The ”Sunna” case

An unofficial translation of the Norwegian Supreme Court – Judgment
HR-2011-1797-A

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KEYWORDS: Maritime Law. Liability for damages. Initial seaworthiness. Maritime Code § 347, § 275 and § 276

SUMMARY: The case concerned a claim for compensation from the goods insurers after grounding. The central question was the extent of liability rules for 'nautical fault', cf Maritime Code § 276 subsection 1 and whether there was "initial unseaworthiness", cf Maritime Code § 276, second paragraph. The Supreme Court held that when the ship as a general scheme sailed without adequate crew on the bridge, this would be characterized as initial unseaworthiness. The shipowner then became liable because of identification with its captain. It was amongst other referred to the Maritime Code § 131 which provides that the captain before the voyage begins must ensure that the ship is seaworthy, and that during the voyage he must do what is in his power to maintain this condition. When, as a result of the captain's disposal of the crew, it is apparent that the ship generally will not be seaworthy at night time, initial unseaworthiness must be considered to exist. The Supreme Court found it clear that there was a causal link between the captain's negligence and the loss arising from the grounding, and the shipowner must therefore be held liable for the insurance companies’ losses. (Summary by Lovdata)
References: LAW-1994-06-24-39-§ 131 (Even) LAW-1994-06-24-39-§ 275 (Even) LAW-1994-06-24-39-§ 276 (Even) LAW-1994-06-24-39-§ 347 (Even)

PROCEEDINGS: Oslo District Court TOSLO-2008-183359 - Court of Appeal LB-2009 to 140,485 - Supreme Court HR-2011-1797-A, (Case No. 2011/72), civil case, an appeal against judgement.

PARTIES	NEMI AS Sjova-Almennar Tryggingar HF (attorney Jon Andersen – on trial) at Nes Hf (lawyer Oddbjørn Slinning – on trial).
AUTHORS:	Kallerud, Falkanger, Stabel, Tønder, Tjomsland.

References in the text: FOR-1999-04-27-537-§ 7, LAW-1976-12-17-100-§ 3 (Late payment law) LAW-1994-06-24-39-§ 506 (Even), LAW -2005-06-17-90 - § 2.20 (Disputes Act)

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(1)

Judge Kallerud: The case concerns a claim for damages from the insurers of goods after grounding and raises questions concerning the interpretation and application of the liability provisions of the Maritime Code § 347, see § 275 and § 276

(2)

The cargo ship MV Sunna, which was used by the Icelandic company Nes Hf under a bareboat charter, grounded on the night of 2 January 2007 in the Pentland Firth between Scotland and the Orkney Islands. The ship was en route from Iceland with 1900 tons of ferrosilicon from Icelandic Alloys Ltd. of Elkem AS in England. MV Sunna had Oslo as its home port and was registered in the Norwegian International Ship Register (NIS).

(3)

It followed from the rules that applied when the ship ran aground, that by sailing in the dark there must be a lookout on the bridge in addition to the duty officer, see the Regulations on safety on passenger and cargo ships § 7, section 2.3, issued pursuant to the then applicable § 506 of the Maritime Code. The same followed from the contracts governing the transport. It is nevertheless clear that the first officer, by following a practice established by the captain, was consistently alone on his regular shift from 24.00 to 06.00.

(4)

The lack of lookout was, along with some other faults, sanctioned in a port state control in the Netherlands 2 November 2006. Those deficiencies were discussed in a telephone conversation that day between the captain and a representative of the shipowner. After the ship came back to Iceland 24 November of that year, a meeting was held where the technical director of the shipowner, the captain and the first mate attended. The shipowner issued a "Non-Conformity and Finding Note" where the lack

of look out in the dark was pointed out. The captain signed the document which was also distributed to the company's other ships.

(5)
It has been acknowledged that the captain and first mate during the time after the port state control in the Netherlands incorrectly stated in the deck log that there was a lookout in place at the mate's night watches. It has not been established whether the deck log was forged also before the port state control in November.

(6).
The direct cause of the grounding was that the first mate fell asleep some time after 03.00 at night. In line with practice, he was alone on the bridge. While the mate was asleep - probably for about an hour - the current brought the ship out of the course he had set on the ship's autopilot. There were no alarms in use which could indicate course deviation, such alarms not being mandatory. Approximately at 04.30 the ship was about 2.5 nautical miles off course and grounded at the island Swona.

(7)
Salvage vessels were called and the ship was escorted into Lyness in the Orkneys. The damages were too extensive for the ship to complete the transport, and the cargo had to be transshipped.

(8)
The cargo sender had taken out insurance with Sjova-Almennar Tryggingar HF. The cargo receiver had insurance coverage with NEMI AS. Both insurances were in force when the ship grounded. The insurance companies covered the losses of the cargo interests, with a total of 4, 279,888 Norwegian kroner, divided by half on each company.

(9)
The insurance companies issued proceedings against the shipowner, claiming indemnity for the amounts paid. The shipowner counterclaimed, demanding payment for the remaining amount of general average contribution of 865 577 Norwegian kroner. The parties agree on the amounts. They also agree that if the insurance companies prevail, the shipowners' counterclaim fails, and that the insurance companies' claims will fail if the shipowner prevails.

(10)
Oslo District Court gave judgement on 6 June 2009 (TOSLO-2008-183359) in favour of the insurance companies. The district court concluded that the shipowner had breached its obligations by not having taken adequate measures to prevent the grounding. The shipowner was therefore held liable for its negligent acts or omissions under the main rule of the Maritime Code § 275, and in the Court's opinion the liability exception in § 276 was then not operable.

(11)
The District Court's judgment has the following tenor:
"1 Nes Hf is ordered to pay damages to Nemi ASA Insurance of 2,139,944 - two million one hundred thirty nine thousand nine hundred and forty four - kroner plus statutory interest from 18 November 2007 until payment is made.

2. Nes Hf is ordered to pay damages to Sjova-Almennar Tryggingar HF of 2,139,944 - two million one hundred thirty nine thousand nine hundred and forty four - kroner with late interest from accrue from 18 November 2007 until payment is made.

3. Nemi ASA Insurance and Sjova-Almennar Tryggingar HF are not liable for the claim from Nes Hf.

4. Nes Hf is ordered to pay court costs of Nemi ASA Insurance and Sjova-Almennar Tryggingar HF with 312 625 –three hundred and twelve thousand six hundred and twenty five – kroner within two weeks from the judgment.»

(12)
The shipowner appealed the District Court's ruling to the Court of Appeal, which held that the shipowner could not be blamed for the loss. The captain and the mate's mistakes fell in the appellate court's opinion within the exception from a carrier's liability for faults and neglect in navigation, and the ship was in the court's opinion seaworthy at the beginning of the voyage, see Maritime Code § 276

(13)
The Court of Appeal's judgement of 15 November 2010 (LB-2009-140485) has the following tenor**:**

"1 Nes Hf is held not liable.

2. NEMI AS and Sjova-Almennar Tryggingar HF shall pay, one for both and both for one, to Nes Hf 865 577, 86 - eight hundred and sixty five thousand five hundred and seventy seven 86/100 - kroner plus interest for late payment under the Act § 3, first paragraph, first sentence from 12 March, 2008.

3. In legal costs for the High Court NEMI AS and Sjova-Almennar Tryggingar HF shall pay, one for both and both for one, to Nes Hf 170 149 - one hundred and seventy one thousand one hundred and forty nine - kroner.

4. In legal costs for the appellate court NEMI AS and Sjova-Almennar Tryggingar HF shall pay, one for both and both for one, to Nes Hf 253 220 - two hundred and fifty three thousand two hundred and twenty – kroner.

5. The time for payment under points 2, 3 and 4 above are 2 - two - weeks after the judgement has been served. "

(14)
NEMI AS and Sjova-Almennar Tryggingar HF appealed the judgement of the Appeal Court, both with respect to the main claim and the counter-claim. The appeal concerns the application of the law, and to some extent assessment of the evidence.

(15

The appeal was allowed by the Supreme Court appeal committee's decision 31 March 2011 (HR-2011-675-U).

(16)

There are two written statements and some new documents before the Supreme Court. The case stands mainly in the same position as before the lower courts.

(17)
The appellants - NEMI AS and Sjova-Almennar Tryggingar HF – have mainly submitted:

(18)
Although the direct cause of the incident was a navigational fault that falls under the exemption rule in the Maritime Code § 276, first paragraph, paragraph 1, the shipowner is still liable for the loss because the ship was not seaworthy at the beginning of the voyage, see Maritime Code § 276, second paragraph. The ship was unseaworthy when it left Iceland because the captain had decided in advance that there would be no lookout while sailing in the dark. It was not likely that this fault would be corrected along the way. The entire voyage must be considered as a whole. It is therefore not decisive whether the ship as such was seaworthy during daytime. The shipowner is vicarously responsible for the master, and must bear the liability for his faults, see the Maritime Code § 276 second para.

(19)
Liability also follows directly from the main rule in the Maritime Code § 275 because the loss is due to the shipowner's own mistakes and negligence. The shipowner, who must here be identified with its technical director, acted negligently in not ensuring that the serious fault detected by the port state control in the Netherlands, were corrected. There is a causal connection between the shipowner's lack of follow-up and the grounding.

(20) NEMI AS and Sjova-Almennar Tryggingar HF have claimed as follows:

1. NES Hf shall be ordered to pay damages to the NEMI of kr. 2139944 –two million one hundred thirty nine thousand nine hundred and forty four – kroner plus statutory interest from 18 November 2007 until payment is made.

2. Nes Hf shall be ordered to pay damages to Sjova-Almennar Tryggingar HF with £ 2,139,944 - two million just one hundred thirty nine thousand nine hundred and forty four - plus statutory penalty of 18 November 2007 until payment is made

3. NEMI insurance AS and Sjova-Almennar Tryggingar HF shall not be held liable for the claim from Nes Hf.

4. Nes Hf shall be ordered to pay NEMI AS and Sjova-Almennar Tryggingar HF legal costs for the High Court, the Court of Appeal and the Supreme Court.

(21)
The respondent - Nes Hf – has mainly submitted:

(22)
Both the direct fault that led to the grounding - the first officer falling asleep and the captain's decision not always to use lookout when sailing in the dark – are nautical faults for which the shipowner is not liable, see Maritime Code § 276, first paragraph no. 1 Even if the captain already before the ship departed from the dock should have decided to depart from the regulations concerning a separate lookout, this was still part of his management of the ship, which falls outside the commercial failure for which the carrier is responsible.

(23)
The provision in the Maritime Code § 276, second paragraph, which imposes liability on the shipowner for unseaworthiness at the beginning of the voyage, does not apply. The same circumstances cannot both constitute a nautical fault under § 276, first paragraph, and entail initial unseaworthiness. If so, there must be a separate, contributing cause to the incident. It would result in undermining of the exemption for nautical fault if the same fault committed by the same person, could also lead to liability under the rule for initial unseaworthiness.

(24)
There was in any event no defect of the ship which made it unseaworthy. MV Sunna had modern navigational equipment, it was in good technical condition and all documents were in order. There was one crew member more than required on board, and the crew was both formally and actually well-qualified.

25)
Should the ship nevertheless - because of the watch arrangement - be deemed unseaworthy at the departure, this could easily be addressed along the way.

26)
Possible unseaworthiness was not the result of the carrier having failed to act diligently. The shipowners' regulations on watch keeping was in line with current legislation, and the company representative took those measures which could reasonably be expected after the port state control revealed that the captain did not comply with the rules. The ship owner is not identified here with the captain.

27)
The shipowner has not acted negligently, hence there is no basis for liability under the Maritime Code § 275. There is also no causal link between possible faults committed by the shipowner and the loss resulting from the grounding.

28)
Nes Hf has claimed as follows:

1 The appeal fails.

2. NEMI insurance AS and Sjova-Almennar Tryggingar Hf shall, one for both and both for one, pay to Nes Hf its legal costs before the Supreme Court.

(29)
My view on the matter.

30)
The parties have agreed that Norwegian law is applicable, and it is understood that the liability of the shipowning company Nes Hf, as carrier, is governed by the Maritime Code § 347, see § 275 and § 276

(31)
The main rule on the carier's liability is set out in the Maritime Code Section 275.

"The carrier is liable for losses resulting from the goods being lost or damaged while in the carrier's custody on board or ashore, unless the carrier shows that the loss was not due to the carrier's personal fault or neglect or that of anyone for whom the carrier is responsible."

32)
The Maritime Code § 276 provides for limitation of liability:

"The carrier shall not be liable if the carrier shows that the loss resulted from:
1) fault or neglect in the navigation or management of the ship, on the part of the master, crew, pilot or tug or others performing work in the service of the ship, or
2) fire not caused by the fault or neglect of the carrier personally.
The carrier shall nevertheless be liable for losses in consequence of unseaworthiness because the carrier personally or a person for whom the carrier is responsible failed to take proper care to make the ship seaworthy at the commencement of the voyage. The burden of proving that proper care was taken rests on the carrier."

(33)
The provisions are adapted to the international bill of lading Convention from 1924 with the protocol from 1968, the so-called Hague-Visby Rules.

(34)
The main rule in § 275 sets forth ordinary liability for negligence, including that of a principal for its servants, but with a reverse burden of proof. The limitations from liability in § 276 are peculiar to maritime transport in international trade. They came in as a compensation when the carriers during the negotiations on the Hague-Visby Rules had to accept the burden of proof rule in § 275, see Norsk Lovkommentar (Norwegian Law Commentary) – sjøloven (Maritime Code), note 500

(35)
It is trite that § 275 encompasses losses resulting both from the carrier's own faults and faults committed by someone for whom the carrier is responsible, for instance the captain and the mate of the carrier's ships. It is also clear that § 275 has further reach than § 276, first paragraph. The main rule applies to all types of negligent acts or omissions that cause losses as specified in the provision, while the exemption provision only applies to nautical fault and fire.

(36)
The exceptions in § 276, first paragraph apply only to nautical fault and fire *not being caused by the carrier's own fault*. In the provision on fire this follows directly from the wording, see also Rt-1976-1002 (Hoegh Heron). The same must apply to the nautical fault, see Thor Falkanger and Hans Jacob Bull: Maritime Law (7th edition) page 262, 267 and 270 and Fredrik Sejersted: The Hague Rules Bills of Lading Convention (3rd edition) page 64.

(37)
According to § 276, second paragraph, the carrier is nevertheless liable for loss resulting from unseaworthiness at the beginning of the voyage. The scope of the provision may be somewhat uncertain. But it is certainly clear that it constitutes an "exception to the exception" as the carrier is held responsible for initial unseaworthiness, even if nautical faults are committed which fall under the first paragraph.

(38)
I then proceed to the evaluation of our case.

39)
There is no doubt that Nes Hf is in principle responsible for the captain and first mate, and that the shipowner can be held liable for losses resulting from their faults and omissions under the main rule of § 275. Both employees have been guilty of serious faults and omissions: the mate by not staying awake while on watch, the captain by organizing watch-keeping on board in violation of the rules designed to protect the safety of both the ship, the crew and the environment.

0)
The first question that arises is whether the carrier can nevertheless free itself from liability because of the exemption for nautical fault in § 276 first paragraph, no. 1.

(41)
The immediate occasion for the grounding - the first officer falling asleep on duty -

must be deemed such a fault. On the other hand, questions may be raised whether the captain's rule-violating decision to generally allow the mate to serve his regular night shifts alone, can be considered a "fault or neglect in the navigation or management of the ship." The way I judge the case, it is not necessary to decide this because the ship - which I will come back to later on – as a result of the captain's decision-making in my opinion was not seaworthy when it began the voyage.

42)
Regardless of the existence of nautical faults, the carrier is liable for faults committed by someone for whom the carrier is responsible, and which has led to unseaworthiness at the beginning of the voyage, see § 276, second paragraph, cf Thor Falkanger and Hans Jacob Bull: Maritime Law (7th edition) page 262. I choose - as the parties did – to link the further discussion to this question.

43)
It is in my opinion clear that the shipowner cannot be held responsible for the mate's fault under the rules on initial unseaworthiness, which has also not been argued.

(44)
The assessment of unseaworthiness relating to the fact that the ship, as a general scheme, sailed without adequate crew on the bridge is slightly more difficult.

(45)
The term "unseaworthy" is not specifically defined in the governing act. Whether a ship is seaworthy must be determined by a fact-specific evaluation where not every trifling defect is taken into account, cf-1975-61 (Sunny Lady). It is clear that not only defects relating to the ship itself and its characteristics are considered. Also failure by the crew may cause the ship not to be seaworthy**,** cf Rt.1993-965 (Faste Jarl) where the shipowner was held liable because the ship was unseaworthy as a result of the mate's intoxication. The crucial issue is thus described in the judgment:
"The crew must be able to perform the voyage without the ship and/or cargo being exposed to greater danger than that which can be expected in carriage of goods by sea.»

(46)
Both parties have expressed the view that MV Sunna was not seaworthy at night time when the mate was on watch alone. I agree. There can be no doubt that the cargo was then exposed to significantly higher risk than what the cargo owners had reason to expect.

(47)
The question then becomes whether this amounts to *initial* unseaworthiness.

(48)
Under the Maritime Code § 131 the captain shall before the voyage begins ensure that the ship is seaworthy, and he shall while underway do what is in his power to maintain this condition. When it is clear before the voyage - because of the captain's disposal of the crew - that the ship generally will not be seaworthy at night time, there is in my opinion also initial unseaworthiness. The voyage must in such a case be

judged as a whole, and it is immaterial whether it is so that there was no failure with the crew on the bridge at the moment the ship left the berth. A prudent shipowner would not - if he had been aware of the situation - let the ship set out on the voyage with a watch-arrangement exposing the cargo to a significantly increased risk.

49)
No information has been adduced which makes it likely that the captain during the voyage would change his practice. The mere theoretical possibility that he might have re-deployed the crew en-route so as to make the ship seaworthy, I ignore.

50)
I must accordingly conclude that the MV Sunna was not seaworthy at the departure from Iceland.

51)
The responsibility for initially unseaworthiness does not attach if the carrier itself, and those for whom he is responsible, have exercised *due diligence* in making the ship seaworthy.

(52)
It is obviously so that the captain has not exercised due diligence in respect of the ship's seaworthiness. Nes Hf is here identified with its captain, so that his fault is deemed the shipowner's fault, see Thor Falkanger and Hans Jacob Bull: Maritime Law (7th edition) page 266 et seq and Rt-1993-965 (Faste Jarl). When the captain's decision-making has caused the ship to be unseaworthy upon commencement of the voyage, it is of no relevance whether his acts could also be seen as a nautical fault falling under § 276, first paragraph. After this I find it clear that the shipowner cannot free itself from liability on such a basis.

53) Since the carrier has to answer for the captain's fault, it is not necessary to decide whether the company itself has committed a fault making it liable in damages.

54)
It is clear in my view that there was a causal link between the captain's negligence and the loss arising from the grounding.

55)
Therefore I have come to the conclusion that Nes Hf must be liable for the insurance companies' losses. The parties are, as mentioned, agreed on the amount of damages and on the question of interest. The shipowner's counterclaim fails since the appellants' claims are sustained.

56)
The appellants have won the case completely and should be awarded legal costs for all services in line with the general rule of the Civil Procedure Act § 20-2. Costs are claimed by a total of 926 250 kroner, including VAT. I accept the calculation for costs. In addition comes twice the court fees for the Supreme Court of 46 440 kroner, cf-2008-1056 .*

57)
I vote for this tenor:
1. Nes Hf shall pay to NEMI AS 2139944 - two million one hundred thirty nine thousand nine hundred and forty-four - kroner plus statutory interest from 18 November 2007 until payment is made.

2. Nes Hf shall pay to Sjova-Almennar Tryggingar HF 2,139,944 - two million one hundred thirty nine thousand nine hundred and forty-four - kroner plus statutory interest from 18 November 2007 until payment is made.

3. NEMI AS and Sjova-Almennar Tryggingar HF are acquitted of the claim from Nes Hf.

4. The legal costs of the High Court, the Court of Appeal and the Supreme Court shall be paid by Nes Hf to NEMI AS and Sjova-Almennar Tryggingar HF jointly 972 690 - nine hundred seventy two thousand six hundred and ninety - kroner within 2 - two - weeks from the service of the judgment. *

(58)Judge Falkanger: I am essentially and in the results in agreement with the first voting judge.
(59)
Judge Stabel: Likewise.
(60)
Judge Tønder: Likewise.
(61)
Judge Tjomsland: Likewise.

62)
After the vote the Supreme Court rendered this
Judgement:

1. Nes Hf shall pay to NEMI AS 2,139,944 - two million one hundred thirty nine thousand nine hundred and forty-four - kroner plus statutory interest from 18 November 2007 until payment is made.
2. Nes Hf shall pay to Sjova-Almennar Tryggingar HF 2,139,944 - two million one hundred thirty nine thousand nine hundred and forty-four - kroner plus statutory interest from 18 November 2007 until payment is made.
3. NEMI AS and Sjova-Almennar Tryggingar HF are not liable for the claim from Nes Hf.
4. The legal costs of the High Court, the Court of Appeal and the Supreme Court shall be paid by Nes Hf to NEMI AS and Sjova-Almennar Tryggingar HF jointly in the amount of 972 690 - n ihundred seventy-two thousand six hundred and ninety - kroner within 2 - two - weeks from service of the judgment.