Supreme Court’s
JUDGMENT

Case no.

delivered in Stockholm on 5 December 2023

T 486-23

PARTIES

See Party Annex

THE MATTER

Establishment of tort liability

RULING APPEALED

Judgment of the Scania and Blekinge Court of Appeal of 20/12/2022 in case T 1665-21

JUDGMENT

In modifying the Court of Appeal's judgment, the Supreme Court affirms that Ronneby Miljö och Teknik AB is liable for compensating the appellants for personal injuries in the form of elevated PFAS blood levels, resulting in bodily deterioration.

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The Supreme Court also modifies the Court of Appeal's judgment in respect of litigation costs, and relieves the appellants from the obligation to pay Ronneby Miljö och Teknik AB's costs for litigation in the District Court and the Court of Appeal and orders the company to pay each of the appellants' costs of litigation

- in the District Court in the amount of SEK 42,833, of which SEK 28,055 pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of 13 April 2021,
- in the Court of Appeal in the amount of SEK 8,859, of which SEK 5,983.36 pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of 20 December 2022.

The Supreme Court orders Ronneby Miljö och Teknik AB to compensate each of the appellants for their costs of litigation in the Supreme Court in the amount of SEK 1,064, of which SEK 786 pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

CLAIMS IN THE SUPREME COURT

The appellants have requested that the Supreme Court establish that Ronneby Miljö och Teknik AB is liable to compensate them for personal injuries in the form of elevated PFAS blood levels, resulting in physical changes and bodily deterioration.

The appellants have also requested to be relieved from paying Ronneby Miljö och Teknik AB's costs of litigation in both the District Court and the Court of Appeal, and that the company be ordered to pay the appellants' costs of litigation there.

Ronneby Miljö och Teknik AB has opposed modification of the judgment of the Court of Appeal.

The parties have requested payment of their costs of litigation incurred in the Supreme Court.

The Supreme Court has granted the leave to appeal as stated in para. 7.

REASONS FOR THE JUDGMENT

Background

1. Ronneby Miljö och Teknik AB (Miljöteknik) is a company wholly owned by Ronneby municipality which supplies drinking water to the urban areas in Ronneby municipality, including from the Brantafors waterworks.

2. In 2013, drinking water from the Brantafors waterworks was found to contain very high levels of PFAS (per- and polyfluoroalkyl substances). This contamination derived from the fire training centre at the base of Blekinge Wing, where, since the mid-’80s, the Swedish Armed Forces has used a special oil-and-petrol firefighting foam which contains PFAS. These substances then spread from the fire training centre to the groundwater and thereafter to the drinking water.

3. A large number of local residents (the appellants) brought an action against Miljöteknik. They requested the District Court to establish that the company was liable to compensate them for personal injury. This action was based on the provisions of the Product Liability Act (1992:18). The appellants claimed that they had suffered personal injury because the water supplied to them by Miljöteknik was defective, being contaminated with PFAS.

4. Pursuant to Chapter 56, Section 13 of the Code of Judicial Procedure, the District Court submitted to the Supreme Court the question of whether the Product Liability Act was applicable. The Court decided that Miljöteknik's supply of water to residents was a product covered by the Product Liability Act (see “Dricksvattnet” NJA 2018 p. 475).

5. The District Court ruled that Miljöteknik was liable to compensate the appellants for personal injury in the form of elevated PFAS blood levels, resulting in physical changes and bodily deterioration.

6. The Court of Appeal dismissed the action, finding it unproven that any of the appellants had suffered personal injury.

What is at issue in the Supreme Court

7. The Supreme Court has granted leave to appeal on the basis of the Court of Appeal's assessment that elevated levels of PFAS substances have been found in the appellants' bodies due to the high content of PFAS in the drinking water supplied to them by Miljöteknik, and that each of the appellants, for this reason and compared to someone not exposed to the same extent, ran a higher risk of suffering negative health effects and diseases which are associated with PFAS exposure.

8. At issue in the Supreme Court is whether the appellants have suffered personal injury as a result of the elevated levels of PFAS in their blood. In other words, the case concerns the question of whether there is liability per se.

Product Liability Act

9. The Product Liability Act implements the EU Product Liability Directive[1] and regulates liability for damage caused by a product to a person or thing other than the product itself. Under the Act, compensation shall be paid for, among other things, personal injury caused by a defective product (see Section 1). It is not required, as in the case of personal injury under the Tort Liability Act, that the injury has been caused by negligence.

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[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

10. Neither the Product Liability Act nor its legislative history contains any definition of personal injury (cf. Govt. bill 1990/ 91:197 p. 37).

11. Nor does the Product Liability Directive contain such a definition. It has been left to national law to define the concept of personal injury and which damages are eligible for compensation. However, according to the Court of Justice of the European Union (CJEU), this concept must be interpreted broadly in order to ensure that the injured parties receive correct and full compensation for the damage they have suffered as a result of a defective product (cf. judgments of the CJEU in Veedfald, C-203/99, EU:C:2001:258, para. 25-29, and Boston Scientific Medizintechnik, C-503/13 and C-504/13, EU:C:2015:148, para. 46 and 47).

12. Since neither the Product Liability Act nor the underlying Directive specifies what is meant by personal injury, the concept of personal injury in that Act (like the concept of property damage) is to be given the same meaning as in the Tort Liability Act (cf. "Flänsämnena" NJA 1996 p. 68).

The concept of personal injury in tort law

13. The concept of personal injury is not further specified in the Tort Liability Act. However, the meaning of the concept has been discussed several times in the legislative history (see, e.g., SOU 1964:31 p. 80, Govt. bill 1972:5 p. 576, SOU 1973:51 p. 36 et seq., Govt. bill 1975/20:33 pp. 61 & Govt. bill 2000/ 01:68 p. 17).

14. Personal injury includes impairment of body and mind. Such an impairment may have been induced by physical means or by any other means. This can be a mechanically induced injury to the body (such as a crushed foot, flesh wounds, internal bleeding) or an injury caused by poisoning, radiation or similar processes (tissue destruction, internal disease, etc.). A mental impairment which is a direct consequence of the injurious act can also be a personal injury.

15. For a physical impairment to be said to take place, change in or to the body must have occurred and this change must objectively constitute a deterioration. Such a deterioration may be temporary or permanent. There may be a visible external impact on the body, a medical condition or impaired function in any bodily organ. A weakening of the body's immune system or an increased susceptibility to disease are examples of the latter.

16. It is in the nature of things that not every physical impact which can be described as negative can be the basis for liability; such an impact must be considerable enough that it can be said to constitute damage. Minor and transient bodily reactions manifesting as mild pain or physical discomfort are normally not so considerable as to be considered personal injuries for the purposes of tort law. However, the issue is usually of minor importance, as such limited 'damage' is unlikely to have consequences for which compensation must be paid.

17. In addition, tort liability generally requires culpa, or, in the case of product liability, the placing on the market of a defective product. The victim's own behaviour and involvement must also be taken into account, where appropriate, as well as what may follow from the requirement of a causal link. In practice, therefore, no tort liability arises for general adverse health effects which often occur as a result of normal exposure to common substances in food or the environment.

Personal injury and health risks

18. Thus, a personal injury requires as a rule the occurrence of an impairment, such as a disease. This case raises the question of whether it is possible, furthermore, to establish liability for the increased risk that such an impairment will occur in the future.

19. An argument in favour of granting injured parties this right is that, in the case of prolonged proceedings, there is a risk that claims for damages will be

statute-barred before the physical deterioration has occurred. And even if the claim is not statute-barred, an extensive period of time can, in some cases, complicate matters of evidence, making it very difficult in practice for the injured party to claim damages.

20. However, the view that increased risks in themselves should be regarded as personal injuries under current Swedish law finds no clear support in the text of the law, the legislative history or case law. The text of the law rather suggests that this is not the case. Historically, such a possibility has been considered non-existent (cf., e.g., Håkan Andersson, *Ersättningsproblem i skadeståndsrätten*, 2017, p. 456, Jan Hellner and Marcus Radetzski, *Skadeståndsrätt*, 12th ed. 2023, p. 211 f. as well as Viggo Hagstrøm and Are Stenvik, *Erstatningsrett*, 2nd ed. 2019, p. 549).

21. A different approach would imply a fundamentally different view of the concept of personal injury than what has so far prevailed. It would then be up to the victim to show that he or she was at risk of suffering from an impairment. This, in turn, has implications for our understanding of fundamental principles of tort law.

22. Liability based on risk necessarily entails a reformulation of traditional concepts of damage, causality and evidence. Under such a model, probability calculations come to the fore. This would entail a change in tort law through adjudication, the consequences of which are difficult to predict. It is primarily for the legislator to take the necessary measures to overcome the difficulties which may arise for an injured party in situations of the kind referred to, and in that connection to consider the questions of principle which arise in tort law.

23. In conclusion, the increased risk of a physical impairment arising in the future cannot inherently be considered a personal injury as a rule.

Consequences for which compensation must be paid

24. When examining claims for damages, it is important to distinguish between the damage itself and its consequences. A finding that someone has suffered a personal injury does not necessarily mean that this person is entitled to compensation.

25. Chapter 5 of the Tort Liability Act regulates how damages are to be determined. Section 1 provides for compensation for what can be termed the consequences of personal injury. A person who has suffered a fracture, for example, is not compensated for the fracture itself, but for the costs, loss of income and physical or mental suffering caused by the fracture.

The assessment in this case

26. That the drinking water supplied by Miljöteknik to the appellants was a product within the meaning of the Product Liability Act is clear from the legal case “Dricksvattnet”. The parties are in agreement that the drinking water contained very high levels of PFAS and that the water was thus defective (cf. Section 3 of the Product Liability Act).

27. Furthermore, the parties agree that the defect has caused the high levels of PFAS measured in the appellants' bodies and that Miljöteknik is the party liable under the Product Liability Act for any personal injury caused by the defect (cf. Sections 6 and 7).

28. The question is therefore whether the high levels of PFAS measured in the appellants' bodies constitute personal injury.

29. The facts in the case show that the measured total PFAS concentration in the blood of the appellants, in 2014 and 2015, was on average around 600 ng/mL The lowest measured value among the appellants was 91 ng/mL and the

the highest value was 1,800 ng/mL. These levels are among the highest measured in populations worldwide. Even the lowest measured levels among the appellants are significantly above normal. The normal blood level of PFAS in Sweden is no more than 10 ng/mL. The facts in the case show that the half-life period of PFAS in the body is so long that it will take many years for the PFAS levels of the appellants' blood to reach levels approaching normal.

30. In accordance with the leave to appeal, the point of departure for the Supreme Court's assessment is that each of the appellants, because of the high levels of PFAS in their blood, ran a higher risk of suffering negative health effects and diseases which are associated with PFAS exposure compared to someone not exposed to the same extent.

31. All in all, the facts in the case can be considered to provide sufficient support for the assertion that the contaminated drinking water has had a significant negative impact on the appellants' bodies. Indeed, the increased risk of future adverse health effects does not in itself constitute a personal injury. On the other hand, the considerable physical deterioration manifested in the high levels of PFAS in each appellant's blood must be regarded as constituting an impairment which is a personal injury for the purposes of tort law.

32. There are therefore grounds for establishing that Miljöteknik is responsible for compensating the appellants for these personal injuries.

33. The assessment being carried out here includes neither the determination of the extent to which these personal injuries have given rise to consequences of the injuries entitling the appellants to compensation nor the amount of any compensation.

Litigation costs

34. In light of this outcome, the appellants shall be relieved of the obligation to pay Miljöteknik's costs of litigation in the District Court and the Court of Appeal. Miljöteknik shall instead reimburse the appellants for their litigation costs incurred in these instances, as well as in the Supreme Court. The appellants have not appealed the amounts awarded by the District Court in respect of litigation costs. The cost claims made in the Court of Appeal and the Supreme Court are reasonable.

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Justices of the Supreme Court Svante O. Johansson, Dag Mattsson, Johan Danelius, Jonas Malmberg (reporting Justice) and Anders Perklev (dissenting)
Judge referee: Hanna Hallonsten

DISSENTING OPINION

Justice of the Supreme Court Anders Perklev dissented and would affirm the judgment of the Court of Appeal. In his view, paragraphs 31 to 33 of the judgment should read as follows.

31. The increased risk of adverse health effects arising in the future cannot in itself constitute a personal injury (see para. 23). For a personal injury to be realised, a change on or in the body must have already occurred. This change must objectively constitute a deterioration (see para. 15). The deterioration must be considerable (see para.16).

32. High levels of PFAS found in the blood can, per se, be considered a change in the body. However, if the adverse effect thereof consists solely of an increased risk of future illness or impaired bodily function, the requirement that the change should objectively constitute a deterioration of the body cannot be considered to be met. Any other approach would be less consistent with the premise that an increased risk of adverse health effects occurring in the future does not in itself constitute a personal injury.

33. The facts in the case are mainly aimed at highlighting links within a larger population between exposure to PFAS and certain medical conditions or other physical defects. It is not possible to draw any firm conclusions from the facts in the case regarding how PFAS affect the body of an individual. Therefore, it is not possible to conclude that a certain level of PFAS in the blood is regularly associated with the significant deterioration of the body, as required for such a change to be considered a personal injury.

34. It follows that it is not sufficient that a certain level of PFAS has been measured in a person's blood to establish that a personal injury has occurred. No other evidence has been presented in the case regarding changes on or in the body of each of the appellants.

35. The foregoing means that, even taking into account the high levels of PFAS measured in the appellants, it cannot be considered proven that each of them has suffered a personal injury within the meaning of the Product Liability Act. The judgment of the Court of Appeal shall thus be affirmed.

In the minority in this respect, I am otherwise in agreement with the majority.

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