



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FORMER THIRD SECTION

CASE OF Y v. NORWAY

(Application no. 56568/00)

JUDGMENT

STRASBOURG

11 February 2003

FINAL

11/05/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Y v. Norway,

The European Court of Human Rights (Former Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr W. FUHRMAN,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Mrs H.S. GREVE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 17 September and on 21 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 56568/00) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Norwegian national, Y (“the applicant”), on 23 March 2000. The applicant had been granted permission by the President of the Chamber to keep his name confidential.

2. The applicant was represented by Mr Klomsæt, a lawyer practising in Oslo. The Norwegian Government (“the Government”) were represented by Mr F. Elgesem, who acted as Agent until he left the Attorney-General’s Office (Civil Matters) in June 2002. Thereafter, they were represented by Mr H. Harborg of that office.

3. The applicant alleged a violation of Article 6 § 2 of the Convention on account of the national courts’ decision, despite his acquittal of criminal charges, to order him to pay compensation to the deceased victim’s parents.

4. The application was allocated to the former Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 11 September 2001 the Chamber decided that, in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the cases of *O v. Norway*, *Hammern v. Norway* and *Ringvold v. Norway* (application nos. 29327/95, 30287/96 and 34964/97 – Rule 43 § 2)).

6. The applicant and the Government each filed observations on the admissibility and merits (Rule 54).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). However, this case was retained by the former Third Section.

8. A hearing on admissibility and merits (pursuant to the accelerated procedure under Article 29 § 3 of the Convention) took place in public in the Human Rights Building, Strasbourg, on 17 September 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr H. HARBORG, Attorney-General's Office, (Civil matters)	<i>Agent, Counsel/Adviser</i>
Mr F. ELGESEM, <i>Advokat</i> ,	
Mr K. KALLERUD, Senior Public Prosecutor, Office of the Director of Public Prosecutors,	
Ms E. HOLMEDAL, Attorney, Attorney-General's Office (Civil matters),	
Ms T. STEEN, Attorney, Attorney-General's Office,	<i>Advisers;</i>

(b) *for the applicant*

Mr S.J. KLOMSÆT, <i>Advokat</i> ,	<i>Counsel,</i>
Ms I. BERGUM, <i>Advokat</i> ,	<i>Adviser.</i>

The Court heard addresses by Mr Klomsæt, Mr Elgesem and Mr Harborg.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1977 and lives in Spain.

10. On 1 October 1997 the applicant was charged (under Articles 193, first alternative, and Articles 229 and 233, first and second sub-paragraphs of the Penal Code-*straffeloven*) of having committed on Saturday, 6 May 1995, offences of violent assault, sexual assault and homicide against his cousin Ms T. (aged 17).

11. The Karmsund District Court (*herredsrett*), sitting with 2 professional judges and 3 lay judges, held a hearing from 20 October to 19 November 1997, during which 84 witnesses and 5 experts were heard. On 27 November 1997 the District Court convicted the applicant of the charges and sentenced him to 14 years' imprisonment. Moreover, under Article 3-5 of the Damage Compensation Act 1969, the District Court ordered the applicant to pay NOK 100,000 in compensation to Ms T.'s parents for pain and suffering and additional inconvenience.

12. The applicant appealed to the Gulating High Court (*lagmannsrett*), which held a hearing between 4 May and 18 June 1998, during which it took oral evidence from 115 witnesses, 2 of whom were experts appointed by the High Court. Statements by 10 expert witnesses were submitted. Giving its verdict, the jury answered all the questions put to it in the negative. When the jury's verdict is that the person is not guilty, but the court finds that he is undoubtedly guilty, the court may unanimously decide that the case shall be retried before other judges. The professional judges withdrew and deliberated for approximately 50 minutes, before they came back to announce that they accepted the jury's verdict. The High Court thence acquitted the applicant of the charges.

13. On the following day, after hearing the pleas of counsel for the applicant and for the victim's parents lasting approximately one hour, but without further evidence being submitted by the parties or taken by the court, the High Court judges unanimously upheld the District Court's decision to award NOK 100,000 in compensation to Ms T.'s parents. On this point the High Court relied on the following considerations:

"It has been established in case-law that in such a serious case as the present one, and where the question of guilt has been decided in favour of the accused, a condition for making an award of compensation for non-pecuniary damages is that it must be clear on the balance of probabilities that the accused has committed the infringements specified in the indictment, see *Norsk Retstidende* 1996:864.

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.

With respect to the compensation matter the High Court finds the following circumstances established.

On Friday, 5 May 1995 the applicant went to the cinema in Kopervik with some of his friends. Around midnight he was in the centre of town. The same night Ms T. had attended a Christian event at Avaldsnes. After this event she hitchhiked to the centre of Kopervik, where she arrived around midnight. She talked to some friends who were in the main street of Kopervik and then left the centre at approximately 12.10 a.m. About the same time [the applicant] left the main street and went for a short while to one of his friend's house. Thereafter he cycled towards his home. He caught up with his cousin, Ms T., and they continued together. [They] lived about 1 km from one

another. They took a road called Gamle Sundsveg. This is a short cut to Ms T.'s home, but a detour for [the applicant]. ...

When they approached the habitation in Sund they stopped. [The applicant] stroked Ms T.'s breasts. She rejected him, kicked his bike, yelled at him and continued on her own. [The applicant] feared that, should Ms T. find his conduct completely unacceptable, it would have disastrous consequences for him when his conduct would be known. He thought about earlier incidents of flashing and obscene behaviour and got scared of the consequences. He charged after her and performed the acts described in the indictment. The High Court considers that his acts had their origin in an explosion of emotion, combined with a sexual attraction to Ms T. According to forensic expert statements, it is established that by the time she was on the road she had already suffered lethal injury. It has not been fully ascertained whether she was dead when he dragged her from the road to the bushes in a field. Here he lifted a 23-kg stone and hit her at least twice on the head. There was blood on both sides of the stone. The accused himself stated that he had the evil idea to conceal her face, so she could not tell anyone, by any means, what he had done.

He then left the scene, washed himself clean from the blood and earth in [a lake] nearby and then cycled at random towards Kopervik. After a while he cycled towards his home and encountered a witness. ... She stated that this was at around 1.45 a.m.

A neighbour, who was the owner of the field, found Ms T. the next morning. ... The police were called.

An extensive investigation was carried out and [the applicant] was summoned for questioning at an early stage. He was considered suspect, particularly because the police had some knowledge about his previous sexual acts, of which one incident had led to a formal complaint. At the end of January 1997 [the applicant] gave a new statement to the police and changed his version as to the time of his arrival at home and his choice of roads from the town centre back home. It was *inter alia* against this background that [the applicant] was apprehended on 8 February 1997. On 10 February 1997 he was placed in custody with a prohibition on correspondence and visits. At the court hearing he accepted his remand in custody. Ten days later [the applicant] delivered to his defence counsel at the time two notes stating that he had killed Ms T. Counsel is thought to have asked the defendant whether he could recall this. He denied it and counsel handed the notes back to [the applicant]. A few days later he confessed and gave detailed information about the course of events and the background. During questioning on 2 March 1997, after having gone through the statements with his counsel, he declared that he was guilty of a crime in accordance with the confession. Approximately one month later the confession was repeated to psychiatric experts. After having been transferred to Bergen regional prison, he began to doubt the accuracy of his confession. ... During a police inquiry on 11 August 1997, his counsel gave notice that [the applicant] would not maintain his previous statement."

14. The applicant sought to appeal against the High Court order that he pay compensation, according to the rules of the Code of Civil Procedure 1915 (*tvistemålsloven*). Ms T.'s parents and the applicant, represented by their respective counsel, took part in these proceedings, but not the prosecution.

On 1 February 1999 the Appeals Selection Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*) refused the applicant leave to appeal

in so far as it concerned the High Court's assessment of the evidence, but granted leave in so far he was challenging the High Court's procedure and interpretation of the law.

15. By a judgment of 24 September 1999 the Supreme Court, by 3 votes to 2, rejected the appeal.

16. The majority, Mr Justice Skogstad, joined by Mrs Justice Gjølstad and Mrs Justice Coward, stated:

“Appeal concerning the procedure

Apart from the fact that neither the wording of the Code of Criminal Procedure nor the preparatory works suggest that an authorisation to pass judgment on civil claims in spite of a defendant's acquittal should depend on the reasons for the latter, I cannot find any real grounds to support this proposition. Although it is evident that – in cases like the one at hand – it must be a condition for passing judgment on compensation for non-pecuniary damage that it is clear on the balance of probabilities that the act has been committed [*handlingen er begått*], the evidentiary standard is not as strict as that applying to a criminal conviction. I have problems seeing that in cases where the defendant has been acquitted, because it has not been found proven that the act has been committed [*handlingen er begått*], should be placed in a somewhat different position than where there are other grounds for acquittal – as for example where the conduct is not punishable, where it has not been established that the defendant acted with the required criminal guilt, where the defendant is not found to be liable under the criminal law, or where there is self-defence or any other ground of exemption from criminal liability. Should it not be permissible to adjudicate civil claims in criminal proceedings in which the defendant has been acquitted because it has not been established that he has committed the act that was the factual basis for the indictment [*begått handlingen*], the consequence would be that the claim must be brought up in separate civil proceedings. However such a lawsuit is both time consuming and expensive [and] the aggrieved party's possibilities to pursue such claims will depend on his economic situation. I find no attraction in such a solution.

I should also point out that if one were to operate a rule whereby an acquittal on the ground that it has not been established that the defendant has committed the act that was the factual basis for the indictment [*har begått den handling han er tiltalt for*] is treated differently than acquittals on other grounds, it might give rise to difficulties in instances where the case has been tried by a High Court sitting with a jury, as in the present case. A verdict of conviction requires that at least seven of the ten jurors have answered 'yes' to the question of guilt and, regardless of whether the jury has answered 'yes' or 'no', no grounds are given for the verdict. In most instances one will have more or less well-founded perceptions, but never total certainty, as to why the jury has answered in the negative.

On several occasions the courts have had to deal with the question whether a civil claim can be adjudicated in spite of the defendant having been acquitted in the criminal case. On those occasions, where the question has been submitted to the Supreme Court or the Appeals Selection Committee, it has not been a condition for dealing with the civil claim in connection with the criminal case that the [criminal] court ... has found it established that the defendant has committed the act that was the factual basis for the indictment [*har begått den handling tiltalen gjelder*]. ...

In my opinion, in the light of existing legal sources, there cannot be any doubt that, under the Code of Criminal Procedure 1981, it is not a condition for adjudicating a civil claim in connection with criminal proceedings that the court in [the latter] proceedings has found it proven that the defendant has committed the act that was the factual basis for the indictment [*har begått den handling saken gjelder*]. ...

Consequently, no procedural errors were committed when the High Court, in spite of [the applicant's] acquittal in the criminal proceedings, passed judgment on the civil claim. ...

Appeal concerning the application of the law

The appellant has based his appeal on law on the argument that it would be contrary to the presumption of innocence in Article 6 § 2 of the Convention if the court, after the defendant has been acquitted in the criminal case, passes judgment for compensation for non-pecuniary damage in the same case. In any event, he submits, it must be contrary to the presumption of innocence to give such reasoning on the compensation matter as done by the High Court. ...

[Article 6 § 2] is primarily addressed to judges in criminal proceedings and its main message is that judges shall not prejudge the defendant as having committed the crime of which he is indicted, or that there shall be no prejudgment through statements by public authorities (see Frowein/Peukert: “*Europäische Menschenrechtskonvention*”, “ECHR”, 2. edition (1996) page 280 and following, and Rehof/Trier: *Menneskerett – Human Rights* (1990), page 164). Both according to legal doctrine and the case-law of the Strasbourg institutions, the provision may also have importance after the criminal case has been terminated (see Harris/O’Boyle/Warbrick: “*Law of the ECHR*” (1995), pages 246-247 with further references to practice). For instance, in the *Sekanina v. Austria* judgment, the Court stated that if the defendant has been acquitted by a final judgment, the courts might not, in a subsequent case concerning compensation for unjust prosecution, base its judgment on the fact that the accused is guilty. However, how far these points of view go is somewhat uncertain. While it is the accused and the State who are parties to the compensation proceedings regarding unjust prosecution, such proceedings can be seen as a prolongation of the criminal case. In my view, however, the presumption of innocence can hardly apply to civil proceedings between the accused and the person who has been prejudiced or has suffered damage by the act [which was] the factual basis for a criminal charge in respect of which the defendant has been acquitted [*en handling som siktede er frifunnet for*]. In any event, it must be evident that Article 6 § 2 of the Convention cannot bar the courts – in a civil case (for example a case for compensation; on dismissal or parental responsibilities) – from establishing facts regarding the course of events in question, even if it should disclose the occurrence of a criminal offence and even if the person against whom the claim is directed has been acquitted of the offence in a preceding criminal case (see, *inter alia*, Lorenzen/Rehof/Trier: “*Den Europæiske Menneskeretskonvention med kommentarer*” “The ECHR with comments” (1994), page 199, and Frowein/Peukert, op. cit. page 285). Should the presumption of innocence apply at all to civil proceedings between the aggrieved party and the accused, it must at any rate be a condition for finding a violation of Article 6 § 2 that a decision establishing criminal guilt has been taken. Were the court in a civil case not permitted to base its decision on the fact that the person acquitted of a criminal offence, has in fact committed the act [*begått handlingen*], the acquittal would deprive the victim, or the person who has suffered damage, of the possibility to obtain a judicial review of claims that he or she might

have against the accused. This would, in my view, be contrary to the fundamental right to a fair hearing in Article 6 § 1.

[The applicant] has argued that a distinction must be made between cases where a civil claim is being reviewed together with the criminal matter and cases where the claim is examined in separate civil proceedings. I do not agree that there is any basis for making such a distinction. The system whereby civil claims may be raised in the criminal case is based upon well-founded considerations of procedural economy and ... can also benefit the defendant. In criminal proceedings the accused is, as a main rule, entitled to defence counsel paid for by the State and, bearing in mind also the thoroughness with which evidence is presented in a criminal trial, the accused, in the event of a civil claim being determined together with the criminal matter, enjoys particular protection against being wrongly judged. If the defendant is acquitted in the criminal case but is ordered to pay compensation for non-pecuniary damage, the accused will be left with a feeling of not having been ‘totally acquitted’. But it should not matter to him whether the compensation claim is determined in connection with the criminal proceedings or in ensuing civil proceedings.

...

As mentioned above, the presumption of innocence under Article 6 § 2 of the Convention can, in my view, hardly be applied in a civil case between the person acquitted and the aggrieved party. Bearing in mind the nature of this case, I do not, however, find it necessary to take a definite stance on this question, the High Court did not in my view base its decision in the compensation claim on a finding of criminal guilt, which under any circumstance must be a condition for a violation of Article 6 § 2. ...

The appellant has pleaded that the courts in practice will have difficulties in applying different evidentiary standards to criminal conviction and compensation. Moreover, he has submitted that when, as in this case, it is a requirement for making an award of compensation for non-pecuniary damage that it is clear on the balance of probabilities that the the accused has committed the act [*begått handlingen*], the evidentiary requirement is so close to that applying to a criminal conviction that this in itself contributes to casting a suspicion of criminal liability. I have difficulties in understanding these arguments. The fact that the evidentiary requirements are different in various relations is nothing special for cases such as the present one. ... [I]t is based on the general view that a qualified probability is required in order for the court to ground its decision on a fact that is strongly incriminating ... The fact that a stricter standard of proof applies in order to protect the interests of the defendant cannot entail a breach of the Convention.”

17. The minority of the court, Mr Justice Flock joined by Mr Chief Justice Smith in the main reasoning and the conclusion, expressed the following opinion:

“I am ... of a different opinion as to the main issue in the case. In my view, the appeal on procedure ... should be upheld. When a court primarily has found that the defendant was not the perpetrator of ‘the act with which the case is concerned’, the court may not, in my opinion, in the same judgment order the defendant to pay compensation for non-pecuniary damage on the ground that he nevertheless has performed the same ‘act’.

Under the 1981 Code of Criminal Procedure – as noted by the first voting Justice – it was authorised to pass judgment on civil claims even though the defendant had been acquitted of the criminal act. ...The former [limitation in this respect] was repealed. However, in my view, the far reaching application of the new rule made by the High Court in this case does not necessarily follow from the statute or from former Supreme Court rulings. Besides, it would be more consistent with the presumption of innocence under Article 6 § 2 of the Convention, now incorporated into Norwegian law, if the court did not both brand the defendant as the perpetrator of the act under civil law and acquit him of criminal liability in the same judgment. Against this background, the best solution would be to interpret the possibility – and the corresponding duty for the courts – under the statute to adjudicate civil claims in the criminal case with the qualification that the most extreme consequences should be avoided.

Below I shall deal with each of the reasons for my position.

When the 1981 Code improved the possibilities of the aggrieved party to have civil claims determined in connection with the criminal proceedings, some instances were mentioned in the preparatory work of claims that could be adjudicated even though the defendant had been acquitted. This was, *inter alia*, where the purpose, intent or gross negligence required by the Penal Code had not been proved but where it had been shown that the defendant had displayed sufficient negligence to be held liable to pay compensation. However, the preparatory works did not include ... those instances where the defendant had been acquitted because it had not been established that he or she had performed the act as cited in the indictment. This would be the most frequent reason for acquittal in, for example, cases of aggravated sexual assault against minors ... and where compensation for non-pecuniary damage is a recurrent issue.

Special questions arise in this kind of acquittal. A conviction and an order to pay compensation are not only different legal consequences based on different aspects of the case, but also, in the same case and on the same evidence, the court assesses the evidence twice with the possibility of reaching different results. Legally, this would be justified by the fact that the evidentiary requirements for criminal conviction are stricter than those with respect to an order to pay compensation for non-pecuniary damage. However, this situation is so special – and was excluded under the former legislation – that one would expect that the subject be discussed, or at least be explicitly mentioned, in the preparatory works. As this was not the case, it can be deduced that the legislators probably did not have such cases in mind, or at least did not regard them as essential when the rules were amended in 1981.

It is undoubtedly correct that the Supreme Court – and other courts in our country – in certain rulings have noted that an award can be made for pecuniary and non-pecuniary damage even if the defendant has been acquitted in the same case. ... However, ... I can hardly see ... that there is such an established case-law in this area as to prevent certain limitations being made in the interpretation of the law.

As regards the presumption of innocence in Article 6 § 2 of the Convention, it is somewhat uncertain how far this requirement extends in Norwegian law. ...

When taking a decision in the present case, one is faced with the need to strike a balance between, on the one hand, the accused's interests and, on the other hand, those of the victim and his or her closest relatives. It is important to take into account the fact that the 1981 revision was intended to strengthen the victim's position. However, I find that an acquittal for having committed the incriminated act – and in particular an

act of murder – must clearly appear from the judgment. This is such a prominent consideration that it should in my view be predominant in the interpretation of the law.

...

In following this reasoning, some issues of delimitation will arise as to when the court should abstain from determining civil claims together with an acquittal. The limitation, that is implied in my opinion, on the possibility to adjudicate such claims is *inter alia* that it must be ascertainable that the acquittal is based on a finding that there is insufficient evidence to show that the accused committed the offence of which he/she was charged. This might be a problem in all cases before the High Court where the question of guilt is decided by a jury, without a reasoned verdict.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Under Norwegian criminal law there are four basic conditions that must be met in order to establish criminal liability:

- (1) the accused has committed the proscribed act or omission (*actus reus*) which is contrary to a provision of the Penal Code or to a special statutory penal provision in force at the time when the act was committed;
- (2) there are no exonerating circumstances (e.g. self-defence);
- (3) the accused has acted with intent (*mens rea*), unless otherwise expressly stated in the relevant penal provision; and
- (4) the accused was of sound mind at the time of the commission of the offence.

19. As a general rule, the prosecution has to prove these four elements beyond reasonable doubt. Any reasonable doubt shall benefit the accused (*in dubio pro reo*).

20. Under the Norwegian jury system, when an accused is acquitted the jury is not entitled to disclose whether any of its members held a different opinion, and no records are kept which could disclose that a negative answer as to the applicant’s guilt was not unanimous. The criminal system knows only two conclusions in a criminal case—guilt or acquittal (see Articles 365, 366, 372 and 373 of the Code of Criminal Procedure). There is no third alternative, which was known in some other European countries, where a criminal charge could result in the finding that there was not sufficient evidence for establishing guilt.

21. In so far as is relevant, Article 376A of the Code of Criminal Procedure reads:

“If the jury’s verdict is that the person is not guilty, but the court finds that he is undoubtedly guilty, the court may unanimously decide that the case shall be retried before other judges. At the new trial the High Court shall be constituted as a composite court (*meddomsrett*)...”

Composed of three new judges and four lay judges, the “composite court” examines the case afresh. In contrast to a trial court sitting with a jury, it gives reasons not only for its decision on civil liability to pay compensation, but also with regard to criminal liability.

22. Article 376 of the same Code provides:

“If the jury’s verdict is that the accused is not guilty and if the court does not take a decision pursuant to Article 376A, it shall render a judgement of acquittal.”

No reasons are given for an acquittal.

Regardless of whether the accused has been acquitted or is convicted, the High Court is to determine any civil claim made in the criminal proceedings, for instance claims for compensation, without the participation of any members of the jury. That is, civil claims are decided exclusively by the three professional judges who have taken part in the criminal case.

The court will determine the claim on the basis of the evidence adduced during the trial but may receive or order the submission of further evidence if necessary. Evidence already produced in the criminal case but relevant to the compensation issue will not be heard again.

Reasons are given for the judges’ decision on compensation.

23. Under the Code of Criminal Procedure 1981, a civil claim may be pursued in connection with a criminal trial, provided that the claim arises from the same set of facts. Consequently, the civil claim of a victim may be decided either in connection with a criminal case or in separate proceedings. Article 3 reads:

“Any legal claim that the aggrieved person or any other injured person has against the person charged may, in accordance with the provisions of chapter 29, be pursued in connection with such cases as are mentioned in Article 1 or Article 2, provided that the said claim arises from the same act that the case is concerned with. On the said conditions the following claims may also be pursued:

The claims specified in the first and second paragraphs are deemed to be civil claims and shall be dealt with in accordance with the provisions of chapter 29...”

Other provisions concerning civil compensation claims may be found in Chapter 29 of the Code of Criminal Procedure, notably the following:

“§ 427. In a public case the prosecuting authority may on application pursue such civil legal claims as are specified in Article 3. ...

When civil legal claims are pursued against a person other than the person charged, the person concerned assumes the position of a party to the case in so far as this issue is concerned. ...

§ 428. Any person who has any such civil legal claim as is specified in Article 3 may himself pursue it in connection with a public case if a main hearing is held. ...

§ 435. A separate appeal against the decision of civil legal claims shall be brought according to the provisions of the Civil Procedure Act. The same applies to a reopening of the case.”

24. Under the Damage Compensation Act 1969, the purported victim may, regardless of the outcome of the criminal proceedings, claim compensation for pecuniary and non-pecuniary damage.

Article 3-5, as in force at the relevant time, read as follows:

“Anyone who, with intent or gross negligence has

a. Caused personal injury or

b. Committed ... an act of misconduct as mentioned in Article 3-3, may ... be obliged to pay the victim such a lump sum as the court deems would constitute reasonable compensation (*oppreisning*) for the pain and suffering and other non-pecuniary damage caused thereby. ...

A person who with intent or gross negligence has caused the death of another person, may be ordered to pay such compensation to the deceased’s ... parents.”

Article 3-3, referred to in the above provision, expressly applies to misconduct mentioned in, amongst others, Article 193 of the Penal Code.

A claim for compensation for non-pecuniary damage submitted by a victim under Article 3-5 of the Act, is subject to his or her showing that the alleged perpetrator, with intent or gross negligence, committed the wrongful act. The test is normally the balance of probabilities and the burden of proof lies with the claimant. This burden may be heavier where liability may have serious consequences for the respondent’s reputation, though it will be less than for criminal liability. The competent court has to determine liability in the light of all the evidence available at the time of the adjudication of the case.

25. The objective constitutive elements of acts which may give rise to both criminal liability and civil liability to pay compensation are not always the same. The subjective constitutive elements in principle differ: normally criminal liability requires intent whereas liability to pay compensation requires gross or simple negligence. There may be exonerating circumstances – such as self-defence, necessity, provocation or ignorance – which exclude criminal liability but which do not exclude liability to pay compensation. A person of unsound mind may be exempted from criminal liability but not necessarily from civil liability to pay compensation (see *Norges Offentlige Utredninger* (Official Norwegian Report) 2000:33 “*Erstatning til ofrene hvor tiltalte frifinnes for straff*” (Compensation to Victims in Cases where the Accused has been Acquitted of the Criminal Charge), study by Mr J. T. Johnsen, Professor of Law, Chapter 1, sub-chapter 1.3.2).

The purposes of the criminal law and the law on compensation are not identical. While deterrence and restoration are important considerations in both areas of law, the former places emphasis on retribution and the latter on the spreading of financial loss. The two systems also supplement one another in important respects. While criminal law sanctions are particularly

designed to deter the actual and potential offenders from committing offences, those of the law of compensation are particularly designed to meet the aggrieved person's need for economic redress (*ibidem*, Chapter 1, sub-chapter 1.2.1).

AS TO THE LAW

I. ADMISSIBILITY OF THE APPLICATION

26. The Government requested the Court to declare the application inadmissible as being manifestly ill-founded.

27. The Court, however, finds that the applicant's complaint under Article 6 § 2 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. It follows that the application is admissible.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

28. The applicant complains that the Supreme Court's judgment of 24 September 1999, upholding the High Court's decision to award compensation to Ms T.'s parents, entailed a violation of his right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty of the commission of an offence.

29. Article 6 § 2 of the Convention provides as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

30. The Government contested this allegation and requested the Court to hold that this provision was not applicable and had not been violated in the instant case.

A. Submissions of those appearing before the Court

1. The applicant

31. The applicant maintained that, during the compensation case following his acquittal, he was still “charged with a criminal offence”, at the least within the autonomous sense of Article 6 § 2. Invoking the Court's interpretation of this expression, he submitted that, under domestic law, he was formally considered as charged until the acquittal gained legal force. Moreover, an award of compensation for non-pecuniary damages had a

punitive purpose, was deliberately used to express the community's disapproval of the act concerned and signalled that the wrong committed ought to be righted. This was apparent from the compensation award which undoubtedly served to weaken the applicant's earlier acquittal.

32. The applicant invited the Court to assimilate his case to that of *Sekanina v. Austria* (judgment of 25 August 1993, Series A no. 266-A), in which it attached primary weight to the degree of linkage between the criminal proceedings and the compensation case in its finding that Article 6 § 2 was applicable to the latter. In the applicant's case, the criminal charges and the compensation claim made against him had been pursued in joint proceedings before the same court, in accordance with Article 3 of the Code of Criminal Procedure. The accused's acquittal and the ruling on compensation were stated in the same court record. The oral pleadings on compensation took place the day after the acquittal, virtually as an extension of the criminal proceedings. Since no new evidence was adduced, the compensation issue was determined on the basis of the same evidence as that submitted in the criminal trial. The applicant's appeal against the High Court's assessment of the evidence was refused by the Supreme Court. Thus, in several respects, this case was even stronger than *Sekanina*, where the compensation matter was adjudicated long after the acquittal and by a court other than the trial court.

Furthermore, in determining under the law on compensation whether the applicant had committed the criminal act of which he had previously been acquitted, the High Court was called upon to establish a form of guilt. Its assessment amounted to a finding of a penal nature, in violation of the presumption of innocence. Only the applicable evidentiary standard had differed from that applicable to criminal liability, but that was merely theoretical. All other relevant criteria were the same as for criminal liability.

33. In these circumstances, the applicant submitted, the compensation matter was so closely linked to the criminal proceedings as to attract the application of Article 6 § 2, which provision had been violated.

34. The applicant refuted the Government's contention that the right of access to court of the victim under Article 6 § 1 militated against the applicability of Article 6 § 2 to his case. That right was not absolute but could be subject to limitations. In addition, the fact that the aggrieved party receive the assistance of the public prosecutor, backed by the entire State apparatus with regard to measures of investigation, could adversely affect the defendant's right to "equality of arms" in a manner incompatible with Article 6 § 1.

2. *The Government*

35. The Government disputed the applicant's contention that he was "charged with a criminal offence" in the civil compensation proceedings. They moreover requested the Court to distinguish this case from the above-

mentioned *Sekanina* judgment, as well as its judgments in *Rushiti v. Austria* (no. 28389/95, 21.3.2000) and *Lamanna v. Austria* (no. 28923/95, 10.7.2001), and to hold that Article 6 § 2 was inapplicable and not violated. While the Prosecution had acted as a defendant party in those cases, the present case had involved other types of litigants. The Prosecution had acted neither as a party nor as a representative of the victim's parents or the applicant, but was discharged upon the completion of the criminal trial. The ensuing compensation round only involved counsel for the victim's parents and for the applicant – two private civil parties. Moreover, there was no link between the outcome of the criminal proceedings and the compensation case, the right of the victim's parents to claim compensation being entirely independent of the criminal case. On essential points the legal basis and the legal issues in the civil compensation proceedings differed from those in the criminal case. Thus the criteria for civil and criminal liability differed, as did the applicable evidentiary standards. Above all, the compensation case did not involve an assessment of the applicant's criminal guilt.

36. The fact that the issues of criminal liability and compensation were adjudicated in joint proceedings could not be decisive for the applicability of Article 6 § 2. The right of a victim to claim compensation was entirely independent of the criminal charges and could just as well be brought in separate proceedings. Joint proceedings were only an option, and a victim's choice in this respect should have no bearing on the applicability of this provision. The system of joint proceedings was based upon well-founded considerations of cost-efficiency and speediness, and was advantageous to both parties.

37. In the Government's view, the application of Article 6 § 2 in such matters would run counter to its wording and to the intentions of States upon ratification of the Convention. A fine – but absolutely essential – line had to be drawn between criminal and civil responsibility. The Convention principle of the presumption of innocence could not bar judicial or other authorities acting in civil matters from addressing the question whether the acquitted person had perpetrated the act that formed the basis for the criminal charge against him. It would be unacceptable if an acquittal in a criminal case should be binding upon any authority that subsequently was called upon to decide civil-law matters arising from the same set of facts. While a court would of course be bound by a finding that criminal responsibility had not been established, it should be free to establish the civil consequences flowing from the same set of facts. An acquittal could not have as its consequence that subsequent decisions in civil matters must take as its premise that the acquitted person did not perpetrate the act, if it was shown on the balance of probabilities that he or she nevertheless was the perpetrator. Such a view would indeed give rise to serious questions under the Convention itself, namely the right under Article 6 § 1 of access

to a court of, *inter alia*, a victim claiming compensation under the civil law of tort.

38. In the light of the above, the Government requested the Court to hold that Article 6 § 2 was not applicable and was not violated in the applicant's case.

B. The Court's assessment

39. The Court reiterates that the concept of a "criminal charge" in Article 6 is an autonomous one. According to its established case-law there are three criteria to be taken into account when deciding whether a person was "charged with a criminal offence" for the purposes of Article 6, namely the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring (see *Phillips v. the United Kingdom*, no. 41087/98, § 31; *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, § 39). Moreover, the scope of Article 6 § 2 is not limited to criminal proceedings that are pending (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, § 35). In certain instances, the Court has also found the provision applicable to judicial decisions taken after the discontinuation of such proceedings (see in particular the following judgments: *Minelli v. Switzerland*, 25 March 1983, Series A no. 62, and *Lutz, Englert and Nölkenbockhoff v. Germany*, 25 August 1987, Series A no. 123), or following an acquittal (see the above-mentioned *Sekanina, Rushiti* and *Lamanna* judgments). Those judgments concerned proceedings related to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his (or his heirs') necessary costs, or compensation for detention on remand, and which were found to constitute a consequence and the concomitant of the criminal proceedings.

Accordingly, the Court will examine whether the compensation proceedings in the present case gave rise to a "criminal charge" against the applicant and, in the event that this was not the case, whether the compensation case nevertheless was linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2.

40. Turning to the first of the above-mentioned criteria, the classification of the proceedings under national law, the Court notes the applicant's argument that, formally speaking, he remained "charged" until the acquittal gained legal force. However, this concerned only the initial criminal charges of which he was acquitted; it was of no relevance to the compensation claim. The Court notes that the latter had its legal basis in Chapter 3 of the Damage Compensation Act 1969, which sets out the general principles of the national law on torts applicable to personal injuries. It is clear from both the wording of Article 3-5 and Norwegian case-law that criminal liability is

not a prerequisite for liability to pay compensation. Even where, as here, the victim had opted for joining the compensation claim to the criminal trial, pursuant to Article 3 of the Code of Criminal Procedure, the claim would still be considered a “civil” one. This also transpires from the Supreme Court’s judgment in the applicant’s case, which described the claim as “civil”. Thus, the Court finds that the compensation claim in issue was not viewed as a “criminal charge” under the relevant national law.

41. As regard the second and third criteria, the nature of the proceedings and the type and severity of the “penalty” (i.e. in the instant case the allegedly punitive award of compensation), the Court observes that, while the conditions for civil liability could in certain respects overlap, depending on the circumstances, with those for criminal liability, the civil claim was nevertheless to be determined on the basis of the principles that were proper to the civil law of tort. The outcome of the criminal proceedings was not decisive for the compensation case. The victim had a right to claim compensation regardless of whether the defendant was convicted or, as here, acquitted, and the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those applicable to criminal liability.

In the view of the Court, the fact that an act which 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 could not, 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 could the fact that evidence from the criminal trial is used to determine civil law consequences of the act warrant such characterisation. Otherwise, as rightly pointed out by the Government, Article 6 § 2 would give a criminal acquittal the undesirable effect of preempting 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 court under Article 6 § 1 of the Convention. This again could give an acquitted perpetrator, who would be deemed responsible 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 establishing civil liability in relation to the same facts.

Thus, the Court considers that, while the acquittal from criminal liability ought to be maintained 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 proof (see, *mutatis mutandis*, *X v. Austria*, no. 9295/81, Commission decision of 6 October

1992, Decisions and Reports (D.R.) 30, p. 227; *M.C. v. the United Kingdom*, no. 11882/85, decision of 7 October 1987, D.R. 54, p. 162).

42. 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 Convention.

43. The Court will therefore examine 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.

44. The Court notes that the High Court opened its judgment with the following finding (paragraph 13 above):

“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)

45. This judgment was upheld by the majority of the Supreme Court (paragraph 16 above), albeit using more careful language. However, that judgment, by not quashing the former, did not rectify the issue, which in the Court’s opinion, thereby arises.

46. The Court is mindful of the fact that the domestic courts took note that the applicant had been acquitted of the criminal charges. However, in seeking to protect the legitimate interests of the purported victim, 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.

47. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

49. The applicant’s claims for just satisfaction and costs have been confused and contradictory, but it appears from his final words at the hearing before the Court that the applicant withdrew his original claim for

pecuniary damage, whilst maintaining his claims for non-pecuniary damages and costs, to be assessed at the Court's discretion.

50. The Government objected to any damages being awarded, the finding of a violation, in their view, being in itself sufficient just satisfaction. They had no comment on the costs issue.

A. Damage

51. The Court accepts that the applicant suffered some non-pecuniary damage as a result of the infringement of the presumption of innocence in the present case. Making an assessment on an equitable basis, the Court awards 20,000 euros ("EUR") under this head.

B. Costs and expenses

52. The Court notes that the applicant claimed translation costs in the sum of 26,000 NOK, plus various expenses incurred in attending the Strasbourg hearing, totalling, according to bills submitted, EUR 950. The Court, deciding on an equitable basis, awards the applicant EUR 4500.

C. Default interest

53. The Court considers that the default interest should be fixed at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* that the applicant's complaint under Article 6 § 2 of the Convention is admissible;
2. *Holds* that Article 6 § 2 was applicable to the disputed compensation proceedings;
3. *Holds* that Article 6 § 2 has been violated;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums:

(i) EUR 20,000 (twenty thousand euros) in compensation for non-pecuniary damage;

(ii) EUR 4,500 (four thousand five hundred euros) in respect of costs and expenses;

(iii) that these sums be converted into the national currency of the respondent State, at the rate applicable at the date of settlement;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

5. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs H.S. Greve is annexed to this judgment.

J.-P.C.*.
S.D.

CONCURRING OPINION OF JUDGE GREVE

Norwegian not being an official language of the Court, the present case, like perhaps most cases originating in legal decisions delivered in languages other than English or French, gives rise to particularly challenging linguistic problems. This is all the more so where the European Court of Human Rights is called upon to examine the fine nuances of the legal language used in the original decisions and where translation is less a matter of word-by-word translation than of understanding the meaning of the expressions used.

It has to be appreciated that the Court does not have any professional assistance in translating official languages of a High Contracting Party other than English into French or French into English (English and French, being the Court's official languages, are translated by professional linguists into the other official language). Texts such as judgments of national courts written in an official language of a High Contracting Party (other than English and French) are translated into the Court's official languages within the Court without any professional linguistic assistance. This raises a general problem concerning the accuracy of the basic documents on which the Court relies when deciding whether Convention rights have been violated in a specific case. It is not unusual for expressions used in the national authorities' decisions to play an important role in the Court's decision-making.

In the present case the issue is whether the Norwegian courts implied that the applicant was criminally liable when they examined the compensation case.

In my opinion, there is a *clear* violation of the principle of presumption of innocence as a result of the language used by the High Court in its decision and the fact that the Supreme Court did not quash that decision. In contradistinction to the language used by the High Court, the Supreme Court distinguished carefully between the reasoning specific to a criminal case and that specific to a compensation case.

In a criminal case there are two main issues to be decided. Firstly, there is the question whether the defendant acted as set out in the definition of the criminal act in the indictment – the *actus reus* issue. Secondly, there are the questions relating to the defendant's personal guilt – the *mens rea* issue. Quite apart from those two issues, there are further considerations relating to the defendant's age, soundness of mind and whether, for example, he acted in self-defence or out of necessity such that he may be exempt from criminal liability. Only when *all* those elements are in place – the *actus reus*, the *mens rea* and the absence of circumstances exempting the defendant from criminal liability – will criminal responsibility be established.

The core of the Supreme Court’s reasoning, as endorsed by this Court, is that an affirmative decision on the *actus reus* issue in a criminal case is not a necessary precondition for determining the issue of civil liability in a compensation case. In other words, in both contexts a central issue will be whether or not (i) the defendant in the criminal case, and (ii) the party sued in the civil case, *acted* (i) as set out in the definition of the criminal act in the indictment, and (ii) in a manner that gave rise to civil liability. The act scrutinised could be identical in both types of cases.

In the present case consideration was given to translating all of the domestic courts’ discussion of whether a person acted in a specific manner by whether the person “committed the offence”. Such a translation would have failed to reflect accurately the kinds of consideration expressed by the Norwegian courts.

By way of compromise, the Court has replaced the word “offence” with “act” wherever it is plain that the Norwegian courts focused solely on *whether the person did act in a specific manner*. Furthermore, the Court has used the expression “commit the act” as having a neutral connotation, that is to say neither a criminal nor a civil one.

For the benefit of readers able to follow the nuances of the Norwegian Supreme Court’s reasoning, the latter (in so far as the majority’s reasoning has been included in our Court’s judgment; cf. paragraph 16) is set out *in extenso* below. It reads as follows:

“Saksbehandlingsanken

...

I tillegg til at det verken av ordlyden eller av forarbeidene til straffeprosessloven kan utledes noe om at adgangen til å pådømme borgerlige rettskrav til tross for at tiltalte er frifunnet for straff, skal være avhengig av frifinnelsesgrunnen, kan jeg ikke se at det er noen reelle grunner som taler for dette. Selv om det for at det i tilfeller som det foreliggende skal kunne avsies dom for oppreisning, må stilles krav om klar sannsynlighetsovervekt for at handlingen er begått, er beviskravene ikke riktig så strenge som for å avsi en fellende straffedom. Jeg har vanskelig for å se at det skal være noen grunn til at tilfeller hvor tiltalte er blitt frifunnet fordi det ikke finnes bevist at handlingen er begått, skal komme i en noe annen stilling enn andre frifinnelsesgrunner – som f.eks. at handlingen ikke er straffbar, at det ikke finnes bevist at tiltalte har handlet med den strafferettslige skyld som kreves, at tiltalte finnes å være strafferettslig utilregnelig, at det foreligger nødverge eller en annen straffrihetsgrunn m.v. Dersom det i tilfeller hvor tiltalte er frifunnet fordi det ikke er funnet bevist at han har begått den handling han er tiltalt for, ikke skal være adgang til å pådømme borgerlige rettskrav i straffesaken, vil konsekvensen av det være at kravet må forfølges i en separat sivil sak. Men å føre en separat sivil sak koster både tid og penger. [Hvis borgerlige rettskrav etter at tiltalte er blitt frifunnet for straff fordi det ikke er funnet bevist at han har begått handlingen, bare skal kunne forfølges i en separat sivil sak,] vil fornærmedes muligheter til å forfølge slike krav være avhengig

av hvilke økonomiske ressurser han råder over. En slik løsning finner jeg lite tiltalende.

Jeg påpeker også at om man skal ha en regel som stiller frifinnelse fordi det ikke finnes bevist at tiltalte har begått den handling han er tiltalt for, i en annen stilling enn andre frifinnelsesgrunner, vil det kunne by på problemer å anvende regelen i tilfeller hvor saken har vært behandlet av lagmannsretten med lagrette – slik tilfellet er i vår sak. For at kjennelsen skal være fellende må minst sju av lagrettens 10 medlemmer ha svart ja på skyldspørsmålet, og uten hensyn til om lagretten svarer ja eller nei, er kjennelsen uten begrunnelse. Som oftest vil man nok kunne ha mer eller mindre velfunderte oppfatninger om hva som er grunnen til at lagretten har svart nei, men full sikkerhet vil man aldri ha.

Spørsmålet om borgerlige rettskrav kan pådømmes til tross for at tiltalte er frifunnet for straff, har flere ganger tidligere vært forelagt for domstolene. De ganger spørsmålet tidligere har vært forelagt for Høyesterett eller Høyesteretts kjæremålsutvalg, har det vært lagt til grunn at det ikke er noe vilkår for at borgerlige rettskrav skal kunne pådømmes i forbindelse med straffesaken, at retten ved avgjørelsen av straffesaken har funnet det bevist at tiltalte har begått den handling tiltalen gjelder. ...

Etter mitt syn kan det på grunnlag av det rettskildemateriale som foreligger, ikke være tvilsomt at det etter straffeprosessloven av 1981 ikke kan oppstilles som noe vilkår for at borgerlige rettskrav skal kunne pådømmes i forbindelse med behandling av straffesaker, at retten [ved avgjørelsen av straffesaken] har funnet det bevist at tiltalte har begått den handling saken gjelder. ...

Etter dette foreligger det ikke noen saksbehandlingsfeil når lagmannsretten har pådømt oppreisningskravet til tross for at [klageren] er frifunnet for straff.

...

Anken over rettsanvendelsen

[Klageren] har begrunnet anken over rettsanvendelsen med at det er i strid med uskyldspresumsjonen i EMK artikkel 6 nr. 2 om retten etter at tiltalte er frifunnet for straff, i samme sak avsier dom for oppreisning, og at det under enhver omstendighet må være i strid med uskyldspresumsjonen å begrunne en dom for oppreisning på den måte lagmannsretten har gjort.

...

[Artikkel 6 nr. 2] henvender seg i første rekke til dommere i straffesaker, og hovedbudskapet i bestemmelsen er at dommerne ikke skal ha en forutinntatt oppfatning om at den siktede har begått den lovovertrædelsen han er tiltalt for, eller gjennom uttalelser fra offentlige myndigheter søkes påvirket til dette, se Frowein/Peukert: Europäische Menschenrechtskonvention, 2. Auflage (1996), side 280 ff. og Rehof/Trier: Menschenkerett (1990), side 164. Både i teori og praksis fra Strasbourgorganene er det imidlertid lagt til grunn at bestemmelsen også kan få betydning etter at straffesaken er avsluttet, se Harris/O'Boyle/Warbrick: Law of the European Convention on Human Rights (1995), side 246-247 med nærmere henvisninger til praksis. I dom av 25. august 1993 i saken Sekanina mot Østerrike har f.eks. Den europeiske menneskerettighetsdomstol lagt til grunn at dersom siktede er

frifunnet ved rettskraftig dom, kan domstolene i en etterfølgende sak om erstatning for uberettiget forfølgning ikke bygge på at tiltalte er skyldig. Men hvor langt dette synspunktet rekker, kan være noe usikkert. Saker om erstatning for uberettiget forfølgning går mellom siktede og staten, og slike saker fremstår som en forlengelse av straffesaken. Etter min oppfatning kan uskyldspresumsjonen derimot neppe komme til anvendelse i en sivil sak mellom siktede og den som måtte være krenket eller ha lidt skade ved en handling som siktede er frifunnet for. Det må i alle fall være på det rene at EMK artikkel 6 nr. 2 ikke kan avskjære domstolene fra i en sivil sak – f.eks. en erstatningssak, sak om oppsigelse eller avskjed eller sak om foreldresansvar – å ta stilling til et faktisk hendelsesforløp, selv om dette i og for seg skulle utgjøre en straffbar handling, og den som kravet er rettet mot, er frifunnet for forholdet i en tidligere straffesak, se blant annet Lorenzen/Rehof/Trier: Den Europæiske Menneskerettskonvention med kommentarer (1994), side 199 og Frowein/Peukert, op. cit. side 285. Om uskyldspresumsjonen overhodet får anvendelse i en sivil sak mellom skadelidte og siktede, må det under enhver omstendighet være en forutsetning for at EMK artikkel 6 nr. 2 skal være krenket, at det blir foretatt en strafferettslig skyldkonstatering. Dersom domstolene i en sivil sak ikke skulle ha adgang til å legge til grunn at den som er frifunnet for en straffbar handling, har begått handlingen, ville frifinnelsen frata den som måtte være krenket eller ha lidt skade ved handlingen, muligheten til å få prøvd krav som vedkommende måtte ha mot tiltalte. Dette ville etter mitt syn støte an mot den grunnleggende bestemmelse om rett til rettfærdig rettergang i artikkel 6 nr. 1.

Fra [klagerens] side har det vært hevdet at det må skilles mellom tilfeller hvor borgerlige rettskrav blir behandlet sammen med straffesaken, og tilfeller hvor kravet blir behandlet i en etterfølgende sivil sak. Jeg kan vanskelig se at det kan være grunnlag for et slikt skille. Ordningen med at borgerlige rettskrav skal kunne tas med i straffesaken, har gode prosessøkonomiske grunner for seg, og [som ankemotpartene har påpekt,] kan også tiltalte ha fordeler av ordningen. I straffesaker har tiltalte som hovedregel krav på forsvarer på det offentliges bekostning, og med den grundige bevisførsel som finner sted i straffesaker, har tiltalte i tilfeller hvor det borgerlige kravet blir behandlet sammen med straffesaken, en særlig beskyttelse mot å bli uriktig dømt. Dersom tiltalte blir frifunnet for straff, men idømt erstatning, vil det for tiltaltes følelse av ikke å være blitt “frifunnet helt”, ikke kunne spille noen rolle om erstatningskravet blir pådømt i forbindelse med straffesaken, eller i en etterfølgende sivil sak.

...

Som nevnt kan uskyldspresumsjonen i EMK artikkel 6 nr. 2 etter min oppfatning neppe få anvendelse i en sivil sak mellom den som er blitt frifunnet for en straffbar handling, og skadelidte. Slik denne saken ligger an, finner jeg det imidlertid ikke nødvendig å ta endelig stilling til dette, da lagmannsretten ved pådømmelsen av oppreisningskravet etter mitt syn ikke har foretatt en slik strafferettslig skyldkonstatering som under enhver omstendighet må være en forutsetning for at det kan foreligge en krenkelse av EMK artikkel 6 nr. 2. ...

[Klageren] har anført at domstolene i praksis vil ha vanskelig for å håndtere forskjellige beviskrav for straff og erstatning, og at når det for oppreisningskrav i tilfeller som det foreliggende blir stilt krav om at det må foreligge klar sannsynlighetsovervekt for at handlingen er begått, vil beviskravene ligge så nært opp til det som kreves for en fellede straffedom, at dette i seg selv bidrar til å kaste mistanke om at det foreligger straffeskyld. Disse argumentene har jeg vanskelig for å

forstå. Det at beviskravene er forskjellige i ulike relasjoner, er ikke noe særegent for denne type saker. [Når det for pådømmelse av oppreisningskrav i tilfeller hvor tiltalte er frifunnet for straff, blir stilt krav om klar sannsynlighetsovervekt for at tiltalte har begått handlingen, er det] ut fra et generelt synspunkt om at det må stilles krav om kvalifisert sannsynlighetsovervekt for at retten skal kunne legge til grunn at det foreligger et sterkt belastende faktum ... Det at det i slike tilfeller av hensyn til den som kravet er rettet mot, stilles skjerpede beviskrav, kan ikke innebære noen krenkelse av EMK.”