



Law Society
of Scotland

Response to the Justice Committee

Civil Actions for damages in respect of rape and
other serious crimes

8 February 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to the Justice Committee in relation to civil actions for damages in respect of rape or other serious crimes.

General Comments

We recognise that the issue of rape and its consequences are attracting considerable public interest in both England and Scotland. This relates to the criminal prosecution for the offence of rape itself as well as any subsequent civil proceedings that may follow.

Before dealing with the specific questions that have been posed, we would refer to the recent Scottish case where decree was granted against two defenders in an action for sexual assault and rape.¹ A subsequent civil appeal² was unsuccessful.

The circumstances of that case are well-known as it received much publicity given the identity of one of the defenders who was a well-known footballer, David Goodwillie. There was also media discussion concerning the Crown's decision not to prosecute for the original allegation of rape. We would not seek to comment on that case's detail other than highlighting its procedural background as an example of how such a case may proceed through the justice system.

Criminal:

The complainer³ accused David Goodwillie of rape in January 2011. That was of course a criminal allegation in respect of which the Crown was fully responsible for investigating following the report by

¹ C v G [2017] CSOH 5

² Unreported

Police Scotland. The decision whether to prosecute in any particular case and in what forum (if rape action is only competent in the High Court) were matters entirely within the Crown's discretion. The Crown will consider, in such cases, whether there is sufficient evidence in Scots law and if it is in the public interest to prosecute. The Crown does not disclose its reasons for not taking proceedings in a case but the above indicate factors why a decision might be not to prosecute. The decision not to prosecute in this case was made in July 2011.

That decision brought the question of criminal proceedings to an end, as a private prosecution was not considered in this matter. It must be stressed that private prosecutions are competent in Scotland but there has only been one successful Bill of Criminal Letters granted in relation to the Carol X⁴ case.

There is of course a presumption of innocence in favour of the accused and the burden of proof in criminal prosecution lies with the Crown to establish guilt beyond reasonable doubt. That is of course a high standard.

Criminal Injuries Compensation Authority (CICA): The complainer then made an application to the CICA for compensation for criminal injury. She was successful in her application and awarded £11,000. The CICA⁵ deals on a UK basis with '*compensation claims from people who have been physically or mentally injured because they were the victim of a violent crime in England, Scotland or Wales.*' The detailed role of the CICA is discussed below. Any decision as to awarding compensation is quite separate and not dependent on any criminal prosecution being commenced or being successful.

Civil: The complainer then raised a civil action in the Scottish courts against the men whom she claimed had raped her. Such an action is of course competent as it too is separate from the criminal proceedings outlined above. Effectively, this was an action for damages for injuries sustained. There can be no question of a criminal conviction as it is a quite separate forum.

All that the court can do if the action is successful is to award financial compensation.

The amount of such compensation depends on what is claimed and that amount will be based on injury and other factors claimed in the initial writ commencing the action (£100,000 was awarded against the defenders here which was agreed once liability was established. It is not possible to ascertain how that figure was arrived at.)

The amount awarded in any decree is relevant when assessing the likelihood of payment by a defender prior to raising any action or in enforcing any decree, once awarded. The reasons why such actions may

³ For the avoidance of doubt, we use the term complainer in respect of criminal matters, applicant in respect of the compensation claim and pursuer in relation to the civil action.

⁴ Carol X was a successful private prosecution Scotland for a brutal rape of a woman in 1982. The Lord Advocate of the day, Lord Mackay of Clashfern, did not oppose the private prosecution and one of the accused was jailed for 12 years. A successful application for a Bill for Criminal Letters -- the means of pursuing a private prosecution was achieved.

⁵ <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority>

be raised by the complainer may be much wider than merely the question of actual financial compensation. It is however important to consider what the pursuer in any such action is seeking to achieve by instituting court action, as the court can only award what is in its power i.e. financial compensation.

The standard of proof in civil matters is on the balance of probabilities. The court needs to believe that it is more likely than not that the person did behave in the manner alleged. That contrasts, of course, with the standard of proof in the criminal case above. In this case, the judge found that the pursuer was a credible and reliable witness but that neither of the defenders' accounts could be accepted.

The issue in the civil court was around the question of consent. The defenders claimed that the sexual intercourse which had taken place had been consensual. The pursuer had by reason of her excessive consumption of alcohol been incapable of consenting to sexual intercourse at the material time. Did the defenders have a legitimate belief whether reasonable or honest that she had consented? The defenders had relied on the fact that she had not said the word 'no' in relation to the events. The Sexual Offences (Scotland) Act 2009 (2009 Act) sent

*'a clear signal that anyone dealing with someone who was intoxicated was put on notice that the person might not be able to give consent no matter what she said or did and in that regard on the balance of probabilities.'*⁶

The court stated that the defenders had culpably ignored what were clear indicators that she was not capable of meaningful consent and had deliberately taken advantage of the situation to sexually assault her. The burden of proof lay with the pursuer to show that she had not consented and there was no reasonable belief that she had. There may be an academic issue around whose responsibility it is to establish consent in a civil case. Consent normally lies with the defender to establish rather than with the pursuer.⁷ This case does provide some legal authority for Scottish courts may deal with the issue in a similar case in the future.

In conclusion, a civil action is competent in cases of rape or serious crimes, irrespective of prior successful criminal prosecution or not. Importantly, there can be no guarantee of success as that will depend on the facts and circumstances in each case as proved in court. Raising civil actions can be very expensive. Such cases need to be funded just as in any other civil case. Subject to the pursuer's financial eligibility, there may be an opportunity to apply for legal aid. Legal aid can potentially be available for both the pursuer and defender.

Legal Aid Considerations: The question whether to grant legal aid or not is a matter for the Scottish Legal Aid Board.⁸ Eligibility for civil legal aid is complex and depends on the applicant's financial means. There is a need to show that the applicant cannot afford to pay for their own legal costs, though some may

⁶ C v G [2017] CSOH 5 at 6.

⁷ C v G Case Comment 2017 J.P.I.L. C70

⁸ <https://www.slab.org.uk/>

need to pay the costs of the case. As well as the question of financial eligibility, SLAB has the responsibility to assess whether:

- the applicant has probable cause and
- whether it is reasonable to make legal aid available⁹

Each case will be considered on its own merits taking into account all of the relevant factors. SLAB will not pre-judge matters which are for the court to consider. It also provides guidance to illustrate how such factors fall to be assessed.

'Probable cause': Is there a legal basis on which to take the case forward? Is it reasonable to spend public money to support the case? What are its chances of success? Will it cost more than it is worth? To establish probable cause, the applicant must show that there is a sound legal basis for the proposed action. That will include establishing jurisdiction in Scotland and 'right, title and interest' in pursuing such an action.

'Reasonableness': SLAB must be satisfied that it is reasonable in the particular circumstances of the case that the applicant should receive civil legal aid. There is a very wide discretion and no exhaustive list of circumstances that sets out when reasonableness may apply. Categories which have not been considered to be reasonable include where:

- the nature of the proceedings appears unreasonable
- the proceedings are frivolous or vexatious (if privately funded, the client would be advised not to prosecute such actions)
- cost benefit analysis means that the application will fail if the potential benefit to the applicant is equalled or exceeded by the likely cost of prosecuting the action¹⁰
- information obtained from the solicitors and/or counsel as to the prospects of success indicate that the prospects of success are not likely. Assessment may include unsuccessful litigation in other cases in Scotland, evidential considerations, and/or contributory responsibility. (Crucially, for an award to be made, there does not need to be any guarantee of success)
- Private client reality applies, as legal aid does not exist to place persons in any better position than privately paying clients¹¹
- the prospects of recovery do not justify the use of public funds

In conclusion, an applicant seeking to raise a civil action will be entitled to apply for legal aid in exactly the same way as for any other potential civil claim.

⁹ Section 14(1)(a) and (b) of the Legal Aid (Scotland) Act 1986

¹⁰ *McTear -v- Scottish Legal Aid Board* 1997 SLT 108.

¹¹ *Venter -v- Scottish Legal Aid Board* 1993 SLT 147

We hope that the background to the procedures that can apply in such a case is helpful in setting out the justice context.

We will now answer the various questions below.

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

We would note that the question refers to a '*successful prosecution*'. The case discussed above was never the subject of a prosecution. We are aware of a civil case currently being conducted that involved an unsuccessful prosecution and the action is described in a newspaper article as '*a legal first after an unsuccessful rape prosecution in Scotland.*'¹² We understand that legal aid has indeed been granted in this case to the pursuer. The accused was acquitted after a trial in November 2015. As we highlighted above, the question as to whether there has been a successful prosecution would not necessarily be a factor for the pursuer in deciding to make any claim or SLAB in awarding legal aid.

It is not possible to quote any statistics as to the number of civil actions raised by rape victims pending or otherwise as records are not kept as to such information. It is important too to remember that many civil cases may never result in going to court. Settlement will be resolved out with the court. Cases may well not be legally reported unless a significant point of law or interest is established.

Having acknowledged that these cases are of public interest and are reported in the media, we would tend to consider that the Goodwillie case and the current case will be the few Scottish cases that have arisen to date.

What can be said is that recent criminal statistics show that rape and attempted rape crimes recorded by the police increased by 4% between 2015-16 and 2016-17. This increase is said to have been caused by the widening of the definition of rape in the 2009 Act which came into force in December 2010 and by increased reporting in the wake of high profile cases.¹³

We do understand, anecdotally, that Sandy Brindlay¹⁴ indicated that '*the number of women asking about using civil actions had jumped significantly since the [Goodwillie] win.*' Certainly, publicity may well result in many more actions being considered. Questions will then arise about the funding of the case as discussed above.

¹² <https://www.theguardian.com/society/2018/jan/17/woman-sues-man-acquitted-of-in-scottish-court-trial>

¹³ Monthly Safer Communities and Justice brief January 2018

¹⁴ Director of Rape Crisis Scotland (<https://www.theguardian.com/society/2018/jan/17/woman-sues-man-acquitted-of-in-scottish-court-trial>)

We understand that *'civil actions have been used in a handful of cases in England but have been very rare in Scotland.'*¹⁵

We would be wary of providing any information in relation to the English position as the question of the success or otherwise of any prosecution may well be very different between the two countries given the evidential and procedural requirements in both criminal and civil cases. Similarly, the application of civil legal aid in England is administered by the Legal Aid Agency and will be subject to its rules.¹⁶

What may be of interest in considering this question in relation to England is the recent case¹⁷ involving a student at Oxford University who has raised a legal challenge against the university's policy on investigating complaints of rape and sexual assault. Apparently, there had been a police investigation but no prosecution followed because of evidential problems. This raises the possibility of other actions being raised in relation to other organisations such as universities as to their investigative and complaints procedure.

A further factor in criminal cases in England and Wales is that decisions about whether to take a criminal prosecution are usually the responsibility of the Crown Prosecution Service but other institutions, unlike COPFS, can take proceedings in relation to certain crimes.

How common is it 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.

Again, it is not possible to ascertain how common such actions are. As we have stressed above, raising an action for damages will be competent in relation to any serious crime where injury or loss has arisen (delictual action). This can include any manner of crimes. By way of illustration, contraventions of the Road Traffic Act sections 1 or 3 (death by dangerous or careless driving), serious assaults, historic sex abuse or even murder would all be possible.¹⁸ Such actions are only going to be raised if there is the prospect of success with funds to pay compensation. If the accused has been convicted, there is going to be no

¹⁵ <https://www.theguardian.com/society/2018/jan/17/woman-sues-man-acquitted-of-in-scottish-court-trial>

¹⁶ <https://www.gov.uk/government/organisations/legal-aid-agency>

¹⁷ <https://www.theguardian.com/law/2015/may/07/student-sues-oxford-rape-complaints-policy>

¹⁸ *Vaickuviene v. J. Sainsbury PLC* [2013] CSIH 67 though the action for damages against the employer was Unsuccessful.

prospect of enforcing a decree even if successful. We are aware of a successful action involving a wife suing her husband for rape.¹⁹

Relevant to the issue of finance would be consideration against whom the action is being or could be raised. Normally it will be against the person who committed the wrong. But action is also competent against the employer if relevant by way of vicarious liability. It is becoming increasingly common for actions to be raised against the employer as they will be the person who may well be able to pay if any decree is awarded. Just as was highlighted above, there is no purpose in taking an action if any decree is unenforceable because the defender cannot be found or is insolvent. In cases such as *Goodwillie*, there are assets to pursue.

The courts are increasingly considering cases being raised against employers; certainly this can be seen in cases involving allegations of historic sexual abuse against staff. The *Catholic Child Welfare Society & Ors v Various Claimants & Ors*²⁰ is an example where the Institute of the Brothers of Christian Schools were held liable for the wrong doing committed by the brothers of the Institute. The test in such cases is relevant as Lord Phillips said:

“This is not a borderline case. It is one where it is fair, just and reasonable . . . for the Institute to share with the [schools’ managers] vicarious liability for the abuse committed by the brothers.”

We do not have specific information in relation to cases that have arisen in England. Please note that these major cases have tended to be heard on appeal by the Supreme Court where the decisions as to the law being applied in determining such claims will generally be binding on the lower courts in both England and Scotland. That may give some indication as to how such cases will be dealt but each case will fall to be determined on its own merits according to the individual facts and circumstances.

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)

We do not have any direct knowledge but we would suggest that the likelihood of action being considered will be more likely where the prosecution has been unsuccessful or where no prosecution has taken place.

With the lower standard of proof in a civil case, there may be a perception that it may be easier to establish. There are no requirements of corroboration which in cases of sexual offences may be one obvious difficulty that can arise under criminal law.

¹⁹ <http://www.independent.co.uk/news/wife-wins-damages-for-rape-1238312.html>

²⁰ [2012] UKSC 56A

It is also dangerous to generalise on the motivation for raising actions as they may simply '*seek their day in court*' if there has been no prosecution or financial compensation. But pursuing a case, unless there is a realistic prospect of decree being enforceable, is problematic, as there needs to be a focus on what the court can actually do. Success in a civil case may mean that the pursuer may feel that they have been believed. On a personal level, that view can be understandable. However utilising public money in respect of both or either party or in private funding, as well as the court time, where there seems no prospect of decree being enforced, does seem to be at odds with the 'private client reality' test referred to above.

It may be relevant in this context to consider too the role of the CICA. It currently handles up to 40,000 applications for compensation each year, paying out up to £200 million to victims of violent crime. The government's Criminal Injuries Compensation Scheme sets the criteria and amounts for compensation which runs UK-wide. It makes payments on the government's behalf to blameless victims of violent crime.

The size of the award varies to reflect the seriousness of the injury and will never be equivalent to the amounts which can be obtained as a result of court action. These are awarded in varying amounts by the CICA according to the severity of injuries - from a basic payment of £11,000 to a maximum of about £44,000. It does provide compensation for suffering or loss described by them as '*just society's way of recognising that you have been a victim*'. It considers claims among others for mental or physical injury following a crime of violence, sexual or physical abuse and loss of earnings.

It is designed to be a 'scheme of last resort'. Where the opportunity for compensation arises elsewhere, the applicant should take all reasonable steps to obtain damages or compensation to which they may be entitled as a result of their injuries. Awards can be made even where the perpetrator is not convicted. Their decision is assessed on the balance of probabilities. There are factors whereby an award may be reduced on account, for instance, if the applicant failed to co-operate with the police or the existence of a previous criminal record.²¹

Lisa Longstaff, Women Against Rape²² said:

'We've recently seen women who've been denied compensation on the basis of having a minor conviction for smoking cannabis, a driving offence or shoplifting....Lots of vulnerable victims have minor convictions from before or after they were attacked. Sometimes it is clear they've got into trouble as a result of the psychological trauma they suffered because of being attacked.'

In conclusion, there is compensation available from the CICA. Should the government pay compensation if there is the prospect of success against the defender?

²¹ <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide>

²² <https://www.theguardian.com/society/2015/mar/17/rape-victims-denied-compensation-petty-convictions>

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.

There are no barriers to a victim bringing a civil action for damages. It is the same as any other action. Funding will always be the issue. Victims will not want to bring civil actions for a variety of factors such as they do not want to go through the trauma of giving evidence in court again (if it has been an unsuccessful prosecution) and if not in receipt of legal aid they are not prepared to privately fund an action to end up with nothing.

It will be important to assess evidential considerations, as if COPFS concluded that a prosecution was not merited, is there a realistic prospect that the victim will be successful? If there has been an acquittal, is there a reasonable prospect of success in the civil court?

Are there any lessons criminal justice bodies should take from instances where there has been a successful civil case but no criminal prosecution?

The only criminal justice organisation in Scotland has already been identified as the COPFS. Prosecution must be justified in the public interest. Sufficient evidence that a crime has been committed and the accused can be identified is required before prosecution can take place. The burden of proof and evidential considerations are quite different in criminal and civil cases. What is established in a civil court is not the same as in a criminal court. There are no lessons to be learnt from a successful civil case.

The support available for victims of crime and other serious crimes where there is no criminal prosecution.

A booklet exists online 'Information and help after rape and sexual assault.'²³ In addition, this question falls best to be answered by those organisations that are already providing a myriad of support to the victims of crime. These include:

- Police: The police offer the support of a Sexual Offences Liaison Officer (SOLO) to every victim of a serious sexual offence.
- COPFS: When the case is reported to COPFS, it is referred to Victim and Information and Advice (VIA) at the stage of assessment in marking. If the case is marked as no proceedings, then VIA will not be involved. Instead the decision will be intimated to the police for ongoing SOLO support and a Victim

²³ <http://www.gov.scot/resource/doc/220190/0059149.pdf>

Right to Review (VRR) letter is issued to the victim. For a marking of no proceedings at the outset this will be relatively rare as most cases will fall to be investigated further. If the case is marked for pre-petition the COPFS victim strategy applies and VIA will make contact with the victim within 21 days to explain what is happening and to offer support. If at the end of the pre-petition stage the decision is made not to proceed, then either VIA or the case preparer will advise the victim of the decision. VRR letters are again issued. That is the end of the COPFS role, subject to any VRR application.

- Victim Support Scotland (VSS): They are the largest charity supporting people affected by crime across Scotland through the provision of practical help, emotional support and essential information. The vast majority of support provided relates to the criminal justice sphere.
- Third sector: There are third sector organisations such as Rape Crisis Scotland²⁴, Scottish Women's Aid²⁵ Shakti Women's Aid²⁶ and Abused Men in Scotland²⁷ all involved in the support of victims of these crimes. These services will be available to a victim irrespective whether there is a prosecution or not.

²⁴ <https://www.rapecrisisscotland.org.uk/>

²⁵ <http://womensaid.scot/about/>

²⁶ <http://shaktiedinburgh.co.uk/>

²⁷ www.abusedmeninscotland.org



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