Supreme Court's
JUDGMENT

Case no.

delivered in Stockholm on 14 November 2023

T 6909-22

PARTIES

I

Appellant

SS

Counsel: Attorneys JR and RJ and lawyer RE

Respondent

Baltic Cable Aktiebolag, 556420-6026

Gustav Adolfs Torg 47

211 39 Malmö

Counsel: Attorneys BT and ON

Counsel: Lawyer JB

II

Appellant

Baltic Cable Aktiebolag, 556420-6026

Gustav Adolfs Torg 47

211 39 Malmö

SUPREME COURT
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Counsel: Lawyer JB

Respondents

1. C.V.m.s. Delfborg
Bosanemoon 5
NL-9408 La Assen
The Netherlands

2. Wagenborg Shipping B.V.
Markstraat 10
NL-9934 Ck Delfzijl
Netherlands

Counsel for 1 and 2: Attorneys JR and RJ and lawyer RE

THE MATTER

Damages

RULING APPEALED

Judgment of the Scania and Blekinge Court of Appeal of 05/10/2022 in case T 1579-21

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JUDGMENT

The Supreme Court affirms the operative part of the judgment of the Scania and Blekinge Court of Appeal.

The Supreme Court orders SS to pay Baltic Cable Aktiebolag compensation for its costs of litigation in the Supreme Court in the amount of SEK 400,000, which pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

The Supreme Court orders Baltic Cable Aktiebolag to pay C.V. m.s. Delfborg compensation for its costs of litigation in the Supreme Court in the amount of SEK 220,442 and EUR 1,934, which pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

The Supreme Court orders Baltic Cable Aktiebolag to pay Wagenborg Shipping B.V. compensation for its costs of litigation in the Supreme Court in the amount of SEK 220,442 and EUR 1,934, which 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

SS has requested that the Supreme Court dismiss Baltic Cable Aktiebolag's action, relieve SS from the obligation to compensate Baltic Cable for its litigation costs in the District Court and the Court of Appeal and order Baltic Cable to compensate SS for his costs of litigation there.

Baltic Cable has requested that the Supreme Court order C.V. m.s. Delfborg and Wagenborg Shipping B.V. to, jointly and severally with SS, pay EUR 10,873,844.50 plus interest in accordance with Section 6 of the Interest Act from 14 January 2013 until payment is made.

Baltic Cable has further requested that the Supreme Court relieve Baltic Cable from the obligation to compensate C.V. m.s. Delfborg and Wagenborg for their costs of litigation incurred in the District Court and the Court of Appeal, and that Baltic Cable be compensated for costs of litigation in the Court of Appeal.

The parties have opposed each other's claims and have requested compensation for litigation costs in the Supreme Court.

REASONS FOR THE JUDGMENT

Background

The incident concerned

1. The motor vessel *Delfborg* was built in 2007. It has a gross tonnage of 3,990 and a deadweight of about 6,000 DWT. After loading a cargo of paper rolls in Hamina, Finland, and timber off Söderhamn, Sweden, the vessel departed on 30 October 2012 for its final destination of Gandia, Spain.

2. In November 2012, an electrical breakdown was detected on an undersea cable for the transmission of high-voltage direct current between Trelleborg and Lübeck. The line is owned, maintained and operated by the company Baltic Cable. The damage to the cable meant that transmission ceased immediately.

3. Investigations revealed that the vessel had anchored in the area of the damage. This stop had been made while awaiting the arrival of spare parts and technicians on the vessel due to an engine failure.

Legal proceedings related to the damage

4. Baltic Cable brought an action in the District Court against the registered owner of the vessel, SS, as well as against the companies C.V. m.s. Delfborg and Wagenborg Shipping B.V. SS, who resides in the Netherlands, is a so-called active owner of C.V. m.s. Delfborg, which is a Dutch company. Wagenborg, also a Dutch company, is a limited partner in C.V. m.s. Delfborg.

5. Baltic Cable requested that the defendants be ordered to, jointly and severally, pay damages to the company. In support of its action, Baltic Cable argued that the damage was caused by the vessel's anchor. According to Baltic Cable, the defendants were liable for the damage. The defendants were liable, in the first place, because they had caused the damage by gross negligence and with knowledge that such damage would probably result. Alternatively, they were liable as the operators of the ship, *redare* in Swedish, because the master and crew of the vessel had caused the damage through fault or neglect in the performance of their duties.

6. Following Baltic Cable's action, the defendants initiated proceedings before a Dutch court to limit their liability. A so-called limitation fund was also established at that court, covering Baltic Cable's claims relating to the incident. Baltic Cable made its claim to the administrator of the fund.

7. Before the District Court, the defendants argued on the merits that they had not caused the damage by gross negligence and with knowledge that such damage would probably result, as alleged, and that they neither individually nor jointly were *redare*. Rather, at the time the damage occurred, according to the defendants, the *redare* was a company wholly owned by SS, Rederij S. Smith B.V.

8. The District Court concluded that the facts in the case did not support the claim that the defendants had caused the damage to the cable by gross negligence and with knowledge that such damage would probably result. However, the District Court found that the captain and crew had caused the damage through fault or neglect in the performance of their duties by, for example, anchoring in violation of the prohibition against anchoring. Furthermore, the District Court held that SS, as *redare*, was responsible for their fault or neglect in the performance of their duties. The Court therefore ordered SS to pay EUR 10,873,844.50 plus interest to Baltic Cable. The claims against C.V. m.s. Delfborg and Wagenborg were dismissed, as the District Court found that neither company was a *redare*.

9. The Court of Appeal upheld the District Court's judgment.

At issue in the Supreme Court

10. In the Supreme Court, the defendants have accepted the Court of Appeal's findings that *Delfborg*'s anchor caused the damage to the cable, that the captain and crew of the vessel caused the damage to the cable through fault or dereliction of duty, and that Baltic Cable's damage amounts to the amount claimed.

11. Against this background, the main question before the Supreme Court is who shall be considered the *redare* and thus become liable according to the rules in Chapter 7, Section 1 of the Swedish Maritime Code (1994:1009). The case also raises the question of what constitutes gross negligence with knowledge that damage will probably result.

The liability of the *redare*

12. General provisions on liability and insurance duty are found in Chapter 7 of the Swedish Maritime Code, which regulates the special liability of a *redare* under maritime law. According to Section 1, first paragraph, a *redare* is liable for loss or damage caused by the master, a member of the crew or a pilot through fault or neglect in the performance of his duties. The *redare* is also liable if loss or damage is caused by any other person while performing work in the vessel's service by assignment of the *redare* or the master.

13. In addition to his liability for the fault of others, a *redare* is liable when damage is caused by his own recklessness. The individual liability may be expressed in the Swedish Maritime Code or be based on the Tort Liability Act and general principles of tort law. The injured party is free to choose the rules on which to base his or her action. (See "Segelbåten som slet sig" NJA 2013 p. 51, cf. as well as Birgitta Blom, *Sjölagens bestämmelser om redaransvar*, 1985, p. 32)

14. Chapter 9 of the Swedish Maritime Code expresses the special maritime law regime of so-called global limitation. It permits a *redare* to limit liability to an amount determined, in principle, on the basis of the vessel's tonnage. Under Section 2, first paragraph, item 1, there exists a right to limitation of liability regarding claims on account of, inter alia, damage to property, if the damage has occurred on board the vessel or in immediate connection with her operation. Such a right applies irrespective of the grounds invoked in support of the claim. A limitation fund can be established to protect against excessive demands for security in the form of, for example, provisional attachment.

15. With regard to gross negligence with knowledge that damages will probably result, the right to limitation of liability is cancelled. The right to

limitation of liability is thus not available to a person who is proved to have caused the damage intentionally or by gross negligence with knowledge that such loss or damage would probably result (see Section 4).

The definition of *redare*

16. In Swedish law, as in Nordic law in general, the term *redare* is not defined. A *redare* normally refers to the natural or legal person who commences the operation of a particular vessel, manages its operation and bears the financial risk. Thus, it is a question of equipping and doing business by means of a specific vessel (cf., e.g., Sjur Brækhus, *Rederens husbondsansvar*, 1953, p. 33 and Hugo Tiberg, et al., *Svensk sjörätt*, 2016, p 173). The liability of a *redare* is not strictly speaking the liability of a principal, as work is not necessarily carried out with the *redare* as employer. Rather, the liability of a *redare* is linked to the operation of the vessel and is therefore more of an operations liability. The term *redare* is not applied uniformly, not even in maritime law, and its usage can vary from one context to another.

17. Typically, the *redare* is the one who, by equipping the ship, also manages its operations. This includes responsibility for manning the vessel with officers and crew. In doing so, the *redare* exercises the authority to issue instructions with regard to the work and has ultimate responsibility for the nautical management of the vessel. Furthermore, the person who equips the vessel is responsible for acquiring provisions, spare parts, fuel, insurance, etc. and paying the expenses. In public law provisions regarding maritime safety, the term *redare* has a meaning that differs slightly from that of private law. In such provisions, it is often stated that the liability of a *redare* also encompasses an individual exercising a decisive influence over the operation of the vessel in the stead of the *redare*.

18. The term *redare*, and its essential functions of equipping and operating the vessel, are initially the responsibility of the one with ownership of the vessel; the functions and the ownership reside in one and the same person. But this is not necessarily the case. The shipowner need not be a *redare*, and there is no direct presumption that this is the case. But for someone else to be considered the *redare*, it is necessary that possession of the vessel and the right to dispose of it pass from the owner to someone else (see Erling Selvig, *Det såkalte husbondsansvar*, 1968, p. 18 et seq.). The person assuming the role of *redare* must therefore derive his powers from the owner. In general, such a transfer is made by contract.

19. Commonly, a person conducting business by means of a vessel enters into contract for the use of the vessel in the carriage of general cargo (see Chapter 13) or passengers (see Chapter 15) or for chartering (see Chapter 14). In demise or bareboat charter, the shipowner hires out the vessel without a crew. When only the commercial management is transferred to the owner's joint contracting-party, as is typically the case in carriage and chartering, the liability as a *redare* is normally not transferred (cf. "Sophie" NJA 1903 p. 461, see also ND 1903 p. 509, and "Öregrund" NJA 1925 p. 398, see also ND 1925 p. 433).

20. However, the owner or the person who assumes the functions of a *redare* may also commission someone else, such as a ship manager, to perform all or some of the typical functions of a *redare*. Such a company can contractually provide several of the different functions such as manning, operation of the vessel or safety work. The decision-making functions, in modern maritime shipping, are thus often divided among several actors.

21. In order to determine who is to be considered *redare*, an overall assessment of the circumstances of the specific case must be made, taking into

account the existing division of functions. The *redare* is then considered to be the person on whom the majority of the typical functions of a *redare* rest (cf. Kurt Grönfors, *Om trafikskadeansvar utanför kontraktsförhållanden*, 1952, p. 306).

22. In such an assessment, the importance of the different functions of a *redare* may vary according to the context in which they arise. The definition of a *redare* can thus vary depending on the context to be assessed. In the application of the collision regulations, it is of great importance who pays the insurance premiums. If, instead, a public law regulation is to be applied, a factor such as who bears responsibility for the safety systems, e.g., according to the ISM Code,[1] may be more important.

Evidentiary issues in determining who is the *redare*

23. According to general rules on the burden of proof, the injured party must initially prove that the conditions for damages are met (cf., e.g., "Kommunens oriktiga upplysning" NJA 2017 p. 824 para. 11). When deciding who must prove a certain fact, the opportunities of the respective parties to preserve necessary evidence are important. If both parties have had such an opportunity, the responsibility can be placed on the party who could most easily preserve evidence or who has had particular reason to do so.

24. The conditions for preserving evidence regarding the various functions that form the basis for the assessment of who is a *redare* vary in many

[1] The ISM Code is brought into force for vessels such as *Delfborg* by Resolution A.741(18) of the International Maritime Organisation (IMO) as amended by MSC.104(73), MSC.179(79), MSC.195(80), MSC.273(85) and MSC.353(92) as well as Chapter IX of the SOLAS Convention. In the EU, the Code has been in force since 1996; it is now subject to Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95.

respects, and evidence can be preserved in different ways. It is therefore hardly possible to establish a uniform principle regarding which of the parties must prove the facts that may be relevant to such an assessment. Rather, the question must be decided for each function separately.

Gross negligence with knowledge that damage will probably result

25. One of the grounds in the case is that the damage in question was caused by gross negligence with knowledge that damage would probably result. The invocation of this ground must be seen in the light of the fact that a limitation fund has been established and that the right to limitation under maritime law ceases to apply where such fault arises. The assessment of the degree of fault should therefore give particular consideration to the application of the rules regarding recklessness in maritime law.

26. Transport law generally provides for exceptions to the limitation of liability when the damage is caused by certain specified negligence. However, these rules are not uniform. In Swedish tort law, recklessness is considered aggravated when an incident must have been caused by gross negligence. Maritime and transport law also impose, in some cases (e.g., under Chapter 9, Section 4 of the Swedish Maritime Code), a requirement of foresight, on the part of the carrier, that such damage would probably result (see para. 15).

27. Traditionally, general tort law has required that recklessness be of a very serious nature before it can be characterised as gross negligence. These cases, for the most part, involve actions which are practically intentional, and where a significant recklessness or indifference brings about a substantial risk of damage. (See “Loffes gräv” NJA 1986 p. 61, see also ND 1986 p. 27, “Mariefreds skola” NJA 1992 p. 130, “Akzo Nobel” NJA 2014 p. 425, see also ND 2014 p. 4, and “Mösseberg II” NJA 2023 p. 680)

28. Usually, conscious negligence is required for an action to constitute gross negligence. However, even unconscious negligence may in some cases constitute gross negligence (cf. “Cigarrettfimpen” NJA 1962 p. 281, “Loffes gräv” and “Mösseberg II”). This presupposes a significant deviation from what can be considered prudent action, and that the person at fault had the opportunity to realise the risk of damage.

29. The rules in Chapter 9, Section 4 of the Swedish Maritime Code are based on Article 4 of the 1976 Convention on Limitation of Maritime Liability. Under the Convention, the right to limitation of liability lapses if a person has caused the damage by his personal act or omission, committed with the intent to cause such loss, or “recklessly and with knowledge that such loss would probably result”. The Swedish Maritime Code instead uses the expression “by gross negligence and with knowledge that such loss would probably result”. (cf. Govt. bill 2003/04:79 p. 11 & Govt. bill. 1982/ 83:159 p. 48).

30. In light of the fact that some national courts had interpreted and applied the Convention provision in such a way that the right to limited liability was breakable on a number of occasions, the International Maritime Organisation adopted Resolution A. 1163(32) on 15 December 2021, providing some guidance on the interpretation of the Convention rule.

31. The Convention’s provision regarding the loss of the right to limitation of liability must, as stated in the Resolution, be interpreted as “virtually unbreakable in nature” and breakable only in very limited circumstances. A level higher than the concept of gross negligence is also required, since that concept was rejected by the international conference that preceded the Convention. Under the Resolution, the term recklessly is to be accompanied by knowledge that such damage or loss would probably result. It also emphasised that the conduct of parties other than those subject to the Convention’s liability

(which include masters, crew members and employees of the owner) is irrelevant and should not be taken into account when assessing whether the conditions for breaking the right to liability are met.

32. These statements are broadly consistent with the approach expressed in Swedish case law for a certain behaviour to be considered as gross negligence with knowledge that damage will probably result. The subject of liability must therefore have caused damage by conscious negligence, for the right to limitation of liability under Chapter 9 of the Swedish Maritime Code to be lost.

The assessment in this case

The defendants have not caused the damage by gross negligence with knowledge that damage would probably result

33. With regard to the allegation of gross negligence with knowledge that damage would probably result, Baltic Cable has argued that a standard paper nautical chart should have been used, as the cable would have been detected. The company has also claimed that the officers and crew aboard the vessel had access to a shore-based organisation operated by the defendants. The defendants thus knew that the anchor was stuck and nevertheless gave instructions to free the anchor by force.

34. The facts in the case show that the vessel was equipped with electronic nautical charts in the form of an approved ECDIS system with duplicate. In such cases, it is normally not required that paper nautical charts be kept aboard (see Chapter 3, Section 5 of TSFS 2011:2, cf. SOLAS Chapter V, Regulation 19.2.1). In such circumstances, failure to equip the vessel with a paper chart cannot be considered as gross negligence. Nor has it been proven that the

defendants were aware of any shortcomings in the crew's use of digital nautical charts.

35. Even if it could be shown that SS and, through him, C.V. m.s. Delfborg, had knowledge of the vessel's location at the time of the engine failure, it is not shown in the case that they had any knowledge of the prevailing conditions at the site of anchoring. Nor do the facts in the case show the existence of any land-based organisation maintained by the defendants.

36. Thus, as the courts have found, the allegation that the defendants acted with gross negligence and with knowledge that damage would probably result has not been proven.

SS was the sole owner of the vessel

37. SS bought the *Delfborg* from Wagenborg in 2007 and, since then, has been the registered owner of the vessel in the Dutch Shipping Register. The three other vessels in his fleet are registered to his wholly-owned company, Rederij S. Smith B.V.

38. Neither the fact that SS is an active partner in C.V. m.s. Delfborg nor the fact that that company is identified as the economic owner in the ship's insurance policy entails that that company is to be regarded as the owner of *Delfborg*. Nor does the fact that Wagenborg is a partner with limited liability in C.V. m.s. Delfborg permit the conclusion that Wagenborg was the owner of the vessel. SS was thus the sole owner of the vessel at the time of the damage.

The differing functions of Wagenborg and C.V. m.s. Delfborg

39. With SS as the owner of the vessel, Wagenborg acted practically as his agent, with responsibility for concluding freight contracts for the vessel. The fact that Wagenborg arranged for insurance for the vessel and ensured that the vessel

had sufficient supplies is to be seen in the light of this assignment. Such circumstances cannot therefore be given decisive importance in the assessment of whether that company is to be regarded as *redare*. The same is true of the fact that Wagenborg's company name remained on the side of the ship, which can also be explained by the fact that this company acted as ship manager. Overall, the tasks assigned to Wagenborg have not been such that constitute typical functions of a *redare*.

40. In the case of C.V. m.s. Delfborg, the facts in the case show that it was not involved in the operations of the vessel. This company appears to have acted solely as a financial hub for the business, through which financing for the operation of the vessel was organised. This conclusion is not changed by the fact that SS and Wagenborg were partners in the company.

Rederij S. Smith B.V.

41. The defendants have referred to the employment contracts of the captain, first mate and chief engineer of the vessel, which identify Rederij S. Smith B.V. as their employer. The remainder of the crew was employed by a staffing agency. The evidentiary value of the captain's contract must be deemed limited, especially given that it is dated before the company was established. The facts in the case also show that work could shift among ships and companies, and that formal employer responsibility was not a central issue for employees. It is therefore difficult to draw a firm conclusion, from the employment contracts invoked, that the company was the employer at the time of the damage.

42. The vessel's hull-insurance contract shows that only the three defendants are insured. Rederij S. Smith B.V. is not among the three insured

parties, as might have been expected if those involved had considered the company as shipowner.

43. The responsibility for developing, implementing and maintaining a Safety Management System in accordance with the ISM Code lies initially with the owner of the vessel. If the entity responsible for operating the vessel is other than the owner, the owner must notify the flag State of the ship. SS has verbally identified Rederij S. Smith B.V. as responsible under the ISM Code. However, this assertion has not been substantiated by, e.g., submission of a written notification, which might easily have been done. The same applies to information from SS regarding who is a designated person under the Code.

44. Against this background, the identification of the designated company by SS is not decisive in the assessment of responsibility for the safety of the ship.

45. It should also be noted that all of the captain's contacts regarding the engine problems were with SS. That is, they were not with the designated person under the Code who, according to the SS, was an employee of Rederij S. Smith B.V. There is no evidence, apart from SS's own statements, to support the conclusion that he acted as a representative of the company in this context. He alone has access to documentation which can establish that the main shipowner functions were transferred to that company, and that he was therefore acting on the company's behalf. It is thus insufficient to refer to an agreement for which no documentation is provided.

SS was the shipowner and is liable for the damage which arose

46. In light of the above, an overall assessment of the circumstances suggests that the vast majority of the typical functions of a *redare* are performed by the SS. He is therefore solely liable as a *redare* for the damage

caused to the cable by the *Delfborg* through fault or neglect in the performance of duties aboard the vessel. The amount claimed by Baltic Cable has not been challenged in the Supreme Court.

Conclusion

47. The appeals of SS and Baltic Cable must therefore both be rejected, and the operative part of the judgment of the Court of Appeal shall therefore be affirmed.

Litigation costs

48. In light of this outcome, SS shall compensate Baltic Cable for its costs of litigation in the Supreme Court, and Baltic Cable shall compensate C.V. m.s. Delfborg and Wagenborg for their costs of litigation in the Supreme Court. The costs claimed by the defendants are reasonable. The cost claimed by Baltic Cable from SS is reasonably determined at SEK 400,000.

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Justices of the Supreme Court Anders Eka, Svante O. Johansson (reporting Justice), Dag Mattsson, Malin Bonthron and Johan Danelius participated in the ruling.
Judge referee: Charlotta Hallgren