

The Presumption of Innocence

Eva Smith

1	Introducing the Problem	490
2	Peter Garde's Proposal	490
3	The Karmøy Case	492
3.1	The Verdict of the High Court	492
3.2	Comments to the Karmøy-Case	493
3.3	The Judgment of the Supreme Court of Norway	495
4	The Decisions of the European Court of Human Rights	496
5	Assessment of the Judgments	498
6	De Lege Ferenda	499
6.1	The Implications for the Civil Case Following the Criminal Case	499
6.2	Modification of the Rectification Principle	503
7	Conclusion	504

1 Introducing the Problem

The presumption of innocence is guaranteed in the European Convention of Human Rights, art. 6, section 2. "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law" At the same time it is prescribed in art 6, section 1, that "In the determination of his civil rights and obligations.... everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law".

When a crime has been committed the victim will often claim damages from the perpetrator. The consequence is two connected decisions. One is the state's criminal indictment against the perpetrator, the other the victim's civil claim for damages from the perpetrator. The first follows the rules of criminal procedure in respect of establishing proof, that is "in dubio pro reo". The other is conducted in the framework of civil procedure and proof is established on the balance of probabilities.

If the offender is found guilty in the criminal trial, the civil case is straight forward. The offender is responsible and it is just a matter of establishing the extent of the victim's loss.

If – on the other hand – the accused is acquitted, the system must decide about the implications for the civil case.

It is obvious that if the accused is acquitted in the criminal case and later convicted in the civil case the conviction will reflect negatively on his acquittal. The question is whether it is in conformity with the country's obligations after the European Convention of Human Rights and the presumption of innocence to allow a court case about an acquitted persons civil liability.

On the other hand the wording of art. 6, section 1 is guaranteeing everyone the right to bring his claim to an impartial court.

How can it be justified that the claim in the civil case cannot be heard because the opponent – under a completely different set of rules - has been acquitted?

It seems like a problem with no satisfactory solution. Could it be that it is not possible for a country to fulfil both article 6, section 1 and article 6, section 2?¹

The problem has been discussed intensely in Norway and the reflections have influenced the Danish debate.

2 Peter Garde's Proposal

Norway – like Denmark – used to have an article in the rules of criminal procedure stating that if a victim is claiming damages in connection with a criminal trial and the claim is directed towards the perpetrator on identical merits, the question of damages can only be heard by the court if the decision concerning the criminal question is rendered to the same effect as the question of damages (The rectification principle). Norway, however, repealed this rule in

1 See Ida Helene Asmussen and Rune Asmussen: *Er det muligt at indrette et processuelt system i fuld overensstemmelse med EMRK?* Justitia, April 2002.

1981. Peter Garde referred to Norway when he² in 1998 submitted a proposal to renew the adhesive procedure in Denmark. His suggestion concerns the Danish administration of justice act art. 992, part 1. According to this rule the compensation issue must be decided to the same effect as the indictment in the criminal case. Peter Garde believes that a rule like that is not suitable under contemporary civil procedure.

He points out that depending on how narrowly the article is interpreted, it can be extremely difficult for the injured party to be successful in a civil action. He mentions that the economic claims are often of minor value which means they are not able to carry the costs and inconveniency of a civil case. He furthermore refers to cases where the criminal case against the offender may turn out to be time-barred, while the civil claim is not, and to cases where it's obvious that the defendant has committed the act and therefore is liable for compensation according to the civil principles but it can't be proved that the act was intentional and consequently there is no criminal responsibility.

He mentions the Danish judgement UfR 1970.348H. In this case the defendant had been convicted by the High Court, but the Supreme Court believed that the act was time-barred and acquitted the defendant. The compensation claim had to be rendered "to the same effect" and consequently the claim was not heard.

In these cases it seems unfair that the civil compensation claim can't be decided in connection with the criminal law suit, since it has no bearing on the result in the criminal case.

I agree with Garde that the Danish administration of justice act. § 992, section 1, should not be interpreted too narrowly and UfR 1970.348H is an example of an interpretation which is much too narrow.

Therefore I support Garde in his wish to make a change in legislation which expands the possibility to hear the compensation claim. But I can only follow him as long as the civil compensation claim will not question the criminal judgment of acquittal.

It is obvious that in a number of situations the non-intentional act will not constitute a criminal offence, but in a civil case a person may be held responsible for his careless acts. Under such circumstances there is no schism between the criminal judgment and the civil judgment. Similarly if the criminal act is time-barred, while the compensation claim is still within the time limits.

The problem on the other hand still persists in the civil cases where the criminal case falls out to acquittal on the proof reviewed under "in dubio pro reo", and it is assumed that a civil case, which only requires probability dominants, would mean pronouncement of judgment on the same merits.

In his article from 1998 Garde claimed that these cases too - regardless of the offensive result - should be decided in connection with the criminal case. He referred to a Norwegian case, the Ringvold case, and the O.J Simpson's-Case.

The Ringvold Case. Rt 1996.864. The case concerns a serious sexual assault on a minor girl. The defendant was acquitted both concerning the criminal indictment and the claim about compensation for tort.

2 Peter Garde in Ufr 1998B p. 31-35 *Adhæsiionsprocessens brister*.

The girl brought the case to the Supreme Court asking for civil compensation. The Supreme Court stated that if an acquitted defendant should be found liable for compensation, the burden of proof must be higher than the “balance of probabilities”, used in a normal civil case, namely “clear probability-preponderance”

In the case in question The Supreme Court was satisfied, that the plaintiff had proven “clear probability” and sentenced the defendant to pay compensation for the sexual assault.

Garde stated that the civil case provided quite a bit of new evidence and that this evidence might have led to a different result in the criminal case, but this was not of crucial importance to him.

His conclusion is generally that even though a few cases will be difficult for the public to understand, the compensation cases should be allowed to get a different result out of consideration for the injured party. This should also be possible when the civil claim is decided at the same time as the criminal case.

3 The Karmøy Case

3.1 The Verdict of the High Court

After the article of Garde was published, a judgment was given on June 18, 1998 in Norway, which brought the question to a head.

In the Karmøy-case concerning deliberate murder the defendant was found not guilty by the Jury. Immediately after the verdict the legal judges convened and decided on the compensation claim of the victim’s bereaved parents.

They decided that there was “clear probability- preponderance” that the defendant had caused the death of the victim and ordered him to pay 100.000 n.kr. in compensation. The wording: “clear probability- preponderance” can be referred back to Rt 1996.864.

The public was mystified. Apparently the person was guilty. How come he was not punished? And if he was innocent – why did he have to pay compensation?

Even though the judgment legally can be explained by the different demands to the evidence in respectively criminal cases and civil cases which each are founded on good reasons – I must admit that I also find the result highly offensive.

In Norway no grounds can be given for an acquittal in a jury case. However a rather comprehensive argument was given for the compensation claim, which was based on the assumption that the defendant had committed the crime.

I quote the judgment:

“After an assessment of the evidence the court believes that there is clear probability- preponderance, that the defendant has committed the crimes with which he was indicted”.

Then follows a description of A’s behaviour and the evidence substantiating that he has committed the crime

The court continues:

“The court believes that the actions of A can not be explained in any other way than that sexual attraction, rejection, previous sexual behaviour and the

likelihood of future condemnation has created fear and aggression in him. A is gifted and a good student, but he is not able to control his urge and act rationally”

And in the end:

“To the assessment of compensation the court is emphasising the considerable shock, pain and grief suffered by the parents: their only child was robbed of her life by a close relative in a horrifying way after being sexually abused when she was unconscious.”

And these remarks are describing a person, who was just acquitted for this murder...

When I read the judgment, my assessment was that we can not implement the Norwegian set of rules in Denmark and at the same time preserve the confidence of the public in the legal system – and I also believed that the Norwegian rules might be a violation of The European Human Rights Convention.

As mentioned the presumption of innocence is set down in The European Human Rights Convention in art. 6, section 2. Obviously it is a human right, which presumably everybody will agree on.

But does the State live up to this obligation, when the acquitted is sentenced to a large sum in compensation, because there is clear probability-preponderance that he did commit the murder? In my opinion the answer is a clear no.

3.2 *Comments to the Karmøy-Case*

The Karmøy-judgment has naturally attracted much attention in Norway. It has prompted the Norwegian legal theoretician Asbjørn Strandbakken³ to reflect over the feasibility of the rules of law, if it's possible to have a judgment like this.

Strandbakken assumed (like Garde in his proposal to change the legal status in Denmark) that the Karmøy judgment is not contrary to the Convention of Human Rights.

A special problem is the demand of “clear probability- preponderance”. Asbjørn Strandbakken mentioned that the more stringent the standard to the evidence are the closer you come to the criminal law standards to the evidence. In other words: The distance between the acquittal in the criminal trial and the conviction in the civil trial may become too small.

He writes:

“It can be claimed that a judgment in a compensation case to some extent will overrule the acquittal in the criminal trial. Even though the higher standards for proof have been developed to prevent that the acquitted unjustly have to pay compensation, the stricter standards to the evidence could paradoxically mean that the Strasbourg institutions may find that the civil judgment has come too close to the acquittal.”

“But” he assures the reader: “The way the Supreme Court has worded the judgment (in Ringvold) there is reason to believe that any harmful

3 Asbjørn Strandbakken in *Lov og Rett*, 1998, p. 540-62.

consequences of the more stringent standards to the evidence have been repaired, since it has been specified that liability for compensation does not change the judgment and the acquittal in the criminal trial.”

I find it difficult to follow Asbjørn Standbakken. First of all The Supreme Court writes in its judgment (Ringvold) that a stricter burden of proof is imposed “because the Court is assuming that the accused has committed the crime”. Under these circumstances the Supreme Court can shout from all of the church towers in Norway that the judgment in the criminal case is correct... and still all thinking individuals will say as the little child in H.C Andersen’s fairy tale who remarked that the emperor wasn’t wearing anything: “But you have assumed that he did commit the crime”.

A so-called “technical” acquittal can hardly be more clearly expressed: “We believe that the accused has committed the act, but because of the strict demands in criminal procedure the evidence is not strong enough for a judicial pronouncement of guilt.”

Neither Garde nor Strandbakken is trying to evaluate the principles behind the Human Rights Convention. They are trying to back their viewpoint by referring to some other judgments by the Court of Human Rights. These judgments, however, are not directly comparable to the situation in the Norwegian cases⁴.

But even so it is a strange characteristic of nearly all the legal scholars who write about the Convention that they are absolutely uncritical to the judgments of the Court.

Their only parameter of the compliance to the Convention is what the court has already said.

It is even more odd since when the Human Rights were established they found their justification and identification in the supranational principles. They can be enforced on the states precisely because they are an expression of moral value which has a more profound validity than the laws of the countries in question.

Of course everybody is obliged to accept that the Court of Human Rights is interpreting the convention –just as we must abide with the judgments of our national courts. Nevertheless it seems to me that as legal scholars we should try to expose the principles underlying the Convention and assess whether we agree with the interpretation by the court.

It seems a reasonable assumption that the principle of the presumption of innocence must be presumed to belong to the basic pillars. The strict demands to the evidence in criminal proceedings are linked to this. They are established with the objective to secure that no innocent person is convicted, and it is accepted by every legal system in Europe that this means that some guilty persons will be acquitted or not even indicted.

They are substantial principles –how can we accept that when they collide with regular, civil claims, it is of greater importance for the injured party to get his compensation than to uphold the presumption of innocence?

⁴ The argument for this: See Eva Smith: *Frifundet i straffesagen – dømt til offererstatning. En kafkask retstilstand* UfR 1999, p 200-204 (201-202).

The general population can't understand neither the Simpson-case nor the Karmøy-case. Either people committed the crime or they didn't. They can't be guilty according to one set of rules and innocent according to another set.

Presumably no one will have any doubts that Simpson murdered his wife – like nobody in Norway will doubt that the legal judges believed that the accused in the Karmøy-case murdered his cousin – but was acquitted because of technical reasons (“in dubio pro reo”).

It is of great importance that laws and interpretation of laws are consistent with people's conception of law and justice. This is no less important when it concerns human rights, which are assumed to rise from a united European perception of justice.

If the interpretation of Human Rights is not in compliance with the population's sense of justice it loses its identification and justification.

3.3 *The Judgment of the Supreme Court of Norway*

The question of compensation in the Karmøy-case was appealed to the Supreme Court of Norway and on 24 September 1999 The Supreme Court pronounced its judgment. How to balance article 6, section 1 against art. 6, section 2 was very much the center of the deliberations⁵. The Supreme Court was divided on the question, but finally delivered a 3-2 judgment. The majority gave the following reasons for their decision:

When deciding the compensation claim the High Court did not look at the question of criminal guilt. The High Court states that it relies on its own decision of the criminal responsibility. The High Court then looks at the question of tort. The High Court describes in details its basis for the decision but it points out that this is the basis for the question of tort.. “Even though the High Court on some points could have used a different wording, the High Court has in none of its expressions made a decision on criminal guilt. Consequently there is no violation of art.6, section 2.”

The minority takes the simple view that a court cannot reach the conclusion that the defendant should be acquitted - and then in the same judgment order him to pay compensation for the very same act. The judges point to the fact that when the former rectification principle of having the criminal and the civil judgment ruled to “the same effect” was altered, there was talk about a number of situations, but nobody mentioned this situation. It appears that the parliament did not explicitly take this situation into account. The minority is also referring to the Ringvold Case and stressing the fact that in the succeeding claim for compensation there was quite a bit of new evidence so that you could not claim that two different conclusions were drawn on the very same evidence. They finally emphasized that the presumption of innocence is a fundamental safeguard for the individual.

5 RT 1999.1363.

4 The Decisions of the European Court of Human Rights

Both the Ringvold Case and the Karmøy Case have been brought before the Court of Human Rights.

Decisions in the cases were rendered on the very same day, 11 February 2003⁶.

In “Ringvold” the court is describing the theoretical problem as follows:

“In the view of the Court, the fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence cannot, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being ‘charged with a criminal offence’. Nor can the fact that evidence from the criminal trial is used to determine the civil-law consequences of the act warrant such a characterisation. Otherwise, as rightly pointed out by the Government, Article 6 § 2 would give a criminal acquittal the undesirable effect of pre-empting the victim’s possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under Article 6 § 1 of the Convention. This again could give a person who was acquitted of a criminal offence but would be considered liable according to the civil burden of proof the undue advantage of avoiding any responsibility for his or her actions. Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude the establishment of civil liability in relation to the same facts⁷”.

Thus, the Court considers that, while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof⁸”.

The court continues:

“The question remains whether there were such links between the criminal proceedings and the ensuing compensation proceedings as to justify extending the scope of Article 6 § 2 to cover the latter. The Court reiterates that the outcome of the criminal proceedings was not decisive for the issue of compensation. In this particular case, the situation was reversed: despite the applicant’s acquittal it was legally feasible to award compensation. Regardless

6 Ringvoldcase. Ringvold versus Norway judgment of 11february 2003 (Appl.no. 34964/97.

Karmøy case: Y v. Norway judgment of 11, february 2003 (Appl no. 56568/00) (BRt 1999.1363).

7 Ringvold pr. 38 og Y. pr. 41.

8 See, mutatis mutandis, X v. Austria, no. 9295/81, Commission Decision of 6 October 1982, Decisions and Reports (DR) 30, p. 227, and M.C. v. the United Kingdom, no. 11882/85, decision of 7 October 1987, DR 54, p. 162.

of the conclusion reached in the criminal proceedings against the applicant, the compensation case was thus not a direct sequel to the former”⁹.

“In sum, the Court concludes that Article 6 § 2 was not applicable to the proceedings relating to the compensation claim against the applicant and that this provision has therefore not been violated in the instant case”¹⁰.

In the *Karmøy Case* (Y against Norway) the court again stresses that the acquittal from criminal liability should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.¹¹

However, if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of Article 6 § 2 of the Convention¹².

The Court therefore examines the question whether the domestic courts acted in such a way or used such language in their reasoning as to create a clear link between the criminal case and the ensuing compensation proceedings as to justify extending the scope of the application of Article 6 § 2 to the latter.¹³

The Court notes that the High Court opened its judgment with the following finding:

“Considering the evidence adduced in the case as a whole, the High Court *finds it clearly probable that [the applicant] has committed the offences against Ms T.* with which he was charged and that an award of compensation to her parents should be made under Article 3-5 (2) of the Damage Compensation Act. ...” (Emphasis added).¹⁴

The Court considers that the language employed by the High Court, upheld by the Supreme Court, overstepped the bounds of the civil forum, thereby casting doubt on the correctness of that acquittal. Accordingly, there was a sufficient link to the earlier criminal proceedings which was incompatible with the presumption of innocence.¹⁵

In the light of these considerations, the Court concludes that Article 6 § 2 was applicable to the proceedings relating to the compensation claim against the present applicant and that this provision was violated in the instant case.¹⁶

9 Ringvold pr. 41.

10 Ringvold pr. 42.

11 Y against Norway, pr. 41

12 Y against Norway, pr. 42.

13 Y against Norway, pr. 43.

14 Y against Norway, pr. 44.

15 Y against Norway, pr. 46.

16 Y against Norway, pr. 47.

5 Assessment of the Judgments

It is interesting closely to study the two judgments. Had they been rendered at separate occasions one would probably have difficulties in combining them. One may have thought that the Court had reconsidered and in the “Ringvold”-case had modified the assessments which were put forward in *Y* against Norway. But the two judgments have been delivered on the same date and by the same group of judges. Consequently there must be a difference between the two cases. To a large degree the argumentation in the two judgments is comparable. It is pointed out that civil liability is different from criminal liability, it has a different purpose, that other rules of evidence apply and that it’s not prohibited to use the same proof in the civil case that has already been used in the criminal case. Also a fact is mentioned that probably is not without importance: A number of European Countries have similar rules as Norway. It is quite a step for the European Court to illegalise the rules of all these countries. It’s further mentioned that in the “Ringvold”-case the appeal solely concerns the question of damages. This is the only question for the Supreme Court, the case is handled in the form of civil procedure between two private parties and there is quite a bit of new evidence (premise 38, 1. section). (This was also the point made by the minority in the Norwegian Supreme Court)

The crucial point is though that in Ringvold the judgment of the Supreme Court does not have any remarks pointing to the criminal responsibility of the accused (premise 38, 3. section). Precisely that is in ECHR’s opinion what happened in *Y* against Norway: In *Y* against Norway a language is used according to the ECHR which violates the boundaries of the civil case and cast doubt upon the applicant’s innocence. In *Y* against Norway The Supreme Court is accepting the language of the High Court: “finds it clearly probable that (the applicant) has committed the offences against Mrs. T with which he was charged”.

In the “Ringvold”-case the Supreme Court has a general remark concerning the situation where the perpetrator has been acquitted. According to the Supreme Court you can in a civil case about damages rely on a finding that the defendant has actually performed the acts in relation to which he has been acquitted. Concerning the case in question the Supreme Court has these remarks “The evidence satisfied the standard of proof, establishing that sexual abuse had occurred, and that, on the balance of probabilities, it was clear that the applicant was the abuser”.

You really have to be a sharp lawyer to see the difference between the two statements from the Supreme Court of Norway. Jonas Christoffersen has discussed the two judgments in *Juristen*¹⁷ in 2004. In his conclusion he describes the difference in this way: “The understanding of article 6, section 2 of the European Court is maybe however to some extent expressing a somewhat artificial distinction”. The amount of reservations is highlighting the fact that after these judgments the legitimate right of the acquitted to be regarded as innocent in the charges put against him is not protected by the court.

17 Jonas Christoffersen: *Erstatning m.v. efter frifindelse*, *Juristen* 2004, p. 16-21.

If even a legal writer like Jonas Christoffersen has a lot of reservations – the legal status must be impossible to understand for the general population. It is true that in Y “offence” is mentioned while in “Ringvold” it’s just said that sexual abuse has occurred and the applicant was the abuser. But nobody can doubt that a crime is described in “Ringvold” whether or not the word “crime” is used.

There was a dissenting opinion, though, in the Ringvold Case, judge Costa¹⁸. He underlines that ... “It seems clear to me that the right to presumption of innocence may continue to apply even after the criminal action has been terminated or the accused has been acquitted”.

He goes on by saying:

“It also seems clear to me that civil and criminal liability do not fully overlap and there may be a civil wrong, entailing an obligation to redress the damage sustained by the victim on account of the accused, even if the latter has been finally acquitted and has therefore lawfully been declared innocent in the criminal proceedings.

However, in my opinion the civil wrong still has to be *distinct* from the criminal wrong and the acts regarded as wrongful and prejudicial in civil law must not be *exactly* the same as those of which the defendant was accused in the criminal proceedings. Otherwise, both the presumption of innocence and the finding that the person acquitted was not guilty would be deprived of any useful purpose if judgment were given against that person in civil proceedings, as it would be paradoxical to protect a mere presumption for as long as it had not been rebutted by a ruling and yet to disregard the proof which reinforced that presumption. What benefit, then, did the applicant derive from his acquittal (apart from the important fact that he was not subject to criminal penalties)?”

Judge Costa suggests that a compensation fund is set up for the victims of crimes which remain unpunished or whose perpetrators are not identified. He ends his dissenting opinion by saying: “Just as revenge is not justice, compassion is no ground for circumventing justice.”

6 De Lege Ferenda

6.1 *The Implications for the Civil Case Following the Criminal Case*

But whether one agrees with the Court of Human Rights or not, a country of course has to shape its legal rules according to the judgments of the European Court. It will now be possible for Denmark as suggested by Garde to abolish the rectification principle¹⁹.

So far no steps have been taken to change the Danish regulation. Furthermore the courts in Denmark do not seem to be aware of the judgments rendered in 2003 in Strasbourg. To illustrate I will mention a judgment from the High Court of Jutland from 2005.

18 Dissenting opinion of judged Costa. Ringvold against Norway (apple 34964/97), p. 17-18.

19 Jonss Christoffersen *Erstatning m.v. efter frifindelse*. Juristen 2004, p. 16-21.

U.2005.1385/2V The criminal case concerned a person who claimed that he had been punched in the face. During this process he had fallen down and broken his left ankle. The accused was acquitted and the civil compensation claim was dismissed according to the rules. After that the victim filed a civil suit about damages and claimed compensation for his broken ankle. The city court voted in favour of the alleged assailant. It was of the opinion that the question whether A had punched B in the face was finally decided by the acquittal which had not been appealed and that it would be contrary to the practice of ECHR if the court was to consider the same question again. The High Court upheld the judgment of the city court.

Obviously the Danish courts are mistaken as to the practice of ECHR²⁰.

One might ask if a case like U 2005.1385/2V should be rejected. If the rectification principle should be so wide, that an acquittal precludes the injured party from filing a compensation claim against the acquitted at a civil court. It would be logical because it would render complete protection to the acquitted. But would it be reasonable to the injured party that compensation according to the rules of civil procedure is impossible because of the criminal case? Furthermore this will mean that cases in which the evidence is so powerful as to justify an indictment, the victim will not be able to claim compensation if the accused is acquitted, while compensation might be possible in cases with less strong evidence where the prosecution has decided not to press charges. This seems highly unreasonable.

Furthermore it must be considered whether a system like this violates the European Convention on Human Rights § 6, section 1. Everyone has the right to a fair trial to have his civil rights and obligations settled. Are the Human Rights of the victim violated if the civil claims are cut off with reference to the criminal judgment?

Sometimes the legislative power is forced to make a choice. Not in every case justice will be done. Is “in dubio pro reo” reasonable to the victim? Has the molested child not a legitimate claim of redress through conviction of the child molester? Of course she has. But this can not always be practised because we value another principle higher: the protection of people who may be innocent. We will not accept that an innocent person is convicted. In my opinion this principle is of such importance that other considerations must yield. Among those are the redress of the victim in a pronouncement of guilt and the victim’s compensation claim.

But it is not necessary completely to cut off the victim’s right to compensation – The claim can be pursued, as long as the compensation is not paid by the acquitted. The compensation issue can be settled if the law of victim compensation is enlarged to award compensation in more cases.

For the time being the public authorities of Denmark offer compensation to the victim when the perpetrator is unknown. With a wider phrasing more victims would come under this paragraph. One could imagine: “When special circumstances are present or the facts strongly indicate that a crime has been committed”. A phrase like that will not have any influence on the acquitted since

20 Asbjørn Standbakken and Peter Garde in UfR 2005B.p.314pp.

the criminal has not been pinpointed. The actual phrasing depends on the extent of the need of compensation to the assumed victim.

It may seem unreasonable that the compensation is off the public purse. But the public already pays a considerable amount of compensation claims which falls on the perpetrator because he often is unable to pay.

If the victims' opportunity for an expanded access to compensations is broadened -as it is suggested by a repealing of the rectification principle - more people will be liable for compensation but since they are often unable to pay, the public's spending will in any circumstances be enlarged.

When the public already is paying, the claim might as well be directed at the Victim Compensations Board. In this way we avoid losing one of the most important principles of criminal administration of justice.

What about the ECHR's demand of a "fair trial" in civil claims? The ECHR is giving the states plenty of opportunities to adjust the judicial system as they wish.

A rule could be introduced proscribing that civil claims connected to a criminal case *must* be tried together with the criminal case. Unless the judge decides that the disadvantage is too large cf. § 992, section 4. This means that it may still occur that a person is acquitted and the victim later files for compensation at a civil court. If the claim is precluded on the grounds that the defendant is acquitted it will probably be a violation of the convention. To avoid this the civil suit must be allowed to be filed.

It can be assumed that the number of cases will be fewer than today, because all claims must be filed in connection with the criminal case. In the few cases where it is not possible the injured party will have to spend time and money on a trial which seem uncertain. A total preclusion of these cases could be achieved if the injured party had to file the compensation claim directly against the state according to the victim compensations law. The injured party should render probable that he had suffered a loss because of the crime.

An arrangement like this would also solve the problem when the injured party is not awarded damages at a criminal trial where the defendant is acquitted. The injured party can possess evidence which the prosecutor does not find suitable for a criminal case. The injured party has not been a part of the criminal case and it seems reasonable that he gets a possibility to present his evidence before the court. The problem can be solved if the claim which has been denied at a criminal suit can be brought before the court as a question of tort against the state according to the Victim Compensations law.

An arrangement like this would solve the problem in *Y. against Norway*. The defendant was acquitted. Consequently it must be assumed that an unidentified perpetrator has killed the victim.

In cases like the Ringvold-case it is harder because it seems like the acquitted is the only perpetrator possible. It seems implied that the acquitted is in fact guilty when the victim is awarded compensation by the Victim Compensations Board.

As I see it, this is the only possible solution if the demand of the ECHR to have a civil redress is adhered – and in my opinion it is preferable to a conviction of the acquitted.

The proposed system is not without its flaws. Imagine two persons (A and B) accused of a careless act causing a third person (C) to be injured. A has acted carelessly and must therefore pay compensation to C. Meanwhile, B has acted with gross negligence but he is acquitted in the following criminal case on account of “in dubio pro reo”. Next the state undertakes C’s compensation claim and B does not have to pay anything.

Comparing A to B the result seems unfair, but I believe that “in dubio pro reo” is of such importance, is such a basic principle for the process of law in a democratic society, that it must take precedence. We are proud of our safeguards for suspects. “Rather 10 guilty persons acquitted, than one innocently convicted”. We must take the consequences and allow these – undoubtedly guilty in a civil court – to escape the liability for compensation.

Even though the example conflicts with the principle of equality²¹ it is a fact that A has acted irresponsibly. That it why he is liable to pay compensation. It is of no relevance to his liability whether further compensation is paid by B or the state.

Strandbakken²² opposes the idea of having all civil claims for compensation heard together with the criminal charge. He refers to the practical problems. If there are more parties involved in a criminal trial it will be more time-consuming. In this respect he points to The Convention of Human Rights art. 6: “Within a reasonable time”. He also thinks the injured parties may throw the procedure off its balance so that the defendant does not have a fair trial. Contrary to my view he thinks a better solution would be to separate the civil case from the criminal case. If the decision about criminal guilt and guilt in a tort case is rendered in two different trials separated by some time, it is possible that the liability to pay compensation may not undermine the acquittal to the same degree.

Garde and Strandbakken state in their article²³ that the by me suggested legal status will result in an unacceptable legal position where an insurance company will be forced to pay a person cleared of insurance fraud the amount which he claims. They refer to two cases from ECHR.²⁴

In Tommy Lundkvist against Sweden the complainant was in a criminal case acquitted of arson concerning his own house, but the insurance company refused to pass the sum of insurance. The insurance company was successful in civil action before both the city court and the High Court. The Courts ruled that according to applicable civil evidence standards it must be assumed that Tommy Lundkvist had set his house on fire. Before the ECHR he referred to art. 6,

21 That is the reason why the suggestion is rejected by Ida Helene Asmussen and Rune Asmussen in: *Er det muligt at indrette et processuelt system i fuld overensstemmelse med EMRK?* Justitia, April 2002.

22 Asbjørn Strandbakken: *Frifunnet for straf – idømt erstatningsansvar*, Lov og Rett 1998 p. 540-552 (551).

23 Peter Garde and Asbjørn Strandbakken: *Retskraft og menneskerettigheder –refleksioner i anledning af Vestre landsrets dom UfR 2005.1385V, UfR 20005B.p.314.*

24 ECHR-judgment Tommy Lundkvist against Sweden. Judgment of 13.11.2003, hb. 48518/99. Pamela Ray Reeves against Norway hb. 4248/02.

section 2. But ECHR stated that the courts of Sweden had not questioned the criminal acquittal and the complaint was rejected as manifestly ill-founded.

In such a case I would advocate for a different result unless the insurance company demands exemption of paying the amount on a different basis ex. imprudence. But if the insurance company refuses to pay on the basis of the same facts that led to an acquittal in the criminal case the insurance company in my opinion must pay the amount insured, if the defendant is acquitted.

If the legal status I am suggesting passes it must be clarified to the insurance companies that they have two options in a situation like this: The person can be reported to the police and they can hope that he will be convicted. In that case the insurance company will not have to pay the sum of insurance. But there of course is a risk that the defendant will be acquitted and in this case he must receive the sum of insurance.

The insurance company can also choose a different way. In the form of a civil law suit they can file for acquittal of the sum of insurance. Of course the insurance company does not have the advantage of the public acting the case for it, but on the other hand the risk of having to pay the sum of insurance is reduced.

In the light of this I will refer to the Danish case, U 2002.864 V. In this case an employee was dismissed for removing two bags of coffee from his working place. The incident was reported to the police, but the defendant was acquitted in the following criminal case. The court did not find reason to disbelieve his evidence claiming that it was a loan and he was going to return the coffee.

Following the acquittal he filed a civil suit for compensation for wrongful dismissal. The employer brought 3 witnesses before the civil court that by a mistake hadn't been brought before the criminal court. Even so the civil court like the criminal court assumed that it wasn't a theft and that the dismissal had been unjustified.

According to the rules suggested by me the employer would not be able to dispute the acquittal – but naturally he could claim that the dismissal was justified based on other reasons.

The Danish Courts have chosen an interpretation of the Convention in which I agree. And when Garde and Strandbakken in their conclusion²⁵ state the opinion that the Danish U2005.1385 V is a serious violation of the human rights of the injured party, it seems appropriate to note that the Norwegian Supreme Court as mentioned has decided that in cases like this a “clear probability-preponderance” is required. From the Strandbakken/Garde point of view one might ask if this isn't a violation of the victim's human rights? Why should the victim meet the demand of a higher burden of proof that in a regular civil lawsuit?²⁶

6.2. Modification of the Rectification Principle

In my opinion the suggested legal status must result in an interpretation change of the rectification principle, in such a manner that it only takes effect when the

25 Peter Garde and Asbjørn Strandbakken in UfR 2005B, p. 314.

26 Strandbakken is discussing this point in: *Simpson in Strasbourg* Lov og Rett 2003, p. 231-247 (pkt. 5.4).

question concerns the same acts in which the defendant is acquitted and on the same grounds.

According to the present phrasing of the rectification principle the decision in the civil claim must be in the “same direction” as the judgment of the criminal case cf. § 992, section 1. As Garde earlier pointed out this means that in a number of cases, where it’s clear that the defendant has committed the act and for this reason is liable for compensation according to the civil principles, it will not be possible to rule about the civil liability, if the defendant is acquitted.

For example this can concern a traffic accident where a criminal liability can not be established for the driver of the car. In cases of limitation or when the incident is not considered to involve punishable negligence etc. If the case history is clear – perhaps even accepted by the negligent party – I don’t see a problem when the defendant is imposed a civil liability coincident with his acquittal in the criminal case. In these cases I support Garde in his request of a change in law which reduces the rectification principle. But I will only reduce it to the extent that the civil compensations claim does not question the acquittal in the criminal judgment.

7 Conclusion

My proposal is: retain the rectification principal but make it narrower, impose a demand stating that the compensation claim which is the result of a criminal case must be processed in the same trial, unless the judge finds it inappropriate, and broaden the victim compensation law area.

A status of law like this will mean that the accused is given the best protection possible according to “in dubio pro reo”. The victim receives support for the compensation claim through the system, since the burden of legal action falls on the prosecution and the victims who has a legitimate compensation claim despite the acquittal of the defendant obtain compensation through the Victim Compensations Board.

One could even claim that this system is in better harmony with both article 6, par. 1 and article 6, par. 2:

It protects the presumption of innocence as far as it is possible without violating the victim’s right after article 6, par. 1.

As to article 6, par. 1 it offers full protection – not weakening the protection by demanding clear probability – preponderance as is the case in the Norwegian system.

For further literature on this subject see:

Line Ravlo: *Retten til domstolsbehandling av erstatningssøksmål*. UfR 1999 B.404, Jonas Christoffersen: *Adhæsiionsproces og menneskeret*. UfR 1999 B.517, Jon T. Johnsen: *Bør retten kunne ilegge en tiltalt erstatning selv om den frikjenner ham for straff*. Tidsskrift for Strafferett, 2001.98, 231. Eva Smith: *Frikändt för brott, men ändå skyldig*. SJT 2004, p. 773-778.