

# When Should the Victim of a Sexual Assault Seek the Advice of a Lawyer?

Sexual assault is a traumatic event; one that can strip away one's trust in the legal system. If the system was not there to protect the survivor from the assault in the first place, how can it be there for them now? In some cases it may be appropriate to seek legal advice. Understandably, many survivors will be reluctant to seek legal advice, for this requires further disclosure. A certain amount of self-doubt or anxiety is to be expected in such cases. If the survivor has just recently revealed the abuse, it may be too soon to consult a lawyer. However, the law sets limitation periods, which are time limits within which individuals must commence legal proceedings or risk losing their rights to sue altogether. Some awareness of the legal issues involved in civil sexual assault cases is helpful.

## After How Many Years Does The Survivor Lose The Right to Sue?

The time limits for suing are covered by the law of limitation periods which can be quite complex. In most civil sexual abuse cases in Ontario, a survivor must commence legal proceedings within two years from the date when the "cause of action" arose. The cause of action arises when the survivor has a substantial awareness of the harm suffered and its cause. This means that the clock begins to tick when the survivor realizes that the assault has caused them to suffer damages and understands the causal link between the harm and the abuse. The Supreme Court of Canada has suggested that in a recovered memory case the law presumes that the survivor only has this required level of awareness when he or she starts therapy, unless there is evidence to show otherwise.



The new Limitations Act in Ontario provides that where a claim relates to a sexual assault committed by a defendant who had charge of the sexual assaulted party, was in a position of trust or authority in relation to him or her, or was someone whom he or she was dependant (financially or otherwise), there is no limitation period.

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The new Limitations Act also provides that the limitation period does not run in cases of sexual assault or assault during any time during which the person with the claim was incapable of commencing a lawsuit because of his or her physical, mental or psychological condition. There is also a presumption that the person was incapable of commencing the proceeding any earlier then it was commenced in all cases of sexual assault, and in cases of assault where there is an intimate relationship or dependence.

Survivors who are interested in pursuing civil claims should speak to a lawyer about potential limitation periods.

## Will We Win In Court?

In some cases, sexual assault is difficult to prove. The alleged offender may deny that the abuse occurred at all. There are usually no witnesses. These factors often compound the anxiety of going to court and telling the world what happened. A lawyer will first decide whether she has a realistic chance of winning the case before having a survivor of sexual assault go through this process. The lawyer will have to determine whether she can prove on a balance of probability (i.e., more likely yes than no) that the assault occurred and that damage was suffered.

Although there may be no eyewitness proof of a sexual assault, there can be other corroborating evidence. Evidence is an important part of winning a case. Perhaps the survivor told a friend, family member or health care professional of the assaults as they occurred or shortly after. In some instances there may be evidence in the form of letters or diaries that the survivor kept during the abuse. The alleged offender's background may provide



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evidence of a history of abuse or relevant medical or psychological history or a tendency to be violent. If the offender has been criminally convicted, although it is not absolutely necessary, it is very helpful to the survivor's case.

The alleged offender may tend to blame the survivor and rationalize, justify or excuse his or her own conduct. The offender may claim that the survivor actually consented to the sexual assault. It is important to remember that a consent is not a true and valid consent if it is obtained by threats, intimidation, or through breach of fiduciary duties.

### Do The Benefits Outweigh The Costs Of Going To Court?

This decision can only be made by the survivor of sexual assault. There are no guarantees that a civil action will be won. With the advice of a lawyer, the survivor must weigh the likelihood of a successful outcome against the difficulties of going through the court process. Some of the following facts may be helpful in making this decision.

The current trend seems to be a rise in the number of large damages awards especially in cases of ongoing abuse occurring over a period of years. The factors that the courts take into consideration in assessing general damages for pain and suffering are: the nature of the acts, the duration of the assaults, the relationship between the perpetrator and the survivor including any breach of trust, the age and vulnerability of the survivor, and the impact on the survivor's life including his or her education and career.

General damages can range from a few thousand dollars for a single offence by a stranger to \$250,000.00 or more for the most serious abuse cases. In addition, survivors can be awarded damages to cover the cost of past and future therapy as well as damages for past and future income losses. Awards of aggravated and punitive damages can also be quite substantial. These are awards based on punishing the offender for his or her conduct. However, sometimes aggravated and punitive damages are not awarded where there is criminal conviction and punishment.

Aside from the survivor, there may be other individuals with claims flowing from an assault. For example, the survivor's own parents, children or family members may have claims for loss of care, companionship and guidance under the Family Law Act. Family members may be awarded some damages because of the extra

support they need to give to the survivor as a result of the effects of sexual abuse.

### Vicarious Liability of Institutions For Intentional Torts

There are instances where a survivor of sexual assault may have recourse against defendants other than the perpetrator. These instances usually occur in employment relationships. An employer may be found to be liable for the acts of its employees. This liability can arise in one of two ways. First, the employer may be directly negligent for example, for failing to properly check the perpetrator's references or for failing to properly respond to and investigate earlier complaints. Even where there is no blameworthy conduct on the part of the employer, the employer may have automatic liability imposed

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by law i.e., vicarious liability. In two decisions, the Supreme Court of Canada developed guidelines on how to determine if an employer will be vicariously liable for the wrongful acts of its employees. The court considers the strength of the causal link between the opportunity created by the employment and the wrongful act.

The Supreme Court of Canada specifically addressed the power-dependency relationship between an employee whose mandate is to care for children and the survivors. The court made no distinction between for-profit and non-profit organizations when determining vicarious liability. It has been determined that the vulnerability of children alone is not a sufficient justification to impose vicarious liability on employers who work with children. There needs to be a strong link between the employment and the sexual assault. The greater the time spent with children and the greater the intimacy, the greater the opportunity for abuse. The court stated that the more the employer encourages the employee to foster the relationship with the child, and to gain their trust and respect, the more the risk may be enhanced, making the employer more susceptible to vicarious liability.



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## How to Select a Lawyer

In choosing a lawyer, a survivor may be referred to potential lawyers through friends, family members, health care professionals, therapists or through lawyer referral services such as the one sponsored by the Law Society of Upper Canada. In selecting a lawyer, the survivor should ensure that the lawyer is experienced generally in litigation and specifically in sexual assault cases. It is perfectly appropriate to ask the lawyer how many sexual assault cases he or she has handled in the past and to ask the lawyer for references from former clients. Of course, the lawyer will have to get permission before giving out any names of former clients. It is also advisable to discuss fees and make sure you understand the financial arrangements from the outset. As well, the survivor should ask the lawyer to provide an overview of the process involved in bringing a civil lawsuit, a description of the main steps in the case and rough estimates of the time frames involved. Finally, because the relationship between lawyer and client may be a long one and a sexual abuse lawsuit necessarily involves discussing personal and painful issues, it is extremely important that the client be comfortable with the lawyer he or she chooses.

## How To Prepare For The First Meeting With The Lawyer

Before the first meeting with a lawyer, it may be helpful for the survivor to take the time to prepare for some of the questions that will need

to be answered. The client can assist the lawyer in assessing the case by documenting a chronological history outlining personal background, education and work experience, a history of the abuse, a list of treating physicians, a list of potential witnesses, and providing copies of any relevant documents. Also the survivor should bring a list of questions to ask the lawyer. Preparing in this way can make this first step much more comfortable for the client.

## Privacy Concerns

Often, survivors are concerned about the extent to which their privacy can be protected when they get involved in a civil lawsuit. As a general rule civil trials are open to the public however, in reality they are rarely attended by persons other than the direct parties and witnesses to the case. In a civil lawsuit, there are many documents

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which are filed with the Court which identify the parties by name. These documents are also a matter of public record. However, in sexual assault cases, the Courts will usually allow the survivor to identify himself or herself by initials only and therefore have his or her identity in the documents protected.

In a civil case the survivor is coming to the Court and asking the Court to award compensation for the damages suffered as a result of the abuse. Therefore, a full inquiry into the effects of the abuse is justified. As a general rule, survivors who sue civilly will be required to produce medical and other records which are relevant to the case. Before deciding to start a civil case it is a good idea for survivors to discuss these disclosure requirements with their lawyer so that there are no surprises.

In cases where liability is strong (i.e., prior criminal conviction), damages are significant and there is a potential defendant who has financial means to satisfy a judgment, the survivor is well advised to seek legal opinion. A lawyer can advise the client of his or her legal rights and remedies. The lawyer can explain the procedural and practical aspects of both criminal and civil proceedings. The lawyer can represent the client in litigation, arbitration or mediation or conduct



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settlement negotiations on behalf of the client. Most civil cases do not go to trial, rather they are settled out of court. As a general rule, the stronger the case the better the settlement. The lawyer can advise the client of the likelihood of success in court and the range of any potential recovery as well as advise the client on what is a reasonable settlement.

A civil lawsuit may well form a part of a constructive healing process for a survivor of sexual assault. It can be a means by which the survivor obtains the funds needed for therapy. It can also be a means for many survivors to take control over how the abuse affects their future. For many, it is a form of empowerment and is therefore one part of the healing process. Unlike criminal proceedings where a survivor is merely a witness for the crown and has no control over the process, in a civil case the survivor/plaintiff assumes a great deal of control over the manner in which the case is conducted. ❖

**Loretta P. Merritt**

*Any enquiries arising out of this article should be directed to: Loretta P. Merritt at (416) 777-5404 [www.sexualabuselawyer.ca](http://www.sexualabuselawyer.ca)*

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