

# **NORWAY**

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## **HR-2017-2352-A: Claim for damages based on loss of income from prostitution**

A group of four prostitute women had been robbed and assaulted. During the criminal proceedings the women claimed compensation for lost income. They had been unable to sell sexual favours for a period of time after the assaults.

## **The majority opinion**

- According to the majority of the judges, the main question, based on previous cases regarding damage (wrongful birth in Rt 1999, 203 and Rt 2013, 1689), was if the interests at stake, after doing a broad consideration, deserves protection by the legal system.
- The consideration must take into account the interests of the victims and the interests of society at large.

- The majority stated that prostitution was not a criminal act according to the Norwegian Criminal Code.
- However, buying sexual favours was a criminal offense. According to the preparatory works, the legislative grounds was that a prohibition was necessary in order to stop this kind of activity towards victims of trafficking. A prohibition could also reduce the recruiting of new customers and stop the increase in the market of prostitution.

- The only reason for not making prostitution illegal in itself, the majority of judges states, is that the prostitutes are considered a weak and exposed social group.
- Based on this, the loss of future income from prostitution should not be protected by tort law.
- In addition, the majority argued, if such protection was given, it would presuppose that a criminal act would be performed by the buyers of sexual favours in the future. This would be a problematic basis for a claim within the legal system, even if income from prostitution formally is liable to tax.

- A denial of compensation can be seen as a further weakening of a weak social group, the Supreme Court noted.
- Still, the collected effort of society to help and support the prostitutes, is the most important. Protection of future economic loss through tort law, could work against other efforts by society to minimize the market of sexual favours. Such protection could even make Norway more attractive as a market for prostitution.

## The minority opinion

- The two dissenting judges argued that it followed from the Damage Compensation Act (skl) § 3-1, which states that loss of income for a victim is to be compensated by the tortfeasor, that the legal starting point must be that loss of income is protected by tort law. To deny such protection, would be an exception from skl § 3-1.
- Such an exception can only be done if it is justified. Previous Supreme Court cases has few examples of such exceptions, even if the majority of judges mentions two cases where such exceptions are done.

- Prostitution is in itself legal, the dissenting judges state. According to the preparatory works of the Criminal Code, this is based on the solidarity with the prostitutes and their need of opportunity to make a better life.
- In addition, income of prostitution is legal and is the subject of taxation as other incomes.
- Thus, the coherence of the legal system is best served by protecting the loss of future income by prostitution by awarding damages according to tort law. If the income is accepted, the loss of income should also be accepted.

- The legal position of the prostitutes should not be influenced by the fact that other people actions related to prostitution, are criminal offences. Based on this, criminal law is not an argument against protection for loss of future income by prostitution, but rather an argument for such protection.
- Also, the dissenting judges argues, even if prostitution is something unwanted in our society, it is important to note that compensation for loss of income according to tort law, does not contribute to prostitution in itself. The compensation is based on a hypothetical course of action.

## **Commentary**

- The majority of judges base their arguments mainly on broader and value based pragmatic considerations.
- The minority of judges base their arguments on the coherence with more specific elements in the legal system.
- The limits of broader considerations in tort law taking into account more specific legal arguments.