VII. Denmark

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1. *Bullying*, Højesteret (Supreme Court) 15 November 2011[1]

The bullying case was an important and long-awaited decision in Danish tort law concerning liability for purely mental harm. Prior to the judgment, Danish courts had generally been reluctant to award damages for psychological injuries unaccompanied by physical harm or immediate risk of incurring such harm, creating significant uncertainty for both practitioners and scholars. The case provided much-needed clarification on the conditions under which mental harm may constitute a compensable personal injury and has since been regarded as a leading authority on causation and adequacy.

A was employed at a kindergarten where tensions existed among the staff. In an effort to improve the working environment, a weekend seminar was arranged at a summer cottage for the employees, and a professional mediator (M) was engaged to facilitate the process. On the first day of the seminar, A – who suffered from a back injury and was therefore frequently absent from work – chose to raise her own situation during a plenary session. She stated, among other things, that her request for more flexible working hours had not been given proper consideration. This issue, however, was not discussed in detail. Instead, M redirected the discussion toward whether A's absenteeism constituted a problem for the kindergarten. The other employees were asked, in turn, to comment on this issue.

The following day, M continued this discussion and, despite A's reluctance, maintained the focus on her absenteeism. At one point, the head of the kindergarten (H) stated that A's absenteeism made it problematic to employ her. M then called for a time-out and asked H and the deputy head to join her in another room to discuss the matter further, while the remaining employees stayed behind. A felt extremely uncomfortable and began to cry. After approximately 15–20 minutes, M, H, and the deputy head returned, and H announced that it had been decided to 'work to-

[1] Ugeskrift for Retsvæsen (Weekly Law Report, UFR) 2012.524H. Reported on by *S Bergenser/A Bloch Ehlers*, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 151, nos 12–14.

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wards' terminating A's employment at the kindergarten. A was shocked and requested that the meeting be ended.

Following the weekend seminar, A experienced significant mental distress and was unable to work for an extended period. As a result, she brought an action against the kindergarten (the municipality), claiming compensation for pain and suffering under secs 1 and 3 of the Danish Liability for Damages Act.[2]

A's claim was rejected by both the City Court and the High Court. The City Court held that the kindergarten had acted negligently but dismissed the claim on the ground that A's injury could not be regarded as a personal injury within the meaning of sec 1 of the Danish Liability for Damages Act. The High Court disagreed with the City Court on this point and found that the mental harm suffered by A constituted a personal injury under that provision. The Court further observed that, although liability for mental harm is generally established only where the claimant has suffered an initial physical injury or has been exposed to a risk of such injury, compensation may also be awarded where the mental harm reaches a certain level of severity. However, on the facts of the case, the High Court concluded that the mental harm suffered by A was not sufficiently severe to justify an award of damages.

Before the Supreme Court, a statement from a psychiatrist was presented. This statement indicated, inter alia, that the events at the seminar had caused A to develop anxiety and depression and that, immediately following the seminar, she exhibited symptoms resembling a mild form of post-traumatic stress disorder. The Supreme Court agreed with the High Court that the kindergarten had acted negligently and that A's mental harm constituted a personal injury under sec 1 of the Danish Liability for Damages Act. The remaining issue was whether the requirement of legal causation (adequacy) was satisfied. In this respect, the Court found that the negligent conduct had increased the risk of mental harm of the kind suffered. It further held that the management of the kindergarten

[2] Consolidated Act No 885 of 20 September 2005. Section 1 of said Act reads as follows: 'A party who is liable in damages for personal injury shall pay compensation for loss of earnings, recovery costs and other losses resulting from the injury together with compensation for pain and suffering'. Section 2 'If the injury has had lasting consequences, compensation shall also be paid for permanent injury and loss or impairment of earning capacity'. Section 3 'The value of work in the home shall rank equally with earned income'. Section 2 reads as follows: 'Compensation for pain and suffering shall amount to DKK 130 for each day the injured person is sick. In special cases compensation can be paid for pain and suffering even if the injured person is not sick. The compensation cannot exceed DKK 50,000.'

was aware that A was in a mentally vulnerable position, leading to the conclusion that the mental harm was a foreseeable consequence of the kindergarten's negligence. Accordingly, damages were awarded in the amount of DKK 50,000 (approx € 6,700). As correctly noted by the High Court, the established starting point in Danish law is that compensation for mental harm cannot be awarded unless the claimant has suffered an initial physical injury or has been exposed to a risk of such injury. In the present case, however, the Supreme Court awarded damages despite the fact that A's mental harm had not materialised in either of these ways. This decision opens the door to compensation claims in a broader range of harm scenarios. Most notably, it suggests that damages may now be claimed in situations where a person has been subjected to bullying or harassment.

The extent to which courts will permit such claims in the future remains uncertain. Although the Supreme Court does not provide a definitive answer, it does lay down several important guiding principles. First, the judgment indicates that the tortfeasor's negligent conduct must have significantly increased the risk of the mental harm in question. In essence, this requires a sufficiently strong causal connection between the negligent act and the resulting mental harm for liability to arise. Second, the Court emphasised that the management of the kindergarten knew, or ought to have known, that A was in a psychologically vulnerable and stressful situation. This finding is relevant to the assessment of the degree of negligence attributable to the kindergarten. Finally, the Court stressed that A's mental harm was caused 'directly' by the kindergarten's conduct. This excludes claims by individuals who merely witnessed the events, meaning that other participants in the seminar would not have been able to bring a successful claim against the kindergarten (municipality). This constitutes an important limitation on the scope of liability for mental harm.

The Supreme Court's decision is therefore significant, and it will be interesting to observe how far Danish courts will be willing to go in awarding damages for mental harm in future cases.

2. *Lauritzen*, Højesteret 13 September 2017[3]

The *Lauritzen* case was a long-awaited case for both scholars and practitioners in the field of product liability, as the uncertainties before the decision had troubled Danish courts, producers and liability insurers for years. The case brought the needed clarity in the grey zone area be-

[3] UfR 2018.98H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2017 (2018) 134, nos 2–18.

tween the law of sales and product liability regulation and has been the leading case since it was delivered.

The litigants in this case are *J Lauritzen A/S (Lauritzen)*, a Danish shipping company, and *MAN Diesel & Turbo German (MAN)*, a company that produces large-bore diesel engines and turbomachinery primarily for marine and stationary applications. MAN delivered, as producer, a number of engines to a Korean shipyard, which constructed seven ships that contained the engines produced by MAN. Subsequently the shipyard sold the seven ships to Lauritzen.

In the engines, there were a special integrated lubricating system called Alpha Lube. After the ships were put into use, Lauritzen determined that the engines were exposed to an unusual and extraordinary degree of wear and tear. This wear and tear implied that several components had to be replaced much sooner than expected. The presumption was that the wear-related damage was caused by the Alpha Lube system in the engines. The contract between the shipyard and Lauritzen contained limitations of liability, which was one of the reasons why Lauritzen filed their claims against MAN instead. No contractual relationship existed between MAN and Lauritzen.

The main question in this case was whether MAN could be held liable for the damage according to the rules on product liability developed by court decisions, outside the area of regulation of the Product Liability Directive. Because of this, the primary dispute in relation to product liability in this case concerned whether the Alpha Lube system should be regarded as a separate product or as a part of the engine.

The judgment in this case was decisive for the question as to whether damage had occurred to something other than the defective product, which would result in applying the regulations on product liability. The other possible outcome of the decision would be that the damage was only in the product itself – an instance of 'self-harm' – which would result in applying the liability rules in the law of sales.

The litigants in the case could not agree on whether the condition for damage to something other than the product itself was fulfilled. The Alpha Lube system was, before its integration in the engines, introduced on the market as a separate product by MAN, which resulted in the fact that it could be a separate product. The counterargument here was that the engine with the Alpha Lube system was sold as a unit. This disagreement was the primary reason for the commencement of the case.

The Maritime and Commercial Court made a decision in the matter before it was appealed to the Supreme Court. The Maritime and Commercial Court found that the Alpha Lube system under these circumstances,

where it was sold for use in the engines of the seven ships, must be regarded as a separate product. The wear-related damage to the engines therefore fulfilled the conditions for damage according to the rules of product liability.

Therefore, it was awaited with suspense whether the Supreme Court would uphold the decision from the Maritime and Commercial Court, or they would use their reasons from an earlier decision, which is very comparable to this case. The comparable case is the *Masnedø* case (UfR 2010.1360H), where the main question likewise was whether a component of a given product should be regarded as a separate product or as a part of the product.

Not surprisingly, the Supreme Court maintained their reasons from the earlier decision in the *Masnedø* case. Therefore, they took into account that the Alpha Lube system was a part of the engines when Lauritzen acquired them from the shipyard.

The Supreme Court found that the engines and the integrated Alpha Lube system must be regarded as a unit. It could not arrive at another conclusion, even though Lauritzen specifically chose the Alpha Lube as the lubricating system. The decisive question was still whether the engines with the Alpha Lube system were sold as a unit.

Therefore, Lauritzen could not raise their claims against MAN according to the rules of product liability developed by court decisions.

The judgment of the Supreme Court was not a surprise, as it complies with the principles laid down in the Products Liability Act § 2 (2) and also complies with the Supreme Court decision in the above-mentioned *Masnedø* case. Based on the two cases, the legal status is presumably clarified where an originally incorporated defective component causes damage to a product in which the component is installed – in any case, when the claim is based on the rules of product liability, which are developed by court decisions.

In such cases as above, it would not be possible to raise a claim against the producer of the defective component in the product, because it would comprise damage to the product itself.

Whether the product is sold as one unit, or if it is sold as separate products can cause difficulties in practice. Following this, an interesting question could be what the outcome would be in cases which should be decided in accordance with the rules in the product liability legislation, which are based on the Product Liability Directive. Ultimately, it will be up to the European Court of Justice to determine the scope of application, even after the 2024 updated Directive on Product Liability 2024/2853.

3. *Memory Card Technology*, Højesteret 27 March 2015[4]

This case is a landmark case in the area of causation in relation to auditors' liability, setting the boundaries for many other court cases and disputes in this important area of liability and establishing the division of risks between the management of companies, auditors' liability and readers of annual reports of companies.

Memory Card Technology (MCT), a company producing computer chips, was very successful in the 1990s. The Financial Statements of MCT for the first quarter of the financial year 2000/2001 showed that the equity in MCT was lost and, after a short period, the company went bankrupt.

The bankruptcy estate sued both the management and the auditors of the company.

Regarding the auditors, the bankruptcy estate claimed that, due to negligence in auditing the company, the management was misled, and further that if the auditors had not acted negligently, the management would not have been able to borrow money to pay for the additional stock of raw materials, stating that the downfall of the company was caused by the decrease in the value of the raw materials.

The Supreme Court found that the auditors had shown considerable negligence in auditing the two annual reports up until the bankruptcy but held that the bankruptcy estate did not prove to the Supreme Court that the management would have acted differently even if the auditors had not acted negligently: a 'classic' ruling that the causation requirement was not met.

The interesting angle in this decision is that the Supreme Court does not lower the requirements of proof regarding causation when the professional party, the auditor, has shown considerable negligence. In Danish law, it is a known fact[5] that the requirements for proof regarding causation is lowered when the professional party has shown substantial negligent behaviour.

The Supreme Court does not provide any reasons as to why the requirements for causation were not lowered in this case, but the defending lawyer had drafted a spread sheet before the Supreme Court hearings that showed how the two annual reports, which had been drafted prior to the bankruptcy, would have been had the auditor addressed the problems in

[4] UfR 2015.2075H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 134, nos 2–12.

[5] *B von Eyben/H Isager,* Læreborg i erstatningsret (2024) 126 f.

these two annual reports, which first and foremost revolved around the valuation of the stock of raw materials and the receivable of an American customer of the company.

This landmark case has paved the way for subsequent important and high value Danish cases, such as the *Hesalight* case (FED 2023.266Ø High Court East).

4. *Capinordic Bank*, Højesteret 15 January 2019[6]

This case represents the first of many high profile court cases where the Danish State sued former management boards of banks that went bankrupt during the years of the financial crisis from 2008–2012.

These cases – this one being the first– have given a wealth of clarity to the legal position of many questions within the area of civil liability of management boards in companies, including the legal principle referred to as the 'business judgement rule'. It is well-established that even if these cases revolve around the management boards of banks, the legal principles laid down in this case are also relevant for management liability in other types of legal entities.

This decision concerns the liability of the managers of Capinordic Bank A/S.

Capinordic Bank A/S was declared bankrupt on 11 February 2010 as the bank was unable to meet the requirements set by the Danish Financial Supervisory Authority for the bank's solvency.

Finansiel Stabilitet A/S, a company owned 100% by the Danish State, took over the bank's assets under the Financial Stability Act and subsequently brought this suit against the CEO (A), a board member (B) and the chairman of the board (C) of the former Capinordic Bank A/S.

The main issue in the case was whether the defendants, as the bank's former management, had acted negligently and therefore must compensate the bank's loss in relation to 11 loan commitments issued in the period 2007–2009.

This case represents a breakthrough for the business judgement rule in Danish law. For many years several court cases[7] revolved around this doctrine, but it was not until the *Capinordic* case that this doctrine was established clearly in Danish law.

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[6] UfR 2019.1907H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2019 (2020) 132, nos 2–26.

[7] Eg UfR 2013.1312H and UfR 2015.2075H.

Initially, the Supreme Court expressed that the members of the management of a bank are subject to a common fault-based negligence standard, and that there is no basis for establishing a stricter standard of liability.

The Supreme Court further found that a decision to grant a loan is largely based on a business judgement, in particular on the basis of a credit rating of the borrower, and that this business judgement must be made on reasonable grounds. In the credit rating, the bank should include factors such as the purpose of the loan, the borrower's financial circumstances, the security provided for the loan and the borrower's ability to run their business, namely considering the common economic cycles. It will, however, depend on the specific situation which factors should be included. The Supreme Court stated that one should generally be reluctant in setting aside business judgements.

The Supreme Court found, however, that in circumstances where it is assumed that the loan was not only granted with regards to the bank's interests, but also other interests irrelevant to the bank, more stringent requirements should be met.

The Supreme Court found that the defendants were liable for the bank's losses in nine of the 11 loan arrangements, as the members of the management board had acted negligently by granting loans or making other transactions in these specific instances, while there was no basis for liability regarding two of the arrangements.

This decision explicitly sets out the boundaries for the Danish version of the business judgement rule.

The judgment of the court aligns with what among scholars has been the understanding of the Danish version of this rule,[8] which is not in fact a rule, but is a principle which sets out the limits for the assessment of the civil liability of directors and officers in Danish limited companies.

This decision also adds new and important knowledge in the area of the civil liability of directors and officers of Danish limited companies as it sets out standards for the legal position when supervisory authorities have been involved in situations that give rise to civil liability disputes concerning directors and officers. There have previously been no court decisions in Danish law that underline as clearly as this decision that the civil liability of directors and officers is much less strict when supervisory authorities have been involved in the situation that gave rise to liability questions.

[8] *T Sofsrud*, Bestyrelsens beslutnig og ansvar (1999); *M Samuelsson*, Bestyrelsesansvaret (1997); *S Bergenser*, Tilsynsrådets erstatningsansvar (2012); *J Winther Høy*, Bestyrelsens ansvar – med særlig fokus på finansielle virksomheder (2020), and *S Bergenser*, The Business Judgment Rule in Danish Law (2022).

The decision is of great importance in Danish law as it is the first Supreme Court decision in a complex of 13 court cases regarding the civil liability of directors and officers that the Danish State has filed against directors and officers of Danish banks that went bankrupt in the period from August 2008 until 2013. This decision addresses a number, but not all, questions regarding management liability that have been addressed in this complex of large (in the sense of their factual circumstances and the economic values involved) court cases regarding the bankruptcy of Danish banks during the financial crisis.