Translation from Norwegian

(Lion of Norway)

NORGES HØYESTERETT
SUPREME COURT OF NORWAY

Know Ye that on the 26th day of September 2011 the Supreme Court of Norway delivered judgement in the matter of:

HR-2011-01797-A (case no. 2011/72), Civil case, Appeal of Judgement:

NEMI Forsikring AS (a Norwegian limited company engaging in insurance) and **Sjova-Almennar Tryggingar HF** (an Icelandic limited company engaging in insurance)	(Attorney Jon Andersen – On probation)
versus	
Nes Hf (an Icelandic limited company engaging in shipping)	(Attorney Oddbjørn Slinning – On probation)

V O T I N G

(1) Justice **Kallerud**: This matter concerns a claim for compensation from the goods insurer following grounding and raises questions about the understanding and application of the liability clauses in the Norwegian Maritime Code, NMC (*Sjøloven*), section 347, confer section 275 and section 276.

(2) The cargo vessel *MV Sunna*, chartered to the Icelandic Shipping Company *Nes Hf* under a "bareboat charter", ran aground on the night before 2nd January 2007 in the Pentland Firth between Scotland and the Orkney Islands. The ship was *en route* from Iceland with 1900 metric tonnes of ferrosilicium from Icelandic Alloys Ltd to Elkem AS in England. *Motor Vessel Sunna* was registered in Oslo in the Norwegian International Ship Register (NIS).

(3) It followed from the regulations in force when the ship ran aground that, when sailing in the dark, there was to be a lookout on the bridge in addition to the duty officer, see Regulations for Watch Duty on Passenger and Cargo Ships, section 7, subsection 2.3, promulgated in pursuance of the then applicable section 506 of the NMC. The same was apparent from the contractual documents that regulated the transport. It is clear that the First Officer (*styrmann*) despite this, in compliance with a practice stipulated by the Master, was consistently alone on his regular watch from 2400 hours to 0600 hours.

(4) The lack of a lookout, combined with certain other mistakes, was cited in a Port State

Control in the Netherlands on 2nd November 2006. The defects were raised in a telephone call that same day between the Master and a representative of the Shipping Company. After the ship returned to Iceland on 24th November that year, a meeting was held in which the Technical Director of the Shipping Company, the Master and the First Officer all took part. The Shipping Company issued a Non-Conformity and Finding Note where the lack of a lookout after dark was cited. The Master signed the document, which was also distributed to the Shipping Company's other ships.

(5) It has been acknowledged that the Master and First Officer, following the Port State Control in the Netherlands, incorrectly wrote in the Ship's Log Book that there was a separate lookout in place during the First Officer's night watches. It is not clear whether or not the Log Book was also forged before the Port State Control in November.

(6) The direct circumstance leading up to the grounding was that the First Officer, some time after 0300 hours at night, fell asleep. As was the custom, he was alone on the bridge. While the First Officer slept – presumably about one hour – the current nudged the ship off the course he had set on the ship's automatic pilot. There were no alarms on the bridge that could have warned of the course discrepancy, and indeed this was not a requirement. At about 0430 hours the ship was about 2.5 international nautical miles off course and ran aground near the island of Swona.

(7) A salvage vessel was called and the ship was assisted into Lyness on the Orkneys. The damage was too extensive for the transport assignment to be completed and the cargo had to be transferred to another ship.

(8) The cargo forwarder had subscribed insurance with *Sjova-Almennar Tryggingar HF*. The cargo recipient had insurance cover with *NEMI Forsikring AS*. Both policies were in force when the ship ran aground. The companies have reimbursed the losses to the cargo owners, to a total of NOK 4,279,888 (Norwegian kroner), paying half each.

(9) The insurance companies filed a suit against the Shipping Company, claiming compensation for the monies disbursed. The Shipping Company raised a counterclaim, demanding coverage of the residual amount following a joint average settlement of NOK 865,577. The parties concur regarding the amount. They also concur that if the insurance companies succeed , then the Shipping Company's counterclaim will lapse, and that the insurance companies' claims will lapse if the Shipping Company succeeds.

(10) The Oslo District Court delivered judgement on 6th June 2009, finding in favour of the insurance companies. The District Court found that the Shipping Company had defaulted on its obligations by not implementing sufficient measures to prevent the grounding. The Shipping Company was therefore held liable for its own faults and negligence under the principal rule in the NMC, section 275, and it was not, therefore, in the District Court's view, appropriate to release it from liability under section 276.

(11) The District Court Judgement concludes as follows:

> "1. Nes Hf is ordered to pay compensation to NEMI Forsikring ASA in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-

hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

2. Nes Hf is ordered to pay compensation to Sjova-Almennar Tryggingar HF in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.

4. Nes Hf is ordered to pay legal costs to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF in the amount NOK 312,625 – three-hundred-and-twelve-thousand, six-hundred-and-twenty-five – Norwegian kroner within two weeks of service of the judgement."

(12) The Shipping Company appealed the District Court's judgement to the Borgarting Court of Appeal, which found that the Shipping Company could not be blamed for the loss. The Master's and First Officer's error lay, the Appeal Court found, within the exemptions from the Transporter's liability for errors and negligence in navigation, and the ship, in the Appeal Court's opinion, was seaworthy at the commencement of the voyage, see NMC, section 276.

(13) The Appeal Court's judgement of 15th November 2010 concludes as follows:

"1. Nes HF is released.

2. NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 865,577.86 – eight-hundred-and-sixty-five-thousand, five-hundred-and-seventy-seven – Norwegian kroner, 86 cents – plus interest under the Overdue Payments Act, section 3, first paragraph, first sentence, from 12th March 2008.

3. In legal costs before the District Court NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 170,149 – one-hundred-and-seventy-thousand, one-hundred-and-forty-nine – Norwegian kroner.

4. In legal costs before the Court of Appeal NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 253,220 – two-hundred-and-fifty-three-thousand, two-hundred-and-twenty – Norwegian kroner.

5. The fulfilment date for counts 2, 3 and 4 above shall be two (2) weeks from service of judgement."

(14) NEMI Forsikring AS and Sjova-Almennar Tryggingar HF declared that they would appeal the Court of Appeal's judgement in both the primary action and the counter-action. The appeal concerns the application of the law, and to some extent the adjudication of the evidence.

(15) The appeal was granted a hearing by the Appeal Committee of the Supreme Court in a decision of 31st March 2011.

(16) Two new written testimonies and a few new documents have been added before the Supreme Court. The matter stands essentially at the same point as before the earlier courts.

(17) The Appeal Plaintiffs – NEMI Forsikring AS and Sjova-Almennar Tryggingar HF – have briefly argued as follows:

(18) Although the direct cause of the accident was a navigational error that comes under the exemption rules in the NMC, section 276, first paragraph, no. 1, the Shipping Company is nonetheless liable for the loss, because the ship was not seaworthy at the commencement of the voyage, see NMC, section 276, second paragraph. The ship was unseaworthy when it left Iceland because the Master had previously decided that there would be no special lookout when sailing in the dark. It was not likely that this error would be corrected *en route*. The entire voyage must be considered as a unit. Therefore the crucial thing is not that the ship – seen in isolation – was seaworthy during the daytime. The Shipping Company is responsible for the Master and must bear the responsibility for his error, see NMC, section 276, second paragraph.

(19) The liability also follows directly from the principal rule in the NMC, section 275, since the loss was due to the Shipping Company's own errors and negligence. The Shipping Company, which must here be identified with its Technical Director, acted negligently when they failed to ensure that the serious faults that were revealed during the Port State Control in the Netherlands were rectified. There is a causal connection between the Shipping Company's lack of follow-up and the grounding.

(20) NEMI Forsikring AS and Sjova-Almennar Tryggingar HF have filed the following Statement of Claim:

> "1. Nes Hf is ordered to pay compensation to NEMI Forsikring ASA in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.
>
> 2. Nes Hf is ordered to pay compensation to Sjova-Almennar Tryggingar HF in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.
>
> 3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.
>
> 4. Nes Hf is ordered to pay legal costs to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF before the District Court, the Court of Appeal and the Supreme Court."

(21) The Appeal Defendant – Nes Hf – has briefly argued as follows:

(22) Both the direct error that led to the grounding – the First Officer falling asleep – and the Master's decision to not always assign a special lookout when sailing in the dark – are nautical errors for which the Shipping Company is not responsible, see NMC, section 276, first paragraph, no. 1. Even though the Master might have decided to set aside the rule for a special lookout when sailing after dark even before the ship left the dock, it is just as much a part of his nautical leadership of the ship, which falls outside commercial errors for which the Transporter is responsible.

(23) The rules in the NMC, section 276, second paragraph, which impose a responsibility on the Transporter for seaworthiness at the commencement of the voyage, do not apply here. The same circumstances cannot simultaneously constitute a nautical error under section 276, first paragraph, and constitute original unseaworthiness. If so, a different, contributory cause must be argued for the accident. It would lead to a hollowing out of the exemption for nautical errors if the same error, committed by the same person, could also lead to liability under the rule regarding original unseaworthiness.

(24) It was in any case no fault in the ship that made it unseaworthy. *MV Sunna* had modern navigation equipment, was in good technical shape and all papers were in order. There was one crew member more than required on board, and the crew were well qualified both formally and in real terms.

(25) If the ship despite the above – due to the watchkeeping – is deemed unseaworthy at the commencement of the voyage, then this could easily be corrected *en route*.

(26) Any possible unseaworthiness was due not to the Transporter displaying a lack of diligence. The Shipping Company's rules for watchkeeping on board were in line with the current regulations, and the Shipping Company's representative took the steps that could reasonably be expected after the Port State Control revealed that the Master did not follow the rules. The Shipping Company here is not identical with the Master.

(27) The Shipping Company has not acted negligently, and there is therefore no basis for liability under the NMC, section 275. Nor is there any causal link between any possible own fault committed by the Shipping Company and the loss following from the grounding.

(28) Nes Hf has entered the following claim:

> "1. The appeal is dismissed.
>
> 2. NEMI Forsikring AS and Sjova-Almennar Tryggingar HF are ordered, all for one and one for all, to pay to Nes Hf its legal costs before the Supreme Court."

(29) My view of the case:

(30) The parties have agreed that Norwegian law shall apply, and they agree that the Shipping Company Nes Hf's responsibility as a Transporter is regulated by the NMC, section 347, compare section 275 and section 276.

(31) The principle rule concerning the responsibilities of the Transporter are given by

NMC, section 275:

> "The Transporter is responsible for losses that follow from the loss or damage to cargo while in the Transporter's custody onboard or ashore, unless the Transporter can show that the loss was not due to a fault or an omission by the Transporter himself or anyone for whom he is responsible."

(32) The NMC, section 276, stipulates the following limitation of liability:

> "The Transporter shall not be liable if the Transporter can show that the loss is a consequence of:
>
> 1) Error or neglect in navigation or manoeuvring of the ship made by its master, crew, pilot or tugboat or other person who performs work in the service of the ship; or
>
> 2) Fire that is not due to fault or neglect by the Transporter himself.
>
> The Transporter shall nonetheless be liable for losses due to unseaworthiness due to the Transporter himself or anyone for whom he is responsible not displaying due diligence by making sure that the ship was seaworthy at the commencement of the voyage. The burden of proof that due diligence was displayed rests with the Transporter."

(33) The provisions are aligned with the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924, as amended by the Brussels Protocol of 1968, the so-called Hague-Visby Rules.

(34) The principal rule in section 275 stipulates an ordinary negligence and employer's responsibility, but with the opposite burden of proof. The liability limitations in section 276 are special to maritime transport in foreign trade. They were incorporated as a counterbalance because the Transporters during the negotiations for the Hague-Visby Rules had to accept the burden of proof rule in section 275, see *Norsk Lovkommentar – Sjøloven* (Norwegian Legal Commentary – NMC), note 500.

(35) It is clear that section 275 both embraces loss as a result of the Transporter's own faults and faults committed by someone the Transporter is responsible for, for instance the Master and First Officer on the Shipping Company's ship. It is also clear that section 275 has a wider remit than section 276, first paragraph. The principal rule covers all types of negligent acts or omissions that lead to loss as indicated in the provision, whilst the exemption clause only applies to nautical errors and fire.

(36) The exemptions in section 276, first paragraph, apply exclusively to nautical errors and fire *that is not due to the Transporter's own fault.* In the rule about fire, this follows directly from the wording, see also *Rettstidende, Rt* (the Norwegian Journal of Supreme Court Decisions) 1976, page 1002 (*Høegh Heron*). The same must apply for nautical errors, see Thor Falkanger and Hans Jacob Bull: *Sjørett* (Maritime Law), seventh edition, pages 262, 267 and 270; and Fredrik Sejersted: *Haagreglene* (The Hague Rules) (International Convention ... relating to Bills of Lading), third edition, page 64.

(37) Under section 276, second paragraph, the Transporter is nonetheless liable for losses due to unseaworthiness at the commencement of the voyage. The remit of the provision may be somewhat uncertain. However, it is certainly clear that it constitutes an "exemption from the exemption", since the Transporter is held liable for the original unseaworthiness, even though nautical errors were committed that come under the first paragraph.

(38) I now move on to the adjudication of our present case.

(39) There can be no doubt that Nes Hf initially answers for the Master and First Officer, and that the Shipping Company can be held liable for losses due to their errors and omissions under the *principal rule of section 275*. Both these two employees have been guilty of serious errors and omissions: The First Officer by not staying awake on watch, the Master by organising the watchkeeping onboard in violation of rules designed to protect the safety of the ship, the crew and the surroundings.

(40) The first issue that arises is whether the Transporter can nonetheless be released from liability due to the exemption for *nautical errors* in section 276, first paragraph, no. 1

(41) The immediate precursor to the grounding – that the First Officer fell asleep on watch – must undoubtedly be characterised as such an error. On the other hand, one can raise doubts about whether the Master's rule-breaking decision that the First Officer should consistently do his fixed nightly watches alone, can be deemed a "fault or omission in navigation or manoeuvring of the ship". The way I judge this case, it is not necessary for us to decide on this issue, since the ship – as I will revert to later – due to the Master's arrangements, in my opinion, was not seaworthy when the voyage started.

(42) Regardless of whether there was a nautical error, the Transporter answers for errors committed by anyone for whom the Transporter is responsible, and who has caused the *unseaworthiness* at the commencement of the voyage, see section 276, second paragraph, see Thor Falkanger and Hans Jacob Bull: *Sjørett* (Maritime Law), seventh edition, page 262. I choose – like the parties – to relate my further discussion to this issue.

(43) In my opinion there is no doubt that the Shipping Company cannot be held liable for the First Officer's error under the rule of original unseaworthiness, and indeed this was not argued.

(44) The assessment of unseaworthiness due to the ship, as a consistent arrangement, was sailing without sufficient crew on the bridge, is rather more problematic.

(45) The term "unseaworthiness" is not further defined in the law in question. Whether a ship is seaworthy must be decided after a specific judgement which is not swayed by every little mistake, see *Rt* 1975, page 61 (*Sunny Lady*). It is clear that faults linked to the ship itself and its condition are not the only aspects worthy of consideration. Also failures of the crew can lead to the ship being unseaworthy, see *Rt* 1993, page 965 (*Faste Jarl*), where the Shipping Company was held liable because the ship was unseaworthy due to the First Officer's intoxication. Regarding the central issue for consideration the judgement says:

> "The crew must be able to carry out the voyage without the ship or the cargo being exposed to greater risk than the risk one must anticipate when transporting cargo by sea."

(46) Both parties have expressed the view that the *MV Sunna* was not seaworthy on the nights that the First Officer was on the watch alone. I concur with this view. There can be no doubt that the cargo was then subject to a significantly higher risk than the owners had reason to anticipate.

(47) The question then becomes if this is a matter of an *original* unseaworthiness.

(48) According to the NMC, section 131, the Master must, before the voyage commences, ensure that the ship is in seaworthy condition, and *en route* he must do whatever is in his power to maintain this condition. When beforehand – due to the Master's arrangements for the crew – it is clear that the ship will consistently be unseaworthy during the nights, then there also exists – in my judgement – original unseaworthiness. The voyage in such a case must be assessed as a unit, and it makes no difference that there was no fault in the crewing of the bridge at the moment the ship left the dock. A reasonable ship-owner would – if he had known of the circumstance – not have permitted the ship to commence the voyage with a watchkeeping arrangement that exposed the cargo to a significantly heightened risk.

(49) We have not been told of anything to make it likely that the Master during the voyage would alter his practice. The theoretical chance that he would reorganise his crew *en route* so that the ship became seaworthy is something I do not credit here.

(50) Following all this I must conclude that the *MV Sunna* was not seaworthy upon departure from Iceland.

(51) The liability for the original unseaworthiness would lapse if the Transporter itself, and the persons for whom the Transporter is responsible, had shown *due diligence* by ensuring that the ship was seaworthy.

(52) It is clear without further ado that the Master has not displayed due diligence for the ship's seaworthiness. Here, too, Nes Hf is identified with their Master, so that his faults are reckoned as the Shipping Company's faults, see Thor Falkanger and Hans Jacob Bull: Sjørett, seventh edition, page 266 and following; and see *Rt* 1993, page 965 (*Faste Jarl*). Given that the Master's arrangements led to the ship being unseaworthy when it commenced the voyage, then – as we already noted – it makes no difference that his circumstances could also be deemed a nautical error that falls under the remit of section 276, first paragraph. Following this I find that clearly the Shipping Company cannot escape liability on this basis.

(53) Since the Transporter must answer for the Master's error, there is no need to decide whether the Shipping Company has itself committed any errors that result in compensation liability.

(54) In my view, then, there is a clear causal link between the Master's negligence and the loss suffered when the ship ran aground.

(55) Accordingly I have come to believe that Nes Hf must be held liable for the insurance companies' losses. The Parties, as already mentioned, have agreed on the size and interest payments on the compensation amount. The Shipping Company's counterclaim lapses now that the Appeal Plaintiffs have succeeded in the main claim.

(56) The Appeal Plaintiffs have succeeded completely and should be awarded legal costs before all instances in line with the general rule in the Civil Procedures Act, section 20-2. Costs totalling NOK 926,250 have been claimed, including value added taxes. I rely on this cost schedule. Additionally there is the standard hearing fee before the Supreme Court, twice over, of NOK 46,440, see *Rt* 2008, page 1056.

(57) I vote for this:

J U D G E M E N T :

"1. Nes Hf is ordered to pay to NEMI Forsikring AS the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

2. Nes Hf is ordered to pay to Sjova-Almennar Tryggingar HF the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.

4. In legal costs before the District Court, the Court of Appeal and the Supreme Court, Nes Hf is ordered to pay to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF, jointly, the amount NOK 972,690 – nine-hundred-and-seventy-two-thousand, six-hundred-and-ninety – Norwegian kroner within two weeks of service of this judgement."

(58) Justice **Falkanger**: I concur with the First Voting Justice in all essentials and in the result.

(59) Justice **Stabel**: I agree.

(60) Justice **Tønder**: I agree.

(61) Justice **Tjomsland**: I agree.

(62) Following voting the Supreme Court delivered the following:

J U D G E M E N T :

"1. Nes Hf is ordered to pay to NEMI Forsikring AS the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

2. Nes Hf is ordered to pay to Sjova-Almennar Tryggingar HF the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.

4. In legal costs before the District Court, the Court of Appeal and the Supreme Court, Nes Hf is ordered to pay to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF, jointly, the amount NOK 972,690 – nine-hundred-and-seventy-two-thousand, six-hundred-and-ninety – Norwegian kroner within two weeks of service of this judgement."

True transcript certified
Åsne Dingsør Haukvik (illegible)(sign.)
Supreme Court Office, Oslo (stamp)