

Compensation for Wrongful Imprisonment

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1 Introduction

In the so-called Lindome case from 1991 a lone elderly gentleman was murdered in his home during a housebreaking committed by two men. It was clear that one of the housebreakers was the killer but not which one, and each of them blamed the other for the murder. One of them was sentenced in the district court but was acquitted on appeal for insufficient proof. He was awarded compensation for a period in detention, which raised a great public outcry in Sweden.

To one engaged in a field of law viewed by many lawyers as peripheral, the Lindome example has offered a stepping-stone into an area of more general interest that can be used in response to the editors' call for a contribution in honour of the broad scholar Jes Bjarup. Though my foothold may be inadequate for a serious study, I shall still try my hand at evaluating the popular concern¹ for the housebreaker's ill-gotten gain. This may be justified even for an amateur since the compensation award seems based on reasoning little more stringent than the popular reaction itself² and on a rule of less than universal acceptance.

My concern is the central issue whether, as in Swedish law, the State ought to be strictly liable for loss through a person's internment when there may still remain serious doubts of the person's objective innocence. I shall not deal with the various exceptions and qualifications to the compensation rule – these include a special 24-hour arrest rule, special restrictions for administrative detentions, an allowance for the detainee's consent and complicity, and non-coverage of legal costs – but I shall have occasion to note one particular exception, i.e. for compensation held to be “unreasonable”. I shall also leave out the principles and measure of calculating the compensation.

2 Present Swedish Regulation

The matter is presently regulated in the Act (1998:714) on Compensation for Deprivation of freedom and other restraints, hereinafter the Deprivation Act, which succeeded a previous Act (1974:515) on Compensation for Freedom Restrictions which in turn succeeded an earlier Act (1945:118) on Compensation to Innocently Detained or Condemned Persons.

Section 2 of the Act provides that a person detained on account of suspicion of a crime is entitled to compensation (1) in the event of acquittal, non-indictment or dropped charges, (2) same for partially dropped charges if the detention would clearly not have been imposed for the remaining criminality, (3) same if the defendant was sentenced under a more lenient provision than the indictment,

¹ It is of course hard to gauge a popular reaction, as the visible expression is usually its reflection in the media. But media reactions are apt to sway the popular opinion, and the Lindome case, and the Pettersson case mentioned later, are so notorious and reactions so often voiced, that I dare say that I can feel the wind.

² Of the sources I have consulted – particularly in the bill (hereinafter Prop. 1997/98:105, cited according to the electronic version) and Bengtsson, Bertil *Skadestånd vid myndighetsutövning II*, Stockholm 1978 p. 181–201 – none discusses or questions the propriety of the central principle of strict liability for wrongful imprisonment.

(4) same if the detention decision was quashed, and (5) same if the detention was otherwise stayed.

Under section 3, the general rules in section 2 are extended to decisions of Swedish authorities leading to corresponding detention abroad. Section 4 deals with a special rule for treatment of juvenile delinquents and psychiatric treatment.

Section 6 excludes compensation for inmates having intentionally caused their detention and, except for compelling circumstances, for such having tampered with the evidence or committed other such negligent acts. The section also allows exclusion or adjustment if the inmate's own fault has caused the detention through his own conduct or "if for other reasons it would be unreasonable to grant compensation." It is specifically stated that remaining suspicion after an acquitting sentence is not such a reason.

The authority competent for determining the compensation on behalf of the State is the Attorney General of Sweden (Justitiekanslern). His decision may be challenged in court.

3 The Strict Liability

As previously stated I shall concentrate on the main principle expressed in section 2 of strict liability in connection with the exception for unreasonableness. Under these rules the mere fact of the defendant's acquittal qualifies him for compensation, even if the court ordering the detention has committed no fault and indeed, as specifically stated, even if suspicions or even strong suspicions remain against the acquitted inmate. This is contrary to the general principle of State liability for exercise of public authority.³

I have seen no reasoned grounds developed for this principle except that it follows from basic principles of legality and that it may be supported by article 5 of the European Human Rights Convention or article 14 (6) of the International Covenant on Civil and Political Rights.⁴ However, the general principle of legality is limited to the punishment as such, the Human Rights Convention provides only for compensation for arrest or detention "in contravention of the provisions of this article" – i.e. that they are "legal" – and the Covenant refers only to "miscarriage of justice", which does not clarify the issue.

While I have made no general investigation of other legal systems, the non-axiomatic character of the strict liability rule may be illustrated, at least, by the absence of such a rule in England, where compensation is paid only for "miscarriage of justice" and will not be awarded merely because at the trial or on appeal the prosecution is unable to sustain the burden of proof against the de-

³ Tort Liability Act (1972:207) Chapter 3 section 1. On the enactment of the Act it was considered appropriate to keep imprisonment liability outside as this Act, it was based on liability for negligence, see Prop. 1997/98:105 part 4.1.

⁴ According to the former, article 5 section 5, "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation". According to the latter, "When a person has ... been convicted of a criminal offence and when subsequently his conviction has been reversed ... on the ground that ... there has been miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law".

fendant.⁵ Also, in US federal law, it is specifically stated that “A person suing for unjust imprisonment must prove that he was factually innocent of the offence of which he was convicted.”⁶

The effect of a strict liability trial detention whenever the accused has been acquitted is, of course, that many inmates acquitted on account of insufficient proof are compensated although they may in fact have committed the crime for which they were incarcerated. This effect is more pronounced the higher proof the court requires for a convicting sentence, and thus a country applying a very high standard of legal security, and requiring proof amounting to near absolute certainty, exposes itself to paying compensation to many actual criminals. Assume, for the sake of argument, that the likelihood required by a court for a convicting sentence is 99 %, while a preponderance rule (50 % likelihood) would result in half of all judgements being objectively correct. Under such circumstances 49% of all acquitted persons would be in reality guilty but would still receive State compensation for wrongful imprisonment.

The situation is topical after the recent death of Christer Pettersson, widely thought to have assassinated Swedish Prime Minister Olof Palme in 1986. Palme and his wife Lisbet were walking a street of Stockholm when he was suddenly shot from behind at very short range. After Lisbet Palme, herself grazed by a bullet, had identified Christer Pettersson out of ten alternative subjects as being the killer, Pettersson was convicted for murder by the District Court. On appeal, the Lisbet Palme’s evidence was rejected with reference to technical objections concerning the method of confrontation, and Pettersson was accordingly acquitted. As a consequence he was awarded compensation for wrongful detention. After the Supreme Court had refused a reopening demanded by the Chief Public Prosecutor, the case against Pettersson is now closed by Pettersson’s death.

Detentions may be of varying quality, however. A detainee’s compensation claim may concern an arrest ordered by the prosecutor for a limited period pending the court’s decision of possible detention,⁷ or it may concern the court order of detention⁸ pending trial of the accusation.

Arrest and detention are normally imposed only for likely suspicion of crimes for which a prison sentence is prescribed.⁹ Reasons are risk of absconding, tampering with evidence and continued criminal activity.¹⁰ The required proof is lighter where a longer prison sentence may follow¹¹ and also for detention after a

⁵ Article 133 (1) of the Criminal Justice Act 1988, said to reflect a written answer by the Home Secretary in the House of Commons on 29 November 1985 “www.legalappeal.co.uk/justice_prevails/wrongful_imprison.htm”.

⁶ Innocence Protection Act of 2002 section 401, 28 U.S.C. 2513. On remedies against the detaining person, see Michael Posner in Netherlands Institute of Human Rights Seminar 2002 (19920311–15: Maastricht).

⁷ Code of Procedure Chapter 24 sections 6–11.

⁸ Code of Procedure Chapter 24 sections 1–5.

⁹ Code of Procedure Chapter 24 section 1 and 2 and for arrest section 6.

¹⁰ Code of Procedure Chapter 24 section 1, 1st paragraph, with reference in section 6 1st paragraph. For arrest, “reasonable suspicion” may suffice if the suspect’s custody is of particular importance, section 6, 2nd paragraph.

¹¹ *Ibid.* section 1, 2nd paragraph.

convicting judgement.¹² If the accused assents, a prison sentence may commence immediately upon an appealable judgement. A prison sentence may also be retried upon reopening due to certain faults affecting the procedure or new circumstances or new evidence being found that would probably have affected the outcome if available at the trial.¹³ The hurdle for the inmate is to prove the new circumstances;¹⁴ once the case is reopened, the prosecutor's burden of proof is the same as in any criminal case.

But whether arrested, detained or imprisoned, the defendant is entitled to compensation upon acquittal. The acquittal may be due to insufficient, though strong, proof of the defendant's culpability, with weighty suspicions still remaining. On the other hand it is also possible that the trial has conclusively shown the accused's innocence. Finally, the incarceration may be due to a fault on the part of the court rectified upon reopening, or in the prosecutor's or the court's faulty application of the requisites for arrest or detention.

Where the incarceration is attributed to fault, there seems no discussion but that the loss should be compensated, except to the extent it can be discounted against a shortened period of prison.¹⁵ In such cases, compensation might indeed be justified on the more general grounds of the Tort Liability Act.¹⁶ Where fault is not involved, but the detention can be shown to be objectively unfounded, the situation may seem less clear as a matter of principle. This may be the case if the accused has been held before and during the trial on formally correct grounds but is then acquitted on convincing evidence, or if he has been imprisoned and the conviction is quashed after the finding of new certain evidence, for instance the confession of the real perpetrator or findings according to new technique such as a DNA test. Although State liability in this situation is contrary to the general principle of liability for exercise of public authority, which is based on the *culpa* principle,¹⁷ few would challenge the justice of the acquitted inmate's compensation claim, particularly of one actually convicted on grounds which on reopening are found to be objectively erroneous.¹⁸

The situation seems markedly different if there remains cause for suspicion against the released inmate. Clearly it is less satisfactory to compensate an inmate if there still remains a 98 % likelihood of his guilt than if the likelihood is reduced to 0 %. Still, the Deprivation Act clearly sets out the principle of com-

¹² Ibid section 21.

¹³ Code of Procedure Chapter 58 section 2 (1–5).

¹⁴ Thus one of the enumerated circumstances, "erroneous application of the law" (no. 5) has been held not to include the circumstance that the convicting decision conflicts with a Supreme Court precedent or that the practice of the courts has changed, see NJA 1981 p. 350 and upper Norrland Appeal Court 24 November 2003 matter Ö 351-03.

¹⁵ Act (1974:202) on calculation of penal custody etc., section 19a.

¹⁶ So also Prop.1997/98:105 page 13.

¹⁷ Tort Liability Act (1972:207), instructively summarised by Hellner-Johansson in *Skadeståndsrätt* 6th ed. Stockholm 2000, pp. 257–262.

¹⁸ In the Bill to the Deprivation Act, the general departure from normal principles of liability in exercise of public authority is very deliberate but based only on the fact that this has been the case in previous legislation in the area, see Prop. 1997/98:105 under 4.1.

pensation in spite of remaining doubt.¹⁹ The Act thus places the risk of the guilt being unfathomable on the State rather than on the accused.

While such a risk division is apt to cause protest among the public and seems inappropriate in the extreme cases, it is harder to suggest a general rule that could satisfy common sentiment. It would hardly be felt satisfactory to set a test requiring simple preponderance of evidence for innocence, that is, in principle, just 50% likelihood. Surely the public would feel it unfair for a person acquitted of a crime to be denied compensation when he might just as well have been innocent as guilty. At the same time, in a case like Lindome, though there may in theory be a 50 % chance of either housebreaker being the murderer, the public reaction was clearly that neither deserved compensation because they were both proved criminals. Apparently, the award took no account of this on the basis that under the law no refusal or setdown of the compensation is allowed merely on account of remaining suspicions.

More straightforward is the American Federal law, requiring ordinary proof of innocence of the crime for which the inmate was incarcerated. Such proof will be according to the normal American requirement of being “beyond reasonable doubt”, which requires the awarding instance to be reasonably convinced that the claim is objectively founded. The consequence of such a rule is of course that the inmate is exposed to being uncompensated for detention in respect of offences of which he was in fact innocent. But the test is pliable, and compensation may be given though the deciding authority still nourishes doubt that the released inmate may possibly have been factually guilty.

The Swedish method, on the other hand, refuses any consideration of remaining suspicion concerning the former detainee’s guilt. This seems to endanger the application of the much more important principle of near certainty for condemnation. A court recognising the preponderant but legally insufficient likelihood of the defendant’s actual guilt may find it hard not to take account of the fact that in being acquitted he is simultaneously being awarded a sometimes considerable compensation.²⁰

4 Compensation Unreasonable

As previously indicated, a certain allowance is made for adjustment where “due to the inmate’s own fault or other circumstances” a full compensation would be “unreasonable”²¹ The previous Act had the same reservation “to the extent it is ... unreasonable that compensation be given”,²² and it was remarked during the

¹⁹ The principle is expressed in section 6, 3rd paragraph 2nd sentence: “Compensation may ... not be refused or set down on the mere ground that suspicion of the crime remains without clarification of the culpability.”

²⁰ Awards show a rising tendency. In a recent decision the Svea Appeal Court increased a compensation for eight years’ prison to SEK 10.2 million, whereof only 1.2 million was for lost income.

²¹ Deprivation Act section 6 3rd paragraph.

²² Act (1974:515) on Compensation for Freedom Restrictions, section 4, 2nd paragraph.

preparation of the new Act that under that formula compensation might properly have been refused in the circumstances of the Lindome case.²³

These “circumstances” apparently refer to that feature of Lindome that although the compensation claimant was eventually acquitted of the murder for which he had been detained, he had unquestionably participated in the house-breaking and thus deserved the detention. The intention to exclude compensation in such a case is reflected in the new formula under which compensation will be forfeit if “the claimant’s own action has caused the detention decision or other circumstances render it unreasonable that compensation be given”.²⁴

Such “other circumstances” may be of various kinds. “Circumstances” occurred already in the previous Act and were intended to include situations such as the withdrawal of a detention decision under provisions of non-arraignment of young offenders, or cancelled indictment due to failure of an injured party to present claims.²⁵ Another situation is that a detention is lifted as a result of supervening circumstances.²⁶ It is also felt that compensation reasons are generally weaker for pre-trial detention than for detention imposed by incorrect convictions.

Against this stands the clear proviso that remaining suspicion of the inmate’s guilt, however strong, does not amount to a circumstance defeating compensation. This is equally explicit in the available commentaries as in this express exception in the law text.²⁷

This disregard of remaining suspicion was a deliberate departure in the former law from an earlier regulation in the 1945 Act, in which a corresponding exception was primarily intended to cover situations of remaining suspicions against the acquitted detainee.²⁸ In the bill to the 1974 Act, the Minister of Justice referred to “the generally acknowledged principle that one not proved guilty of a crime shall be regarded as innocent”, and that “refusing compensation to one acquitted on the ground that suspicion remains is not in accordance with our concept of justice”.²⁹ Similarly in the bill to the present (1998) Act, the Minister stated that “the principle that one acquitted in a trial shall be regarded as innocent is very important in a State professing to uphold the rule of law”, and that “as a consequence hereof a person acquitted after deprivation of freedom should normally be entitled to compensation from the State.”³⁰ This was in accordance with the Committee proposal and was supported by general agreement among those consulted about the proposal.³¹

²³ Attorney General as cited in Prop. 1997/98:105 p. 18.

²⁴ Prop 1997/98:105 p. 118.

²⁵ Ibid.

²⁶ Bengtsson op.cit. p. 187 f, Supreme Court Justice Svensson in NJA 1989 p. 502.

²⁷ Bengtsson op.cit. p. 186, Prop. 1997/98: p. 18.

²⁸ Bengtsson op.cit p. 186 with further reference to NJA II 1945 p. 741 ff.

²⁹ NJA II 1974 p. 370.

³⁰ Prop. 1997/98 p. 18.

³¹ Ibid.

5 Appreciation

While compensation to acquitted persons in spite of remaining suspicions is based on a combination of the generally acknowledged principle of acquittal as equal to innocence and the somewhat less obvious consequence of the acquitted inmate's automatic compensation right, that connection was unrecognised in Sweden as late as 1974 and is not the rule today in countries such as England and the USA; nor is it a rule required by the wording of the relevant Human Rights instruments.³² It hardly needs demonstration that much popular resentment has been aroused in Sweden by compensation awards such as after the Lindome and Palme murder cases.

Under such circumstances there seems to be reason to inquire whether a regulation apparently at variance with popular feeling is the best solution to the compensation problem. This is not so much for the costs involved for the State – the Minister's exposition to the 1997/98 bill indicates that at that time, at least, these were not prohibitive³³ – but rather for the outrage in public opinion and disdain for the law likely to be nourished by repeated cases of notorious criminals being paid off in the absence of technically binding evidence.

Recognising this legitimacy problem is not the same as furthering popular justice. The upholding of high standards of certainty for a convicting sentence is a universally recognised principle. But confinement of suspects and compensation therefor are separate matters and should be given separate attention. The trial court's attention is directed to the defendant's liability and should not have automatic consequences for the compensation of detention to which the accused may have been exposed. As I have indicated above, such confusion might even be counterproductive in making a court hesitant to acquit likely criminals who would then cash a liberal compensation as a result of the acquittal.

The 1945 solution prescribed compensation but left it to the Attorney General – or court upon challenge – to decide whether insufficient proof should be seen as a counterindication to compensation. The awarding authority had a latitude in evaluating the circumstances, but its task was essentially negative, i.e. to determine whether compensation normally due should be refused.

The American model is more straightforward but perhaps somewhat rigid. The awarder's role is positive, and as in normal lawsuits he will require the claimant to prove his claim, which here means proving his innocence. In a system of free evaluation of evidence the required proof would not be 100 % but would accord with the nuanced practice applied in civil procedure. On the other hand, the evidentiary theme seems to be only innocence of the crime that caused

³² The dichotomy of the question may be demonstrated by the fact that the Human Rights Court has sometimes regarded the establishment of a detention as violating the Convention as sufficient redress, Crafoord, Clarence, *Inhemska gottgörelse för kränkningar av Europarättskonventionen*, in 2001 *Europarättslig Tidskrift*, at p. 533, and also Arvmyren, Simon, in a master thesis at the Stockholm Law Faculty, *Grundläggande rättigheter och skadeståndsrätt*, Stockholm Law Faculty 2003, pp. 37–40 including observations on Engel and Others v. Netherlands.

³³ Prop. 1997/98 p. 33 f, where it is also said that if the solution is justified from a tort point of view, the State should not shun the consequent costs.

the detention, not other circumstances. In this respect the Swedish solution from 1945 appears more flexible.

I have refrained from studying and considering the Danish law of the matter. On this I would not presume to impart advice to Jes Bjarup.