

Civil Justice for Victims of Crime in New York

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Table of Contents

I.	Purpose of this Booklet	2
II.	Victims' Financial Losses and Potential Sources of Compensation	2
III.	Why File a Civil Suit	3
IV.	Comparing Civil and Criminal Justice.	4
V.	Parties in a Civil Suit	6
VI.	Statutes of Limitations	9
VII.	Types of Civil Lawsuits	9
VIII.	Victim Privacy	11
IX.	Filing a Civil Lawsuit	11
X.	Discovery	11
XI.	Trial	12
XII.	Damages.	12
XIII.	Judgment and Enforcement.	13
XIV.	When a Perpetrator Sues a Victim	13
XV.	About Lawyers	14
XVI.	Conclusion	17

I. Purpose of this Booklet

Every crime victim has the right to file a civil lawsuit seeking financial compensation from the perpetrator or from other parties whose unreasonable conduct gave rise to conditions which allowed the crime to occur. The purpose of this handbook is to provide victims and service providers with a basic understanding of the civil justice system so that victims might consider this important option and know where to turn for help.

II. Victims' Financial Losses and Potential Sources of Compensation

More than twenty-four million Americans are victimized by crime each year. The consequences of crime frequently extend far beyond the criminal act. All too often, victims are left with expenses for medical procedures, physical rehabilitation, counseling, lost wages, and property damage. It has been estimated that crime costs society \$450 billion annually.

Restitution

A criminal court may order a perpetrator to reimburse certain expenses incurred by a victim, victim's survivors, or persons who have become responsible for the maintenance and support of a victim as a result of a crime. Unfortunately, even when a court orders restitution, it is often not collected. This lack of enforcement, combined with limitations on the type of damages that may be included in a restitution order, often results in restitution falling far short of meeting victims' needs.

State Crime Victim Compensation

Compensation may also be available to victims from the New York Crime Victims Board. The Board's compensation fund is designed to reimburse victims for certain losses and expenses resulting from crime, such as funeral expenses, medical bills, counseling fees, lost wages, and other out-of-pocket costs. A compensation

award may be reduced by the amount of money that a victim received from insurance or other sources. While there is no limit on the amount of money victims can be reimbursed for medical bills or mental health counseling, state law often limits how much money can be given for a particular type of loss. For example, the maximum reimbursement for funerals is \$6,000 and the maximum award for lost wages is \$30,000. There are also restrictions on eligibility for victim compensation. For more information, contact the Crime Victims Board at **1-800-247-8035** or visit their website at **www.cvb.state.ny.us**.

Civil Actions May Help Where Restitution and State Compensation Cannot

In some circumstances, a civil lawsuit may provide more complete compensation than restitution or the state victims fund. Neither restitution nor state compensation pays anything for hard-to-quantify damages such as pain and suffering. Restitution orders may be hard to collect and the compensation fund limits some types of awards.

III. Why File a Civil Suit

Some of the benefits of civil actions may include:

Control of the Case - Victims have greater control in a civil suit than in a criminal case because they are a party to the civil case, cannot be excluded from the courtroom, and have final approval of settlement proposals.

Compensation - Civil actions can provide compensation for victims for the monetary damages they suffered, such as medical expenses or lost income. Civil actions can also compensate victims for the emotional damage they have suffered.

Justice and Accountability - Civil suits can hold offenders directly accountable to victims. These suits give victims their "day in court," regardless of whether there was a criminal conviction or any prosecution at all.

Crime Prevention - In addition to suing perpetrators, victims can often sue other

responsible parties. Civil actions provide economic incentives for crime prevention. Businesses such as hotels, apartments, and shopping centers sometimes fail to enact proper security measures because they view such expenses as unnecessary. When businesses are held accountable for safety lapses, proper security becomes cheaper than the cost of defending lawsuits. Crime victims' civil suits have resulted in increased security protection in public places, better oversight and supervision of daycare facilities, and countless other improvements.

IV. Comparing Civil and Criminal Justice

Both the civil and criminal justice systems have important roles in securing justice for victims of crime. These systems are not mutually exclusive, so victims do not have to choose one system over the other. Many victims choose to go through both systems. Because the criminal and civil justice systems were designed to address different needs, victims are best served when these systems work together. A significant difference between the criminal and civil court systems is that in a civil case, the victim controls essential decisions shaping the case. It is the victim who decides whether to sue, accept a settlement offer, or go to trial.

The Criminal Justice System

The criminal justice process begins after a crime has been committed and reported to law enforcement. If an arrest has been made and charges have been filed, the offender may be prosecuted. In a criminal prosecution, the crime is considered "a crime against the state." The victim's role is primarily defined as a witness for the prosecution. Although the prosecuting attorney may be very helpful to the victim and the victim's family, the prosecutor still represents the interests of the state, not the victim.

The criminal justice process judges the guilt or innocence of accused offenders, and when offenders are found guilty, attempts to punish or rehabilitate them.

The Civil Justice System

The civil justice system does not attempt to determine the innocence or guilt of an offender. Offenders are also not put in prison. Rather, civil courts attempt to determine whether an offender or a third party is liable for the injuries sustained as a result of the crime.

A civil court's finding of liability usually means that the defendant must pay the victim, or the victim's family, monetary damages. The civil justice system can provide victims with monetary resources necessary to rebuild their lives. While the criminal justice system holds defendants accountable for their "crimes against the state," the civil justice system holds defendants who are found liable directly accountable to their victims.

Burden of Proof

In the civil justice system, liability must be proven by a fair preponderance of the credible evidence, which simply means that one side's evidence more closely represents what happened than the evidence opposed to it. In other words, the plaintiff must prove there is a fifty-one percent or greater chance that the defendant committed all the elements of the particular wrong. This standard is lower than the "proof beyond a reasonable doubt" required for a conviction in the criminal justice system. Therefore, it is sometimes possible to find the defendant liable in a civil case even though a verdict of "not guilty" was rendered in the criminal case. (A civil case can also be successful even if the offender was never prosecuted.)

A good example of this principle is the O.J. Simpson case. Simpson was prosecuted for the murder of his former wife, Nicole Brown, and Ronald Goldman. The jury in the criminal case found Simpson "not guilty" of the murders. Despite Simpson's acquittal, the victims' families filed and won a civil wrongful death lawsuit against Simpson. The jury in the civil case awarded the victims' families \$33.5 million in damages. While a criminal conviction may increase the chances of a perpetrator being held civilly liable, it is not a requirement for bringing a civil action.

CRIMINAL CASES

In a CRIMINAL case...

...the goal is to hold the defendant accountable to the State.

...the State prosecutes and controls the case.

...the victim is a witness. Although the victim may have rights to participate in the criminal justice process, the victim does not have the right to direct the prosecution of the case or to veto the prosecutor's decisions.

...the State must prove that the perpetrator is guilty "beyond a reasonable doubt."

...the perpetrator is presumed innocent until proven guilty.

...if a perpetrator is found guilty in a criminal court, the perpetrator is subject to punishment, such as probation or jail, and is held accountable to the State. The victim will not obtain money unless the court orders the defendant to pay restitution for the victim's out-of-pocket expenses. The court cannot order restitution for non-economic damages.

...if the perpetrator is found not guilty, the State cannot initiate a second prosecution.

CIVIL LAWSUITS

In a CIVIL lawsuit...

...the goal is to hold the defendant accountable to the victim.

...the victim initiates and controls the case.

...the victim is a party, and as such, is entitled to all important information relating to the case, and can make decisions about the direction of the case, such as settlement of the claim.

...the victim must prove that it is more likely than not that the perpetrator is liable.

...the civil system makes no such presumption. The victim and the perpetrator appear as equals.

...if the perpetrator is found liable in a civil court, the perpetrator owes an obligation to the victim, such as money to compensate the victim for medical and therapy expenses, psychological damage, damage to family relationships, and lost wages. A civil court can order the perpetrator to pay for non-economic damages, such as pain and suffering, and can also order punitive damages.

...the victim can sue the perpetrator in a civil court regardless of whether the perpetrator has been found guilty in a criminal prosecution.

V. Parties in a Civil Suit

Plaintiffs

The main parties in a civil suit are called plaintiffs and defendants. Plaintiffs are the individuals who file the suit. They control the action, are entitled to all information relating to the case, and make decisions, such as settlement. The plaintiff in a civil suit can be the victim, survivors of the victim, or persons responsible for the victim.

Family Members

Family members who might bring a civil suit include the parents, spouse, children, or siblings of the victim.

Defendants

The defendants are the parties against whom a civil action is brought. The defendants in a civil suit can be the perpetrators, individuals who have assisted the perpetrators, or individuals or organizations whose negligence has in some way contributed to the commission of the crime (third parties).

Offenders

The offenders are the individuals who committed the original offense, whether or not they were found guilty by a criminal court.

Third Parties

In some civil cases, a "third-party" defendant may be held liable. Third-party defendants are not the persons who actually commit the crimes, but instead are those parties who may have contributed to or facilitated them. A few examples of possible third-party defendants in a victim's case would include:

- landlords who do not provide adequate security measures, such as locks on doors and windows and adequate lighting;
- colleges that fail to provide adequate security for students or fail to notify students of campus assaults, leaving students vulnerable to victimization;
- shopping malls that do not employ security guards or take other necessary measures, despite a likelihood of criminal attacks on customers;
- people who allow children access to firearms or other dangerous instruments when the children, in turn, use the weapons to injure other people;
- child-care centers, schools, and churches that do not properly check the backgrounds of their employees, or simply transfer employees to other locations following allegations of abuse; or
- tavern owners or social hosts who continue to serve alcohol to inebriated persons who subsequently injure other people in drunk driving crashes.

VI. Statutes of Limitations

There are time limits for filing civil suits set by law. Any suit filed after the expiration of the statute of limitations is "time-barred" and cannot proceed. In New York, a civil suit based on wrongful death must be filed within two years of the victim's death, while a lawsuit claiming personal injury or property damage

caused by negligence must be filed within three years of the injury. Generally, an action to recover damages against the perpetrator for assault, battery, false imprisonment or other intentional act must be filed within one year of the injury.

New York has a special statute of limitations for civil cases arising out of criminal acts. A civil lawsuit filed by a victim of crime may be commenced against a perpetrator who has been convicted of the crime within seven years of the date of the crime or within one year from the termination of the criminal action.

If the victim is a child under the age of eighteen at the time of the injury, then that child's right to file a lawsuit is extended and does not begin to expire until the child turns eighteen. For example, if the victim of a crime is fourteen years old, that victim's right to file a lawsuit through a parent or guardian is immediate; however, if no lawsuit is filed the child/victim still has the right to start a lawsuit after he or she turns eighteen. At that time the victim would have one year to start a lawsuit against the perpetrator, and three years to start a lawsuit against a negligent third-party. An attorney should always be consulted about questions regarding a statute of limitations.

VII. Types of Civil Lawsuits

There are numerous claims under which civil actions may be brought. They include wrongful death, assault and battery, intentional or negligent infliction of emotional distress, and negligence. Some of these actions are described below.

In civil cases, the crime or wrongful act is referred to as a tort. For most criminal offenses, there is a corresponding tort for which a crime victim may bring a civil suit. Some examples of torts include:

Assault - putting the victim in fear of immediate injury while the perpetrator has the ability to inflict such injury.

Battery - intentional physical contact with a person without that person's consent. Battery includes the crimes of sexual battery, rape, molestation, fondling, forcible sodomy, malicious wounding, and attempted murder.

Wrongful Death - a death caused by another person which occurs without justification or excuse, including murder, manslaughter, and vehicular homicide.

False Imprisonment - holding a victim against his or her will for any amount of time, no matter how brief. This often occurs in rape and kidnaping situations.

Intentional or Reckless Infliction of Emotional Distress - causing a victim emotional distress or anxiety through extreme and offensive conduct. This is frequently seen in stalking cases.

Fraud - an intentional misrepresentation of facts made to deceive the victim, resulting in damages. This is often seen in white collar or economic crimes such as criminal fraud, telemarketing schemes, or racketeering.

Conversion - the theft or destruction of personal property or money. This includes larceny, concealment, and embezzlement.

Negligence - the failure to use such care as a reasonably prudent person would use under similar circumstances, when such failure is the cause of the plaintiff's injury. Examples include negligent security and negligent hiring.

Affirmative Defenses

There are several defenses that defendants of a civil lawsuit may use in an effort to avoid civil liability. These defenses include: self defense, comparative negligence, and assumption of risk.

Self Defense - perpetrators claim their actions were justified because they were defending themselves or someone else.

Comparative Negligence - the defendant claims that the victim's negligent conduct caused or contributed to the victim's injuries. In New York, the amount of money a successful plaintiff collects will be reduced by the plaintiff's proportional share of the blame for the injury.

Assumption of Risk - defendants claim they should not be held liable because the victims

voluntarily and knowingly exposed themselves to the danger.

Immunity - Under certain circumstances, the law provides immunity from civil liability to government agencies, government employees, and other parties.

VIII. Victim Privacy

Attorneys may employ various methods to protect victims' privacy. Victims' names and other personal information can be kept out of public records by filing suits under pseudonyms, such as Jane or John Doe. Victims can also use confidentiality agreements with the offender, or third-party defendant; file cases "under seal" (closed to the public); and videotape depositions. Each of these techniques allows victims to fight for their rights in a safer manner.

IX. Filing a Civil Lawsuit

A victim begins the civil case by filing a document that in New York is called the Summons and Complaint. The Summons and Complaint sets out the facts of the case and the legal claims being made. Defendants then have a certain amount of time to file a document called the answer. In this, defendants set forth their version of the facts and any defenses which apply. As a part of the process of the case, either side can request information from the other side. (For more information, see "Discovery.") In addition, either party can file motions asking the court to throw out certain claims or defenses or dismiss the entire case.

X. Discovery

In a lawsuit, each side can ask the other side for information and documents relating to the case. This process is called discovery. Civil discovery involves investigations of the facts and circumstances of the case, interviewing witnesses, obtaining relevant documents, and questioning parties and other witnesses under oath. The investigation may include a review of police records, informal interviews of eye witnesses, and photographing the location of the crime.

Request for Production of Documents

Document requests are a formal procedure by which one side can ask the other side to produce documents and other materials relevant to the case. Requests for production of documents must be answered in a specified amount of time.

Depositions

A deposition is a proceeding in which a party's attorney has the opportunity to question opposing parties and potential witnesses under oath. Deposition testimony is transcribed. The transcripts may be used at trial for various reasons, including if the witnesses are no longer available or if the witnesses offer trial testimony which conflicts with the deposition.

After documents have been produced and depositions have been completed, each side should know much more about the other's case. At this point, the parties sometimes engage in negotiations which lead to settlement of the case.

XI. Trial

If a settlement is not reached, the case proceeds to trial. A plaintiff wins at trial if the plaintiff has met its burden of proof and the defendant has not successfully asserted a defense to the claim. If the plaintiff wins, the judge or jury awards damages and the matter is over unless the defendant appeals. A defendant wins at trial if the plaintiff has not met the burden of proof or the defendant has successfully asserted a defense. If the defendant wins, the case is finished unless the plaintiff appeals.

XII. Damages

Judges and juries have the power to decide how much money to award as damages if the plaintiff wins. There are two main types of damages, compensatory and punitive. The goal of compensatory damages is to "pay back" the injured party. The primary purpose of punitive damages is to punish and deter criminals or third parties.

XIII. Judgment and Enforcement

A victim contemplating a civil lawsuit should understand that obtaining a civil judgment is only half the battle. In many cases, it may be difficult to collect the money awarded by the court. Some defendants do not or cannot pay judgments entered against them. However, there are potential sources of payment, such as insurance or various types of income, which should always be considered.

XIV. When a Perpetrator Sues a Victim

Occasionally, offenders may sue or counter sue victims. Defendants may take this step in order to harass or intimidate victims into dropping charges or withdrawing their civil suits.

Sometimes these suits are filed in response to the victim's civil complaint, along with answers to the complaint. Sometimes perpetrators file them in response to a criminal charge. Victims need to know that truth is an absolute defense to defamation and slander, which are the most common civil claims filed by perpetrators.

XV. About Lawyers

Finding a Lawyer

The National Center for Victims of Crime established the National Crime Victim Bar Association (NCVBA) to facilitate civil suits by crime victims. The NCVBA offers victims free referrals to attorneys for consultation.

Victims seeking more information or attorney referrals should call the NCVBA at:

1-800-FYI-CALL (1-800-394-2255).

Selection Considerations

More attorneys than ever are representing crime victims in civil lawsuits, though relatively few specifically list themselves as "crime victim" attorneys. Typically, these attorneys can be found handling premises liability, personal injury, wrongful death, or professional malpractice claims on behalf of plaintiffs. Finding qualified attorneys to represent victims in civil lawsuits often requires diligence.

A productive attorney-client relationship is based upon the ability of both sides to communicate fully and effectively with each other. Although relating sensitive details can be difficult for crime victims, they should feel as comfortable as possible in fully disclosing all details and information to their attorneys. Attorneys should be able to effectively explain all aspects of legal proceedings to victims and they should be responsive to victims' needs and requests.

Victims should fully understand all the details of any retainer agreement (contract to hire the attorney) prior to signing it. If victims have questions, they should feel comfortable discussing them with their attorneys. If questions persist, local bar association personnel may be able to explain laws, regulations, and common practices pertaining to contracts with attorneys.

Victims should be clear about what they wish their attorneys to do, and attorneys should be clear about what services they are providing. Understanding each other's expectations—as well as avoiding unrealistic expectations—can minimize the possibility of disappointment and frustration.

Victims should feel free to consult with several lawyers before selecting one. Lawyers are professionals, and it is good consumer practice to obtain a second opinion in selecting professional legal counsel.

Victims should cooperate, as fully as possible, with their attorneys. Such cooperation is necessary for successful representation of their interests. By the same token, victims have the right to expect their attorneys to be understanding, respectful, and responsive to their needs. Attorneys have the right to expect their clients to be honest and willing to participate in building their own cases.

Information Your Attorney May Need

When crime victims consult with an attorney, they should be prepared to answer detailed questions about the case that will allow the attorney to conduct a proper evaluation. Attorneys might request information such as the following:

About the Criminal Event:

- Date and time of criminal occurrence
- Location of events, addresses, and description of premises
- How the perpetrator gained access to the victim
- Identification of witnesses to any stage of the occurrence
- Identification of known physical evidence
- Whether a police report was filed, and if so, identification of: the police department where the complaint was filed, the detective or officer assigned to the case, the complaint or report number, and statements taken as part of an investigation
- Whether there was or is a criminal case, and if so, identification of: the prosecutor, current stage of criminal case, and description of the case investigation conducted

About the Perpetrator:

- If the perpetrator is known to the victim: nature of relationship with victim, perpetrator's name and aliases, address, date of birth and social security number, employment information, and any information known about the perpetrator's assets and insurance coverage
- If the perpetrator is not known to the victim: physical description of the perpetrator, identifying features
- If the perpetrator is not known to the victim, but a third party might bear some liability for the occurrence of the crime, details surrounding the crime and where it was committed become increasingly important, such as information about where the rape occurred and whether there was any security.

About Damages Sustained by the Victim:

- Medical information: degree of physical, emotional, and psychological injuries sustained, and extent and cost of anticipated treatment
- Identification of hospital, physician services
- Identification of property damage
- Lost amount of victim's or victim's spouse's time from work, lost wages, money recouped from workers' compensation, or state or private disability insurance
- Source of funds to cover damages or losses such as insurance (policy number), crime victims compensation, Medicare, and restitution

Fees and Retainers

Usually, the type of civil cases brought by victims of crime are billed by attorneys on a contingency fee basis. This means the attorney is only paid if the victim is awarded a monetary settlement or judgment. Attorneys will be paid a predetermined percentage of the total award.

There are also costs, such as filing fees, deposition fees, and service of process fees the victim might be responsible to pay before a suit is filed or during the course of the suit. Some attorneys require that plaintiffs pay a retainer fee. A retainer is money paid to an attorney, but kept in a special account from which the above-mentioned costs can be paid. Money not used in the retainer may be returned to the client at the conclusion of the suit.

XVI. Conclusion

The civil justice system offers victims of crime another opportunity to secure what they seek most—justice. Regardless of whether there was a successful criminal prosecution, or any prosecution at all, victims can bring their claims before the court and ask to have the responsible parties held accountable. While money awarded in civil lawsuits can never fully compensate victims for the trauma of their victimizations or the loss of loved ones, it can provide valuable resources for crime victims to help rebuild their lives.