

LEGAL PROCEEDINGS: CIVIL OR CRIMINAL?

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Sometimes legal proceedings can be an important part of a survivor's healing journey. As a civil lawyer, I am often asked by clients whether it is better to pursue criminal charges or a civil lawsuit. I will attempt to provide an overview of civil and criminal proceedings and highlight the pros and cons of each in the context of historical abuse cases.

Criminal Prosecutions

The purpose of criminal prosecutions is to punish the criminal. The parties to the criminal case are Her Majesty the Queen (the Government) against the accused individual. The burden is on the Crown to prove beyond a reasonable doubt that the accused person has committed a crime. It is a very high burden of proof. The criminal case proceeds in two stages. First, the Court has to determine whether the defendant is "guilty" or "not guilty". The accused person can plead guilty. This is often done as part of a "plea bargain". A plea bargain occurs when the accused person agrees to plead guilty in exchange for a reduced sentence or fewer charges. If the accused pleads not-guilty, a trial is held to determine guilt. At a trial, witnesses are called, documents are marked as exhibits and ultimately the judge or jury determines whether or not the accused is guilty. If the accused is not guilty, the case ends at that point. If the accused is found guilty, in most cases, they will be convicted and then a sentencing hearing occurs. At sentencing, both the accused person and the Crown have the right to make submissions to the Court on what is the appropriate sentence. At this point, victim impact statements can be done. These statements give the victim the opportunity to tell the court how the crime has affected them. In a criminal case based on historical abuse, the Crown may request a publication ban. Such requests are often granted. Publication bans prevent publication of the victim's name or identifying information. There are no time limits for prosecuting crimes.

Pros

In criminal cases, the police conduct the investigation and the Crown conducts the prosecution all at no cost to the complainant/victim. The complainant's role is minimal, they are simply a

witness for the Crown. The complainant does not need to hire his or her own lawyer. If the accused person is convicted, there can be vindication, justice, healing, closure, etc.

Cons

Because the complainant is not a party and has no right to legal representation, the complainant can feel somewhat “outside “ of the process. However, we now have the Victim’s Bill of Rights which includes the right to be informed to the proceedings and other rights. We also have Victim’s Services Offices which offer some support services to victims going through criminal proceedings. Obviously, if there is no conviction this can be extremely invalidating for the abuse survivor. However, judges do not often find that complainants have lied, rather they are more likely to find that the high burden on the Crown of proving the case beyond a reasonable doubt has not been met.

Civil Proceedings

The purpose of a civil proceeding is to provide compensation for harm done to a plaintiff. The parties to a civil lawsuit are the individual plaintiff against the individual defendant(s) and/or institution. There is a lower burden of proof in a civil case. In a civil case the plaintiff needs only to prove their case on a “balance of probabilities”, meaning more likely yes than no (i.e., 51%). This is a much lower burden of proof than in criminal cases. Like Criminal cases, Civil cases also proceed in two parts. Firstly, the court will determine liability or legal wrongdoing. If there is a prior criminal conviction it is admissible as proof that the accused person did what they were convicted of doing. It is still possible to get a finding of civil liability without a criminal conviction. This is what happened in the O.J. Simpson case. He was found non-guilty in the criminal case and liable in the civil case.

If there is an institution involved, this adds an additional liability question. Meaning, even if the plaintiff proves the abuse happened, they must also establish that the institution is liable for it. There are two ways an institution can be liable, i.e., vicarious liability and negligence. Vicarious liability is automatic liability imposed by law regardless of any wrongdoing on the part of the institution. Vicarious liability is imposed in certain cases depending on the extent to which the employment gives the perpetrator the power to abuse the child. So far, vicarious liability has been imposed in residential group home cases, residential school cases, and in church cases.

Some courts have imposed vicarious liability in public school cases, others have not. The law is still evolving in the area of vicarious liability for sexual abuse by employees. Even if there is no vicarious liability, institutions may also be liable for abuse committed by their employees if they have been negligent. Examples of institutional negligence could include failing to check references, failing to properly supervise or monitor employees, failing to respond to complaints, etc.

If liability is not found, the civil case ends there. If liability is found the Court will award damages. In civil sexual abuse cases typically damages are awarded for pain and suffering, past or future therapy costs and sometimes loss of income. In my experience, most plaintiffs bringing civil cases are not doing so just for the money. Rather, plaintiffs' goals include being heard, holding the defendant to account, a transfer/shift of blame, justice, healing, closure to name a few.

Another important difference between civil and criminal cases is that in a civil case the plaintiff must enforce his/her own judgment. If the defendant does not have sufficient money or assets to pay, a civil judgment may be worthless (i.e., you cannot get blood from a stone).

In civil cases courts will usually allow plaintiffs the right to proceed by way of pseudonym or initials. If the defendant objects to this procedure, the plaintiff may need to have expert evidence prove that he or she will be psychologically harmed if their identity is disclosed.

There are time limits for suing. The basic limitation period is two years. However, the two years will not start to run before the plaintiff turns 18 years of age. Also, in sexual assault cases, the commencement of a limitation period is postponed during any period when the plaintiff is not psychologically capable of proceeding with a civil action, i.e. not ready to address the issues. There are other exceptions to limitation periods for civil sexual assault cases.

Pros

In civil cases, the plaintiff has a great degree of control over the process, the timing of the proceedings and decision making throughout. The plaintiff is instructing his/her lawyer throughout the action. The lawyer works for plaintiff. There is also the lower burden of proof and the opportunity to be compensated for damages. .

Cons

Civil actions can be lengthy and expensive if the defendant decides to fight. Some lawyers work on contingency meaning you only pay them if they win. Civil cases can be settled at any time if both parties agree to an out of court settlement. Most sexual abuse cases are settled out of court.

If an abuse survivor decides that a legal proceeding will be a constructive part of the healing process, he/she would be wise to seek the advice of a lawyer with experience litigating these types of cases.

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