

Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils

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With contributions from Jessica Mindlin

“Civil tort claims are claims that seek financial compensation for wrongs that have caused injury. Tort claims brought by victims of sexual assault have recently been increasing at an exponential pace. These claims can be pursued against perpetrators as well as additional defendants known as third parties. A tort claim can be filed against a perpetrator regardless of whether there was a successful or unsuccessful criminal case, or no criminal prosecution at all. Third-party defendants can include businesses, landlords, school administrators, bus drivers, placement agencies, Boy Scout leaders, foster parents, religious institutions, hospitals and treatment centers, among others.”

Applied Research papers synthesize and interpret current research on violence against women, offering a review of the literature and implications for policy and practice.

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In some ways, tort actions filed by victims of sexual assault as a means of redress are nothing new. These actions have been available to rape victims since at least the early 1900s (Bublick, 1999). In other ways, these legal claims are quite recent. Contemporary sexual assault victims and survivors bring tort actions far more frequently than did victims in previous decades. In addition, contemporary victims can file a wider array of tort causes of action and can seek redress from a wider range of actors than their earlier peers were able to (Bublick, 2006).

This paper offers an overview of trends and outcomes for victims in civil tort cases, which are sometimes referred to as personal injury cases. The paper also discusses benefits and drawbacks of tort litigation for sexual assault survivors. While some of the concerns in the tort process mirror challenges victims confront in criminal prosecution, others are exclusive to tort suits.

It is important to note that while a contrast is sometimes drawn between civil and criminal actions, the category of civil actions that victims can pursue is quite broad. Rape and sexual assault survivors pursue civil remedies in the housing, education, employment, immigration, public benefits and family law arenas. For example, in family law, survivors pursue civil cases involving child custody, paternity, and visitation issues. Parental rights and visitation issues arise in both intimate and non-intimate partner sexual assault cases. Only a minority of states have laws that address a rape victim's rights when rape results in pregnancy. In terms of education, survivors may file civil suit for an educational accommodation under federal laws such as Title IX, No Child Left Behind, or Section 504 of the Rehabilitation Act. State anti-discrimination and other laws may also provide protections and remedies for sexual assault victims. An increasing number of cities and states have established civil rights actions for sexual assault survivors in the employment, housing and public benefits context. Under some state and local statutes landlords are required to allow a victim to break a lease without penalty, employers are legally obligated to grant a victim unpaid leave from work, and unemployment insurance benefits are guaranteed to a victim who leaves a job due to sexual assault.

In cases involving child sexual abuse, appointment of a guardian ad litem (a guardian appointed to represent the interest of the child in a legal action) may also be involved (Mindlin & Vickers, 2007).

This paper discusses none of these civil actions. It focuses on a particular type of civil action that can be brought by victims of sexual assault — tort actions. (For a comprehensive discussion of civil non-tort remedies for sexual assault victims see Mindlin & Vickers, 2007). Tort actions seek financial compensation for wrongs that have caused injury to the plaintiff, the person bringing the suit. These wrongs may include intended harms, as in the case of a perpetrator who touches a victim in a harmful or offensive way against her wishes (in legal terms this is called a battery). The wrongs may also include negligent harms, as when a person or entity fails to use reasonable care for the victim's safety. In this latter category of cases, a negligent harm might include cases in which an employer fails to conduct a background check or to adequately investigate prior complaints of sexual harassment or assault. Claims of intentional or negligent harm can be pursued by both adult and child victims of sexual assault.

Tort Actions

Rape and sexual assault victims are filing increasing numbers of tort claims. A recent study analyzing the prevalence of tort cases filed by victims of rape and other sexual assaults is instructive. The study compared state supreme court decisions issued between the years 2000-2005 with court decisions from just thirty years earlier, 1970-1975. The study found that over this thirty year time frame, reported state supreme court decisions in sexual assault cases rose by more than 1000% percent (Bublick, 2006). This exponential increase in the number of high court decisions on sexual assault held sway even though there was a general decline in the overall number of state supreme court decisions published during the time period. The increase in intermediate appellate court decisions in sexual assault related torts cases during the same thirty year period was equally, if not more, dramatic (Bublick, 2006).

Of course, decisions issued by appellate-level courts reflect only a fraction of the cases that courts adjudicate, and an even smaller fraction of the claims that are initiated. Although there are no reliable estimates of the number of tort cases filed by sexual assault victims in the trial courts, extrapolating from the cases resolved at the appellate court level suggests the frequency of lower court filings. In civil cases as a whole, only 3% of all civil claims proceed to a lower court judgment and a full 97% of all cases settle before trial. Even when a claim is tried, most cases are never appealed (Hans & Albertson, 2003). If these general observations of the civil system hold true for cases filed by sexual assault victims, the dramatically increased state appellate court opinions suggest that the number of tort cases currently being filed by sexual assault victims in U.S. trial courts is likely to be in the thousands.

This increase in the number of tort actions filed by victims of sexual assault is matched by an expanded range in the types of tort actions available to victims. Before the 1960s, sexual assault victims' tort suits were focused on the perpetrator's individual liability. Cases alleging responsibility of a party beyond the perpetrator were almost always unsuccessful (Bublick, 2006). However, recent case law recognizes much broader responsibility for the use of reasonable care to prevent foreseeable sexual assault. As a result, most current actions filed by sexual assault victims name at least one other party besides the perpetrator as a defendant at fault (Bublick, 2006). For example, a nursing home or care facility may be sued for negligent hiring or negligent supervision and can be held at fault for hiring and retaining an employee with a history of criminal or sexual misconduct to care for a vulnerable patient (*Kodiak Island Borough*, 2003; *Regions Bank & Trust v. Stone county Skilled Nursing Facility*, 2001). Similarly, a cable company may be at fault for failing to heed a complaint that an employee who regularly enters customers' homes abused a customer during a previous home visit (*Saine v. Comcast Cablevision of Arkansas, Inc.*, 2003).

Tort Actions Against the Perpetrator

Some wrongs, such as rape, may be crimes and also form the basis of a tort action. The defendant who made unconsented to contact with the plaintiff may be prosecuted criminally and also be held liable to the plaintiff for the tort. Perhaps more importantly, a defendant may be held liable in tort even if he was not criminally prosecuted or if a criminal prosecution was unsuccessful (Bublick, 2006). For example, in one South Dakota Supreme Court case, a woman alleged that she had been raped by her doctor while the doctor was ostensibly performing a pelvic exam. Although three other women came forward with similar claims, a jury acquitted the doctor on all criminal charges. In a subsequent tort action against the doctor, each victim was awarded \$450,000 in damages (*St. Paul Fire and Marine Insurance v. Engelmann*, 2002). At times, the difference in outcomes can be explained by differences between the standards of proof in criminal and civil cases.

Criminal cases require “proof beyond a reasonable doubt” while civil cases require only a “preponderance of the evidence.” Also, the process of “discovery” or exchange of information is different in criminal versus civil cases. In criminal cases, the prosecution must disclose exculpatory information to the defense, but the defense has no obligation to respond in kind. In civil cases, both parties must disclose relevant information or face court sanctions (Bublick, 2006). The defendant-heavy protections that apply in criminal cases to protect those facing government prosecution and punishment do not apply in the civil law where jail is not a possible penalty.

In most tort actions, suits against the perpetrator are filed along with suits against other parties. In a significant number of the 2000-2005 appellate court decisions in cases filed by sexual assault victims, the victim settled with the perpetrator before trial and proceeded with litigation only against the other party (Bublick, 2006).

Tort Actions Seeking a Remedy from Third Parties

Sexual assault victims can also bring tort actions against people other than the perpetrators; these defendants are known as third parties. Litigation against third parties concerns the responsibilities of those actors who fail to use reasonable care to protect against foreseeable sexual assault. Third party defendants can include businesses, landlords, school administrators, bus drivers, placement agencies, Boy Scout leaders, foster parents, religious institutions, hospitals and treatment centers, among others (Bublick, 2006). Any individual or institution may be named as a third party, unless the party is immune from suit. For example, if a case involves a state actor, governmental immunity may bar a victim from collecting damages from the state. Although each tort case involves particular legal rules, in almost all cases the victim must show that the third party itself committed some wrongful act and that, but-for the third party’s wrongful act, the plaintiff would not have been victimized. Often, the wrongful act alleged by a third party is a failure to take some kind of reasonable security precaution. The failed security precaution at issue can involve discrete problems such as a broken door lock, or invoke broader policy questions such as in a case about whether the defendant failed to appropriately train staff, parents or children to recognize and properly react to signs of sexual abuse (Bublick, 2006)

Therapeutic Consequences of Tort Actions

Unfortunately, there have not been any U.S. studies of the therapeutic consequences of tort claims filed by sexual assault victims. Canada has also experienced a surge in civil claims for damages by victims of sexual abuse. One Canadian study describes the therapeutic consequences of both tort and other civil claims (Felthusen, Hankivsky, & Greaves, 2000). According to the Canadian research, although victim claims were for monetary damages, the majority of claimants identified therapeutic, rather than monetary, motivations for filing them. Accordingly, victims measure their success or failure in therapeutic terms (Felthusen, et al., 2000).

However, there was not a unitary view about the success or failure of Canadian civil actions in therapeutic terms. Both therapeutic and anti-therapeutic outcomes of the cases were chronicled. The range of victim experiences was quite wide. For example, 27% of civil claimants would recommend pursuing a suit for civil damages to others. Conversely, 18% of the victims surveyed reported that, if they could go back and decide whether or not to file the claim again, they would decline to do so. Thirty five percent of claimants reported that the process gave them a more positive outlook. However, 84% of the victims reported some negative emotional consequences including a sense of loss of control over the process, mental anguish, depression, suicidal tendencies, frustration, anger, and a feeling that the system was not dealing with them in a responsive or personal manner (Felthusen, et al., 2000).

Given the similarity of Canadian and U.S. civil suits, particularly the adversarial nature of the proceedings, there is reason to believe that the positive and negative therapeutic consequences of civil cases in the Canadian system provide a helpful guide to understanding the potential consequences that can be expected from the U.S. system. For example, victims cite delay and adversarial cross examination by the other party's attorney as source of negative emotional consequences (Felthusen, et al., 2000). The experience of delay and adversarial cross-examination and the corresponding negative consequences that result from them for victims are also likely to occur in the U.S. system. In terms of positive consequences, victims felt well represented by their lawyers, achieved satisfactory financial compensation, and found that litigation provided a feeling of closure. While these consequences might be expected in a survey of sexual assault survivors in the United States, given differences in the substantive and procedural law of Canada and the United States, further research is needed on the therapeutic consequences for victims who pursue tort actions in the United States.

Potential Benefits of a Tort Action

Potential benefits to victims of tort actions are numerous. The victim, as a plaintiff in a civil action, controls many important decisions in the litigation including whether

to file a case, proceed with it, settle the case or pursue further action. In short, the victim gets to direct the course of the litigation (within the confines of the law). This is in stark contrast with criminal law, in which the state is the party in interest and the prosecutor represents the state or commonwealth; the victim is a mere witness in the state's case, subject to a subpoena or at times even contempt for failure to appear.

In terms of procedure, civil actions require the plaintiff to meet a lower burden of proof, preponderance of the evidence, rather than the proof beyond a reasonable doubt standard of criminal law (Manley, 1990). Moreover, because the defendant does not risk incarceration, procedural protections such as the right to legal counsel and the right to refuse to testify without adverse consequences do not exist in the tort context. In a civil suit, the plaintiff is entitled to depose the defendant and ask him questions under oath. This may be empowering or otherwise healing for a victim.

In terms of the substantive law (versus the procedural components of the suit), a benefit of tort actions is that there is no tort of rape or sexual assault. This does not mean that a sexual assault victim has no claim. To the contrary, it means that the claim is filed under more general standards. For example, victims can sue perpetrators for causes of action which may include:

- battery
- assault
- false imprisonment
- outrage
- seduction
- violation of section 1983 (a federal civil rights statute that guards against deprivation of federal rights by state actors)
- intentional infliction of emotional distress
- invasion of privacy; and
- negligent infliction of emotional distress

Unlike criminal laws, which are narrowly written and rigidly applied, tort law is more fluid. Victims do not need to meet specific requirements about exactly which part of the defendant's body touched which part of the plaintiff's body to establish a cause of action. In battery, for example, a plaintiff need only establish that she

was harmed or offended by defendant's contact and that the defendant intended the contact and possible harm or offense. This can be shown by the defendant's knowledge that the victim did not consent to the contact (Bublick, 2006). Elements like penetration and force are no part of the cause of action for tort cases.

Suits seeking compensation can yield both monetary and non-monetary benefits for the victim. A successful lawsuit would result in a financial judgment for the victim, as would a successful settlement of the case. However, a settlement could also include other terms agreed to by the parties such as an apology, the assailant's agreement to transfer jobs, housing or educational institutions, or a financial contribution by the defendant to an organization the victim chooses (Seidman & Vickers, 2005). Some victims may want to file suit even if a defendant has no money; securing a judgment that the defendant wronged the victim may be validating and healing in and of itself. As a practical matter, however, it can be difficult and expensive to pursue such a suit.

In addition to financial compensation, suits against third parties can also provide opportunities for a victim to negotiate a settlement that provides redress and also serves as a deterrent to prevent future harms. Examples of such settlement terms might include revised hiring policies and procedures, discontinuing alcohol-focused company events, or an employer agreeing to train all personnel on sexual assault related issues (such as intoxication and victim safety).

Some defendants are more concerned about a criminal conviction (and the attendant consequences such as jail or prison time, sex offender registration, firearm restrictions, and so forth) than they are about civil settlement. As a result, they may be more willing to admit wrongdoing in a civil suit for monetary and non-monetary damages. At times victims themselves may feel more comfortable filing civil rather than criminal actions, particularly when the victim does not want the perpetrator to go to prison, but does want to negotiate for other remedies like sex offender treatment and counseling.

Potential Concerns about Tort Actions

Although it is true that tort cases involve a lower burden of proof for the plaintiff, it is important for victims and their advocates to understand that the civil law is not simply a weakened or lesser version of the criminal law. Tort actions can present familiar and unfamiliar problems for the plaintiff (Bublick, 1999).

In procedural terms, a tort action can take five or more years to complete at the trial court level alone. This delay and the resultant long-term interaction with the defendant can be emotionally difficult for victims, impeding the healing process and forcing them to relive the memory and keep the details of the assault fresh in their mind (Shuman, 1993). (It is important to note, however, that non-tort civil remedies such as workplace, housing or educational accommodations may be implemented more speedily). Moreover, because discovery in civil actions is very broad, the defendant may be entitled to discover all sorts of personal information about private facets of the victim's life, including her sexual relationships (Bublick, 2006).

Another important practical hurdle is victims' access to legal representation. Private attorneys represent many victims but they are most interested in helping plaintiffs who will be sympathetic to juries and thus more likely to prevail. Attorneys may be concerned about taking cases in which the victim used drugs or alcohol, was raped by an acquaintance, or did not suffer damages in ways that were immediately visible to others after the attack (Kuniholm, 2006). Even if an attorney believes that the victim can prevail, other factors may limit access to representation. Lawyers who represent victims on a contingent fee basis typically only accept cases where there is a good likelihood of financial recovery. If a suit does not promise significant financial recovery, it can be difficult to pursue a suit even if it promises vindication for the victim. A civil lawsuit is very expensive for a victim who has to bear the full cost of litigation.

The challenges of access to legal representation are compounded for poor and low income victims. Representation by legal aid programs (which have done an admirable job advocating for victims in the domestic

violence arena) is virtually unavailable for most sexual assault victims. Federal restrictions prohibit legal aid programs from litigating most tort cases. Although these programs are allowed to represent sexual assault victims with respect to other civil legal remedies, only a handful of legal aid offices screen for or prioritize services to victims of non-intimate partner sexual assault, who comprise the majority of sexual assault victims. Civil lawyers funded by Legal Assistance to Victim grants awarded by the Office on Violence Against Women face similar restrictions on tort representation (Kanter, 2005).

In terms of the substantive legal rules for recovery, tort actions pose difficulty for victims on familiar issues like consent. However, some hurdles are unique to tort actions. For example, many jurisdictions now have comparative responsibility systems which ask juries to compare the responsibility of the perpetrator, any third parties and the victim. In these jurisdictions, a jury might assign 92% of the responsibility for the attack to the rapist, 3% of the responsibility for the attack to the third party and 5% of the responsibility to the victim herself (*Ozaki v. Association of Apartment Owners*, 1998). In other jurisdictions, the victim can be assigned a percentage of fault only with respect to third parties and not the perpetrator. In both types of jurisdictions, the legal rules permit juries to assign victims percentages of the responsibility for the attack. The rules have sparked occasional public uproar, as in a recent case in which the Stamford Marriott alleged the fault of a victim who was raped in her car in a parking lot in front of her two young children (Marriott Hotel, 2009). However, this public outcry has yet to change, in legislatures or in courts, the actual legal doctrines employed in these cases. In many cases juries have assigned victims large shares of responsibility for the attack, even in the case of child plaintiffs (*Beul v. ASSE Intern., Inc.*, 2000) (16 year old German girl was assigned 41% of responsibility for harm from statutory rape by father of the host family). Victim or plaintiff “no-duty” rules have been proposed as a method to prevent judgments that blame the victim (Bublick, 1999). However, this idea is just beginning to be considered by and adopted in tort cases. (*Christensen v. Royal School Dist. No. 160*, 2005, p. 288) (“we hold that as a policy matter children do not have a duty to protect themselves from sexual abuse”).

In courts that ask juries to assign victims percentages of responsibility for the attacks committed against them, therapeutic consequences to the victim of an assignment of fault must be considered. Attributing blame to victims for their own assaults could well contribute to post traumatic stress disorder (Koss & Figueredo, 2004). Another concern of comparing the responsibility of all parties is that if large percentages of responsibility are assigned to the perpetrator, third-parties who are also at fault in the attacks will be assigned only a small share of the damages, even if the perpetrator cannot pay his share. As a result, the victim is left uncompensated. A number of other defenses raise frequent issues. For instance, tort statutes of limitations are particularly short for intentional torts and present issues for victims who do not file actions quickly. (For a list of tort statutes by state, see [http:// www.statutes-of-limitations.com](http://www.statutes-of-limitations.com)).

Issues about insurance coverage also frequently arise in tort cases. Victims typically cannot seek insurance coverage in actions against a perpetrator for sexual assault because insurance policies generally do not cover intended harms. However, insurance coverage is available in some actions against third parties (Bublick, 2006).

Issues of privacy and confidentiality are frequent concerns for sexual assault victims (Seidman & Vickers, 2005). Victims report that they are more concerned about others finding out about the assault than they are about getting pregnant or a sexually transmitted infection (National Center for Victims of Crime, 1992). The tort law presents many challenges in the area of privacy from the range of discovery permitted regarding the plaintiff’s activities, to possible disputes over the availability of pseudonymous filing, to judicial decisions that can make public certain facts of the case.

Finally, the filing of a tort case prior to a criminal action may compromise the success of an existing criminal case against the perpetrator. Although tort compensation is analogous to restitution in a criminal proceeding, defense attorneys and media may use the existence of the tort suit to undermine the victim’s credibility by portraying her as a person seeking financial gain from her accusations (Lininger, 2008).

Conclusion

An increasing number of victims are seeking tort remedies for sexual assault. To bolster this trend and ensure positive outcomes for victims, lawyers and advocates must not only track substantive litigation outcomes in terms of cases won and dollars collected, but must also confer with victims who have pursued these actions and assess the outcomes in terms of the victims' overall well-being. At the same time, it is important for victims, as well as lawyers and advocates, to remember that many remedies and accommodations are available to sexual assault survivors, including other civil causes of action that do not fall under tort claims (Mindlin & Vickers, 2007).

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Ellen Bublick with contributions from Jessica Mindlin

Civil tort claims are claims that seek financial compensation for wrongs that have caused injury. Tort claims brought by victims of sexual assault have recently been increasing at an exponential pace. These claims can be pursued against perpetrators as well as additional defendants known as third parties. A tort claim can be filed against a perpetrator regardless of whether there was a successful or unsuccessful criminal case, or no criminal prosecution at all. Third-party defendants can include businesses, landlords, school administrators, bus drivers, placement agencies, Boy Scout leaders, foster parents, religious institutions, hospitals and treatment centers, among others. Litigation against third parties concerns their responsibilities to use reasonable care to protect against foreseeable sexual assault. For example, a nursing home or care facility may be sued for negligent hiring if it hires an employee with a history of criminal or sexual misconduct to care for a vulnerable patient. Similarly, a cable company may be at fault for ignoring a complaint that an employee who regularly enters customers' homes abused a customer during a previous home visit. Failed security precautions can involve discrete problems such as a broken door lock or invoke broader policy questions such as an allegation that the defendant failed to appropriately train staff, parents or children to recognize and properly react to signs of sexual abuse.

Although there have been no U.S. studies of the therapeutic consequences of tort claims filed by sexual assault victims, research from Canada reveals both therapeutic and anti-therapeutic outcomes of these actions. Most claimants reported some negative emotional consequences from the litigation process, and in particular, from delay and adversarial cross-examination. Positive consequence of the litigation included victims feelings that they were well represented by their lawyers, achieving satisfactory financial compensation, and experiencing a feeling of closure from the litigation.

Benefits of tort actions include the fact that the victim, as a plaintiff, controls many important decisions in the litigation including whether to file a case, proceed with it, settle the case or pursue further action. Moreover, civil cases require a lower burden of proof than do criminal cases (typically "preponderance of the evidence" or "clear and convincing" in civil cases as contrasted with "beyond a reasonable doubt" in criminal law). Legal rules in tort are also more fluid and offer broad protections. Through the civil litigation process, the victim can reach a settlement of the case that includes financial and other terms. For example, the parties may agree that the perpetrator must transfer jobs or schools or attend counseling.

However, tort actions can also present problems for victims. Tort actions can take a number of years to conclude. Broad rules about exchange of information between parties may threaten victim privacy and access to legal representation can be difficult. Moreover, legal doctrines can make recovery difficult. For example, not only can defendants claim that the victim consented, but they can also claim that the victim herself was at fault. While victim fault defenses have occasionally sparked public outcry and scholars have proposed that they be changed, these defenses hold sway in most states.

Accordingly, victims and advocates should consider tort cases as one viable option for victims but must examine the advisability of suit in light of a number of contextual factors.

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