

Scottish Women's Rights Centre

Response to the Justice Committee's call for evidence on civil actions for damages in respect of rape or other serious crimes.

09/02/18

How common it is for a rape victim in Scotland to raise a civil action for damages (against the alleged perpetrator) where there has not been a successful criminal prosecution? Information relating to other parts of the UK would also be helpful.

It is extremely rare for rape victims in Scotland to raise a civil action for damages where there has not been a successful criminal prosecution.

January 2017 saw survivor Denise Clair bring the first civil action for rape since 1926 in a landmark case against David Goodwillie and David Robertson after the criminal prosecution was dropped by the Crown in 2011. The case received considerable media and public attention and prompted discussions about failures of the criminal justice system and the potential in civil action in helping survivors to secure justice.

Since then, the Scottish Women's Rights Centre (SWRC) has had queries from a number of rape survivors considering this option and is currently preparing such a case for proof in March 2018. It is involved in the preparation of a further two cases.

Rape Crisis Scotland (RCS) have similarly noted an increase in survivors enquiring about civil actions. We believe that that publicity around the Goodwillie case has indicated this as a possibility to survivors who feel let down by the criminal justice process, where there are significant barriers to prosecuting rape cases.

How common it is for a victim in Scotland, of another serious crime, to raise a civil action for damages in such circumstances? Again, information relating to other parts of the UK would also be helpful.

In our experience, this is not a common step for victims to take. This is for a multitude of reasons which include lack of awareness, access to specialist legal services, costs, time limits, the personal impact of taking such case and the likelihood of enforcing any successful action against a perpetrator. This is a specialist area of law requiring specialist legal services. These exist in Scotland but are more widespread in London.

What are the main reasons why a victim of rape or other serious crime might wish to raise a civil action for damages in such circumstances (e.g. to establish the facts and/or obtain financial compensation)?

There is a gap between women's experiences of violence and abuse and their access to justice; this disparity leaves many victim-survivors of abuse dissatisfied by the criminal justice system. Rape remains under-reported and the numbers of successful convictions disproportionately low. Barriers to accessing justice for rape survivors are many.

In our experience most women consider the possibility of civil actions to seek acknowledgement of what happened to them and that it was wrong. Their motivations are rooted in the poor outcomes and experiences of survivors throughout the criminal justice system; they seek justice.

There are procedural particularities with our criminal justice system which can create the need for a civil action. For instance, in our experience, the existence of a not proven verdict can create a significant feeling of injustice particularly where the jury has been split. For other women, the case has not been prosecuted and they do not understand why. This last point reflects the loss of agency and control experienced by a woman throughout the criminal justice process and is a common complaint through the SWRC. Women have no standing in the criminal justice process and many women complain about the lack of information and loss of control caused by the process. Women do not understand why certain evidence was not investigated or presented in the criminal case. They complain about their treatment throughout the process at all stages. This compounds and worsens their experiences increasing trauma and their feelings of injustice and loss of agency. Many tell us that the criminal justice process can cause just as much damage as the crime itself.

A civil action therefore gives women back agency of what has happened to them. It gives women ownership of what has happened to them. They have the ability to present their case in the way they think it should have been. It brings back agency and control often lost through being the victim of a crime and the subsequent process. It ultimately facilitates empowerment which is significant for women in regaining control and moving forward in their lives. This is more often or not more important than any financial compensation.

Financial compensation is often relatively inconsequential to their decision making process and whilst damages might be awarded, there are risks in being able to enforce the award depending on the financial circumstances of the perpetrator. Furthermore, legal expenses will be clawed back from any award.

It is furthermore not possible to financially compensate someone for such a crime.

Whilst civil action opens up a possible option to those survivors failed by the criminal justice process we're clear that it does not hold the same consequences for perpetrators and cannot be considered a suitable 'alternative' route. This conversation is important but should not detract from the reforms to the criminal justice system that we know are necessary to ensure that it is fit for purpose.

What are the current barriers to a victim bringing a civil action for damages (including financial and evidential considerations) and whether those seeking to bring civil actions should have more help to do so?

Lack of awareness is the first barrier. Following the Goodwillie case and press attention around our case, we see an increase in advice requests in this area. Women talk about feeling encouraged and motivated by such action and the fact that there is a specialist service which can provide advice and representation in this area.

There are many other serious barriers to the pursuit of civil action for damages for rape survivors, notably the cost of doing so and the risk of costs being awarded against them. For this reason, they are most unlikely to be able to bring a civil action unless they are in receipt of Legal Aid. Given eligibility for legal aid is partially based upon the ability of the accused to be able to pay the damages, this is a considerable obstacle for the majority of survivors. It is notable that Goodwillie and Robertson are both professional footballers so the Denise Clair case was able to meet this test.

While the balance of proof is different to the criminal justice process and the case is heard by a judge rather than a jury, the process itself does not lend protection to complainers. This is probably in part related to the fact that civil damages actions for serious crimes is not common and therefore standard procedures have not been adapted for the civil court process. As it stands survivors of rape bringing civil damages cases may be cross examined by the defender if he represents himself. This does not happen in criminal trials and should not be allowed in civil trials. Survivors of sexual crimes who are going to trial through the criminal process consistently describe fear and humiliation at having to recount their abuse with the perpetrator present. Fear of a potential trial is often a barrier to survivors reporting their experience in the first place. We support the decision made by Lord Armstrong that it would not have been appropriate for Goodwillie to cross examine Denise Clair, we consider that this would have been unnecessary and re-traumatising. It is not clear how the use of sexual history and character evidence would be treated.

Furthermore, the issue of anonymity remains unclear. In criminal trials this is granted by convention but given there have only been two civil damages cases for rape in Scotland it is not a given that such convention applies to civil process. This would be a significant barrier to most survivors.

Are there any lessons criminal justice bodies should take from instances where there has been a successful civil case but no criminal prosecution? The Committee is, of course, aware that there are important differences between the two systems (e.g. in relation to the standard of proof).

The main reason that criminal cases do not proceed or do not end in conviction is the requirement for corroboration. Corroboration is notoriously difficult to achieve for sexual

crimes where there are usually no witnesses and where it is not uncommon to delay reporting due to the impact of trauma or for other valid reasons. The standard of proof required in civil cases means that it is more likely that a case will proceed than in the criminal justice process for this reason. We believe that reviewing the requirement for corroboration could have a significant impact on the number of rape cases reaching trial.

The not proven verdict in criminal trials is used more commonly in rape and attempted rape trials than for any other crime. Around 15% of rape cases end in a not-proven verdict which is seen by some as being less damaging to complainers than a not guilty verdict. This is a falsity, an acquittal is an acquittal and is always damaging. The removal of the not-proven verdict would be clearer for juries reaching their verdict. It is worth noting that civil damages cases are heard by a judge not a jury. It is possible that their experience of the justice process and understanding of witnesses credibility means that they are less likely to hold views that may be common in relation to rape myths.

What is the support available to victims of rape and other serious crimes where there is no criminal prosecution?

Sexual crimes have a devastating and lasting effect. It is possible to recover from such trauma with specialised support from local and national services. It is of critical concern that survivors who have engaged with the criminal justice process say it was as bad as or worse than the attack itself. This is entirely unacceptable and it is impossible to underestimate the impact that this has on those who may wish to report. The RCS Advocacy Network provides specialised support, information and advocacy to survivors from reporting to verdict, the model should be resourced to support survivors undertaking civil action.

Specialised legal representation such as that offered by the SWRC should be resourced to take more civil damages cases and to use this experience to further build specialism in the civil damages process in relation to rape and to utilise this experience to influence policy. However, to truly close the gap between women's experiences of violence and abuse and their access to justice it remains a matter of urgency the criminal justice system is reformed.