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A Sexual Violence Survivor's Handbook

Chapter 10: The Criminal Trial



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Sexual Assault: The Criminal Trial

After charges have been laid in a sexual assault case and the first appearances in court have taken place, if the accused has plead “not guilty” to the charges, there may be a trial. This section explains what happens at the trial.

When Will the Trial Happen?

Unfortunately, there can be long delays in the court system. The trial should happen **6 months to 1 year after a preliminary inquiry**, or between **3 to 6 months if there is no preliminary inquiry**. Delays often happen because the court is busy and there is a backlog, conflicting schedules, unavailable witnesses or because the accused is trying to delay the trial as long as possible. Before the trial there will be at least one hearing to determine the date of the trial (the “set date”). Usually there are many more hearings than just this one.

Will There Be a Jury?

Many charges can be laid in a sexual assault trial; this is called “hybrid offences” meaning the Crown can proceed by way of summary conviction or indictment. Summary conviction usually happens when it is a first offence for the accused. There will be no jury and the case will proceed directly to trial once the accused has entered a plea of not guilty. If the Crown goes by way of indictment, which is often the case when the crime is more serious or the accused has a lengthy record for similar offences, **it is the accused’s choice whether there is a jury or not.**

What Is the Order in Which Things Happen at the Trial?

- 1. Jury selection** (if there is one). The accused chooses whether they want to have a jury.
- 2. Pre-trial motions** (these are used to decide on specific issues related to the trial, such as if certain evidence should be allowed to be heard, if a witness can testify or tell their story in court etc).
- 3.** The Crown makes its **opening statement** to the court.
- 4. Examination-in-chief** of Crown witnesses. The Crown calls its witnesses to testify.
- 5. Cross-examination** of Crown witnesses. The Crown witnesses are questioned by the defense.
- 6. Re-examination** of Crown witnesses. The Crown may re-question its witnesses.
- 7.** The defense calls its **witnesses** (if any).
- 8.** The Crown **cross-examines the defense witnesses.**
- 9.** The defense may **re-examine its witnesses.**
- 10.** Each side gives its **closing statement.**
- 11.** The **judge “charges” the jury** (if there is one). This is when the judge explains the law to the jury.
- 12.** The jury or judge alone delivers the **verdict.**

What Is Cross-Examination?

During a trial, both sides have the chance to ask questions of each other's witnesses. The defence lawyer will try to convince the judge or jury not to believe you or to try to show that your version of events is less believable than the accused's version. This usually involves trying to discredit you by asking many questions about the sexual assault and your character. Defence counsel also often tries to focus the Court on stereotypes or myths about consent and sexual assault to try to discredit you.

There are strict rules about what can and cannot be asked in a sexual assault trial, but defence lawyers sometimes try to get around those rules. A good Crown Attorney will interrupt inappropriate questions by objecting to them, and a good judge will tell you that you do not have to answer them.

The cross-examination is almost always the most difficult part of the trial. Here are some key things to remember when you are being cross examined:

1. Focus on what you know.
2. Do not lie about anything.
3. Say that you do not remember when you are unsure.
4. Do whatever it takes to make yourself feel comfortable: wear clothes that you like, speak slowly, drink water, pause, ask for a break. Some women find that it is helpful to focus on a support person in the court whom they know believes them.
5. Trust that the judge and/or jury will be able to tell the difference between the truth and dishonesty.
6. Try to remember that it is the defence lawyer's job to try to make you look bad.

What Is the “Criminal Standard of Proof?”

Because sexual assault is a criminal offence, it must be proved “**beyond a reasonable doubt**” that the accused committed the crime. This means that there can't be any other reasonable explanation for the crime; only that the accused committed it.

In a sexual assault trial, the Crown must prove three things:

1. That the accused intended to touch you (purposely touched).
2. That the accused knew you were not consenting or giving permission to what was happening.
3. That the act itself happened.

The accused doesn't have to prove they did not commit the offence; the Crown must prove that they did.

How Does the Accused Defend Themselves at Trial?

The following are the most common defences raised by an accused.

1. Defence lawyers tend to argue that the victim consented to sexual contact. This is probably the most common defence since most criminal charges of sexual assault are laid in circumstances where the victim and perpetrator know one another.
2. Defence lawyers sometimes argue that the accused had an “honest and mistaken belief” in consent. This means that, even though the victim did not consent, the accused honestly believed that they did.

What Does “Lack of Consent” Mean?

Lack of consent means that you did not want that person’s sexual advances, you didn’t accept the sexual advances, or you didn’t show a desire to engage in sexual activity.

The responsibility lies with the person who starts the sexual contact to make sure that the other person is consenting to the sexual activity. A lack of consent can be expressed by words or actions. Even if a victim doesn’t say “no” out loud, they can communicate it through body language. Submitting or agreeing to sexual contact out of fear is not consent. If someone coerces or intimidates you into agreeing to sexual activity, this is not consent.

A lack of consent is probably the most difficult to prove in a criminal sexual assault trial. It is hard to prove that a sexual assault occurred because there are generally no witnesses other than the accused and the victim. **The evidence generally consists of what the accused and the victim say happened.**

Not surprisingly, the two versions are often entirely contradictory, so the judge or jury must decide who is more believable. Because the criminal standard of proof requires that the Crown prove the charges “beyond a reasonable doubt,” **even if the court believes the victim, it must acquit the accused if it has a reasonable doubt that an assault took place.**

When the two people know each other, and even more when they have a prior sexual history, judges and juries might rely on myths and stereotypes about sexual assault and what a “victim” should act or look like. This is also the case in other circumstances: for example, where the victim is a sex trade worker or where alcohol or other drugs are involved.

What Is the Defence of “Honest and Mistaken Belief” in Consent?

This defence is raised if the victim says they didn't consent to the sexual activity and the accused says they thought the victim did. Criminal law is reluctant to send a “morally innocent” person to jail, so **if the accused says that, although they may have been wrong, they had an honest belief that the victim was consenting, and the court may not convict them.** This defence is especially common in cases where the accused and the victim have a prior sexual history and in cases where the victim was consenting to a certain amount of sexual activity and then wanted it to stop.

This defence must have an “air of reality” to be accepted by the court. This means the mistaken belief must be based on some evidence. For example, the accused could argue that they believed there was consent because the victim “invited them in” or “they took off their clothes”. This area of the law is problematic because it is so easy for courts to rely on stereotypes to determine that it was reasonable for the accused to believe that the survivor was consenting.

Will My Sexual History Be Brought Up in Court?

In the past, a complainant's sexual history was almost always a topic in court. Now, the law has changed, and sexual history should only be raised when it is relevant to an issue in the trial. For example, if the accused and the victim have a prior sexual history together, the accused may be able to enter details of that if they are relevant to the case.

Unfortunately, in some jurisdictions (depending on the judge, Crown Attorney, and defence lawyer), the victim's sexual history is still brought up at trial, even when it isn't relevant. Your local sexual assault centre can work with you to prepare you for this aspect of the trial.

Will Any of My Personal Records Be Used at the Trial?

This issue is referred to as “**disclosure**” or “**production of personal records.**” The defence can apply to the court to gain access to private records, such as diaries and doctor's or therapist's notes. If the defence makes a request for your personal records, they may be turned over to the judge, who will consider whether they are relevant to an issue at trial. The judge will then decide whether all or some parts of your records will be given to the defence.

Individuals reporting a sexual assault to the police should consider keeping information about diaries or therapy private in order to prevent the defence from asking for these records. If an application for production of your records is made by the defence, you and whoever created the records (e.g. your therapist), will be served with a court notice and will be given the opportunity to argue to the judge why those records should NOT be provided to the defence.

You may wish to hire a lawyer if this happens. Depending on your financial circumstances, you may be eligible for a legal aid certificate to allow you to hire a lawyer to represent you in this hearing.

What Happens to the Defendant if They Are Convicted?

A person found guilty of sexual assault may receive a penalty of **up to 10 years in jail for an indictable offence**, or **up to 18 months in jail for a summary conviction**. If threats or weapons were used or if the victim received serious injuries, the maximum penalties may be higher. **In most cases, someone who is convicted of a sexual assault does not go to jail.**

IMPORTANT TO NOTE, in most cases: Penalties are usually very minimal. Men found guilty of sexual assault, particularly first offenders, are often given suspended sentences or probation and sometimes even an absolute discharge, which means they will have no criminal record.

What Is a Verdict?

Following a trial, whether by judge alone or by judge and jury, there will be a verdict of guilty or not guilty. If the accused is found not guilty, the case is over. **Any conditions imposed on them (such as a requirement that they stay away from you) are no longer in place.** If they are found guilty, the trial moves into the sentencing phase.

How Does the Judge Decide on a Penalty?

If the defendant is found guilty, the judge will listen to arguments from both the Crown and the defence before deciding on the appropriate penalty.

- The defence may argue that the accused is a person of very-good character and may present witnesses to give evidence about this. Defence counsel will also argue that a jail sentence will have an undue negative impact on the offender's life.
- The Crown will argue about the importance of protecting society and will talk about the impact on you.

You will have the opportunity to submit a “victim impact statement” in which you can talk about the impact that the assault has had on you.

This statement will be given to the defence lawyer and, if they object to it, you will have to agree to be cross-examined during the sentencing hearing. If you are not prepared to do this, then the statement will not be provided to the judge.

You should not submit your victim impact statement until the accused has been found guilty. If you provide it to the Crown before or during the trial, it will be disclosed to the defence at that point. The defence will be able to cross-examine you on the statement before the trial is over. There may be a delay before sentencing to allow the two sides to prepare their arguments. As well, the judge may ask for a pre-sentencing report from a probation officer. This will indicate what type of person the accused is and whether there is a chance for rehabilitation.

Sexual Assault: The Criminal Trial

Source: Ontario
Women's Justice
Network

Sexual Assault and Civil Actions

Victims of sexual assault and other sexual offences can seek damages through **civil actions**.

Civil action seeking damages are civil lawsuits initiated by plaintiffs against defendants for alleged wrongful conduct. Depending upon the jurisdiction, there may be other remedies available for victims as well, such as criminal proceedings, criminal injuries compensation, human rights complaints, labour grievances, and public or private inquiries.

In human rights legislation, it is a discriminatory practice, and thus contrary to the law, to harass an individual on any of the prohibited grounds, including sex (see for example, Canadian Human Rights Act R.S.C., 1985, c. H-6, s. 14).

The civil justice system plays an important role to determine how society compensates various claims, such as claims of sexual assault and other sexual offences. A civil action will frame the issues and develop principles for compensation. In the past two decades, civil actions for sexual assault have become more frequent and hence, a body of case law has developed that provides guidance to lower courts when assessing non-pecuniary damages (**intangible losses such as pain and suffering**) for the impacts of sexual assault.

Civil and criminal law recognize that sexual assault has a harmful impact — particularly psychological and emotional harm — on victims, and potentially on family and friends of victims. Yet, despite years of court decisions, it remains difficult to quantify in monetary terms these intangible impacts. Aggravated or punitive damages may be awarded to punish the defendant and deter others from such actions. **If there has been a conviction in a criminal process, the sentence may be deemed to serve the punitive function.** Pecuniary damages are awarded for economic losses (e.g., lost wages, medical expenses, future loss of earning and future costs of care) with the goal of restoring the plaintiff to the same position they would have been in, had the injury not occurred.

All these damages, if awarded, are costs to the defendant. There are significant costs to both the plaintiff and defendant in civil actions and legal aid is available in only a few jurisdictions (BC, Alberta, Quebec) provided the applicants meet eligibility and merit criteria. There are also costs to the court system.

A review of civil sexual assault cases in Canada found that between 2001 and 2011, there were 67 cases involving female plaintiffs where damages were awarded (average pain and suffering award: \$271,000) and 38 similar cases with male plaintiffs (average pain and suffering award: \$193,000). The specific circumstances of these cases are unknown, and they could include cases of childhood sexual abuse in the past or current adult sexual assault.

Sexual Assault and Other Sexual Offences

Source: Government
of Canada