Community Legal Assistance Society

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Assessing and Advising on Tort Claims based on Sexual Assault[1]

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Introduction

An assault is causing someone to fear bodily harm. It need not include actual touching.

A sexual assault is an assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated.

Battery, which does require actual touching without consent, is actionable without proof of harm (*T.O. v. J.H.O.* 2006 BCSC 560)

In addition there are other related torts:

- Intimidation
- Intentional Infliction of Mental Suffering
- Malicious Prosecution
- Breach of Privacy
- Defamation
- Internet Harassment
- False Imprisonment
- Breach of Fiduciary Duty

In *Ahluwalia v. Ahluwalia* 2022 ONSC 1303 the court recognized a new tort of family violence. This case involved rather exceptional circumstances and this new development may or may not survive on appeal.

If the sexual assault/battery or other tort occurred in the context of a common-law or marital relationship the claim for damages should be included among the relief sought in the family law proceeding and not as a separate lawsuit.

[1] This paper is prepared for Community Legal Assistance Society as a resource for the roster lawyers of the legal advice for sexual assault service and SHARP Workplaces legal advice clinic.

Initial Contact

Initial contact may be made by the victim or by their parent, sibling or spouse. However well-intentioned the caller it is key that the actual victim initiate a contact, both to ensure the accuracy and completeness of the information, and to confirm that taking this step is what they want to do. It is important for sexual assault survivors to make their own choices and engage with you directly. Well-intentioned family and friends are not helping a survivor take their own power back. Indeed they are often pushing for them to take steps before they are ready to do so. So while providing some preliminary information may be helpful, early on it is important to clarify that the survivor must be the one to make contact and make decisions about what they want to do.

An exception is of course a call from the parent of a young child. Generally parents should be advised against taking any legal steps while their child is a minor. This is because many of the effects of sexual abuse and assault do not manifest themselves until the survivor is engaged in intimate relationships, and/or in the workplace. As a result it is not possible to know what the long term effects of the sexual assault(s) will be, and therefore it is not possible to quantify damages. In addition, it is important for the survivor to exercise control over the process, something that can't be done until after the age of majority. Even teenagers should be discouraged from bringing a claim until later in life; they have enough going on in their lives without the disruption and very personal probing involved in a civil claim. An exception to this advice would be where the perpetrator is likely to die or to leave the country (with their assets).

It may be helpful to consider whether there is evidence, typically in the form of records, such as medical records, school records or social worker records which can be collected and preserved so as to be available to the survivor in the future.

Early Screening

It is advisable to do some screening early on to determine whether there is any benefit to the survivor providing all of the details of the incidents at this early stage. It may be that a few questions will elicit a determination that a lawsuit is not practical or not advisable for some months or years, or ever. It is important to be realistic about the prospects of a successful outcome. The financial and emotional costs of civil claims for damages for sexual assault/abuse are significant and false hope is not a benefit to the client. Nor is passing them on to another professional to whom they will have to again tell their story with the same outcome.

Survivors will often say that they don't care about the money, but they just want him to recognize what he has done. 98% of abusers will never recognize, acknowledge or take responsibility for what they have done. In seeking this outcome the survivor is continuing to

give up their power to the abuser; looking to the abuser for the answer to their loss. Similarly, apologies from sexual abusers are also empty; they will provide them where they believe it is in their interests to do so.

Compensation

One of the early questions is whether the perpetrator has the funds to pay a settlement or a judgment, and/or whether there is an institution which may be found vicariously liable for the perpetrator's sexual assaults.

It is important not to underestimate:

(1) The costs of bringing a civil claim. Even where a lawyer will take it on a contingency fee basis, disbursements will usually be between $5000 and $15,000. While expert evidence is not strictly necessary to prove the nature and extent of psychological injuries, it is highly advisable to obtain and adduce a report from an independent psychologist or psychiatrist. Sadat I v. Moorhead 2017 SCC 28; T.O. V. J.H.O. 2006 BCSC 560.
(2) Note that Legal Aid BC used to provide funds for disbursements in civil cases, with the proviso that they be repaid when the claim succeeds, but this was abolished. There are companies which will fund disbursements at a very significant cost, but some lawyers will not agree to have any dealings with them and have a term to that effect in their contingency fee agreements. Some lawyers will agree to carry disbursements until the conclusion of the case.
(3) The difficulty, expense and delay involved in collecting on a judgment, particularly where the defendant does not own real estate in B.C.

Consider whether the perpetrator's employer may be vicariously liable to the plaintiff. This will depend on the features of the employment relationship created by the institution and the extent to which they contributed to the ability of the perpetrator to carry out the wrongful behaviour. Consider first whether there is legal precedent for vicarious liability arising out of the role of the perpetrator. If not the relevant factors may include, but are not limited to, the following: (a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims to the wrongful exercise of the employee's power. *Bazley v. Curry*, 1999 CanLII 692 (SCC), [1999] 2 SCR 534, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of B.C.* 2005 SCC 60.

Note that this is not a child-centred perspective. While children may see all adults in schools, sports clubs, churches, etc. as persons in authority, the courts will look at the role conferred on the adult by the institution. It is also worthy of note that these lines are shifting somewhat, and that cases will depend on their facts.

Consider whether there is a basis for a claim in negligence. Is there a person or entity which had a duty of care to the survivor and breached that duty of care? To establish liability in negligence it will likely be necessary to provide that the person or entity knew or ought to have known of the danger posed by the perpetrator, or by the circumstances in which they placed the survivor. In historical abuse cases courts will not impose a 21st century lens on the question of what the institution or person ought to have known.

Concurrent Criminal Proceedings

Callers will sometimes ask whether they should make a report to the police. This depends on what they want to accomplish. If they want the perpetrator exposed and prevented from having access to other vulnerable people, and perhaps even be incarcerated, these can only be provided in the criminal system, with the caveat that this result is statistically unlikely. If they would be satisfied with holding him to account to them, and making him pay compensation, then the civil system is likely a better option.

Where a police report has already been made, civil proceedings should not be commenced until the criminal proceedings, including sentencing and any appeals, have been brought to a conclusion. The reasons for this are:

1. There is no effective way to ensure the disclosure required in a civil case, e.g. medical and counselling records, does not seep into the criminal proceedings, effectively providing the defence with more personal information then they would normally have access to; and
2. Initiating a lawsuit or sending a demand letter provides the perpetrator with a basis to argue that the allegations have been made for a financial reason.

Criminal Victim Assistance Program (CVAP)

One of the benefits of making a report to the police is having access to CVAP. It is not necessary for there to be a conviction or even a prosecution for someone to access this program. The program provides funding for counselling and for any fixed expenses incurred as a result of the criminal act. Note that the amount provided for counselling is much less than the great majority of counsellors charge. It is often difficult to find counsellors who are available, and even more so at the low CVAP rate.

Where an action is started seeking damages arising from that criminal act, the plaintiff is obliged to notify CVAP and likely to repay some or all of the benefits received.

Residential Historical Abuse Program

This is now administered by the various health authorities. The program funds counselling for anyone who experienced sexual abuse while under the age of majority and in the care of the provincial government. There is no requirement that a report be made to the police, or that "proof" be provided. It is only necessary to have been in the care of the government, be it a foster home or any other government operated institution.

Workplace Sexual Assaults

Where someone is sexually assaulted in their workplace it is advisable to file a WorkSafeBC claim. Coverage should include wage loss and other related expenses, including therapy, and, in some circumstances, retraining. A WorkSafeBC claim may still permit the survivor to proceed with a claim against the individual perpetrator, although the benefits paid out may have to be repaid from the proceeds of the lawsuit. WorkSafeBC has a sensitive claims unit and survivors should be advised to request that their claim be directed to that unit.

Consideration should also be given to whether it is advisable to advance a human rights complaint, although that is beyond the scope of this section.

Limitation Issues

In B.C. there is no limitation period for claims arising from sexual assault, or from sexual misconduct against a minor. There is also no limitation period for assault and/or battery against a minor or against a person who is in an intimate and personal relationship with the perpetrator, or who is in a relationship of dependency with the perpetrator. *Limitation Act S.B.C. c. 13, s. 3(i),(j),(k)*

Bans on Publication

A common concern of potential plaintiffs is the extent to which their identity as persons who have experience sexual assault or abuse will become public. In the criminal process a judge must order a ban on publication of information that could identify the complainant if asked to do so.

In the civil proceeding a ban in those same terms can be applied for when the claim is filed. It is advisable to have the ban track the words used in the Criminal Code, as media outlets are very familiar with those terms. Indeed where there is a ban in the criminal proceeding a ban in the civil case should follow or it is difficult to see how any publication in relation to the civil

proceeding would not violate the terms of the ban in the criminal proceeding. This was noted by Justice Gray in *A.B. v. C.D.* 2022 BCSC 2145 who ordered a ban on the identity of the schoolteacher abuser and the school district where the abuse took place to ensure that the terms of the criminal ban were strictly complied with.

It is not advisable to include a provision that the ban expires at any time. Should plaintiff later decide that they want to lift a court-ordered ban they can bring an application to do so. On the other hand a built-in expiry may place the perpetrator in a better position to argue that it should not be extended. The Court of Appeal in *B.G. v. The Queen in Right of B.C. 2004 BCCA 345* overturned the decision of a trial judge to set aside a ban on publication after the case was dismissed. The Court recognized the "chilling effect the prospect of termination (of a ban on publication) might have on those pursuing similar civil claims for historic sexual abuse."

The registry should be advised when the Notice of Civil Claim is filed that an application for a ban on publication is being made. The best practice is to ask the registry to hold onto the file while counsel goes up to chambers to speak to it (before a judge). The draft order is then signed by the judge and entered, and the ban noted on the front of the file. A sealing order is more difficult to obtain and will generally not be necessary to protect the identity of the Plaintiff.

If the matter is settled without the commencement of proceedings then it will usually be the defendant who is seeking protection of his identity. In that case it is up to the survivor whether she is agreeable to including that term in the settlement. If she agrees but then seeks to renege, the other party has remedies in contract.

Demand Letters

There may be circumstances in which counsel is not prepared to take a case on a contingency fee basis, or where a client does not want to commit to a civil claim, but wants to confront the abuser by a letter and seek payment from him. It is very important that this letter be written by a lawyer so that there can be no danger that the client will stray into a communication which can be considered to constitute the offence of extortion. It is not permitted to threaten to make a criminal complaint if the abuser does not meet the demand.

Best practice is to set out in the letter a detailed description of the incidents of assault/abuse and the impact those actions have had on the client. Reference to the heads of damage and some supporting case law for the amounts of the potential claim can also be helpful. It is useful to assume that the demand letter will make its way to a lawyer, so it should be drafted in such a way that the abuser will feel exposed by seeing their actions in black and white, and the lawyer will find the claim convincing. Serving the letter personally is likely to persuade the perpetrator that the matter is serious, with potentially significant consequences.

It is advisable to take into account the abuser's ability to pay; there is no point sending a demand letter seeking $500,000 where it is obvious that they have no means to pay that amount, but they could potentially pay $100,000. If an abuser says that they want to pay but do not have the means to pay the amount demanded, it is a good idea to require them to make a Statutory Declaration setting out their financial circumstances.

A demand letter does conclude with the assertion that if payment is not made a civil claim will be brought. The cost of that, and the public exposure, are the reasons why an abuser will sometimes agree to the payment sought, or at least enter into negotiations.

It is often advisable to start with a demand letter before initiating a civil claim, although an exception to that would be where there is a concern that the abuser may take an opportunity of that notice to move assets.

If the lawyer does not want to take the case on a contingency fee basis, it is reasonable to do a limited retainer, either on an hourly rate or a contingency fee basis, to prepare and serve a demand letter, and to negotiate any resulting settlement. It is not reasonable to charge the same percentage for this kind of limited retainer as for the much greater risk of taking on a lawsuit; nor is it reasonable to take the case on a contingency basis and drop it when a demand latter does not result in a settlement.

<u>Pleadings – Heads of Damages</u>

- Heads of damages

    - general damages;
    - aggravated damages;
    - punitive damages;
    - special damages;
    - past loss of earnings
    - loss of future earning capacity;
    - loss of an interdependent relationship
    - the recovery of the past and future costs of health care services attributable to the Sexual Assaults pursuant to the *Health Care Costs Recovery Act*
    - an order prohibiting publication of the name of the Plaintiff or any information, which would tend to identify them;
    - costs; and
    - interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79,

Pleadings – Checklist of Injuries

The following list includes injuries caused by sexual abuse/assault. No survivor will have experienced all of these injuries, but all will have experienced some of them:

a) the relationships between the Plaintiff and their parents and siblings have been harmed;
b) the Plaintiff has suffered from loss of some of her memory of childhood;
c) the Plaintiff has suffered post-traumatic stress disorder;
d) the Plaintiff has impaired ability to trust other people and to form or sustain intimate relationships;
e) the affections between the Plaintiff and their family have been alienated;
f) the marital relationship(s) of the Plaintiff has(have) been impaired;
g) the Plaintiff has suffered from addictive behaviour, including drug and alcohol addiction;
h) the Plaintiff's feelings about her pregnancy, birth and parenting have been affected;
i) the Plaintiff has suffered from social isolation;
j) the Plaintiff has engaged in high risk sexual behaviour;
k) the Plaintiff has had ongoing difficulties with people in authority;
l) the Plaintiff's education was interrupted;
m) the Plaintiff has suffered continuing humiliation and embarrassment;
n) the Plaintiff has suffered from an inability to concentrate;
o) the Plaintiff has suffered from an inability to express emotions;
p) the Plaintiff has suffered from depression and anxiety;
q) the Plaintiff has suffered suicidal periods and periods of self-harm;
r) the Plaintiff has suffered headaches and other physical pain;
s) the Plaintiff has suffered from eating disorders;
t) the Plaintiff has suffered from sleep disorders; rem
u) the Plaintiff was not able to undergo healthy and normal emotional and sexual development;
v) the Plaintiff has an impaired ability to experience sexual enjoyment;
w) the Plaintiff has suffered from periods of uncontrollable anger;
x) the Plaintiff has suffered from feelings of lack of self-worth and low self-esteem;
y) the Plaintiff continues to fear the Defendant;
z) the Plaintiff has suffered from body dysmorphia;
aa) the Plaintiff has suffered from a lack(loss) of an interdependent relationship.

Health Care Costs

The *Health Care Costs Recovery Act* obliges a plaintiff to plead a claim under this Act and to notify the Ministry of Health of their claim, and not to enter into a settlement which releases a defendant from liability under that act. The plaintiff is required to notify the Ministry of an upcoming mediation or trial. The Ministry will then review its records of the medical services provided to the plaintiff which they determine are causally related to the sexual assault and will quantify their claim. The Ministry asserts that the monies are only recoverable from the defendant, and that the plaintiff gets paid out first, but their claim is a factor, and potential obstacle to negotiations. The Ministry keeps no records of how much it recovers from sexual

assault and abuse claims so there is no way of knowing whether the extra time and trouble involved in addressing these claims generate any value. Plaintiff's counsel can claim a fee which is 15% of the money recovered under the HCCRA, should they feel comfortable doing so.