute. Which is reasonably associated with the fact that in the present case it is indifferent whether the matter is judged under Norwegian or English law.

As already mentioned, there is also disagreement between the parties about the contents of the applicable Norwegian law for this matter, insofar as it concerns

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the question of a shipowner's liability for errors committed by a compulsory pilot. However, in my view it can be read from, the Maritime Code, section 8, at the end of the first subsection, that a shipowner is also liable for the compulsory pilot's faults. I suppose that although the compulsory pilot is not taken on voluntarily by the shipowner (or the shipmaster), but obliged by law, it must be said that the work he performs on board is a work in the vessel's interest and in its service. As far as I know, it has also always been considered applicable law with us that the shipowner is responsible for the errors of the compulsory pilot. And this point of view has in fact likewise been taken as a basis for the Norwegian side during the negotiations about the International Convention on Collisions.

As it is clear, as mentioned, that the collision was due to errors from "Irma's" compulsory pilot either alone or in combination with mistakes made by the shipmaster and lookout, it is in accordance with the opinion that I have stated above that "Irma's" shipowners are obliged to pay compensation for the damages caused by the collision without needing to answer the question of whether any blame can be placed on the shipmaster or the lookout.

With regards to the size of the damage suffered, however, there is some dispute as far as the relationship between "Irma's" shipowners and "Mignon's" shipowners are concerned. Of the particular amounts, as set out in A/S Cornelius Røe & Co.'s statement of claim, it is only the compensation mentioned under (d)

for the crews effects which Det Bergenske Damskipsselskap has not objected to. Conversely, the company has denied the accuracy of the other amounts and claimed that the compensation in those cases should be determined by judicial assessment.

As regards the first item in the claim, it was obtained by A/S Cornelius Røe & Co. entering the vessel's value at a price of NOK 220.00 per tonne with NOK 125,620.00 and deducting the received insurance sum, totalling NOK 35,000.00. In support of this calculation, A/S Cornelius Røe & Co has before the Supreme Court submitted three statements from a shipowner and two ship brokers regarding vessel prices in the summer of 1916 and a letter from the War Insurance that, in July 1916, according to its tariffs, it could have taken over up to NOK 61,000 on the bark «Mignon». For my part, I cannot find that these statements sufficiently demonstrate that the vessel was as valuable as A/S Cornelius Røe & Co. have calculated. Nor can I find that sufficient justification has been obtained for the compensation amounts mentioned under b) and c). The NOK 16,000 listed as lost freight has, as far as I understand, been calculated by making a totally random deduction from the gross freight of NOK 21,125.15. And there is no evidence of the correctness of the amount listed for provisions and supplies.

Therefore, the determination of the compensation must, in my opinion, in so far as these three items are concerned, be referred to judicial assessment, under which both the vessel itself, the freight and the provisions and supplies will be taken into consideration. As there has been some procedure regarding the question of the principles for valuing the vessel, I find that I should comment that the valuation must be made while taking into account the prices that applied in Norway, however, also considering

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the fact that the vessel was in Tyne, insofar as this may have a bearing on the value. As far as the freight is concerned, as far as I understand, there is an agreement between the parties that what may be required compensated is the gross freight less the likely costs of the voyage and a discretionary amount corresponding to the risk that the vessel would not arrive at its destination and as a consequence not earn the freight.

As for the interest claim submitted by A/S Cornelius Red & Co., I find that there is no opportunity to apply interest from an earlier date than the institution of legal proceedings. On the other hand, I think there is reason, in accordance with a request made during the oral arguments, to raise the interest rate to 6 per cent from 16 July 1921 in accordance with the law of the same day.

As stated in the claim from the Bergenske Dampskibsselskap, there has been no objection to it, in the event it is found to be liable for damages, is required to pay to the insurance companies those sums that these have paid. And, as far as I understand, the company has made no real objections to the payment of NOK 535.86 which Bergenske Sjøforsikringsselskap has paid for legal assistance in England. The claim made by Bergenske Sjøforsikringsselskap and Wikborgs Assuranceselskap will therefore be accepted.

As for the interest claim, there is also as regards the insurance companies presumed to be no reason to apply interest from an earlier date than the institution of legal proceedings, just as the interest rate cannot be set higher than 4 per cent for the time up to 16 July 1921. From this day, on the other hand, it is deemed reasonable to raise the interest rate in accordance with the companies' claims.

I find that Bergenske Damskipsselskap should be charged the costs for the legal proceedings for both courts. For the maritime court, the cost amount will be considered as one for all three Claimants, while costs for the Supreme Court case must be separately attributed to A/S Cornelius Røe & Co. on the one hand and the two insurance companies on the other.

Conclusion:

Det Bergenske Damskibsselskap A/S should pay: 1) to Bergens Sjøforsikringsselskab A/S NOK 51,938.11, 2) to A/S Wikborgs Assuranceselskab NOK 15,000, 3) to A/S Cornelius Røe & Co. NOK 3,268.25 and the amount by which compensation for the shipowner's additional suffered loss from "Irma's" collision with "Mignon" on July 5, 1916, as determined by a maritime judicial assessment made at the expense of Det Bergenske Dampskibsselskap, may exceed NOK 35,000 – all with annual interest 4 of a hundred from 31 May 1917 to 16 July 1921 and 6 of a hundred from that day until payment is made.

Det Bergenske Damskibsselskab will pay in litigation costs incurred before the maritime court to A/S Cornelius Røe & Co., Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskab NOK 1,500, and litigation costs incurred before the Supreme Court to A/S Cornelius Røe & Co. NOK 2,500 and to Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskab NOK 800.

Extraordinary assessor Bade: I agree in the essentials and in the result with the first voting judge.

Assessor Lie and extraordinary assessor Motzfeldt: Likewise.

Extraordinary assessor, previously assessor Hambro: Likewise. I find that the Supreme Court ruling in Rt 1906-165 et seq., mentioned by the first-voting judge, cannot be assumed to be decisive for a case such as the present, where both the injurious and the injured vessel are Norwegian and the case is settled by a Norwegian court. I agree with him that the rules of Norwegian law should apply in such cases and that those rules as laid out by the first-voting judge, lead to the result adopted by him. How the question will be resolved by a Norwegian court, if both vessels are of the same foreign nationality and the collision takes place in a third country's territorial waters, is beyond the decision made in the present case.

Extraordinary assessor city court judge Gjessing: Agree in the essentials and in the result with the first voting judge.

Chief justice Scheel: Likewise.

From the Maritime Court's judgment:
The night between 4 and 5 July 1916 – a little over midnight – on the river Tyne in England there was a collision between the vessels "Irma" and "Mignon".

"Irma" had from Newcastle an English pilot on board, namely Edward C. Burn. - - -

Finally, it should be noted with regard to the pilot that by the provisions laid down on 1 October 1915, by brigadier general A. J. Kelly, according to the law of the state's defense (passed in connection with the war at that time - it is set out, inter alia - after repealing previous provisions of 29 November 1914 - that "an authorized pilot must be taken on board any

vessel which loaded or unloaded leaves the port" (Tyne) and that the pilot shall not leave the vessel "until the vessel is outside the docks of the Tyne". This applies, it further says, "to the river Tyne's pilot section no. 1". - - -

By this I consider it proven that pilot Burn was aboard the "Irma" in accordance to positive orders from competent English authorities.

I must therefore assume that it was right that the pilot was in command of "Irma". - - -

The pilot is consequently solely to blame for the collision. Thus raising the question: Are the shipowners responsible for the compulsory pilot?

I assume it must be necessary to decide whether English or Norwegian law is to be applied before answering the question, as I cannot take as given, that at time in question the same rules applied in this area in both of the two legal systems and thus the result would in any case be the same. The issue in this case is, after all: there has been a collision between two Norwegian vessels in English territorial waters and the arising dispute has been brought before the Norwegian court, but there is disagreement between the parties as to which country's laws apply to the question of shipowner's liability, which does not have to follow the same rule as for the guilty party's own liability. The question is not resolved in Norwegian law and there is also

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no known Supreme Court ruling in any similar case. In theory, it is discussed by Platou, who in his Maritime Law, page 29 speaks in favour of lex loci. He says: "If a Norwegian vessel with an English compulsory pilot collides, the Norwegian shipowner should, even if he is sued before a Norwegian court, not be deemed liable for the mistake of the pilot." Platou assumes that the shipowner is liable for the compulsory pilot under Norwegian law, but not pursuant to English law. Further, Møller, in Vessel collisions II page 26 et seq and 61 et seq, and Klæstad in Shipowner's liability page 297 et seq have spoken in favour of lex loci. On the other hand, Jantzen appears in the N. D. S. 1905 page 329 to maintain flag state law.

In accordance with what is the general opinion of theorists, especially the following reasoning seems applicable: It is desirable that the same rules of law apply to the territorial waters of a country as for the country itself, both for almost idealistic reasons such as in the interests of the relevant country's full sovereignty which for national reasons, but also for practical reasons such as for the sake of unity of law and law enforcement within one and the same state area and therefore for the sake of the rule of law. This is among other things recognized for police and customs regulations. But it is hard to understand how it could be defensible to claim another rule when it comes to damage caused by collision. In this case, it may, at least for the assessment of fault for a collision, be necessary to investigate whether any rules for avoiding collision have been complied with and that in such cases the rules must be those of the relevant country must surely be commonly agreed. I therefore come to the conclusion that shipowners' liability in this case must be determined according to English law. - - -

I therefore find that the shipowners can invoke the old English provisions of freedom from liability for a compulsory pilot. - - -