

Civil Recoveries for Victims of Criminal Acts

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Special Feature

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When the unthinkable happens and someone becomes a victim to a rape, sexual assault, battery or other crime of violence, justice is often sought through the criminal justice system. However, there is another important side to seeking justice beyond criminal sanctions and penalties against a perpetrator: the civil remedies that may be afforded to a victim of a crime of violence. Criminal penalties punish the perpetrator and often serve to protect society from further harm by placing the perpetrator in prison and, in some instances, rehabilitating the perpetrator. Also, sometimes the victim will receive some restitution from the criminal or a fund for crime victims. However, even when such restitution is available, it usually is insufficient compared to the injury the victim has suffered.

On the other hand, when available, the civil remedies for victims of criminal acts through a civil personal injury case can be far more substantial. In the short term, civil remedies provide a victim with compensation for medical and mental health bills, time lost at work, loss of future earning capacity, and funding for future care and treatment, as well as providing the victim the empowerment in holding the perpetrator accountable for his actions. Long term effects of seeking civil remedies often extend to the protection of future targets of sexual assaults and other incidents of violence through holding third parties responsible for their failure to prevent these often foreseeable crimes.

In evaluating whether a criminal act may have a civil tort recovery component, it is first important to understand that there are three basic components to any civil tort action: *liability*, *damages* and *collection*. Additionally, proper preservation of evidence

from any criminal case is critical to successful prosecution of a civil case.

I. Collection (Evaluating Sources of Recovery).

When evaluating a case, ideally start with assessing the third component: *collection*. No matter how severe the damages and how clear the liability – if there are no assets worth pursuing and nothing to recover for the victim – then why bother?

Moreover, even when the perpetrator has significant assets – it is important to find out exactly what they are and how they are held. If they are held jointly (like with a spouse) or in a trust – then they probably are not going to be accessible. Also, even when there are available assets, and even if the perpetrator is enjoined by court order from dispensing with the assets, the assets often have a tendency to dwindle or dissipate prior to getting to a judgment or settlement. Thus, the best cases are the ones where insurance might be implicated.

Common sources of insurance include:

- a. homeowner insurance coverage,
- b. renter insurance coverage,
- c. automobile insurance, and,
- d. general liability coverage.

While homeowners and renters insurance may provide coverage in some cases, typically they will exclude intentional acts, punitive damages, and acts by others in the household. Automobile and general liability policies also typically exclude intentional acts. However, nearly all insurance policies will cover negligent or reckless acts. Accordingly, it is important to assess how the pleadings will be crafted and how the case facts might be presented to ensure

coverage. Also, sometimes the way that the defendant answers the Complaint can ensure coverage.

By way of example, one case this author handled involved a female client sexually molested on an Amtrak train by a highly intoxicated passenger. The molester was arrested at the next stop and the victim had very visible bruises on her breasts and thighs which were photographed. A warrant was sworn out and the molester entered into a plea agreement. While it (a) appeared to be an intentional act and (b) appeared that the molester had no source of coverage, the case took two fortunate turns: the molester (a) had condominium coverage and (b) argued it was an accident – that the sudden jerk of the train threw him into the victim as he was walking by her seat. The case settled for a respectable sum.

II. Damages.

Pursuing civil actions arising out of criminal acts often can be difficult, so the next factor in evaluation is to determine the severity of the injury and the applicable damages. If the damages are not sufficient enough to warrant a decent recovery then there is not much incentive to pursue the case.

1. The damages prayed for should reflect significant injuries; alleging mere fear is insufficient.
2. Psychological or emotional damages must be supported by the testimony of medical professionals.
3. Damages also should include lost wages and earning capacity, medical bills, counseling bills, loss of household services and prescription and medication costs. The victim is also entitled to compensation for scars, disfigurement, disability and other permanent injuries or losses. If a victim is not already in mental health counseling, then counseling should begin immediately. Post traumatic stress disorder and many anxiety disorders are typical injuries to victims of crimes, but those disorders often go undiagnosed unless the victim is receiving treatment by qualified mental health professionals. Future treatment also should be assessed as many victims will require future care for a significant period of time.
4. The lawsuit should allege severe violations and/or clearly unacceptable acts by a perpetrator of a crime of violence. These are cases that can lend to juror outrage. However, care must be taken in drafting the Complaint because, as previously noted, intentional acts and punitive damages may be excluded under some insurance policies.

III. Liability.

In determining liability, the civil causes of action often most appropriate for victims of sexual assault and other violent crime include:

- i. Civil assault and/or battery against the

perpetrator.

- ii. False Imprisonment/False Arrest.
- iii. Respondeat Superior/Vicarious Liability
- iv. Negligent Hiring/Negligent Selection¹
- v. Negligent Retention²
- vi. Inadequate or Negligent Security³
- vii. Failure to Meet a Special Duty of Care
- viii. Breach of Express Contract
- ix. Negligent Supervision
- x. Other Causes of Action

A. Assault & Battery

1. An assault may have occurred when the offending party's actions placed the victim in fear of imminent bodily harm.
2. Battery occurs in many situations where the offending party makes unwanted bodily contact with the victim to which the victim did not consent.
3. Assault & battery may be brought against a perpetrator of a sexual assault or other violent crime.
4. A battery also may apply in situations where a medical provider initiates an unwanted touching.
5. Most states recognize a civil cause of action for assault and battery. While this outline is based on Virginia law, much of the law is applicable across state lines and similar laws can be found in other states, with some variation among states. Virginia law has recognized distinct causes of action for sexual assault and battery.⁴
 - a. *Kidwell v. Sheetz, Inc.*, 982 F.Supp. 1177 (W.D.Va. 1997) *recognized both sexual assault and sexual battery as independent tort causes of action*, however the Supreme Court of Virginia has never directly addressed and defined the torts of common law sexual assault or sexual battery.
 - b. Several published opinions by Circuit Courts in Virginia have recognized the separate cause of action, but there has been at least one published decision in the circuit court to reject the existence of sexual assault and battery as separate causes of action.⁵
 - c. As in the criminal law cause of action, there must be a threat of force, threat, or intimidation.⁶ *See N.G. ex rel. D.G. v. Schefer Circuit Court*, 72 Va. Cir. 239 (2006), which took great care in recognizing the legitimacy of common law sexual assault and battery, stated that a plea of sexual assault or battery must include the existence of:
 - i. a legal duty,
 - ii. a breach of the duty,
 - iii. harm to the plaintiff, and
 - iv. a causal relationship between the breach and the damage.⁷

B. False Imprisonment/False Arrest

1. A victim of sexual assault also may bring an action for false imprisonment against a perpetrator of a sexual assault or assailant who committed another violent crime.
2. If the victim has had her freedom of movement restrained such that she reasonably believes force will be used against her should she not submit, and this leads her to submission, the victim will likely have a claim for false imprisonment.
3. The tort of false imprisonment requires unjustified restraint of liberty without any legal excuse. Neither actual force on the part of the perpetrator nor resistance on the part of the victim is necessary to make a showing of false imprisonment.
4. A showing of malice is required to recover punitive damages, but there is no requisite wrongful intention on the part of the perpetrator to recover general damages under false imprisonment.⁸

C. *Respondeat Superior*/Vicarious Liability

1. An employee, acting in the scope of his employment within the ordinary course of business, may cause his employer to be liable for his actions.
2. Actions taken by an employee are generally considered to be in the scope of employment unless:
 - a. *The employee is acting outside of the scope of his agency*, which is to say the actions were not directed, expressly or implicitly, by the employer or principal, or not naturally incident to the business, didn't further the employer's interest in any way, and didn't reflect a "great and unusual deviation from the employer's business."
 - b. *The scope of employment* may be interpreted fairly narrowly: for example, in *Kensington Associates v. West*, 234 Va. 430, 362 S.E.2d 900 (1987) the Supreme Court of Virginia held horseplay by a security guard who accidentally and recklessly shot a co-worker to be outside of the scope of employment. And in *Webb v. U.S.*, 24 F.Supp.2d 608 (W.D. Va. 1998) the federal district court noted that "scope of employment" for a physician must be reasonably related to the treatment being provided. In this case, a woman seeking care for her panic attacks was being molested by her doctor. Her treatment did not call for any physical contact. The court ruled that the physician's employer could not be held liable because the touching was not within his scope of employment, *i.e.* related to the treatment.

c. More recently, however, the Virginia Supreme Court has held that a company whose gas station attendant jumped a counter to sexually assault a customer⁹ and a firm whose therapist sexually assaulted a patient¹⁰ were both responsible for their agent's actions, implicating the doctrine of *respondeat superior*.

3. An employer is liable for an employee's tortious acts when the employee performs the employer's business and acts within the scope of employment when the acts are committed.
4. The burden of establishing an employment relationship is on the plaintiff, but as soon as the employment relationship is established between the employee and defendant employer, the burden of establishing that the employee was not acting within the scope of employment is on the employer. The question of whether an action took place within the scope of employment is one for the jury.¹¹
5. When determining whether an action is within or outside of the "scope of employment," the juror will look to factors such as:
 - a. whether the tortfeasor employee was performing employment duties,
 - b. whether he was executing the services for which he was engaged,¹²
 - c. whether the employee was acting to further the employer's interest or the act arose as a consequence of doing the employer's business,¹³ and
 - d. whether the incident occurs in the place the employee carries on his duties.
6. The primary question is whether the service in which the tortious action took place is in the scope of the employment relationship.¹⁴ In *Gina Chin & Associates, Inc. v. First Union Bank*, 260 Va. 533, 540, 537 S.E.2d 573, 576 (2000), the Supreme Court of Virginia, citing *Davis v. Merrill*, 133 VA. 69, 112 S.E. 628 (1922), stated "it matters not whether the act of the servant is due to lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury."

D. Negligent Hiring/Negligent Selection

1. The Supreme Court of Virginia first recognized negligent hiring as a cause of action in *Weston's Adm'x v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921), and was reaffirmed in *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391 (1988).
2. An employer has a duty to inquire as to the

employee's "past record, habits, or general fitness for the position" of hire.¹⁵

3. This duty is breached if an improper person is hired for a position that involves an unreasonable risk of foreseeable harm to others.¹⁶ Hiring an employee whose known propensities, or propensities that could be discovered on reasonable investigation, will likely be deemed negligent hiring or selection.

This rule was reinforced by the Supreme Court of Virginia in *Interim Personnel of Central Virginia, Inc. v. Messer*, 263 Va. 435, 559 S.E.2d 704 (2002).

4. The victim-plaintiff in a negligent hiring case does have to show that an employer failed significantly to meet its duty of care in hiring. In *Southeast Apartments Management, Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999), conducting a check on the perpetrator's references (the employer spoke with two of the six references provided) with positive feedback, but failing to conduct a criminal background check was insufficient to make out a *prima facie* case.

E. Negligent Retention

1. Closely related to the recognized cause of action for negligent hiring is the cause of action for negligent retention. The Supreme Court of Virginia first recognized negligent retention in *Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 173 S.E. 363 (1934). However there was substantial debate whether the tort existed until 1999 when the Virginia Supreme Court handed down *Southeast Apartments Management, Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999) and definitively held that the cause of action existed. See also *Phillip Morris Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988).
2. The employer must have actual or constructive notice of an employee's misconduct and fail to exercise reasonable care to address the misconduct that causes injury to a victim.
3. In the context of an owner of leased premises, a landlord liable for negligent retention must be negligent in retaining an employee who is dangerous or may foreseeably cause harm to tenants or other potential victims, and this negligence must lead to actual injury or harm.
4. Actual notice of an employee's dangerous propensities and previous complaints about specific instances of assault has been sufficient to find negligent retention¹⁷ but discovery that an employee engaged

in passing bad checks, along with other "obnoxious" behavior was not.¹⁸

5. Sovereign immunity may protect municipalities and other government bodies from being sued on this theory. The Supreme Court of Virginia recognized this in *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002). Here the plaintiff sought to sue the city when it did not fire a police officer despite notice of his propensity for sexual assault.

F. Inadequate Security (Negligent Failure to Protect/Negligent Failure to Warn)

1. Inadequate security, which may be pled as negligent failure to protect and/or negligent failure to warn, must arise out of a special relationship between the victim-plaintiff and defendant or between the third party criminal actor and the defendant, and that special relationship must create a duty of care. See *Yuzefovsky v. St. John's Woods Apartments*, 261 Va. 97, 540 S.E.2d 134 (2001) and *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987).
2. The victim must show that:
 - a. A special relationship existed,
 - b. That created a duty of care,
 - c. The duty of care was breached, and
 - d. The breach caused the harm complained of.
3. Parties that have a special, elevated duty of care include landlords, innkeepers, common carriers, hospitals, psychiatric institutions, nursing homes and schools.
4. Examples of third party liability arising out of special relationships include:
 - the situation where a landlord has prior knowledge of a violent crime occurring on the property, fails to fix a broken lock despite the tenant's request, and the tenant falling victim to an assailant who accessed the door with the broken lock.
 - a college or university which, having prior notice of a student's propensity to commit sexual assault, fails to expel the student, leading to a sexual assault being committed by that student.
 - a nursing home or psychiatric ward whose agents have been put on notice that a resident had made sexual advances on another resident, but failed to take adequate precautionary measures before a sexual assault occurred. See *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 523 S.E.2d 826 (2000).
 - a common carrier (bus, plane, train, ship, etc.) continues to serve a passenger who is clearly drunk, and that passenger assaults another passenger.

- the owner of a “half-way house” for felons with regard to clients coming in. *Dudley v Offender Aid & Restoration of Richmond, Inc.*, 241 Va. 270, 401 S.E.2d 878 (1991).

G. Breach of Express Contract

1. An express written contract may create a duty for crime prevention measures or protection. See *Richmond Med. Supply v Clifton*, 235 Va. 584, 369 S.E.2d 407 (1988). And sometimes the plaintiff can argue that she/he was an intended third party beneficiary. *Levine v Selective Ins. Co. of America*, 250 Va. 282, 462 S.E.2d 81 (1995); *Wooldridge v Echelon Serv. Co.*, 13 Va. Cir. 323 (Arlington Cir. Ct. 1988).
2. Though breach of written contract creates the best cause of action for the plaintiff-victim, the victim also may be able to recover if an oral contract is breached.
3. The oral contract must be performable in one year under the Statute of Frauds, and the victim must make a good showing that an oral contract was indeed intended.
4. Where an agent of the owner of leased property promised but failed to secure a tenant’s door causing the tenant to become a victim of an attack, the landlord was held liable.¹⁹

H. Negligent Supervision

1. Whether this cause of action is recognized in Virginia and in other states is debated and evolving. The exact contours of the claim, and in what circumstances it would apply, are largely unknown due to a lack of established case law dealing with negligent supervision. In general, for there to be an actionable claim of negligence, including negligent supervision, the claim must contain a legal duty, a violation of that duty, and consequent injury.
2. In 2009, the Supreme Court of Virginia recognized a common law action in *Kellermann v. McDonough* for the negligent supervision of a child.²⁰ The Court held that “when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care. However, such adult who agrees to supervise and care for a child upon the relinquishment of that care and supervision by the child’s parent is not an insurer of the child’s safety. Rather, the supervising adult must discharge his or her duties as a reasonably prudent person would under similar circumstances.”²¹
3. However, the Supreme Court of Virginia also previously held in 1988 in

Chesapeake & Potomac Telephone. Co. of Virginia v. Dowdy that an employer has no duty of reasonable care in supervision of an employee, even though the employer was on notice that stress and pressure were directly and adversely affecting the employee’s physical condition.²²

4. Before bringing a cause of action for negligent supervision, research the more recent circuit case decisions thoroughly and be sure to set out the allegations so as to more closely align with the *Kellermann* decision than the decision in *Dowdy* which has fairly distinguishable facts.

I. Other Causes of Action

1. Other causes of action may be brought in seeking compensation for a sexual assault or other violent crimes against a perpetrator or third party.
2. If an assault occurs within the course of employment, it may amount to unlawful sexual harassment under Title VII of the Civil Rights Act of 1964, as amended. When bringing an action under Title VII, the victim must file a complaint within 180 days with the Equal Employment Opportunity Commission.
3. If the assault or other violent crime involved the federal government or a federal government agent, the victim may bring an action under §1983. In such a case, timely notice must be given under the Federal Tort Claims Act.
4. If a claim is brought against the Commonwealth, notice must be given under the Virginia Tort Claims Act, and the amount which the victim can recover is limited.
5. Claims involving city and county employees and entities have special six-month deadlines (in Virginia), and municipalities often have immunity defenses at their disposal.
6. A negligence *per se* claim may be brought where a statute exists to protect a certain class of persons. See *Va. Elec. & Power Co. v. Savoy Const. Co.*, 224 Va. 36, 39, 294 S.E.2d 811, 814 (1982).

IV. Client Intake

The initial steps in performing intake for a client that was or may have been a victim of sexual assault or another crime of violence should include:

- ensuring the preservation of evidence,
- encouraging the client to follow through with criminal charges if criminal proceedings have not already begun,
- NOT signing up the client to bring a civil action (unless a statute of limitations is about to expire and the case must be filed) - this ideally should not be done until criminal proceedings are over. One reason,

among others, is that the civil case could be a basis for the criminal defense attorney to impeach the client victim in the criminal proceedings. Instead, it is preferable to simply be retained as a legal consultant to the victim until the criminal proceedings are over,

- preparing the client for being re-traumatized via bringing the criminal case and/or civil claim/lawsuit and ensuring therapists in place,
- determining the client victim's past (often-times victims of sexual battery have prior incidents),
- determining the sources of recovery,
- assessing the damages and ensuring the client victim previously received and/or is now getting proper medical and mental health treatment, and,
- evaluating liability – that is, what cause or causes of action are available for the client, and against whom (which defendants) the causes of action are available.

V. Preserving Evidence

1. Collecting and preserving evidence is crucial to a successful outcome in any civil action involving a criminal act. However, it also is important to stay out of the way of any investigators, detectives and prosecutors who are handling any related criminal case. Let them know of your role as a legal consultant to the victim and that you are available to assist in any way.
2. All potentially relevant evidence should be preserved. If a criminal case is underway then the evidence generally already is being preserved by the investigators and prosecutors involved. Once the criminal case is over, the prosecutor can be one of the most helpful individuals in providing information about the case and access to the evidence. However, where no criminal case is undertaken, the civil attorney needs to be integrally involved in gathering the evidence. The evidence to be gathered may include, but is not limited to, the following:
 - a. photographs of all physical injuries as well as the incident scene;
 - b. all clothing should be preserved;
 - c. the details should be written down or otherwise recorded as soon as possible after the incident;
 - d. the criminal case should be followed and a court reporter should be sent to the criminal hearings if the criminal proceedings are not already being recorded;
 - e. any police reports, EMT reports, 911 tapes, video tapes, and other incident

reports or other records of the incident should be gathered via FOIA requests and later by subpoena if need be;

- f. any involved law enforcement or emergency personnel, and witnesses should be interviewed;
- g. the perpetrator's background and criminal record should be investigated and discovered;
- h. preservation or "no spoliation" letters should be immediately sent to any custodians of evidence (so long as they do not interfere with any pending criminal case).

Endnotes

1. *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391(1988).
2. *See Apartment Mgmt. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999) (recognizing cause of action but reversing case because employee had no prior convictions of prior behavior); *Flanary v. Roanoke Valley SPCA*, 53 Va. Cir. 134 (2000) (employer negligently continued to employ a male employee after being placed on notice of his dangerous propensities, and of prior incidents of specific assaults by him against the plaintiff).
3. *Yuzefovsky v. St. John's Woods Apartments*, 261 Va. 97, 540 S.E.2d 134 (2001) (cause of action recognized, but claim rejected where landlord failed to provide adequate security in crime filled area).
4. *Kidwell v. Sheetz*, 982 F. Supp. 1177 (1997).
5. *Flanary, supra*.
6. *Kidwell, supra*, 982 F.Supp. at 1185.
7. *N.G., a minor v. Schefer*, Cir. Ct. of Fauquier County, 72 Va. Cir. 239 (2006).
8. *S.H. Kress & Co. v. Musgrove*, 153 Va. 348, 356, 149 S.E. 453 (1929).
9. *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 526, 539 S.E.2d 426, 429 (2000).
10. *Plummer v. Ctr. Psychiatrists*, 252 Va. 233, 236, 476 S.E.2d 172 (1996).
11. *Majorana, supra*, 260 Va. at 526.
12. *Plummer, supra*, 252 Va. at 236.
13. *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 541, 537 S.E.2d 573 (2000).
14. *Id.* at 543.
15. *J. v. Victory Tabernacle Baptist Church, supra*.
16. *See Apartment Mgmt. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395 (1999).
17. *Flanary, supra*.
18. *Jackman, supra*, 257 Va. at 261-62.
19. *J.W.S. v. Nusbaum Realty Company, et al.*, at Law No. 20338-RF (Newport News Cir. Ct. decided August 17, 1995).
20. *Kellermann v. McDonough*, 278 Va. 478, 684 S.E.2d 786 (2009).
21. *Id.* at 487, 684 S.E.2d at 790.
22. *Chesapeake & Potomac Tel. Co. of Va. v. Dowdy*, 235 Va. 55, 365 S.E.2d 751 (1988).



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