(Arms of the Norwegian State)

THE SUPREME COURT OF NORWAY

On 8 October 2009, the Supreme Court pronounced judgment in

HR-2009-01932-A, (Case No. 2009/213), civil case, appeal against judgment,

I. Dag Vilnes	(Attorney Eivind Ludvigsen – qualifying)
versus	
The State, represented by the Ministry of Labour and Social Inclusion	(Attorney General of Civil Affairs, represented by Attorney Christian H. P. Reusch (Legal adviser: Attorney General of Civil Affairs, represented by Attorney Anne Cathrine Haug
II. Åsbjørn Jørgensen Angus Gunnar Kleppe Magn Håkon Muledal	(Attorney Tom Sørum – qualifying)
OffshoreDykkerUnionen (Offshore Divers' Union) (party adviser)	(Attorney Erik Johnsrud)
IndustriEnergi (party adviser)	(Attorney Eyvind Mossige)
Versus	
The State, represented by the Ministry of Labour and Social Inclusion	Attorney General of Civil Affairs, represented by Attorney Christian H. P. Reusch (Legal adviser: Attorney General of Civil Affairs, represented by Attorney Anne Cathrine Haug

V O T I N G :

(1) Justice **Møse**: The case concerns the claims of four divers against the State for compensation for injuries from diving in the North Sea during the so-called pioneer days in the petroleum industry, from around 1965 to 1990. The basis for the lawsuit is the Directorate of Labour Inspection's, and later the Norwegian Petroleum Directorate's, supervision of diving, and the State's overall involvement in the petroleum activities.

(2) The background for the case can be summarised as follows:

(3) Following the adoption of the Convention on the Continental Shelf of 29 April 1958, the Government proclaimed by Royal Decree of 31 May 1963 Norwegian sovereignty over the seabed and subsurface off the coast Norway. This was followed up by the Act of 21 June 1963 relating to exploration for and exploitation of subsea natural resources (The Continental Shelf Act). Drilling in the North Sea started in June 1966.

(4) Diving took place in part in sheltered waters, e.g. for construction and outfitting of concrete platforms, and was then often conducted from barges or smaller boats with the necessary equipment. Diving in the North Sea did not take place at great depths in the first few years. The depths around Ekofisk and Statfjord were about 70 and 150 meters respectively. Diving was initially conducted from oil rigs, supply ships, drillships or pipelaying vessels. From the mid-Seventies purpose-built diving vessels were used which could operate regardless of the weather conditions. This gradually became the norm for diving in the sea.

(5) Until 1 April 1978 the Norwegian Labour Inspection Authority supervised and issued permission for diving. The Norwegian Petroleum Directorate then took over.

(6) The parties agree that between 350 and 400 persons with permanent affiliation to Norway participated in petroleum-related diving in the pioneer days. Gradually it became known that many of them had sustained health ailments. Long-term studies conducted at the University of Bergen, the Norwegian Underwater Technology Centre and Haukeland Hospital showed possible connections between diving and injuries to the central nervous system. At the same time prevailing compensation schemes seemed only to a limited extent to cover the situation of the North Sea divers. The Ministry of Local Government and Labour therefore appointed a committee (the Kromberg Committee), which submitted its report and proposals on 2 November 1993. The Ministry subsequently established a discussion forum (the Habberstad Committee) to follow up and coordinate the Kromberg Committee's recommendations.

(7) In a consultation memo of 27 November 2000, the Ministry of Health and Social Affairs proposed that divers with permanent health impairment be awarded a lump-sum compensation of up to NOK 200,000. At the same time the Ministry emphasised that the State could not be deemed to have acted illegally or in a blameworthy manner on the basis of the knowledge that existed when the diving took place.

(8) In the Storting (Norwegian Parliament) in 1999, the Minister of Health and Social Affairs was questioned about the situation of the pioneer divers, and in April 2000 two representatives proposed that an investigation commission should be established, cf. Document No. 8:58 (1999-2000). The Standing Committee on Health and Social Affairs endorsed this proposal in Recommendation to the Storting No. 243 (1999-2000) and pointed out e.g. that many divers with permanent health impairment and reduced earning capacity would fall outside the proposed lump-sum compensation scheme. On 13 June 2000 the Storting asked the Government to appoint an independent investigation commission to consider all aspects in relation to diving in connection with the oil activities in the North Sea in the pioneer days.

(9) On 2 March 2001 the Government appointed the investigation commission. It was headed by High Court Judge Petter A. Lossius and submitted its unanimous study on 31 December 2002 (NOU 2003: 5 Pioneer divers in the North Sea).

(10) The commission found that many of the pioneer divers had managed well, while a not insignificant percentage had serious medical problems. Nearly one-fifth received disability benefits, all the way down to those who were in their forties. This factor, compared with the large number who suffered from mental ailments, indicated in the view of the commission that many divers had been exposed to strain that was stronger than what most people experience in normal working life.

(11) The Lossius Commission also considered potential liability in damages for the State, diving companies and licensees/operators on the Continental Shelf. In relation to the State, the commission found that it was most appropriate to look at strict liability. It concluded that all in all there was "much to indicate a legal liability for the State and that it should therefore bear the financial liability for injuries sustained by some divers as a result of diving in the North Sea and injuries that could develop (delayed injuries)". On this basis the commission recommended that a compensation scheme be established and financed by the State, and that the licensees/operators should be invited to take part in the funding.

(12) The commission's report was submitted to affected institutions and organisations for consultative comments. In addition, the legal assessments in the report were submitted to the Legislation Department of the Ministry of Justice, which in a statement of 27 March 2003 found that the State did not have sufficient affiliation to the oil activities to be deemed to be liable on a non-statutory strict liability basis. The Legislation

Department also had difficulty seeing that what emerged in the report was sufficient to establish employer's liability for the State, but stated at the same time that the Ministry of Labour and Government Administration was better suited to assess whether the statutes and regulations governing safety and supervision could be said to have entailed legal obligations to make further decisions. Blameworthy violations of such obligations could entail liability under the circumstances.

(13) Following the consultation round, the Ministry of Labour and Government Administration prepared Storting White Paper No. 47 (2002-2003), in which the Government stated that the pioneer divers, who had performed trailblazing work in the North Sea from 1965 to 1990, would receive the redress and financial compensation they deserved. The Storting White Paper was based on there being no legal liability for the State, but "independent of this the Government perceives a particular moral and political obligation vis-à-vis the pioneer divers". A special compensation scheme administered by a committee was proposed.

(14) In the Recommendation to the Storting No. 137 (2003-2004), the majority of the Standing Committee on Local Government endorsed the conclusions of Storting White Paper No. 47, and the Government was asked to establish a compensation scheme in compliance with the majority's proposal. The Storting Report was considered in the Storting on 9 March 2004. By Royal Decree of 4 June the same year, a committee was established to administer and consider applications for compensation from the pioneer divers. The scheme was financed in its entirety from the State budget. Disbursements were ranked according to the degree of disability for disability benefits from the National Insurance and linked to the base amount (G) of the National Insurance. Maximum disbursement was set at 40 G, or about NOK 2.3 million. In addition, the divers received a quantum of damages for non-economic loss of NOK 200,000.

(15) By Royal Decree of 27 June 2003 it was resolved that immediate measures were to be implemented for pioneer divers who were in a precarious and acute financial situation. This took place pending the Storting's consideration of Storting White Paper No. 47 (2002-2003). The scheme entailed that the North Sea divers would receive up to NOK 200,000 following an individual assessment. This was conditional on the disbursements being deducted from a potential compensation scheme, cf. Storting Proposition No. 85 (2002-2003) page 1. The amount was subsequently increased to NOK 300,000.

(16) Independent of the proposals in Storting White Paper No. 47, two other compensation schemes had been established earlier. When the Storting asked the Government on 13 June 2000 to appoint an investigation commission, it also made a decision on compensation in the form of an individual lump sum of up to NOK 200,000. The scheme entered into force from 1 July 2000 and applied to divers who received disability benefits from the National Insurance and were more than 50% disabled. It was meant to be special compensation for North Sea divers with permanent health impairment. Furthermore, Statoil established an application-based compensation scheme on 1 November 2001, regardless of whether the applicant had been employed by the company.

(17) Many North Sea divers believe they have a claim in damages that exceeds the established compensation schemes, and several cases are pending before the courts of law. The four divers in this case filed a lawsuit before Oslo District Court in 2005, which pronounced the following rendition of judgment on 10 August 2007:

> "1 The claims from Magn Håkon Muledal, Angus Gunnar Kleppe and Åsbjørn Jørgensen for a declaratory judgment are dismissed.
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> 2. The State, represented by the Ministry of Labour and Social Inclusion is ordered to pay compensation to Dag Vilnes in the amount of NOK 6,527,302 – six million five hundred and twenty-seven thousand three hundred and two kroner - within 2 – two – weeks of service of the judgment – with the addition of the prevailing statutory interest on overdue payments on NOK 4,880,479 – four million eight hundred and eighty thousand four hundred and seventy-nine kroner – from the due date until payment is effected.
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> 3. The State, represented by the Ministry of Labour and Social Inclusion is ordered to pay compensation to Angus Gunnar Kleppe in the amount of NOK 5,946,939 – five million nine hundred and forty-six thousand nine hundred and thirty-nine kroner - within 2 – two – weeks of service of the judgment – with the addition of the prevailing statutory interest on overdue payments on NOK 5,025,439 – five million and twenty-five thousand four hundred and thirty-nine kroner – from the due date until payment is effected.
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> 4. The State, represented by the Ministry of Labour and Social Inclusion is ordered to pay compensation to Magn Håkon Muledal in the amount of NOK 3,123,420 – three million one hundred and twenty-three thousand four hundred and twenty kroner - within 2 – two – weeks of service of the judgment – with the addition of the prevailing statutory interest on overdue payments from the due date until payment is effected.

5. The Court finds in favour of the State, represented by the Ministry of Labour and Social Inclusion, as regards the claim for compensation from Åsbjørn Jørgensen.
6. Costs are not awarded."

(18) The District Court found that the State was liable pursuant to the rules on non-statutory strict liability. It therefore did not find it necessary to decide whether there was liability in damages on a negligent basis pursuant to the rules on employer's liability, but found in favour of the State as regards Vilnes' claim for damages for non-economic loss due to gross negligence. The divers' human rights had not been violated.

(19) The judgment was appealed to Borgarting Court of Appeal, which on 28 November 2008 pronounced judgment with the following rendition of judgment:

"The Court finds in favour of the State, represented by the Ministry of Labour and Social Inclusion."

(20) At the same time Jørgensen's claim for a declaratory judgment for breach of convention was dismissed. The Court of Appeal's judgment in favour of the Defendant was based on the State not being sufficiently affiliated to the oil activities, on there not being negligence that could lead to employer's liability and on there not being breach of human rights.

(21) The divers have appealed the Court of Appeal's judgment to the Supreme Court. The appeals concern the application of the law and the assessment of evidence. After the parties were given the opportunity to state their case, the Appeals Selection Committee made the following decision on 24 March 2009 with this conclusion:

"1. Leave to submit the appeals is refused as regards the assessment of evidence on the issue of whether there is a basis for liability. Leave is nonetheless granted to submit supplementary documents as evidence regarding the affiliation requirement within the framework of Section 30-7 of the Dispute Act.
2. Leave to submit the appeal from Dag Vilnes regarding the issue of liability on the basis of four specific acts committed by the authorities is refused in its entirety.
3. Leave is otherwise granted to submit the appeals.

4. The proceedings before the Supreme Court shall be restricted to the issue of the basis for liability, so that there for the time being shall not be deliberations on causal connection and compensation basis, cf. Section 30-14, third subsection of the Dispute Act.

(22) Before I give an account of the parties' submissions, it may be expedient to provide an overview of some factual circumstances of significance to the case.

(23) *Diving*
The divers are supplied with breathing gas and other supplies (e.g. electricity, communication and hot water) through supply lines that are entwined or taped together into sort of a hose, called an umbilical. The breathing gas is supplied to the lungs at a pressure equal to the water pressure at the depth the diver is located at any given time. When he is to resurface, excess gas must be separated out via respiration. The return (pressure reduction) to the surface is called decompression. To avoid problems the pressure must be reduced gradually so that the body manages to dispose of excess gas via the lungs before dissolved gas forms bubbles in the blood or tissue. Table have been prepared that state how decompression shall take place after a given stay at a given depth (decompression tables). Resurfacing too quickly can cause so-called decompression sickness.

(24) Several forms of diving took place in the pioneer days. For "air diving" – generally shallower than 50 meters – air was used as breathing gas. Diving using mixed gas meant that the diver could stay longer under water. "Bounce diving" took place for deep and relatively short-term diving work, most often less than an hour, generally using a diving bell and decompression chamber on the surface.

(25) Saturation diving was implemented from the first half of the 1970s. Here the diver was pressurised in a chamber system on the surface (for example on a rig, platform or diving vessel) to the pressure he was to work at. In some chambers the divers could live for extended periods of time, while others could be connected to a diving bell. Before the dive, two or three divers were transferred over to a diving bell and lowered down to the worksite. The operation normally lasted several hours. Afterwards they were hoisted in the bell and transferred into the pressure chamber on the surface, while the next team descended. The total work period for saturation diving – before decompression – could last days or weeks.

(26) *Injuries*

Diving affects the organism in a number of ways, through pressure effects, chemical effects of the breathing gas and differences in temperature. Of particular significance is decompression sickness in connection with too rapid decompression during ascent. The symptoms can include severe choking with possible life-threatening build-up of liquid in the lungs. Other potential effects are pain in or near larger joints, which can cause them to bend ("the bends"), as well as damage to bone substance (necrosis of bone). In the event of decompression sickness, proper treatment within one hour will normally lead to complete recovery in most, but not all, cases.

(27) Extreme, life-threatening situations can lead to so-called post-traumatic stress disorder (PTSD). This syndrome can include reliving the event, avoidance of certain thoughts or situations, loss of memory, alienation, as well as problems sleeping, irritation and difficulty concentrating.

(28) Research indicates that permanent damage can also occur in the brain, spine and lungs. Ear canal infections were also a common complication associated with diving in the North Sea, and subsequent hearing reduction seems to be widespread. I will return to the issue of uncertainty surrounding delayed injuries associated with diving in connection with the employer's liability.

(29) *The four divers*

Dag Vilnes, born in 1949, was first a Royal Marine commando and a diver in the Armed Forces. He dived in the North Sea from 1976 until the middle of 1978. After other activities, which did not include diving, he was hired by a diving company in June 1983 where he performed a seven-day saturation dive on the diving ship Tender Comet, down to a depth of about 180 meters. The dive was shorter than planned because Vilnes felt that there were hazardous safety deficiencies on board. After having raised this issue with the management, he complained to the Norwegian Petroleum Directorate and filed charges against the company. The dive on Tender Comet, which I will get back to later, was Vilnes' last dive in the North Sea. He has subsequently been found to have PTSD, a light degree of encephalopathy (brain damage), reduced hearing and tinnitus. The District Court judged his medical invalidity to be 40%. Vilnes is 100% disabled. He has received NOK 2,551,120 from the State, NOK 300,000 in immediate compensation and NOK 750,000 from Statoil. Vilnes has also received compensation for permanent injury according to the rules for industrial injuries benefits.

(30) Åsbjørn Jørgensen was born in 1956 and took his diving certificate in the Navy. After other work and additional diver training in the USA, he worked in the North Sea from 1978 to 1990, in part as a diver and divemaster. He was a saturation diver up to 1986 and dove down to 160 meters. Jørgensen has been diagnosed with PTSD. The District Court has judged his medical invalidity to be 40% and he is 100% incapacitated for work. He has been paid NOK 2,551,120 from the State, NOK 200,000 in special compensation, NOK 750,000 from Statoil and NOK 1,540,800 from the employer's occupational injury insurance.

(31) Angus Gunnar Kleppe, born in 1948, has completed sports diving courses, diving courses in the Navy and bell diving courses. After diving in sheltered waters, he worked in the North Sea from 1976 and carried out his last dive there in 1993. He had a high number of air dives, bounce dives and saturation days. According to examinations, Kleppe suffers from PTSD, possible encephalopathy, diminished function and pain with sleep disturbances. The District Court judged his medical invalidity to be 45%, and he is 100% disabled for work purposes. Kleppe has received NOK 2,551,120 from the State, NOK 200,000 in special compensation, NOK 750,000 from Statoil as well as compensation for permanent injury from the National Insurance.

(32) Magn Håkon Muledal was born in 1953. After having been a Navy and construction diver, he worked in the North Sea from 1978 to 1989. During this period he had about 500 saturation days and 200 bounce dives, as well as a test dive to 360 meters which lasted 28 days. Muledal was terminated in 1989 after chronic lung disease was diagnosed in 1987. In addition to this ailment, he also suffers from noise injury and some other ailments. The District Court judged his medical invalidity to be 15%, and his occupational disability is 50%. Muledal has received NOK 2,257,230 from the State, NOK 150,000 in special compensation for divers, NOK 375,000 from Statoil and a so-called "Loss of Licence" compensation of about NOK 500,000.

(33) *Test diving*

From 1979, a number of deep test dives were carried out under the direction of the Norwegian Underwater Institute (NUI) outside Bergen, primarily near the Institute, but also in fjords. NUI was established in 1976 by the Royal Norwegian Council for Scientific and Technical Research (NTNF) and Det Norske Veritas (DNV). The professional field was to be diving medicine, diving technology and testing of subsea equipment. The Institute first functioned as a joint venture, and was converted into a foundation in 1982 with the name NUTEC – the Norwegian Underwater Technology

Center. Statoil, Norsk Hydro and Saga Petroleum were founders, along with NTNF and DNV. In 1985, the foundation was converted into a limited company, in which the three oil companies were the largest owners.

(34) Distinctions are often made between research dives and verification dives. The purpose of the first group of dives was e.g. to test and develop equipment, technical and operational procedures (e.g. in connection with compression for deep diving), as well as to enhance knowledge about human reactions to exposure under pressure. According to Norway's public report NOU 2003: 5, the most important dives were Polar Bear 1 (1980, 150 meters), DeepEx I (1980, 300 meters), DeepEX II (1981, 500 meters) and Polar Bear 3 (1982, 150 meters). The divers involved in this case did not take part in these dives. The financing mainly came from the oil industry, but the government also participated through research funds from NTNF and Norway's Scientific Research Council.

(35) After the DeepEx dives, several verification dives were carried out at NUTEC. Such dives were financed by the oil companies. The purpose was first and foremost to show that work operations could be carried out at great depths. In 1983, Statoil executed the so-called Statpipe dives, two of which were in pressure chambers (350 meters). Kleppe took part in one of these. As part of the preparations for the Oseberg development, Norsk Hydro took the initiative for several deep dives, including the three so-called OTS dives in 1986 (360 meters). OTS I and II have in particular been criticized. Muledal took part in the OTS III dive.

(36) For the sake of completeness, we would mention that Norskerenna (the Norwegian Trench), which lies between the North Sea Basin and Norway, has depths in excess of 300 meters. Therefore, diving to such depths had to be expected when laying pipelines to Norway. A demonstration dive arranged by an American diving company in Skånevikfjorden (300+ meters) in 1978 had led to the death of one American diver.

(37) The appellants – *Dag Vilnes, Åsbjørn Jørgensen, Angus Gunnar Kleppe and Magn Håkon Muledal* – have mainly argued:

(38) Diving activity in the pioneer days was so hazardous that the State is responsible under the non-statutory strict liability. The risk was constant, typical and extraordinary. According to case law, there is no requirement that the risk must be unexpected, but under any circumstances, the serious injuries suffered by the divers were unexpected for them.

(39) The decisive element in the evaluation of whether the State had sufficient connection with the diving activity in the North Sea, is not – as the Court of Appeal assumed – whether it is "reasonable" to assign liability. The central issue is the tortfeasor's "dealings" with the risky activity. The salient point is thus which connections exist. The considerations behind the strict liability and case law indicate that the State is responsible.

(40) The divers refer to the State's own objective of control over the oil activities. This is relevant both because it created expectations in the outside world and on the basis of the interest consideration. The State's ownership rights to the oil as a natural resource gave it the opportunity to control risk factors, choose which areas to be developed and determine the routes for landing. The State's involvement gives it an overall interest in the activities in the North Sea which is unique, and separates it from others with a more specific interest, e.g. the diving companies.

(41) A further connection follows from the licensing system the State has established for a number of steps in the process, and which is still in force. Permits are required for exploration and production, under which conditions can be set that the State can participate. Furthermore, the overall development plan must be approved, and pipeline permits must be secured. The State can issue orders to postpone and initiate activities.

(42) The State's commercial connection through Statoil and SDFI (the State's Direct Financial Interest) is also asserted. Furthermore, the State has a financial interest in the oil activities through taxes and fees. This is sufficient so that the prevention consideration does not apply in full in connection with the strict liability for compensation, but it would have a preventive effect that liability be assigned to the State.

(43) In the opinion of the divers, all of these elements of connection show that the State has dealings with the oil activities that must lead to liability. Not only is the State's ownership of significance, so too is its exercise of authority. The existence of other liable parties, such as the oil companies and the diving companies, is not decisive.

(44) As another basis for liability, the divers assert that the State is responsible as employer under the (Norwegian) Damage Compensation Act, Section 2-1 for negligent acts carried out by the employee during service. Vilnes also argues the presence of liability

in damages for non-economic loss, and that the State has acted with gross negligence, so that redress for non-economic loss is also demanded.

(45) Contrary to case law, the Court of Appeal has applied a mild standard of due care. The State took the initiative for, and has connections to the oil activities, but did not follow up with adequate supervision. Moreover, the State has financial self-interest from the diving activity, which entails great risk of personal injury. It was determined by law that the activities were to be carried out in a responsible manner. The fact that the State was responsible for issuing diving permits and dispensations from the regulatory requirements for diving gave a particular opportunity to exercise care.

(46) The Court of Appeal has not taken into consideration that the State had simple alternative actions available to avoid the occurrence of injuries. The risk associated with decompression sickness was known. The State could have prevented the injury from occurring, in part by ensuring that a doctor was present in the event of problems with decompression. The fact that decompression tables were used as competitive factors between the diving companies was also well known, but the State did not take the initiative of harmonizing the tables until 1990.

(47) The State was also aware that there were recruiting problems. Many of the divers lacked the necessary technical training to carry out repairs, etc. This increased the risk of injuries. The State should have set the same requirements for professional industry competence as it did on land.

(48) Reference is also made to the lack of any organized training of divers in the early years. Not until 1980 was there a requirement for a diving certificate, and experience was accepted as a qualification requirement during a transition period. While waiting for a diving school to be established, the State should have set requirements for competence or training in an approved educational institution. Furthermore, not enough was done to ensure that all equipment was satisfactory. On the whole, the practice of issuing dispensations was lenient.

(49) According to the divers, it also follows from the human rights conventions that the State is liable. It is argued that the State has violated the European Convention on Human Rights (ECONHR), Article 2 on the right to life, and Article 8 on the protection of the right to private life, cf. the UN Covenant on civil and political rights (CP), Articles 6 and 17. Vilnes also refers to ECONHR Article 3 on inhuman and

degrading treatment as well as the prohibition against discrimination in Article 14, cf. CP Article 7 and Article 2.

(50) Dag Vilnes has submitted the following statement of claim:

"1. Principally:
The State, represented by the Ministry of Labour and Social Inclusion, is liable for compensation vis-à-vis Dag Vilnes for the economic loss he has incurred through his work as a pioneer diver in the North Sea and for compensation/redress for pain and suffering and other mortification or damage of non-economic nature he has suffered through lack of prudence he has been exposed to in connection with pioneer diving in the North Sea.
2. Alternatively:
The State, represented by the Ministry of Labour and Social Inclusion, is liable for compensation vis-à-vis Dag Vilnes for the economic loss he has incurred through his work as a pioneer diver in the North Sea."

(51) Åsbjørn Jørgensen, Angus Gunnar Kleppe and Magn Håkon Muledal have submitted the following statement of claim:

"1. The State, represented by the Ministry of Labour and Social Inclusion, is liable for compensation vis-à-vis Angus Gunnar Kleppe.
2. The State, represented by the Ministry of Labour and Social Inclusion, is liable for compensation vis-à-vis Magn Håkon Muledal.
3. The judgment of the Court of Appeal in relation to Åsbjørn Jørgensen is set aside."

(52) The party advisers – *the Offshore Divers Union and IndustriEnergi* – have endorsed the appellants' arguments and expanded on some of these arguments.

(53) The Offshore Divers Union has submitted the following statement of claim:

"The Offshore Divers Union, represented by chair of the board Henning O. Haug, shall be awarded costs before the Supreme Court of Norway in accordance with the submitted statement of costs, with due date 14 days after the judgment is served and with the addition of statutory interest on late payments until payment is effected."

(54) IndustryEnergy has submitted the following statement of claim:

"IndustryEnergy shall be awarded costs for the District Court, Court of Appeal and the Supreme Court."

(55) The respondent – *the State represented by the Ministry of Labour and Social Inclusion* – has mainly argued:

(56) It is disputed that such connection exists which, according to case law, is necessary in order to impose liability on a non-statutory strict basis. Moreover, it is doubtful that the general conditions for strict liability – constant, typical and extraordinary risk – exist. An assessment of reasonableness does not indicate liability. A claim for compensation should possibly be aimed at the divers' employers – the diving companies – which still exist. Moreover, special rules regarding joint and several liability exist for the petroleum industry. It is the job of the legislator to expand the strict liability to cover the diving activity. The Storting (Norwegian Parliament) has considered the issue and has instead established a special compensation scheme.

(57) In the State's opinion, there is also no basis for employer liability. The State's supervision was strict and a model for other countries. The resources placed at the disposal of the supervision were substantial, compared with other fields. In any event, it is established law that a lack of legislation or appropriations cannot lead to liability for the State. Vilnes' arguments concerning the existence of gross negligence are baseless.

(58) The human rights conventions do not lead to liability for compensation. The State has not violated any duty to act under ECONHR Articles 2, 3 and 8, to the extent that they, or the comparable provisions in CP, are applicable at all. Nor has the prohibition on discrimination been violated.

(59) The State, represented by the Ministry of Labour and Social Inclusion, has submitted the following statement of claim:

"The appeals shall be dismissed."

(60) *I have arrived at* the same result as the Court of Appeal.

(61) The four pioneer divers in the case have carried out diving to varying degrees. What they have in common is that they have carried out dives under pressure and have suffered injuries. Their claim for compensation is aimed at the State, not at those who directly carried out the activities that led to their being injured, i.e. the diving companies and the licensees (the oil companies).

(62) *Strict liability*

I will first address the non-statutory strict liability. How far this extends must be determined with a basis in case law, although we cannot assume that case law development in this area is finished. The development began when the tortfeasors were assigned liability for so-called hazardous enterprise. This can be characterized as the core area of the liability, cf. Norwegian Law Gazette 2006, page 690, paragraph 52. The strict liability has subsequently been expanded to include injury as a consequence of a constant risk in the surroundings, and this is now based both on risk considerations and balancing of interests, see Norwegian Law Gazette 2003, page 1546, paragraphs 39 and 40. It further follows from case law that a more detailed assessment must be made wherein one questions e.g. whether the risk is constant, typical and extraordinary, cf. Nils Nygaard, Damage and liability (2007), page 255 and Peter Lødrup, Textbook in law of torts (2009), page 293.

(63) Particularly as regards the question of whether the risk is extraordinary, the natural starting point is that diving is a risky activity, in which injuries can occur. Nevertheless, I find it clear that the risk for the North Sea divers exceeded what they must have been prepared for. When the diving took place, uncertainty reigned regarding the injury consequences that have subsequently materialized. The opinion that many and deep dives could result in delayed neurological injuries gradually grew. Even when the Lossius Commission submitted its report at the end of 2002, it concluded that there was a lack of good controlled studies on the possibility of delayed effects, cf. NOU 2003 5, page 43.

(64) Under these circumstances, the divers cannot be deemed to have accepted the risk of delayed injuries, that they were not aware of. This conclusion also conforms with the principle viewpoints concerning acceptance of risk for occupational injuries that has gradually crystallized in case law, cf. particularly the account in the Norwegian Law Gazette 2001, page 1646.

(65) The evaluation of whether the general criteria for strict liability are fulfilled must otherwise take place in light of the diving activity in relation to which one is potentially linking the liability. The conditions here could be different, both as regards depth, decompression table and other circumstances.

(66) The salient point in the assessment of whether there is a basis for strict liability in this case is whether there is sufficient connection between the State and the tortious

enterprise. The point of departure in Norwegian law is that only the owner or proprietor of the enterprise can be liable, however, connection on a different basis can suffice, depending on the circumstances, cf. Nils Nygaard, Damage and liability (2007), pgs. 258-260 and Viggo Hagstrøm, Governmental liability (1987), pgs. 211-214. In this case, the State is not the owner or proprietor of the diving enterprise, such that the decisive point will be whether other sufficient connections exist.

(67) Case law on this point is limited, and the judgments do not provide direct guidance in our case. I would mention that, in the Norwegian Law Gazette 1910, page 347, the Supreme Court found that leasing out a site could not entail liability when the owner had had no dealings with the operation that led to the damage. Norwegian Law Gazette 1983, page 1052 is also of interest. Here Dyno Industrier AS, as owner of a warehouse building, was held liable for damage caused by explosives in the warehouse, which was managed by the dealer, Gol Bygg AS. The judgment was rendered with dissenting votes (3-2). The first-voting judge stated inter alia (page 1057):

> "The next question is thus whether Dyno can also be held liable. In my opinion, this question must be answered in the affirmative. In this connection, I find reason to emphasise that it is Dyno that built the warehouse building, that has had the building approved by the Explosives Inspectorate, and that is the owner of the building. It has been placed at the disposal of Gol Bygg as part of the distribution of the explosives that Dyno manufactures. This arrangement is not peculiar to Gol; it is generally the case that Dyno builds explosives warehouses in locations as needed, and then places the warehouse at the disposal of a dealer. The distribution takes place in part through dealers who are agents for Dyno, and in part through dealers who purchase explosives on a firm account. Also when the representative has dealer status, Dyno sells and invoices the explosives delivered from the warehouse to major customers itself. Gol Bygg was originally an agent for Dyno, but in 1972 switched to purchasing explosives on a firm account, at Dyno's request, for business or other reasons not associated with the liability. The dealer contract can – like the other dealer contracts – be terminated with three months' notice. These factors – viewed as a whole – give Dyno such a connection to the operation of the warehouse that Dyno must also be held liable for the explosion damage."

(68) These statements show that a very strong connection existed between the owner – Dyno Industrier AS – and the tortious enterprise.

(69) The Court of Appeal has, when considering whether liability shall be assigned to the State, taken its basis in an overall assessment in which the question is whether the tortfeasor's connection to the injurious enterprise is strong enough that it is "reasonable" to assign liability. The appellants assert that the central issue must be the tortfeasor's "dealings" with the enterprise. To this I would remark that this expression, under the circumstances, can be useful as a negative demarcation, of which the aforementioned decision in the Norwegian Law Gazette 1910, page 347 is an example. On the other hand, the formulation provides little guidance in determining how broadly the group of potential liable parties shall be drawn. The evaluation must be linked to the elements that justify the strict liability, and I assume that a close connection to the enterprise is needed in order to ascertain liability without blame for a party that is neither the owner nor the proprietor of the enterprise.

(70) The appellants point out a number of factors which, in their view, show that the State has sufficient connection to be held liable. Before I address this in detail, I would note that it is not the number, but the nature and strength of the links which is crucial in such an assessment.

(71) Firstly, the divers refer to the fact that the State is the owner of the oil resources in the North Sea. They point out that Section 2, first subsection of the Continental Shelf Act of 21 June 1963 No. 12 confirms that "the right to submarine natural resources is vested in the State." A similar formulation followed in the Act of 22 March 1985 No. 11 relating to petroleum activities, Section 3, first subsection, which has subsequently been replaced by the Act of 29 November 1996 No. 72 relating to petroleum activities, Section 1-1. This provision – adopted after the pioneer period – reads: "The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management."

(72) It is natural to take one's point of departure in the Continental Shelf Act, Section 2, first subsection, which has subsequently been continued in legislation. In my opinion, the provision must be viewed in light of the rules of international law concerning the coastal states' jurisdiction over the continental shelf. It emerges from Odelsting Proposition No. 75 (1962-1963), particularly pages 2-3, that the Act was adopted to remove any doubt whatsoever regarding the Norwegian Continental Shelf after the adoption of the Convention on the Continental Shelf on 29 April 1958. Although a formal proclamation was not necessary, it was regarded as being important to confirm – both at home and abroad – that Norway had the exclusive right to the natural resources, inter alia because the Norwegian authorities had received inquiries from

foreign companies interested in conducting exploration and if relevant, also exploiting the resources. This was also the background for Section 2, second subsection concerning the King's right to grant Norwegian and foreign persons, including companies, permits to explore or exploit, as well as the right to stipulate specific conditions for such permission. In relation to other states, the Norwegian jurisdiction was proclaimed, as mentioned, by Royal Decree of 31 May 1963.

(73) Since the formulation used in Section 2, first subsection aimed to clarify or confirm the Norwegian jurisdiction over the continental shelf, in my mind it has little weight in the context of the law of torts. The State has not elected to carry out petroleum activities on its own, but has left this task to others, under State control. When petroleum is extracted from the seabed, the ownership of the oil and gas passes to the licensee. The operations take place for the account and risk of the oil companies, not the State. The fact that the State is the original licensee, is thus of lesser importance. It is probably true that the State could have refrained from initiating the activities, but this – relatively theoretical – viewpoint, carries little weight, in my view.

(74) The divers have also asserted that the State has found it important to exercise control over the oil activities. They have inter alia referred to the so-called Ten Oil Commandments, formulated by the Storting's Standing Committee on Industry in the spring of 1971 in connection with Storting White Paper No. 95 (1969-1970) and Storting White Paper No. 76 (1970-1971). The Recommendation to the Storting No. 294 (1970-1971) states that "national management and control must be secured for all activities on the Norwegian Continental Shelf" and that the State shall be involved on all appropriate levels, as well as contribute to a coordination of Norwegian interests. A State-controlled oil policy was developed in which the Storting played a strong role with management and control activities and awards of blocks, while the Norwegian Petroleum Directorate (NPD) submitted annual reports containing guidelines for the activities.

(75) A related argument is that the control viewpoints are reflected in the legislation. The State announces and awards licenses after open application procedures (licensing rounds). After a production license is awarded, permits are required inter alia for development, operation and production. Directives can also be issued regarding initiating or postponing operations. Another policy instrument is the opportunity of stipulating conditions.

(76) I agree that these factors illustrate the State's wide-ranging control over the oil activities. This is not surprising given the scope of the activities and their importance for the Norwegian society. On the other hand, this control has limited weight in terms of an assessment of the connection in relation to the law of torts. The State has not carried out test drilling for oil, has not carried out petroleum production under its own auspices and has not directly been an employer or a principal in the diving activities. Its general control thus gives little guidance as regards the question of liability for this activity. The control arguments, viewed independently, would lead to the State having a strict liability for all damages in connection with the oil activities in the North Sea. Case law does not provide a basis for such a broad conclusion.

(77) The divers have also referred to the State's authority to impose taxes and fees. Odelsting Proposition No. 26 (1974-1975) On the Act relating to taxation of subsea petroleum deposits, etc., page 11, states for example that it is "a natural point of departure that petroleum production on the Continental Shelf is exploitation of natural resources that belong to the Norwegian State", both in connection with exploitation and disposal of the resources and as regards the tax and fee system. There are similar statements on page 21 of the Proposition regarding the introduction of a special tax on income from oil production. Furthermore, a special tax system has been established for oil production, see Storting White Paper No. 53 (1979-1980), pg. 119 on the exploration tax, handling fee, one-time fee and area fee, which is an annual fee per square kilometer for the area encompassed by the licence.

(78) Even though these items of the legislative history refer to the State's ownership right to the resources, the State's tax and fee authority in the petroleum sector is not different in principle from other areas of the society. It cannot make a difference whether the State's revenues in this area are high, or whether special types of fees have been stipulated for the Continental Shelf. Such special features do not change the principle picture – that the State collects taxes and fees from the entire Norwegian society. Moreover, the tax revenues, etc. from the North Sea do not create any special connection to that part of the oil activities that relate to the diving activity.

(79) For similar reasons, neither can the arguments concerning the State's business operations or financial involvement be heard. It is certainly true that the State has secured substantial ownership interests in important fields for Statoil and SDFI – the State's Direct Financial Interest. However, Statoil is a separate legal entity, different from the State, and this must be the decisive factor. There can be no form over substance here.

(80) The divers have argued that, even though prevention considerations are not as relevant as regards the strict liability, it does carry weight in this case, combined with the control the State exercises over the oil activities. If liability is assigned, it will raise the safety level through the supervision that has been established. As previously mentioned, the Norwegian Labour Inspection Authority, and subsequently the Norwegian Petroleum Directorate, had to grant permits for diving operations, and they also carried out general supervision of the diving.

(81) In my opinion, such a combination of control and prevention viewpoints carries greater weight in relation to the employer's liability. With the requirement for connection associated with the strict liability, we must not deviate from the premise that stipulating conditions and exercising control are fundamentally different from carrying out operations for one's own risk and account. If the elements asserted by the divers were, in an overall perspective, found to constitute a sufficient connection, this would mean a significant expansion of the non-statutory strict liability.

(82) In this context, it is also mentioned that a special liability system was established for the oil activities at an early point in time. The Petroleum Act of 1985, Section 60, first subsection, contained the following provision:

> "If a party that carries out assignments for a licensee becomes liable for damages vis-à-vis a third party, the licensee is liable, to the same scope as and jointly and severally with, the tortfeasor and, if applicable, its employer, for the claim for damages."

(83) This was a continuation of the Royal Decree of 8 December 1972, Section 51. The scheme is continued in the subsequent Petroleum Act of 1996, Section 10-9. The divers are undoubtedly a "third party" in the legal sense, and they have the choice between filing suit against the diving companies or the oil companies. Both groups are still capable of being sued. In my opinion, it is not to the point to describe this special arrangement to the benefit of the injured parties such that the State has thus attempted to transfer the liability over to the operators, as the appellants have tried to indicate. We are dealing with a special compensation scheme intended to reinforce the position of the injured parties.

(84) The Court of Appeal has – without this having any bearing on the strict liability – mentioned the compensation schemes that have been established for the divers. I agree that it is not natural to include these in the assessment.

(85) My conclusion is thus that the factors asserted by the divers, neither individually or together, create a sufficiently close connection between the State and the tortious enterprise so that liability can be assigned to the State under non-statutory strict liability. It is certainly the case that the State has heavily involved itself in the petroleum activities. As regards the diving activity in particular, the State's involvement is limited to supervision and control. This is not a close connection per se, and does not differ from other State supervision and control activities.

(86) *Liability in negligence*
I will then address the issue of whether the State can be liable as employer. This part of the case has a somewhat different position for the Supreme Court than for the lower courts, since the Supreme Court has declined to hear Vilnes' appeal of four specific acts by the authorities. Moreover, the appellants' criticism of legislation, regulations and allocations seems to be somewhat more moderate.

(87) The core of the appellants' arguments is that it was negligent for the supervisory authority to grant diving permits and dispensation from the regulations without stipulating adequate conditions and requirements for documentation. The State was made aware of the existence of blameworthy conditions, and should have been more active in ensuring that the diving was carried out in a prudent manner.

(88) It is natural to link the negligence assessment to Section 2-1 of the Act relating to compensatory damages, even though it is acts by the public authorities that are to be evaluated, cf. correspondingly Norwegian Law Gazette 1992, pg. 453. Under this provision, the employer is liable for harm that is caused deliberately or negligently during the work, as consideration shall be given to whether the demands the injured parties can reasonably stipulate for the enterprise, have been disregarded.

(89) In the legislative history of the Compensatory Damages Act and in case law, it is assumed that a milder standard of care shall be applied for certain forms of public control, assistance and service enterprises than that which follows from the general rules for employer's liability. Inter alia in the above-mentioned judgment incorporated in the Norwegian Law Gazette 1992, page 453, however, such a milder norm was not applied. As emphasized in the Norwegian Law Gazette 2000, page 253 and the

Norwegian Law Gazette 2002, page 654, there must be a specific determination of which demands can reasonably be placed on the enterprise. Relevant elements of significance include the general risk of harm in the relevant area, the financial resources at the disposal of the authorities, the nature of the interests that have suffered harm and the opportunities the injured party had to insure himself against harm. One must also distinguish between omissions and active acts by the government, cf. Norwegian Law Gazette 2000, page 253.

(90) Based on the considerations emphasized in case law, it is my opinion that there is no basis for applying a mild standard of care in relation to the Norwegian Labour Inspection Authority's and subsequently the Norwegian Petroleum Directorate's permits to carry out diving. Under the regulations, the diving companies were obliged to submit a plan for the diving. It was then the job of the authorities to determine whether the diving could be carried out in a prudent manner, or whether permission should be refused, or alternatively, changes demanded. The authorities took an active part in the process and could prevent individual diving operations from taking place.

(91) At the same time, the assessment must be made in light of the knowledge available at the time in question. Norway had no previous experience with petroleum activities. The Lossius Commission emphasized that, in the beginning, it was the foreign players who possessed technical knowledge about deep diving, and there was little organized medical and technical research in this field, cf. NOU 2003: 5, page 51. It would obviously take time to acquire knowledge and experience (cf. in more general terms, pages 50-55). The authorities' supervision was naturally also characterized by this. Application of the general standard of due care cannot be characterized by hindsight. In addition comes the fact that diving is risky by nature. This applies particularly in connection with development of oil fields where saturation and bounce diving were used, and in connection with pipelaying at great depths.

(92) My point of departure is the regulations that existed at the time. It followed as early as from the Royal Decree of 15 May 1964, laid down pursuant to the Continental Shelf Act, that exploration on the Shelf had to be carried out "in a prudent manner". This was continued in the Royal Decree of 9 April 1965, with consideration for exploration for and exploitation of petroleum deposits, while it was emphasized at the same time that safety provisions could be laid down (Section 37) and inspectors could be appointed (Section 45).

(93) The first independent safety regulations relating to exploration and drilling (not production), laid down in the Royal Decree of 25 August 1967, maintained the requirement that exploration and drilling should take place in a prudent manner in accordance with good and reasonable practices (Section 4), and in Section 121 contained special rules regarding diving:

> "A plan for how diving is to be implemented, which equipment is to be used, including which safety measures will be taken to protect the divers' life and health, shall be submitted for approval in advance to the Ministry or such agency as it may authorize.
>
> If a party that is to perform the diving is not equipped with an approved Norwegian diving certificate, consent shall be obtained from the Ministry or such agency as it may authorize, before the diving can commence.
>
> Diving work shall be carried out in a prudent manner and in accordance with the prevailing regulations."

(94) The authority under this provision was delegated to the Norwegian Labour Inspection Authority which, on 26 March 1971, sent a circular to "All diving operators … on the Norwegian Continental Shelf". In this circular, Section 121 was translated into English, together with a requirement that diving bells were always to be used under certain specific circumstances.

(95) I note that, so far in the development, there were no factors that would give rise to liability. The rules were issued early, they emerge according to their content as being prudent, and together with the circular letter, they show that the authorities took steps to prevent injury. Furthermore, it can be mentioned that the four divers in this case started their work in the North Sea from 1976 (Vilnes and Kleppe) and 1978 (Jørgensen and Muledal).

(96) In the early 1970s, work was begun on common diving rules for the Norwegian and British sectors. The British rules took effect on 1 January 1975, while a final draft in Norwegian was submitted for consultation in November and December that same year. Final draft diving regulations existed on 4 November 1977, but since it was clear that the NPD was to take over the supervision of diving in the North Sea from 1 April 1978, the implementation of the regulations was postponed. During this period, representatives of the diving organizations were allowed to make statements. Some of

their suggestions were incorporated, while more wide-ranging proposals that could lead to delays, were deferred to subsequent revisions, cf. in general NOU 2003: 5, pages 72-74. The NPD adopted the diving regulations on 1 July 1978, and they entered into force immediately. This was a comprehensive regulatory body of work, with specific requirements for diving operations, divers, diving contractors, divemasters, diving equipment, breathing gas, evacuation under pressure, fire protection, etc.

(97) It is possible that the 1978 regulations should have been adopted earlier, and that the divers organisations' viewpoints should have been reflected to a greater degree. However, such a general criticism of the rules – which seems to underlie parts of the divers' arguments – can clearly not lead to liability. Like the Court of Appeal, I place emphasis on the fact that Norway was the first country after the United Kingdom to introduce rules for diving at sea, while the USA adopted rules in 1981 and Denmark in 1995. The Court of Appeal has also found that the regulations that were in force prior to the adoption of the 1978 regulations, were not worse than in other countries.

(98) From 1979, the NPD revised the regulations. This led to the introduction in 1980 of diver certificates and new competence requirements, maximum limits for the time a diver could spend in saturation, in the water and in diving bells, as well as stricter requirements for reporting accidents. Among other changes, we would mention the issuance of safety reports from April 1980, which provided information on incidents or problems that the sector should be aware of. In the fall of 1990, the NPD took the initiative for a project to standardize the compression and decompression tables, which resulted in recommendations that were still in use when the Lossius Commission submitted its study, cf. NOU 2003: 5, pages 81-82. In my opinion, these factors show that the NPD did not exhibit passivity, but to the contrary, took active steps to improve the rules relating to the divers' safety.

(99) Like the Court of Appeal, I also cannot see that the actual *organisation* of the control was irresponsible. While the Norwegian Labour Inspection Authority held the responsibility up to 1978, a person with technical education was employed in a full-time position to carry out supervision of the diving activity in the North Sea. The information in the case indicates that the work pressure from time to time was too great to carry out as many inspections as desirable, but according to the circumstances, assistance was hired in, and it is not the job of the courts of law to try the budgetary considerations. The Lossius Commission emphasized also that no personal criticism could be raised against the responsible party in the Norwegian Labour Inspection Authority, cf. NOU 2003: 5, pages 70-71. When the NPD took over from 1 April

1978, five people were employed, thus making the supervision more efficient. The leader of the team was an educated and experienced diver (page 79 and page 82 of the study).

(100) I will now move on to an evaluation of how the rules were *practiced*, which is the central issue in the appellants' arguments concerning negligent liability. Here the knowledge the authorities possessed regarding the actual circumstances regarding diving in the North Sea is of significance. On this point, the Court of Appeal stated the following:

> "The Court of Appeal assumes that the State was largely aware of the conditions in the North Sea, including the divers' working conditions. However, because of under-reporting, they probably did not have a full overview of the extent of near-misses and other undesirable incidents. The State was also aware of the divers' demand for improvements. The divers and their organizations made a number of inquiries to the authorities through letters, newspaper articles, direct contact in the form of meetings and conferences, etc."

(101) Another aspect of the negligence assessment is what was known about the harmful effects of diving. As mentioned by the Court of Appeal, it was clear that acute pressure changes in various ways entail significant strains for the organism, while there was less knowledge about the long-term effects. In 1983, the Norwegian authorities took the initiative for a conference in Stavanger to discuss facts related to the unfortunate medical effects of deep diving. Here, opinions were divided. Representatives of the American, British and French medical diving experts, who had the longest experience, believed that diving that was carried out according to the regulations was not dangerous, while others – including Norwegian researchers – were not convinced.

(102) Ten years later – in 1993 – Norwegian researchers organized a so-called consensus conference in Godøysund outside Bergen. Here the opinions were largely the same, but now there was some opening for the possibility that neurological and psychiatric delayed effects could possibly occur. When the Lossius Commission released its study in late 2002, little had changed. Therefore, the Commission concluded that there was still no reliable data that could answer the question of whether normal diving could result in unfortunate neurological and cognitive long-term effects. However, for its purpose, the Commission found that it could grant credence to studies that proved such a connection. I refer in general to NOU 2003: 5, pages 39-45. In relation to the

prudence assessment, it is not necessary to discuss subsequent studies the parties have referred to, for example at Haukeland University Hospital and in Aberdeen, both in 2004, as well as a consensus conference in Bergen in 2005.

(103) The Court of Appeal stated the following about decompression sickness:

> "After the presentation of evidence, the Court of Appeal assumes that there was a broad-based opinion that diving did not have serious long-term effects if there was no decompression sickness. Decompression sickness that was only manifested as pain that went away, possibly after treatment in a pressure chamber, was also not considered to be particularly dangerous. It seems that decompression sickness was accepted as a part of diving, an inconvenience one tried to avoid, but that one accepted as part of the deal. The sickness was treated with recompression, and treatment was thus considered to be complete, cf. NOU 2003:5, page 76".

(104) Furthermore, the Court of Appeal found it to be established that the harmful mental effects of extreme, life-threatening situations, particularly in the case of repeated experiences, was known, although the diagnosis PTSD – previously mentioned – was possibly more recent.

(105) With this as a basis, I will first consider the *dispensation practices.*

(106) According to the diving regulations, saturation time should not normally exceed 16 days, but the NPD could allow up to 24, and in exceptional cases 32 days, if an agreement was entered into regarding extended saturation time between the diving contractor and the divers' elected representatives. Applications for dispensation were based on the fact that some work operations could take more than 16 days, and that from an overall perspective, it was less risky to allow extended saturation time than to subject a new diving team to pressure in order to complete the work, cf. NOU 2003: 5, page 80.

(107) The diving regulations also confirm that diving from diving bells was not allowed in cases where the diver's hose (umbilical) was longer than 29 meters, and that the umbilical to the person remaining in the bell should not exceed 31 meters. Here dispensations were sought for safety reasons, for example because it was risky to let the ship and the diving bell get too close to the oil platform.

(108) On both points, the practice was very liberal, and the Lossius Commission had the impression that granting dispensations was almost automatic; a practice which was criticized by the diver organizations. At the same time, the Commission remarked:

> "The Norwegian Petroleum Directorate would probably have avoided criticism from the divers if the maximum length of the umbilical was set at, for example, 60 meters, and the maximum number of saturation days was set at 32. Then dispensations for the umbilical would only have been given in exceptional cases. The thought behind the rules and the NPD's dispensation practices seems to have been that – taking all factors into consideration – one thought that it would better promote safety work by having a main rule for the umbilical of about 30 meters and a saturation period of up to 16 days, combined with extensive use of dispensations."

(109) Strict rules combined with broad dispensation practices thus appear to be the result of a balancing, based on the view that the control would then be better than it would have been if the rules had been liberal. Even though dispensations were regularly granted, I cannot see that this was negligent. According to the regulations, all applications for dispensation had to include a statement from the divers' representative and diving physician that the proposal had been considered and found to be in order. The documentation presented to the Supreme Court shows that this practice was followed strictly. Emphasis was also placed on the divers giving their consent. It is otherwise of interest to note that the United Kingdom still has more liberal regulations (maximum saturation time of 28 days and no specific umbilical restriction). Based on an overall assessment, I cannot see that the arrangement in general was irresponsible, and there is no information concerning specific dispensations of significance for the appellants that would indicate a different assessment.

(110) An important issue in the case has been which diving tables were accepted as regards how the regulations were put into practice. Decompression tables that were too fast could, as mentioned, lead to decompression sickness. The appellants have argued that here, the NPD's control was too lax, which led to injury, and they refer to the fact that standard tables were subsequently introduced.

(111) When the companies applied for consent to dive that was based on rapid ascent, they normally had the divers' consent. The problem was that the diving companies regarded the decompression tables as proprietary for competitive reasons, since companies with fast tables were often preferred when assignments were awarded. When drilling for oil

in the North Sea started, bounce diving tables developed by the US Navy were utilized. The Norwegian Labour Inspection Authority did not have access to tables for saturation diving, and in late 1972 took the initiative to develop their own, Norwegian tables. A German research institution was contacted, but the work was difficult, cf. in more detail NOU 2003: 5, pages 74-76. In 1984, the NPD expressed concern regarding the variations in the tables and announced a revision. Standardized tables were not achieved until 1990, following a project financed by the NPD. Since then, decompression sickness has been extremely rare.

(112) The assessment of why the supervisory authority allowed the diving companies to use decompression tables that could lead to decompression sickness must be carried out in light of the knowledge and attitudes that prevailed at the time in question. The authorities did not have knowledge about which tables would eliminate decompression sickness. As previously noted, there was widespread uncertainty concerning the harmful effects, and in the industry there was a perception that decompression sickness was an inconvenience one attempted to avoid, but that was regarded as being part of the work. It has been stated that other countries still do not have standardized tables.

(113) I will here interject some comments concerning under-reporting as a general problem. The reasons why the divers generally did not speak up seem to have been a sort of professional pride, but also the experience of pressure from the diving companies. In some companies, "difficult" divers could be sent to land. As mentioned, the NPD was aware of this. In a newspaper interview, the head of the NPD's diving section encouraged the divers to speak up about blameworthy conditions. Whether or not this had any effect is unclear. In any event, the lack of reporting had to have an impact on the effectiveness of the supervision.

(114) On the basis of an overall assessment, I have arrived at the conclusion that the authorities' practices cannot be characterized as negligent. The appellants' arguments concerning the absence of a physician on the diving vessel, and that the pressure chamber was not easily accessible, have been taken into consideration. The companies had diving doctors that they could consult. First and foremost, it had to be the diving companies and the oil companies that ensured that the operations that were carried out for their account and risk were carried out in accordance with the regulatory requirements that diving should take place in a prudent manner. The circumstance that medical experts generally pointed to a need for more knowledge about diving-related medicine and greater pressure chamber capacity does not change this.

(115) The divers have also asserted more general criticism that is not directly related to licences and dispensations. I would remark that in relation to *inspections,* it emerges that the intensity of the Norwegian Labour Inspection Authority's supervision was less than the Norwegian Petroleum Directorate's. This mainly seems to be related to the different resources the agencies had at their disposal, ref. above. No facts have emerged that confirm blameworthy passivity.

Quite the opposite, in fact; the documentation that has been submitted indicates that the authorities reacted when they were made aware of violations of the regulations.

(116) The appellants have also argued that the divers lacked *qualifications,* and that the diver education was deficient. This increased both risk and stress levels. I would initially mention that all four divers in this case had solid training, including from the Norwegian Navy, and also extensive experience when they started diving in the North Sea. Furthermore, I would note that there is no information to indicate that lack of qualifications on the part of other divers created situations that have led to danger or injury for the appellants. Generally speaking, there is reason to point out that Item 10 of the 1978 Regulations contained detailed requirements concerning previous experience and competence. Thus, it had to be up to the diving companies to recruit qualified divers.

(117) It is true that the Norwegian State Diving School was not established until 1980. However, many divers had training from the Navy, and some diving companies also carried out training of their divers. Nothing emerges from the Lossius Commission's study that provides a basis for ascertaining negligent liability, see NOU 2003: 5, Section 4.3.3 on competence and 5.9 on education. Based on the arguments, I would add that it cannot be regarded as being blameworthy that the authorities accepted that experience as a diver could be put on a par with a certificate from a deep diving course in a transitional period after the Norwegian State Diving School was established.

(118) It has also been asserted that there were deficiencies in the *equipment* that was used for diving. The divers were subjected to chemical substances through the breathing gas, and this exposure was particularly strong because of the long periods under pressure. Furthermore, the temperature in the diving suit could fluctuate, sometimes resulting in burn injuries. And if emergency situations arose while the divers were in saturation, they had to be evacuated in a pressure chamber (hyperbaric evacuation). According to the appellants, the evacuation units were not satisfactory, and dangerous situations arose.

(119) An assessment of these arguments must be based on the fact that the regulations contained detailed requirements for proper equipment, cf. particularly Items 13 to 15. According to Item 15.1, no diving facility or equipment was to be used until one checked to make certain that it was in good condition. It was thus the responsibility of the diving company to ensure that everything was in accordance with the regulations. A liability for the authorities would, in such case, have to be based on the premise that they were aware of unsatisfactory conditions and did not intervene. However, there is little reference to specific episodes relating to the appellants, and when such reference is made, they have not documented blameworthy passivity.

(120) As an illustration, the appellants have referred to Dag Vilnes' complaint of 18 July 1983 in connection with diving from the diving vessel Tender Comet. For the Court of Appeal he described, inter alia, that the diving ship drifted off, the diving suit was alternately too cold and too warm, which led to burn injuries, and also that toxic mud penetrated into the diving system, and that the tools were not suitable.

(121) Vilnes' letter caused two representatives from the NPD to inspect the Tender Comet on 30 August 1983, and in a letter of 29 September 1983 to the operator, the NPD criticized a number of factors, demanded changes and set a deadline for repairs and reply. This was explained in more detail in a letter to the operator of 4 October 1983, and the company was summoned to a meeting – in October – to give a verbal presentation of its internal control. The question also raised the issue of whether there was a connection between the fact that Vilnes had pointed out deficiencies, and was subsequently terminated. It can be mentioned that the operator, in a letter dated 11 October 1983, informed the NPD that the contract for the diving operation would be transferred to a different diving company with a Norwegian operations philosophy.

(122) In my view, this demonstrates that the Directorate was not passive, but took active measures. In a letter dated 29 September 1983, Vilnes was informed of the follow-up. In the letter, the Directorate stated that it was pleased that he had contacted the authorities and emphasized the importance of the divers pointing out deficiencies to the diving contractors, the oil companies and the authorities. Vilnes has submitted that the Directorate did not lodge a formal complaint with the police, that his own formal complaint was dismissed due to delay on part of the Norwegian Petroleum Directorate and certain other aspects. However, an investigation report did not support his claims of delay, and it has not been substantiated that the submitted factors reduced the efficiency of the supervision of the Norwegian Petroleum Directorate.

(123) Specifically, as regards hyperbaric evacuation, it followed from Item 2.2 of the regulations of 1978 that the licensee was compelled to implement efficient preventive measures to evacuate divers under pressure in case of fire or other emergencies. The District Court, which deliberated these issues, emphasized that there was a development, and that the introduction of hyperbaric lifeboats in 1977 was an improvement, but that saturation divers had less satisfactory evacuation safety until the 1990s. Nor has it been substantiated that the Norwegian Labor Inspection Authority or the Norwegian Petroleum Directorate were passive in this regard. Nor can it be assumed that the evacuation problem had any effects for the four divers in this case.

(124) I would add that many of the factors pointed out by the divers, such as too rapid compression tables or equipment deficiencies, may very well cause a considerable strain for many divers. This strain came in addition to the strain which the diver profession already entailed. However, this does not result in liability on part of the Norwegian Labor Inspection Authority or the Norwegian Petroleum Directorate as long as they did what could reasonably be expected of them in the execution of their supervision. On the basis of the some of submissions I add, for the sake of completeness, that there is no basis for liability in damages for non-economic loss in this case.

(125) In closing, I will consider whether the State is liable for test dives which took place at NUI, later NUTEC, in Bergen. This is of importance for two of the appellants. Angus Gunnar Kleppe participated in a Statpipe dive which started on 31 January 1983, lasted for 17 days, and went down to a depth of 350 meters. Magn Håkon Muledal participated in the OTS III dive, which lasted for 27 days from 6 November 1986. The deepest dive went down to 360 meters.

(126) The basis here is that the test dives took place at a research institution which was an independent legal subject, separate from the State. In 1983, the institute was organized as a foundation, while it was a private limited company in 1986. A compensation claim must therefore be directed at NUTEC. Furthermore, the State was not the commissioner of the verification dives, which were initiated and mainly financed by the oil companies. The appellants' submission that this was in the State's interest as it contributed to making work a great depths possible – e.g. when laying pipelines – and to oil production, does not result in the State being liable.

(127) Such liability for the test dives must, accordingly, be based on the authorities supervision responsibility. The diving at NUTEC took place in chambers on land. The Norwegian Labor Inspection Authority is responsible for upholding the regulations relating to diving in sheltered waters, but the Norwegian Petroleum Directorate played a key part as an adviser due to its experience with the diving regulations of 1978.

During the period the test dives in this case took place, the Norwegian Labor Inspection Authority only consented to test dives – following the Norwegian Petroleum Directorate's advisory assessment – when a statement from a research ethics committee and a medical assessment from the Advisory committee for diving activities at NUTEC were available. The Health Director's advisory committee for diving medicine also played a certain role.

(128) The test dives raised complicated medical and technical diving questions. Prior to approval being granted, the Norwegian Labour Inspection Authority obtained opinions from expert bodies. Approval was granted in light of the knowledge available at the time. Documentation before the Supreme Court shows that the Norwegian Petroleum Directorate considered the supporting documents thoroughly before dives were approved. The research/ethical committee was ordered to consider such cases in light of the Helsinki Declaration, which I will revert to. The committee considered each dive in several meetings and obtained additional information before issuing an opinion. Test dives were obviously not deemed to be a matter of course, but subject to a thorough assessment. It otherwise emerges that information was given in advance for each dive, e.g. that it was on a voluntary basis and that the diver could withdraw. It was supervised by medical doctors.

(129) On this background I cannot find that the Norwegian Labour Inspection Authority acted negligently in approving or supervising the test dives. To the extent agreed procedures were deviated from during or immediately after each dive, any claim in damages must be made against the companies or institutions that implemented the dive, not against the State's supervisory authorities.

(130) *Liability on the basis of human rights*
I will finally look at the appellants' submissions that there is violation of the human rights conventions, and that this entitles them to compensation. This is in part invoked as part of the negligence liability, in part as an independent basis of liability.

(131) First of all, reference is made to ECONHR Article 2 and CP Article 6 on the right to life. With support in case law from the European Court of Human Rights (ECHR), the divers claim that the State has not fulfilled its obligation to secure this right, as the right to life was threatened.

(132) It is quite clear that ECONHR Article 2 cannot only be applied when lives have been lost, but under the circumstances also when there is a threat against the physical integrity, cf. the judgment of 20 March 2008 in the case of Budayeva et. al versus

Russia, paragraph 146 and Peer Lorenzen et. al, the European Convention on Human Rights with comments (2003), pages 83-84. Furthermore, the provision requires both that the State must refrain from intervening in the right and that it shall implement suitable measures to secure it. According to ECHR this safeguarding duty first and foremost entails an obligation to establish a scheme ("administrative framework") with a view towards providing efficient protection against threats to life. This concerns any activity, public or non-public, where the right to life may be exposed ("at stake"). The obligation comprises "industrial risks" and "dangerous activities", cf. e.g. the Budayeva case, paragraphs 128-131, which concerned an earthquake. Reference is also made to a judgment of 19 February 1998 in the case of Guerra et. al versus Italy (toxic emissions), a judgment of 9 June 1998 in the case of L.C.B. versus the United Kingdom (health hazards due to nuclear detonation) and a judgment of 30 November 2004 in the case of Öneryildiz versus Turkey (methane explosion at refuse dump).

(133) None of these cases concerned threats against life as a result of occupational risk. There are no judgments on this from ECHR as far as I can see, but its statements are worded in such general terms that I cannot rule out that the court, at least to some extent, would apply Article 2 to such circumstances. It is not necessary to go into further detail on this, as I under any circumstances find that the provision has not been violated in this case.

(134) It follows from ECHR case law that if there is a real and immediate danger to life, and this danger is or should have been known to the authorities, the State may under the circumstances also have an obligation to implement special measures. In the assessment of which measures should be implemented, the State has discretionary latitude in principle. It cannot be imposed an impossible or disproportionate burden, as it must make choices in light of priorities and resources, cf. paragraphs 134 and 135 of the Budayeva judgment, and paragraph 38 of the L.C.B. judgment and paragraphs 100-101 of the Öneryildiz judgment.

(135) When these principles are applied in this case, the situation is that the State pursuant to statute had adopted an extensive regulatory body of work on the diving activities. An administrative scheme had been established where the Norwegian Labour Inspection Authority and subsequently the Norwegian Petroleum Directorate conducted supervision. Furthermore, funds were granted for their operations based on a priority in light of available resources. As mentioned previously, there is nothing to indicate that the supervisory authorities remained passive when they became aware that there was a violation of the regulations that created risk. As also mentioned, the decisions

were made on the basis of existing knowledge at the time. Accordingly, I cannot see that there is any violation of Article 2. I would add that CP Article 6 cannot lead to any other result.

(136) The appellants also submit that ECONHR Article 8 and CP Article 17 on protection of privacy and home provide the right to efficient protection of physical integrity and health, and that this must also apply to occupational circumstances.

(137) To support their view the appellants have referred to numerous judgments from ECHR on violation of Article 8 because the authorities had conducted a search and seizure at the plaintiff's place of business, e.g. a lawyer's office. This practice shows that the terms "privacy" and "home" comprise "certain professional or business activities", cf. e.g. the judgment of 16 December 1992 in the case of Niemietz versus Germany. The facts of the case in these judgments are, however, far removed from our case, and they therefore provide little guidance in relation to personal injury that has occurred in an occupational context, nor do the UN Committee on Human Rights' general comments 16 on CP Article 17 clarify this.

(138) The parties have also referred to judgments on health risk as a result of pollution. But the main viewpoint here is that Article 8 is applicable because privacy and family life are primarily exercised in the home., cf. e.g. the ECHR judgment of 2 November 2006 in the case of Giacomelli versus Italy, which concerned noise and emissions from a plant for treatment of hazardous waste. With reference to previous case law it is stated inter alia that (paragraph 76):

> "Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home."

(139) Nor is ECHR's case law on health injuries as a result of pollution thus immediately comparable in our case.

(140) Of the case law emphasised, only the case of Roche versus the United Kingdom concerns potential injuries in connection with work performance. The plaintiff served in the British Army and for a specific period agreed to participate in tests with mustard gas and nerve gas. He later claimed that this had led to injuries and demanded access to the case documents. In a judgment of 19 October 2005 the ECHR found that the right to privacy was applicable, and that his right to access pursuant to Article 8 had been violated (paragraphs 155-169).

(141) This judgment provides a basis for test divers coming under Article 8. But there is no case law that shows that this is generally applicable to hazardous diving. In my view, however, it is not necessary to take a position on this question, as the safeguarding obligation that might follow from Article 8 under any circumstances has been fulfilled. I would here refer to the discussion above on Article 2.

(142) Article 3 of the European Convention on Human Rights (ECONHR) and CP Article 7 on inhuman or degrading treatment have also been invoked. One can obviously not consider finding that there was violation of these provisions under reference to general diving conditions, as submitted by Vilnes.

(143) As regards the test dives at NUTEC, which Kleppe and Muledal participated in, I would remark:

(144) CP Article 7, last sentence, lays down that no one shall be subjected without his free consent to medical or scientific experimentation. Similar protection presumably follows from ECONHR Article 3. In this case it is clear that the divers were informed of the test dives in advance. Written guidelines had been prepared. There is nothing to indicate that these dives progressed differently than assumed.

(145) The test dives had been cleared in relation to the Helsinki Declaration, prepared by the World Medical Association in 1964. This procedure complied with NUTEC's practice and the Ministry of Health and Social Affairs' guidelines of 8 June 1984 regarding the mandate for regional committees for medical research ethics. It was there expressly laid down that guidance was to be sought in internationally adopted declarations, including the Helsinki Declaration. As mentioned above, the members of the committee considered the matter thoroughly. There is no basis on which to attribute

the delayed injuries sustained by Kleppe and Muledal to these test dives. Information in the case otherwise shows that at the time a number of much deeper dives had been carried out in the USA, England, France and Switzerland.

(146) Accordingly, I cannot see that the test dives were in violation of ECONHR Article 3 or Article 8, nor CP Article 7.

(147) Vilnes has otherwise claimed that the discrimination prohibition in ECONHR and CP Article 2 has been violated, as the protection level was lower for diving in the oil activities than in other parts of working life. To this I would remark that these provisions only apply to non-objective discrimination in relations to rights protected by the convention. The submission is of a general nature, the rights to which Vilnes – and any other divers – have been precluded from enjoying have not been specified in further detail. To the extent this means that the divers in a specific period did not come under the Working Environment Act, then this will not be successful.

(148) Based on the fact that there is no violation of any convention provisions, it is not necessary to consider whether - and, if so, to what extent – this would give the divers a claim for compensation.

(149) Accordingly, the appeals must be dismissed. The appellants have been granted free legal aid and the State has not submitted a claim for costs.

(150) I vote for this

J U D G M E N T :

The appeals are dismissed.

(151) Justice **Endresen:** I agree with the first voting justice in all essentials and the result.

(152) Justice **Skoghøy:** I concur.

(153) Justice **Øie:** I concur.

(154) Justice **Gjølstad:** I concur.

(155) Following voting the Supreme Court pronounced the following

J U D G M E N T :

The appeals are dismissed

True copy certified:
Ann Kr. Thorsen (sign.)

(Stamp)
OFFICE OF THE SUPREME COURT - OSLO