

# Frequently Asked Questions<sup>1</sup>

## on **Defamation**

### and **civil claims against perpetrators**

### for survivors of sexual violence

#### INTRODUCTION TO THE LAW OF DEFAMATION

##### **Q1 What is defamation?**

Defamation is either libel or slander.

##### **Q2 What is the difference between libel and slander?**

Libel is a statement that is written or recorded, whilst slander is a statement made verbally.

Libel can include not only something written in a letter or newspaper but also statements made on social media or online e.g. Facebook, Twitter or Instagram, or a recording. A recording of a verbal conversation preserved in a permanent form, e.g. a phone message or a voice memo on WhatsApp, could be libel because it can be accessed repeatedly, similar to a piece of writing. Pictures can also be libellous, for example a photograph of a perpetrator with a heading “rapist” could potentially provoke a defamation claim.

Slander could include speaking to friends and family, or to a perpetrator’s associates or employer.

Almost all court cases on defamation involve libel, not slander.

A perpetrator who sues for defamation is alleging that untrue things have been said about him, and in court he would have to prove that:

- The survivor has reported things to other people;
- The things said identify the perpetrator;

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<sup>1</sup> With special thanks to Tamsin Allen and Daniel Shaw at Bindmans solicitors and Clare Duffy at Doughty Street Chambers for their work preparing these FAQs

- The things said have caused or are likely to cause serious harm to the perpetrator's reputation.

The perpetrator does not have to prove that the things said are untrue, it is up to the survivor to prove that the things she said were true – see more on this below at Q27.

### **Q3 What is serious harm to reputation**

- In order to be defamatory, the words must cause serious harm to the reputation of the person suing. Allegations of sexual offences would generally be regarded as causing serious harm, as most people regard sexual offences as repugnant. The burden is always on the person suing to prove serious harm to their reputation. The court would generally assume that an allegation of a serious sexual offence would cause serious harm to reputation, unless there was evidence to suggest no one believed the allegation or that it was only seen by a very small number of people. If the allegation was less serious, for example, unwanted touching around the waist at an office party, then the perpetrator would usually have to convince a court, with evidence, that he suffered serious harm to reputation.
- If the perpetrator had already been convicted of a previous sexual offence, then he would have difficulty showing that the new allegation caused serious harm to his reputation, as his reputation was already damaged. If he had convictions for some other type of offence then damage to reputation will depend on the offences, when they took place, and other factors in the particular case.

### **Q4 What is Malicious Falsehood**

To win a claim for malicious falsehood, a perpetrator suing would have to prove that:

- The survivor has made a false statement;
- Her words refer, directly or indirectly, to the perpetrator, or to his financial interests;
- The words are stated maliciously; and
- This has caused financial damage or was intended to

Difference with libel / slander:

- There is no need to prove harm to reputation. The person suing must prove they have suffered financial loss, or show that the survivor intended to cause financial loss.
- The perpetrator must prove that the survivor acted maliciously, which includes a situation where she knew or should have known that the allegations were false.

(There are some other more technical differences which are not included here).

#### **Q5 What is misuse of private information?**

- This would apply if a survivor discloses details about a sexual encounter or relationship, for example a description or photographs, where the perpetrator could argue he had a reasonable expectation of privacy because of details given about a sexual matter.
- A breach of privacy could be found whether the things said by the survivor are true or false. The fact that the things said are true is not a defence.
- Disclosing private information means disclosing private details about someone. Therefore, if a survivor simply says that the perpetrator has raped her, without giving any details whatsoever, this is unlikely to amount to a breach of privacy due to the lack of any details. Courts have held that a “bare fact” does not disclose any private information. (However, a word of caution is needed here, as the perpetrator may still threaten defamation proceedings by arguing that allegation is untrue, so there is a risk of a defamation claim even if he could not succeed in a claim for misuse of private information).
- In a misuse of private information claim the court must balance the perpetrator’s right to privacy and the survivor’s right to freedom of speech. If a survivor can show that she disclosed the information for a good reason, then a court may put her right to speak out above the perpetrator’s right to privacy. Examples of a good reason could be to warn another woman about the perpetrator, or to explain why the survivor won’t do something such as work in a shared office with the perpetrator.

#### **Q6 What compensation can be claimed by a perpetrator?**

- In a libel case compensation can be paid for damage to reputation, and also other types of losses such as financial losses which result from the defamation, for example the person who is suing has lost business opportunities, or for psychiatric impact such as a diagnosed depression or an anxiety disorder that resulted from the defamation.
- A slander case can usually only be brought where financial loss has been caused, unless the allegation is of a serious criminal offence (an offence that is punishable by imprisonment). If the allegation is of a sexual assault then compensation can be claimed for damage to reputation, as well as for financial losses, if there are any.
- In a malicious falsehood claim the compensation is to make up for the financial losses.

## **SPEAKING OUT – WHAT TO CONSIDER**

### **Q7 What is the best way to avoid being sued for speaking out?**

- No one can sue a person for reporting a crime to the police – doing this does not put a survivor at any risk of a defamation claim.
- Once a survivor has reported a crime, she has a lifelong right to anonymity so should be careful that by speaking out she does not lose that right – it may be better to speak out anonymously.
- If the survivor considers the perpetrator to be a danger to other women, she should make sure that she says whatever is the minimum necessary to protect other women. That is speech that should be protected as being in the public interest. For instance, if she knows the perpetrator is grooming young women at a youth group, speaking to the organiser of the youth group to warn them of the risk is a report which is likely to be protected as being in the public interest. Making a public statement online that the man is a risk is more difficult to defend.
- If the survivor wants to speak to friends on social media, she should be careful about privacy settings and make sure that she tells people in confidence and limited to a few trusted people. It is safer to tell them verbally in person.
- If the survivor makes a public statement that does not name the perpetrator and does not identify who he is to anyone, including people who know him and her, then it will be difficult for the perpetrator to sue for defamation (see Q14 below).
- If the survivor wants to make a public statement that she is a survivor of a sexual offence but does not identify the perpetrator publicly, she should be careful that she does not identify them accidentally (e.g. I was raped by my partner last Christmas – some would know who the perpetrator was).
- If the survivor wants to identify the perpetrator publicly and speak about her experiences, she can minimise the risk of being sued by taking legal advice and/or making sure that she is able to prove what she says is true, or that it could be defended in court on one of the other legal grounds for defending a case, (See Q28 below, e.g. that it is privileged or her ‘honest opinion’, or a statement in the public interest.) These are complex therefore she should discuss them with a specialist defamation lawyer before she goes public (contact Centre for Women’s Justice for help).

- The survivor should consider whether the information she is publishing may be protected by law as being private, such as photos, or details about sexual activity, this could be a breach of privacy of the perpetrator regardless of the fact that what she is saying is true.

### **Q8 Should the survivor speak out using her name or remain anonymous?**

A survivor will need to consider carefully whether to reveal her identity if she speaks out. If she has reported sexual assault or rape to the police, she will have a lifelong right to anonymity automatically<sup>2</sup> and it would be a criminal offence for anyone to reveal her identity without her consent.

Despite anonymity being automatic, in any kind of civil case she should apply to the Court for an anonymity order to ensure her identity is not revealed through the court proceedings. This would apply, for example, if she is being sued for libel or if she is bringing a civil case for sexual assault against the perpetrator. If she has an anonymity order in place, it would be a contempt of court to breach that order.

By contrast, when a survivor is a victim in a criminal case she does not need to take any further steps need to be taken to safeguard her anonymity. Her name will be stated in the courtroom, but it cannot be published by anyone who observes the trial (such as newspapers). The survivor may, understandably, be nervous about giving evidence in front the public gallery and jury. If so, she can apply for special measures, such as screens and giving evidence by video link. In the overwhelmingly majority of cases involving sexual allegations a court will grant an application for special measures.

If she discloses her identity, for example in a media interview, either deliberately or accidentally, she loses that right to anonymity for all future time. It can also be difficult to later claim anonymity if the criminal case goes ahead.

If she has not reported to the police she does not have this anonymity, but she should bear in mind that she may want to report in future so if she discloses her identity now she could lose her right to anonymity in future.

### **Q9 The survivor has reported rape to the police but also wants to speak out about what happened to her.**

She cannot be sued for anything that she has said in private to the police when reporting a crime, or another professional for a court case. However, if she tells other people about the details that she has reported to the police then the perpetrator could try to sue her for that.

If the perpetrator has been arrested and is under investigation by the police, then the survivor could be at risk of committing a criminal offence if she says something which

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<sup>2</sup> A person who has alleged a sexual offence has automatic lifelong anonymity under s1 of the Sexual Offences (Amendment) Act 1992 which prohibits the publication of their name, address, any still or moving picture of them.

runs a serious risk of prejudicing a future trial. For example, if she were to say publicly to a large number of social media followers that she is glad he has been arrested, he has already been convicted of sexual assault and violent offences on numerous occasions, and she hopes he will be again, this could be a contempt of court because the jury in the criminal trial should not be told about previous convictions (unless the judge decides they can be).

Generally, if a criminal investigation or prosecution is underway it is best to wait for it to be over before speaking out publicly.

**Q10 The survivor doesn't want to report her rape to the police but wants to speak out / warn others in her / the perpetrator's community – what can happen if she does this?**

In theory the perpetrator could threaten to or try to sue her. If she knows the perpetrator and what sort of person he is she can assess the likelihood of this.

If she goes ahead she should try to prepare the statement carefully and to make the allegations in a way which could be defended as a public interest statement. It is best to get legal advice and help with this. She needs to be able to show that she made the statement because she believed that it was in the public interest to make the statement, and that her belief was reasonable. For example, if the perpetrator was a well-known TV personality with access to children, she could consider making a complaint to the relevant production company or his employer rather than publicising the allegation generally. If it is important to make the allegations publicly, she should be careful to say no more than is strictly necessary and to think about whether she could fulfil the public interest in another way.

If she wants to speak out it is best to seek advice from a lawyer beforehand about any statement she intends to make. She should try to gather evidence to support her. The lawyer can advise about the risks in her particular case and how to minimise those risks. She can contact Centre for Women's Justice to see if we can arrange pro bono advice, or she can pay a lawyer.

**Q11 Apart from defamation, could the perpetrator take any other legal action against a survivor?**

The perpetrator could try to sue for misuse of private information. He would have to show that he had a reasonable expectation of privacy in the information – so that the information was private. For example, if the survivor disclosed publicly photographs, texts or details of sexual activity, he could threaten or bring a privacy claim. A privacy claim by him will fail if she can show that the statement is exposing wrongdoing or in the public interest for another reason (e.g. protecting the public).

(It is also possible for a survivor to sue a perpetrator for disclosing private sexual materials, see Q45 below.)

It has been known for perpetrators to try to bring a private prosecution for perverting the course of justice, and a civil claim for malicious prosecution against a person who has reported them for a criminal offence. This is very rare and it would be

difficult for a perpetrator to find a lawyer to take on such a case. Any such case would be based on the same argument that the rape allegation was malicious, so fighting it would involve the same evidence as in a libel case, though the legal points would be different. Again, it would be very important to try to get legal advice from a specialist lawyer if such a case is brought by a perpetrator.

### **Q12 Can a defamation case be used to stop a survivor speaking out?**

A perpetrator can bring a defamation case after someone has spoken out, but they cannot usually seek an injunction (court order) in advance to stop a survivor from speaking out (assuming they knew she was planning to do so). However, they might try to bring a privacy claim to stop a survivor from speaking out as injunctions can be ordered to prevent a privacy breach. An injunction is a court order to stop a person making something public, where it is known in advance that they are going to do this and what they are going to disclose.

### **Q13 What if the survivor has not disclosed anything in public?**

Libel or slander can take place whenever words are written or spoken to any third person who is not the perpetrator: this can be to only one, or several other people, it does not need to be to a large number of people or to be available in public. Therefore, a message on a social media platform that is only accessible by one other person can be a libel, although it is unlikely to cause 'serious harm' which is needed for a legal claim to be successful.

### **Q14 What if the perpetrator is not named?**

If the perpetrator is not identifiable then he cannot sue for defamation. However, even if he is not named, he might still be identifiable to friends or family or anyone else who knows him, as in the example above "I was raped by my partner last Christmas" – some would know who the perpetrator was. In contrast, if a survivor spoke about an incident during a one-night-stand, and had previously had a number of one-night-stands, then the perpetrator would not be identifiable, unless some detail were given that would identify him. The question is whether at least one person would reasonably understand the words to refer to the person who is suing (see Q13 above, disclosure to only one person is unlikely to cause 'serious harm', though one person identifying the perpetrator could lead to the identity being shared more widely).

### **Q15 What about words repeated by someone else, or published in the press?**

If the words are published or repeated by someone else, both the original survivor who made the allegations, and the newspaper or other third party who repeats them, can be sued for defamation. Usually people who sue for libel choose to sue the newspaper or TV company etc, rather than the person who originally made the allegation, because a company will have more money to pay compensation and legal costs if they win their case. But sometimes they will choose to attack the survivor so, unless the survivor is totally anonymous and her identity protected by the newspaper as a confidential source, she could be sued as well or instead.

**Q16 The police have decided not to charge the perpetrator. The survivor feels let down by the criminal justice system and wants to speak out about the abuse she suffered. Could the perpetrator sue her for defamation?**

Her situation is the same as in Q7 above. If she names the perpetrator, or identifies him in some other way, he could potentially try to sue her for defamation.

The fact that the police have investigated and decided not to charge him does not make a difference to the issues in a defamation case. There will always remain a risk of being sued if she makes any statement on allegations that have not been proven in court.

She will still keep her right to anonymity even if the police do not charge, so she should think carefully about whether she wants to lose that right by speaking out in her own name.

If she feels that she wants to continue to seek justice against the perpetrator she could consider a civil claim for sexual assault against him (see Q39 and Q40 below).

If she does decide to speak out she should consider the points in Q7 above and get legal advice to try to protect her self as much as possible (see Q47 on how to contact Centre for Women's Justice for advice).

**Q17 The survivor wants to speak about the abuse she suffered in the media and has been asked to do an interview - could the perpetrator sue her for defamation?**

All the same considerations apply see Q7 above. Defamation claims are rare so she should not let this stop her from speaking out, but she should be aware of the possible risks if the perpetrator is identifiable from what she says in the interview. If he is not identifiable in any way this would prevent a successful defamation claim. A newspaper or broadcaster will have their own legal advice and take steps to avoid defamation claims.

If he is identifiable, a perpetrator could in theory sue both her and the newspaper / broadcaster, or either of them, though in practice defamation claims are often brought against the media and not the person who made the allegations, because the media have money to pay compensation and legal costs.

If she has reported the abuse to the police she will be entitled to anonymity. If she has not reported abuse to the police she can still ask the journalist for anonymity. Although there would be no court order, journalists have obligations to protect sources if they choose to remain anonymous. If they were to reveal her identity against her wishes, then she could potentially sue the publisher for misuse of private information.

A commercial publisher will seek advice from their own lawyers before any allegations are published and as professional journalists, they may contact the perpetrator and give them a right of reply. This will be necessary if the commercial publisher is then sued by the perpetrator and wishes to rely on a public interest



defence. It will be for the commercial publisher to decide on the risk of publication and at what stage. This will ultimately be an editorial decision for the publisher as to how much detail they publish, as it is generally the publisher who has to handle the risk of being sued.

The safest time to publish is after a finding by a court that the perpetrator is guilty, when the survivor will be protected from defamation claims.

If the criminal process is still underway, after she has reported to the police, but before the case comes to trial, she should be very careful and it would be better not to take part in any interviews, as this could be a contempt of court (see Q9).

## WHAT TO DO IF A LEGAL THREAT OF DEFAMATION IS RECEIVED

### **Q18 The survivor has received a letter from a solicitor acting for the perpetrator threatening to sue her for defamation and telling her to retract what she said about him. What should she do?**

This is sometimes called a “cease and desist letter”. She should try to get some urgent legal advice (see questions Q32 and Q33 below about how to pay for a lawyer and how to find a lawyer). You can also contact the Centre for Women’s Justice to try to get help with finding a lawyer (see Q47 below on how to contact us).

The solicitor acting for the perpetrator should not start a case in court against the survivor without first complying with court rules called the “pre-action protocol”<sup>3</sup>. This means that the solicitor must first send her a “letter of claim” telling her what the perpetrator is accusing her of, why they say it is unlawful, and what the perpetrator is asking her to do. Under the rules of the protocol she should usually reply within 14 days, though she should reply sooner if it is reasonably possible, and if she can’t reply within 14 days she should tell them the date by which she intends to reply.

The survivor should not feel pressurised by the perpetrator’s solicitor to reply immediately or within a short time which is less than 14 days. She can reply to tell them that she has received the letter and she is seeking legal advice and will respond after that.

It is very important not to ignore the letter as that could prompt the perpetrator to start a court case against her. It is better to respond even just to confirm she has received it and then try to get legal advice as soon as she can.

The survivor should never feel under pressure to back down and just agree to what the perpetrator and his solicitors are demanding, but try to get legal advice instead. If the letter is written in an aggressive way she should try not to feel intimidated, as the solicitors are simply trying to frighten her and this does not necessarily mean that the perpetrator has a strong case.

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<sup>3</sup> A copy of the pre-action protocol for defamation cases, called the pre-action protocol for media and communications, is here: [https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_def](https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def)

Just because the perpetrator has a solicitor who is able to write a letter does not mean that the solicitors would take a case to court. If the survivor does not have money to pay legal costs it is actually very unlikely that the solicitors would represent the perpetrator in a court case unless he is very wealthy. Therefore the letter could be a bluff and does not necessarily mean that there will be a court case brought against her (see Q19 below about the perpetrator's legal costs).

### **Q19 Does the perpetrator need a lawyer in order to sue for defamation?**

No, a perpetrator does not need a lawyer in order to sue for defamation but he should comply with the pre-action protocol steps before he begins a case in court (although in practice many do not). See Q18 above on the pre-action protocol which contains a link to it. This means writing a letter to the survivor to set out what he considers to be defamatory and what he wants to be done to avoid a court application. The letter that a perpetrator should send is called a "letter of claim" and paragraph 3.2 of the protocol sets out the things he should include in the letter. If he pursues a case without legal representation, especially if he does not follow the court rules correctly, his chances of success are far weaker.

A person who sues for defamation will generally only be able to get a lawyer to represent him if he either pays privately (and defamation claims are particularly expensive) or if he can find a lawyer to take the case on "no win no fee". A lawyer is only likely to do that if, firstly, they believe there are good prospects of winning the case, and secondly if the survivor is wealthy enough to pay compensation and legal costs if she loses. Otherwise the perpetrator's lawyers will not get their costs paid even if they win. In some cases, a lawyer may send a survivor a letter threatening to bring a defamation case against her, but that does not mean that they would agree to represent the perpetrator in a court case, as they will know they probably would not be paid even if they win if she cannot afford to pay tens of thousands of pounds. They may continue a case against a newspaper or broadcaster or publisher who can pay.

However, a perpetrator may continue to bring a court case against a survivor without legal representation. Therefore if she receives a solicitor's letter threatening to take her to court for defamation, and she does not have much income or property, the likelihood of a case actually being pursued against her in court depends on whether the perpetrator is likely to go to court on his own without a lawyer. If she knows him well enough she may be able to assess the likelihood of this.

### **Q20 Does the survivor need a lawyer if the perpetrator threatens to sue her for defamation?**

No, but it is important to try to get independent legal advice from a defamation specialist if she can. Most lawyers will not have experience in this area of law so she should try to get advice from a specialist. You can contact Centre for Women's Justice to see if we can find a defamation lawyer on our panel to give her some limited advice free of charge. However, if the case proceeds to court, in order to have legal representation she will need to either pay privately (which can be very expensive) or try to find a solicitor to act on "no win no fee". This is unlikely unless

her opponent is wealthy and can pay her lawyers' costs if you win. In some cases it may be possible to get legal aid, which not only pays for her lawyers but protects her from having to pay legal costs if she loses. See Q32 below on how to pay for a lawyer.

### **Q21 The perpetrator is threatening to sue a survivor for defamation because she reported him to the police for rape**

She cannot be sued for reporting a rape to the police, that is considered a privileged act (see Q9 above) so she would have a complete defence and he would lose his case if he took her to court. This also applies to other professionals involved in a legal case. If she has also told other people about the allegation that she reported to the police, who are not police or other professionals involved in a legal case, this protection does not apply.

### **Q22 What are the time limits for defamation cases?**

Any libel case will need to be issued in court within the legal time limit, which is one year from the date that the statement or words were published, written or spoken. The one-year period ends the day before the same date the following year, so if the statement was made on 1 December 2020 the final date for issuing a case in court would be 30 November 2021.

Although the time limit is a year, if a perpetrator delays for several months before taking any legal action (such as sending a "letter of claim"), the survivor could argue that he is not really upset about the allegations and did not suffer serious harm, as he did not take prompt steps to vindicate his reputation. However, so long as the perpetrator issues a claim in court within the one-year deadline, he is entitled to pursue a claim, though his claim will be weaker if he has delayed, especially if he has left it to close to the end of the year.

If the statement or words are repeated, for example in more than one publication, or shared on social media multiple times, the time limit still runs from the date of the first time the statement or words were shared, published or spoken.

### **Q23 What happens if the time limit has passed?**

If a perpetrator issues a case against a survivor in court after the one-year time limit has passed the court can dismiss the case on the basis that he has missed the time limit, without considering the actual issues in the case. She should seek legal advice about this. A person could make an application to allow a claim even though it was started after the time limit especially if he did not know about the defamatory statement until later, but this is at the Court's discretion and is not automatic.

## **WHAT TO EXPECT IN LEGAL PROCEEDINGS**

### **Q24 Can a survivor ignore a claim?**

No, if she ignores the time limit to respond with a defence she risks the Court finding that the perpetrator has won the claim without her being able to defend it. Even if she applies to have that situation reversed, she would have to pay his legal costs. It is very important not to ignore any formal document from the Court or a document called a Claim Form or Particulars of Claim

### **Q25 Are there any obligations on a survivor once proceedings have started?**

Yes – she has to comply with any Court Orders and there can be serious consequences if she does not. She needs to be prepared to disclose any documents in her control – e.g. text messages, Whatsapp messages, letters etc – especially if they undermine her case or support his case. It can be a criminal offence to delete unhelpful material so she should be very careful to preserve electronic materials and other documents in case she has to disclose them later.

### **Q26 What if there are disputes about what the survivor's words meant?**

A person who sues for defamation must set out the 'defamatory meaning' of the words. If there is a dispute, the Court will decide the single natural and ordinary meaning that an ordinary reasonable person, who does not have any unique background knowledge, would understand from the words.

The words could also have an 'innuendo meaning', which is a meaning that is defamatory if the person reading or receiving the information has some background knowledge. For example, a statement that Mr X was a regular visitor to 23 Bridge Street would only be defamatory to those readers who knew this was a drug dealer's house.

### **Q27 The perpetrator is accusing a survivor of defamation but the things she said about him are true. What can she do?**

A survivor can win a case brought against her for libel or slander if she can prove that the allegations are "substantially true". This means that the core or 'sting' of what is said is true, but it does not mean that all the details of the allegation have to be proved to be true. Therefore, even if there are some details that are unclear or not accepted by the court, if overall she can prove that she has been abused by the perpetrator as she claims then he will lose his case. Every case will depend on its own facts.

In court in a libel case, it is important to be aware that the survivor would have to prove that the allegations are true, rather than the perpetrator having to prove that they are false. Defamation is a civil case, not a criminal case, so she has to prove that her account is true 'on the balance of probabilities' i.e. more likely than not. She does not have to prove her account to the higher standard of 'beyond reasonable doubt' as in a criminal prosecution. Nevertheless, the more serious the allegations, the higher the standard of truth, so where very serious allegations such as rape are made, the survivor would be required to prove these allegations convincingly. In practice this means stronger evidence than in some other types of civil cases.

Similar issues arise in civil as in criminal cases when the events took place in private without witnesses, as sexual assaults generally do. She will have to consider what corroborating evidence may be available, such as people she told about the events soon after, medical records, etc as for a criminal case. However, it is important to remember that in criminal cases there does not have to be corroboration of the victim's account, so a clear and consistent account from a victim of crime can be enough for a prosecution and a conviction, and very often is in many different types of offences. The same is true in a civil case, where the standard for proving a case will be lower, so it is easier for the victim to prove her case than in a criminal court.

In a civil case she can also use evidence that undermines his credibility to cross-examine him more easily than in a criminal case. There are no rules to prevent the court knowing about any unspent and relevant previous criminal convictions that he has, as there would be in a criminal court.

If the perpetrator has been convicted of the incidents that the survivor is speaking out about, then he cannot succeed in a libel case because the truth has already been proved in the criminal court. If a civil court, for example the Family Court, has made a finding that the perpetrator committed the abuse alleged against him, then the court in a defamation case will not find a different outcome on the same facts as a previous court. The law will treat the facts as already being proved and the survivor could apply to have the case thrown out by the court in the defamation case without it going to trial.

### **Q28 Are there any other ways a survivor can defend herself against a defamation claim brought by the perpetrator?**

In addition to the things she has said being the truth, the other main defences available to a person who is sued in a libel or slander case are 'honest opinion', 'publication on a matter of public interest' and 'privilege', which can be 'absolute privilege' or 'qualified privilege'.

Privilege is a defence that applies in certain situations where the law recognises that people need to be able to speak freely. Absolute privilege applies to statements made to the police, or in a document prepared purely for legal proceedings. Therefore she could not be sued for defamation for what she has reported to the police, or if she is asked to give a witness statement in any legal case. Another example would be an assessment by a social worker for the Family Court.

Qualified privilege provides some protection for a person who makes a statement, but not if the statement was made maliciously. An example of this is giving a job reference, or replying to an attack on your own reputation (for example, in a Twitter conversation – if the perpetrator accused a survivor of being controlling and she defended herself by accusing him of being controlling and gave an example, that is a statement which she could claim was privileged.) The perpetrator has the burden of proving that what she said was malicious, which is often difficult to do.

The other two defences, honest opinion and public interest, usually apply to newspapers and other publishers but they are important defences for anyone. If the survivor can show that she made the allegations because she reasonably believed it

was in the public interest to publicise the behaviour of the perpetrator, for example to protect other women, that would mean that she had a public interest defence. As allegations of sexual assault/rape are serious and damaging allegations, she would need to think carefully about how to set up a public interest defence and demonstrate why she believed it was reasonable to publish the allegations, and consider if there is a less damaging way to reach the same public interest outcome (See Q7 above). Someone reporting an assault on someone else's behalf, such as a journalist, may need to be cautious and fair, e.g. by saying that the perpetrator denies the assault, and contacting him for his response.

An opinion defence applies where the words published are clearly an opinion/view/conjecture, and the basis for making the allegation is true and can be understood by the readers. Allegations of sexual assault will usually be factual. But in some situations, a survivor may be able to express her allegation as an opinion. She will need to set out the basis for the opinion (and that needs to be accurate), and then she can comment freely. For example, if she had received inappropriate text messages from someone in a position of responsibility, she could refer to those (setting out what he said) and then give her opinion of the perpetrator ("in my view he is a dangerous predator and should not have any position of responsibility"). It is advisable to get legal advice from a defamation lawyer before relying on this, or any other defence, because they are complex legally.

The additional defences set out in this question can be included along with her defence that what she said was the truth. It will usually be advisable to include other defences. It is important to obtain legal advice at the earliest opportunity if she is threatened with defamation proceedings to help identify which defence(s) are relevant to her claim.

**Q29 If a perpetrator sues a survivor for libel for saying that he raped her, can she sue him back for the rape?**

Yes, it is often a good idea, when defending against the libel case, to also sue him back for sexual assault as part of the same case. This is called a counter-claim. The things that have to be proved for both matters are the same. See questions below about bringing a civil claim against a perpetrator. This is a personal injury claim for assault and it would be helpful to have advice from a personal injury lawyer.

**Q30 What happens if a civil claim for defamation goes to trial?**

Civil cases can take several years from beginning to end, around two to three years on average. There are likely to be short hearings in court as the case goes along, before the final trial. Libel claims are now heard by a judge (they used to be before a jury before 2013).

If a survivor has reported the sexual assault to the police, she is entitled to life-long anonymity. She can also apply for an anonymity order if a case is issued in a civil court, whether she reported to the police or not. Usually in a case involving sexual assault this would be granted by the court. If she is entitled to anonymity her name and identifying details will not be reported but the press can be present in the Court

and report the trial generally. Any court judgment would refer to her by her initials or some other letters, and not use her name.

At trial, the perpetrator will give evidence first as he is bringing the case against the survivor. She or her barrister will cross examine him. A civil case does not have the same restrictions as in a criminal case about raising allegations of other offences committed by the perpetrator. Therefore, if she knows of other relevant allegations against him she can put those to him in court. However, he can simply deny them so she will need to present her own evidence to back up her allegations. This will usually mean calling other survivors as witnesses who can give their own accounts about the incidents that happened to them. Documents such as press reports are hearsay and there are special rules about whether she can use them and how relevant the judge should consider them to be. Any other allegations must be similar enough to the allegations she is making to be considered relevant and/or relate to the perpetrator's credibility generally.

After the perpetrator and any of his witnesses have given their evidence, the survivor will go in the witness box to give evidence about what happened. In most cases her written witness statement will be read by the judge in advance and she will not be expected to go through that account again in the witness box, though this is always still a possibility. She will then be cross examined by the opponent's barrister.

If the perpetrator is doing the case on his own without a lawyer, he would normally be able to cross-examine witnesses himself, so a survivor who wants to prevent this has to apply to the court to avoid this. There are some protections in a civil court, but not as many as in the criminal courts or the Family Court, and it is important to try to get some legal advice on this if the case does go to trial. She can request a "ground rules hearing" where the judge would consider whether there should be a special arrangement to prevent the perpetrator from directly cross-examining a survivor. This hearing would be in advance of the trial and it should be with the same judge who will hear the trial. There is no automatic prohibition and in each case the judge has to consider the rights of both parties and decide whether direct cross-examination should be allowed or not. If the judge decides not to allow direct cross-examination, the perpetrator will be told to put his questions in writing for the judge to ask them on his behalf. The judge does not have to ask every question requested by the perpetrator, s/he can assess how relevant and proportionate the question is. Also, the judge does not have to just stick to the questions prepared in advance, but can follow the flow of cross-examination, which is a dynamic process. The judge can also adopt a less confrontational style than in a 'normal' cross-examination.

There may be witnesses called by either side, including medical experts, and other evidence such as medical records, CCTV, mobile phone evidence etc.

### **Q31 What would happen if the perpetrator wins a defamation case, or if a survivor wins?**

In a defamation case, if the main dispute is whether the statement/s the survivor made were true, the judge will decide whether she was telling the truth or not. If the perpetrator is suing the survivor for stating that he assaulted her, this means that the judge will decide whether she was assaulted by him. The judge has to decide

whether her words were ‘substantially true’, this means that the core or ‘sting’ of what is said is true but, it does not mean that all the details of the allegation have to be proved to be true. Therefore, even if there are some details that are unclear or not accepted by the court, if overall the judge accepts that she was abused by the perpetrator as she claims, then the perpetrator will lose the case. Every case will depend on its own facts.

Sometimes there may be other issues, for example if she uses a defence other than truth (such as public interest or qualified privilege, see Q28). In effect it is the perpetrator who is on trial, even though he is suing the survivor. The judge will give a detailed judgment saying why one side or the other has won the case.

If a survivor loses a defamation case she will be ordered to pay compensation to the perpetrator, the amount will depend on the impact of his loss of reputation, and any financial losses he has suffered. The amount of compensation can be very large and she would likely be required to pay aggravated damages which increases it even more. She would also be ordered to pay his legal costs, which may also be very large. If she does not pay, there are a range of enforcement methods the court can apply such as deductions from her salary or freezing her bank account. If she simply does not have the money to pay then he won’t be able to get any money from her, but she will have the court order hanging over her and continue to owe him money if she gets a job or comes into money in future, and she may have to declare herself bankrupt. A defamation claim may be brought primarily about the reputation issue, rather than for the compensation, so a perpetrator may bring a case even if he knows she doesn’t have the money to pay.

In addition, in a defamation case, if he wins the perpetrator may get an order that the survivor must delete defamatory statements (e.g. if she put them online) and forbidding her from repeating the statements in the future.

If the survivor win the case the perpetrator does not have to pay her anything except her legal costs.

## **PAYING FOR LEGAL ADVICE FOR DEFAMATION**

### **Q32 How can a survivor pay for a lawyer?**

This section is about paying for a lawyer in a defamation or malicious falsehood case. See Q42 below about paying for a lawyer to sue a perpetrator for a sexual assault, where the rules are different.

In a defamation case the person who loses the legal case pays the winner’s legal costs, so a survivor has to think about how she could pay her own lawyer, and also how she could pay the other side’s lawyer if she loses.

There are various options to consider, but each has its difficulties:

- a. Legal aid



There is usually no legal aid available for a defamation claim or a malicious falsehood claim, whether you are the person suing or the person defending. It may be possible to apply for “exceptional funding” under the legal aid scheme despite the fact that legal aid is not usually available, where legal aid would be necessary to ensure access to justice as required by the European Convention on Human Rights.

There has been a case in the European Court where the court stated that legal aid was required in a libel case to protect freedom of expression and the right to a fair trial because of the huge imbalance of power between the two sides.<sup>4</sup> However, we are only aware of a very small number of cases where legal aid has been granted as “exceptional funding”. The application form is very complex so you should seek help from a specialist solicitor. The Centre for Women’s Justice can try to help put you in touch with a solicitor. We can may also be able to provide a template application for exceptional funding which has been successful, which may help the survivor or her solicitor to prepare her own application.

Exceptional funding is more likely to be granted where the person who applies would find it particularly difficult to represent themselves, for example because of a learning disability, mental health difficulties, limited English or literacy, or other similar reasons. It could also be granted without these factors if the issues at stake are very important for the survivor and the law is very complex. The application would be based on the survivor’s right to freedom of expression under Article 10 of the European Convention on Human Rights and her right to a fair trial under Article 6 ECHR.

Anyone who applies for legal aid also has to come within the financial threshold, which means they must have a very low income, savings below £8,000 and not own a house worth over £200,000. A detailed calculation will have to be carried out by a solicitor, including the finances of any partner that the survivor lives with, their housing costs and the number and ages of any children. Detailed financial documents have to be provided including the last three months’ bank statements.

Very importantly, if a person has legal aid they don’t have to pay the other side’s lawyers if they lose.

b. “No win no fee” or “No win low fee”

This is the most common way of paying for legal representation in defamation cases. In a “no win no fee” case the survivor’s lawyers will only be paid if she wins, and then the other side will have to pay her lawyers’ costs. In a “no win low fee” case, she will pay her lawyer a small amount, and they will receive their full

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<sup>4</sup> *Steel & Morris v United Kingdom* (2005) where the European Court found that two campaigners who wrote a leaflet about McDonalds (criticising the environmental, animal welfare and other negative impacts of their food), who had defended a libel claim brought against them by McDonalds, had been denied a fair trial, in breach of Article 6 of the European Convention on Human Rights and they should have been protected by Article 10 of the Convention, which protects the right to freedom of expression. They had applied for legal aid but were refused as it was not available for defamation cases. The European Court stated that “*the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonalds*”.

costs from the other side if she wins. A “no win low fee” may be combined with crowdfunding, see section d. below. All these types of arrangements are known as Conditional Fee Agreements (CFAs) as they are conditional on the survivor winning her case.

A lawyer will only enter into such an agreement with the survivor if they believe that her prospects of winning are good. This will generally mean that the case has to be considerably stronger than 50%, it has to be strong enough for the lawyer to take a gamble on not being paid for a large amount of work, because such cases can be large and take years to get through court. Some lawyers will charge an initial limited fee to consider the case in detail to see if it is strong enough to offer a CFA.

A lawyer will only enter into this type of agreement if they believe that the opponent will be able to pay their costs if the survivor wins her case. This means that the perpetrator must be either a rich individual, or a person who has insurance, such as a doctor or therapist or other professional. A rich perpetrator who is not insured may also refuse to pay if they lose, so the survivor’s lawyer may also have to consider the cost of enforcement action in that situation, whether they would have to get court orders to force the perpetrator to pay, whether he may try to hide his financial assets or leave the country or evade payment in other ways.

Therefore, the survivor will have to try to find a lawyer who believes that she has good prospects of winning the case and is willing to take the risk that they will not be paid, or only be paid a small amount, if she loses. Each solicitors’ firm will have their own approach to doing such cases and they will decide case by case, and explore the likelihood of winning before they make a decision on her case.

When a person is suing, rather than defending a case, some firms may add a “success fee” which is additional legal costs which can be deducted from the compensation if the person wins, to offset the risk of doing their work unpaid if they lose the case. This does not usually apply if you are the person being sued.

If the survivor is bringing or defending a claim against someone with a lot of money, she might be able to get insurance to protect her from having to pay costs if she loses the case, but this is unusual. She should discuss this with your solicitor.

If the survivor loses a case she would have to pay the perpetrator’s legal costs, see d. below on paying privately.

### c. Crowdfunding

One way that is used to raise money for some legal cases is public crowdfunding through websites such as Crowd Justice, which publicises cases on its website and invites the public to make donations. However, this is usually not an option in a defamation case if the survivor has to avoid repeating her allegations against the perpetrator. Also, in many sexual violence cases survivors do not feel able to share their experiences publicly.

To pursue this option she would have to go public about her case and campaign for it, though this can be done with her remaining anonymous. This is generally done after she finds a lawyer who is prepared to take on her case with this type of funding. This type of funding is most often successful where the issue in the case has wider public appeal, for example the survivor can present her case as being about seeking justice for male violence, or the right to speak out about male violence.

To make this kind of fundraising successful, the survivor would need to share her crowdfunder widely on social media and through contacts and campaigns. However, even strong cases may not raise more than a few thousand pounds if they relate to an individual (rather than a strategic or 'test case' that affects large numbers of people). Therefore, she may only be able to raise enough money for her lawyers to take a case up to a certain point, but not necessarily to cover the cost of fighting the case all the way to trial, which can have very high legal costs.

The money she raises will also have to cover paying the other side's legal costs if she loses and sometimes all the money will go towards this and her own lawyers act free of charge, therefore it can be difficult to find lawyers who will do this. If she doesn't raise enough money to cover the other side's legal costs if she loses, she will remain personally liable to pay those costs out of her own pocket. The opponent can apply to court to enforce a costs order against her, for example by deducting money from her monthly salary or freezing her bank account.

d. Paying privately – how much will it cost?

As in any legal case, she can pay lawyers privately, which is normally done on an hourly rate, and different rates are charged by different lawyers depending on their level of specialism and the seniority of the individual lawyer. A defamation claim can become very costly as the case progresses. This is therefore not usually an option unless the survivor is wealthy.

She may be able to afford legal costs just for the early stages, such as a letter to the opponent or his lawyers, trying to get them to back down. Some solicitors may agree to do this on a limited fee or a fixed fee where the amount is agreed in advance so she can see whether she will be able to raise the funds for it. Solicitors may also charge for an initial legal analysis and advice on the prospects of success, so she can decide whether she wants to continue to fight the case and consider all her options. Some firms will do this work on a private paying basis, and then if they think the prospects are good enough they will consider a "no win no fee" or a "no win low fee", though this will depend on whether the opponent could afford to pay legal costs if they lose.

Usually a solicitor will act in the early stages on their own, and then a barrister will be instructed later, if it looks as if the case is likely to go to court. Because defamation claims are usually heard in the High Court, often a QC (very senior barrister) and a junior barrister are instructed, which will be very expensive. Where the solicitor is doing the work on a CFA, it may be possible to also have

the barrister/s also working on a CFA. Again, this will depend on the opponent having enough money to pay all the legal costs if they lose.

If a defamation case goes all the way to trial, the legal costs can be between £250,000 and £1m for a complex case that is fought all the way. If the survivor wins her case, she can try to recover most of her costs from the opponent, so she could get most of her money back. She will also face the risk of losing the case and having to pay the other side's legal costs.

Therefore for most people who are not very wealthy going to court is not an option without one of the arrangements described here, as they won't be able to afford to pay a lawyer or risk having to pay the other side's lawyer, beyond the very early stages of sending lawyers' letters.

e. Home contents insurance policy

If the survivor has this kind of insurance policy she can check whether defamation cases are included, however this is extremely rare.

If she is able to obtain legal costs to pay for her own lawyer on your insurance policy, it may not cover the other side's legal costs if she loses, so this has to be checked and taken into account when she considers the risks of going to court.

f. Pro bono

This means that the lawyer works on the survivor's case free of charge. Some lawyers will offer to do a limited amount of work to assist people who have deserving cases. This will usually be limited to advising the survivor on the main issues in her case, the strengths and weaknesses and her options going forwards. It might include sending a reply to the perpetrator's or his solicitor's letter under the pre-action protocol (see Q18 and Q19 above) or other correspondence with her opponent. It is very unlikely that a lawyer will represent a survivor pro bono in a case which has started in court, as that involves a very large amount of work and lawyers cannot afford to do a lot of work free of charge. However they may give her some advice and assistance 'behind the scenes' in an on-going case where she is representing herself.

You can contact Centre for Women's Justice to see if we can help find you a pro bono lawyer. We cannot guarantee that we can find a lawyer to assist in every case, but we have a few lawyers on our panel and we can try. A solicitor could advise the survivor and also write letters to her opponent. A barrister can only advise her and help you write letters or other documents that she would have to send herself. See Q47 at the end of this FAQ on how to contact us.

### **Q33 How do I find a specialist defamation lawyer?**

Centre for Women's Justice can give you some recommendations for defamation lawyers on our panel who have experience in dealing with violence against women cases.

Otherwise you can look on the Law Society website in the ‘Find a solicitor’ page or in legal directories Chambers & Partners<sup>5</sup> and Legal 500<sup>6</sup>. However, the vast majority of lawyers who do defamation cases only act for media companies or for very wealthy people.

## **DEALING WITH RETALIATION BY A PERPETRATOR**

**Q34 The perpetrator is making false allegations about the survivor to other people in retaliation because she has reported him for rape, is there anything she can do?**

She can threaten to sue him for defamation or malicious falsehood, or actually do this if he continues, (see Q2 for a summary of what has to be proved in a defamation case and Q4 on malicious falsehood).

**Q35 The perpetrator has deliberately made false allegations against the survivor to her employer – what can she do to protect her position at work?**

She may be able to threaten or to sue him for malicious falsehood, see Q4 above for what needs to be proved in a malicious falsehood claim, and see below on getting legal advice and representation.

She could report him to the police for harassment and she might also be able to take him to court for harassment in a civil case and get an injunction (court order) to stop him doing anything else against her – see Q36 below.

She should also seek advice from a lawyer who specialises in employment law urgently. There is virtually no legal aid for employment law, but she may be able to get free advice and representation through her trade union if she is a member. If she has a home contents insurance policy she should check whether it includes legal expenses cover, as many policies do. If it does, she may have her legal costs paid by the insurance company, either by being referred to a lawyer on their panel, or have them pay for a lawyer of her choice, which is preferable. If neither of these are an option there are some law centres and other pro bono services which provide employment law advice free of charge, however they generally only give one-off advice and not take on the case. You can also contact Centre for Women’s Justice to see if one of the employment lawyers on our panel can give you some limited pro bono advice, or we can help you find another free legal advice service to give you some employment law advice.

**Q36 What can the survivor do if the perpetrator is harassing her as a result of her reporting or speaking out about sexual assault?**

Harassment can be a criminal matter or a civil matter.

**Criminal matter:**

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<sup>5</sup><https://chambers.com/guide/uk?publicationTypeId=1&practiceAreaId=20&subsectionTypeId=1&locationId=11805>

<sup>6</sup> <https://www.legal500.com/c/london/risk-advisory/reputation-management/>

The survivor can report harassment to the police if the perpetrator is targeting her repeatedly.

She should report to the police as soon as possible.

There are two levels of harassment in criminal law, and there may also be stalking.

Harassment under section 2 Protection from Harassment Act – this is the lower level which would go to the Magistrates Court. The police must charge within six months of the last incident of harassment. This time limit is very strict and a case cannot be brought after that, however strong the evidence.

Harassment under section 4 Protection from Harassment Act – this is harassment which includes fear of violence. This is the more serious offence which can go to the Crown Court and there is no time limit.

Stalking – where there is harassment and also stalking behaviours which are obsessive or fixated behaviours<sup>7</sup> this is a separate offence and can also be under section 2 or section 4 with fear of violence. In addition, if the stalking is very serious, but there is no fear of violence, it is possible to have a section 4 offence. This is stalking involving serious alarm or distress which has a “substantial adverse effect on day to day activities”, and can apply where there is overall emotional and psychological harm and other serious impact. One type of serious behaviour that could be part of this kind of offence is making false reports against the survivor, such as false reports to employers or social services.

### **Civil matter:**

The survivor can bring a case for harassment against the perpetrator in the civil court (County Court) and get a court order (injunction) telling him to stop the harassing behaviour. She can also sue him for compensation for anxiety and for financial loss (for example if she has lost wages as a result of the impact of the harassment on her). The time limit is six years. Legal aid is available for an injunction (if she qualifies financially), but not for a compensation claim.

If she has had an intimate or family relationship with the perpetrator she can apply in the Family Court for a non-molestation order, which is more straight-forward than an application for an injunction in the County Court and legal aid is also available (with a slightly less strict financial limit than other types of legal aid).

To prove harassment the survivor has to show the following:

- His behaviour is causing her “alarm or distress”
- The behaviour must be at least two or more occasions (a “course of conduct”)

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<sup>7</sup> There is no legal definition of stalking but some examples of stalking behaviours are given on the CPS website, see this link under heading “definition of stalking”  
<https://www.cps.gov.uk/legal-guidance/stalking-and-harassment>

- The behaviour can be speech or actions, and can include unwanted communications or contact (such as phone or text messages) which could be expected to cause distress or fear in any reasonable person. For instance, if he is tagging her in social media posts which cause her alarm and distress this could be harassment even though not sent to her directly
- She must show that the perpetrator deliberately intends to cause alarm or distress and be oppressive and unreasonable, where he knows or ought to know that it amounts to harassment. If that is not clear, she could write him a clear message to say that she wants the behaviour to stop and that it amounts to harassment. If the behaviour continues he cannot say he was not aware that it was harassment.

**Q37 Is there anything the survivor can do if the perpetrator says things in public about her private life which are highly personal, but not false?**

She may be able to bring a privacy case against him if he is disclosing aspects of her private life to others. This would apply whether he put information into the public sphere (for example, by posting a public post on his social media) or if he only shared the information with a limited group of people (for example, by sending a chat message to a group of friends).

This would apply whether the information is true or false. It also applies even if she is not identified by name but is instead identified by factual information known to a small number of people (e.g. her relationship with the perpetrator).

To defend himself against a privacy case, the perpetrator would have to show that there is a public interest in him sharing the information. If he did that he would have to show that the public interest is sufficiently strong to outweigh her right to privacy - the court would balance his public interest against her privacy rights and decide which one is stronger. In addition, she might be able to get an injunction, which is a court order to prevent further publication of private information, so that he has to remove anything in public such as material online.

See Q5 on misuse of private information. The reverse of the situation in Q37 is where a perpetrator tries to sue a survivor for misuses of private information, see Q11.

If a perpetrator shares intimate sexual images of her without her consent intending to cause her distress then he is committing the criminal offence of ‘revenge porn’<sup>8</sup>, and she can report him to the police. The Centre for Women’s Justice toolkit contains more information about revenge porn and other electronic communications offences. See also Q45 on disclosing sexual images.

**Q38 Does the survivor need a lawyer if the perpetrator is making false allegations about her and she wants to take legal action against him?**

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<sup>8</sup> The correct name for the offence is disclosing private sexual photographs or films with intent to cause distress

She is not obliged to have a lawyer to bring a legal case, but it is highly advisable to seek legal advice from a lawyer who specialises in defamation, and/or privacy rights cases. Most lawyers will not have experience in this area of law so she should try to get advice from a specialist. You can contact Centre for Women's Justice to try to get some initial limited advice from one of the lawyers on our panel. They will be able to give you some advice about the case free of charge, and may be able to help the survivor write a letter to the perpetrator or his lawyers. However, they will not be able to take on her case and represent her unless there is a way of paying their legal costs.

If she only wants to apply for an injunction in the County Court to order the perpetrator to stop harassing you, you can use a family law solicitor as these cases are very similar to non-molestation orders in the Family Court, or she may be able to apply in the Family Court for a non-molestation order if she has had an intimate or family relationship with the perpetrator. You can find a family law solicitor who specialises in non-molestation orders through the FLOWS website which was set up by Rights of Women <https://www.flows.org.uk>. Legal aid is available for civil injunctions, both in the Family Court or in the County Court, but she has to qualify financially, and to show the Legal Aid Agency that she has a strong enough case.

If the perpetrator's actions affect her employment, she should also seek employment law advice, see above at Q35.

If she gets pro bono legal help this will usually be initial advice and will not include representing her in court. Many people who cannot pay for a lawyer and don't have legal aid (because it is not available for their type of legal issue or because they don't qualify financially) have no option but to go to court without legal representation.

## **BRINGING A CIVIL CASE AGAINST A PERPETRATOR**

**Q39 The police have told the survivor that they are not charging the perpetrator with rape and she wants to bring a civil case against him, can she do that?**

If she wants to sue the perpetrator for rape, she may be able to bring a civil claim against him for assault. This is a personal injury case and she needs advice from a specialist personal injury lawyer, rather than a defamation lawyer. See Q42 below on how to find a personal injury lawyer and how to pay for a lawyer. The biggest hurdles which prevent most of these cases are around legal costs.

If a case goes to trial there will be a finding of whether the rape or sexual assault took place and if she wins she would be entitled to receive compensation from the perpetrator. A civil court cannot find the perpetrator guilty of a crime or punish him in the way that a criminal court can impose a sentence such as imprisonment. Most civil cases do not go all the way to trial, but settle out of court. In an out of court settlement the perpetrator would usually agree to pay compensation, but does not have to admit that he is guilty (admit liability). Her lawyer would advise her on what is a reasonable amount of compensation and other aspects of a settlement. She can demand that he admits that he committed the sexual assault and gives an apology, but that is not something that she can enforce as an out of court settlement if he



refuses. In some cases she may be successful in getting this if he really wants to avoid a trial, which will be held in public. A personal injury solicitor can advise in more detail about what she can expect and what she can achieve in a civil claim.

#### **Q40 What would a civil claim for rape against the perpetrator involve?**

Civil claims can take a very long time, on average 2 or 3 years to an out of court settlement and even longer to trial. An individual perpetrator may dig his heels in and insist on the case going to trial even if he has a weak case. If the perpetrator has insurance, for example he is a doctor or therapist, his insurers can put pressure on him to settle out of court if they think he is likely to lose. If a survivor wants to pursue a civil case she has to be prepared to engage and live with it hanging over her for a long time. But for much of that time there won't be anything for her to do, she can leave the work to her lawyers.

A civil claim can be similar to a criminal case against the perpetrator, but if it goes to trial it will be before a judge, not a jury. Also it may be easier to win a civil case than a criminal case as she has to prove her case on the balance of probabilities (that it is more likely than not that her allegations are true) rather than beyond reasonable doubt as required in a criminal court. However, because an allegation of rape or other sexual assault is very serious, in a civil case the court still requires clear evidence to make a finding that the perpetrator is guilty, and a stronger level of evidence than in many other types of civil cases.

If a claim is successful, or settles out of court, she can get compensation for the assault itself, for any longer-term impact on her mental health, and for any financial losses, for example if she had to take time off work, or dropped out of a university course. This can be not just for wages that she actually lost, but for a lost opportunity to earn wages if she was unable to study or work for a period of time as a result of the impact of the rape.

If she has suffered a serious psychological impact from the sexual assault, such as a diagnosed condition of Post-Traumatic Stress Disorder, clinical depression or anxiety disorder, or if she had a pre-existing mental health condition that has become worse as a result of the assault, she may be able to include a claim for compensation for suffering this (known as "psychiatric damage"). If she has suffered severe distress, but it does not amount to symptoms that meet a diagnosis for a mental health condition, then it is not possible to include a claim for "psychiatric damage".

Including a claim for "psychiatric damage" is very common in such cases, and usually this is the main part of the compensation. Without it the claim may not be worth much and a lawyer may not be able to pursue it. If this is included in the claim she will have to see a clinical psychologist or psychiatrist to prepare a report on her for the case. This would not usually be a psychologist or psychiatrist that is already giving her treatment, but a new person who is only involved for the court case. She may also have to see a psychologist or psychiatrist instructed by her opponent for them to prepare their own report. If she does then there are professional guidelines that they have to abide by and their primary duty is to the court, rather than to the opponent (this also applies to the psychologist or psychiatrist who prepares a report for her).

If she had contact with medical or therapy professionals in relation to the sexual assault, it is very likely that her medical or therapy records would be disclosed in the case, and this could mean that they are disclosed to her opponent, the perpetrator. It may be possible in some cases for only the records that are directly relevant to be disclosed, and that may be decided by the court if it is disputed, however if her mental health is being considered it is likely that the court would say that all of her previous medical records should be disclosed to have a full background of her mental health throughout her life. Other things in her medical records that do not relate to mental health may not be disclosable.

She will need to have a solicitor to collect other evidence, such as witnesses, police records etc and a barrister to advise and represent her in court if the case goes to trial. If the case does not settle out of court and does go to a trial she will have to give evidence about what happened to her and her opponent's barrister can cross-examine her. This is similar to a criminal case, but as noted above there is no jury and you have a lower civil standard to meet in order to win. Also usually in a civil claim the judge will read the survivor's witness statement in advance and she will not have to give her account again, but go straight to cross-examination.

If the survivor has corroboration that will strengthen her case, but if she doesn't that does not mean that she cannot bring or win a case. Most sexual assaults take place in private and the main evidence will be the account of the survivor. The judge will hear her account as the main evidence in the case and decide whether they believe her or the perpetrator. This is the same as in many criminal cases where the evidence is "your word against his".

The perpetrator would also give evidence in a civil trial and the survivor's barrister can cross-examine him. Any evidence which shows he may be lying, such as previous convictions, can be brought up in court, and there are no restrictions on that as there are in criminal cases.

#### **Q41 What are the time limits for a civil claim for rape or assault against the perpetrator?**

A claim for personal injury has a time limit of three years, but this can be extended in certain circumstances. The time limit runs from when the sexual assault took place, not from the end of a police investigation or other process, though that may be relevant to the reasons for an extension. If the survivor was under the age of 18 at the time of the assault, the three years start to run from her 18<sup>th</sup> birthday.

Where more than three years have passed since the sexual assault there are a number of legal rules on whether an extension will be allowed and every case has to be considered on its own facts. If she has not reported the sexual assault for many years due to trauma this can be taken into account. If she has evidence from a doctor or therapist about the psychological impact on her this will be very useful.

#### **Q42 How can a survivor pay for a lawyer to sue a perpetrator for assault?**

In personal injury cases there is a special rule that if you sue someone you do not have to pay their legal costs if you lose, but they do have to pay yours if you win.<sup>9</sup> There is no legal aid for a personal injury case against a perpetrator.

The most common way to bring a personal injury claim is using a “no win no fee” (CFA) agreement, where a solicitor does not charge you for their work, but takes the chance that they will be paid by the perpetrator if you win. This means that it is unlikely that a solicitor will take on a case on this funding arrangement unless the perpetrator is either wealthy, or is a professional with insurance, such as a doctor or therapist. He also needs to be someone who would actually pay if he lost, so not someone who might disappear, hide his assets, or lives abroad.

If the case is against a person who could pay some legal costs if he loses, the solicitor will first need to assess the chances of winning, to see if they can take the risk of doing the case for free. They may charge the survivor a fee for this initial work, or they may do it free of charge. A solicitor may give a survivor legal advice and write a “letter before claim” to the perpetrator, which is a threat to take him to court if he does not pay compensation, to see if an out of court settlement can be reached at an early stage. This could be a limited amount of work that a solicitor could charge for, or they may do it on a CFA if they think her case is strong enough. It is unlikely that a solicitor would take the case further unless the perpetrator is rich enough to pay substantial legal costs, or has insurance such as a doctor or therapist. If the perpetrator has no money at all and no insurance, a solicitor will not be able to do any work on a CFA and would ask a survivor to pay privately if she wants to try to take action against him.

If a solicitor agrees to take on a case on a CFA, the survivor will usually be able to get a barrister to also work on the case on a CFA. However, a CFA will only cover the solicitors’ and barrister’s own work so she will still have to pay other expenses such as court fees and fees for medical experts. If she is on a low income she may be able to get exemption from paying court fees, and she can apply to the court for that. However, paying for a medical report could be around £1,000 or more, and if the case does not settle out of court at an early stage and the expert has to do a lot more work, and even come to court for trial, it will be far higher.

Another option for raising money for legal costs, court fees and expert fees is through crowdfunding, which is discussed at Q32c. above. In a civil claim for assault there does not need to be as much money raised as in a defamation case, because there is no danger of having to pay the perpetrator’s costs if she loses, so it is only her own expenses that have to be covered.

A survivor can also bring a civil claim for assault without a lawyer, as a litigant in person. This is not easy. As she is the person who is suing she has to be proactive and take a lot of legal steps. However, many people do go through civil court cases as litigants in person. She could try to find a lawyer to give her free advice behind the scenes, or give her advice for a limited fee. However, she would still have to pay her court fees (unless she can get an exemption – see above) and expert fees. As

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<sup>9</sup> This is called “qualified one-way cost shifting” and was introduced because the vast majority of personal injury claims are road traffic cases which are brought by an individual against an insurance company

mentioned above, if she loses a personal injury case she would not have to pay the perpetrator's legal costs. If a survivor sues without a lawyer and the perpetrator has a lawyer this could be very difficult to manage and they could exploit her lack of legal experience.

**Q43 What would happen if a survivor wins a case of rape or assault against the perpetrator, or if she loses?**

The judge will decide whether the perpetrator raped or sexually assaulted her. If she wins he will be ordered to pay her compensation. The amount will depend on what happened during the assault itself, any long-term physical effects, the mental health impacts and any financial losses she has suffered. The perpetrator will also have to pay her legal costs and any expenses she had to pay such as court fees and fees of medical experts.

However if she loses she does not have to pay the perpetrator anything, including not having to pay his legal costs. The only exception would be if he argues successfully that her case was based on dishonesty, but that would have to go beyond just the issues that were disputes in the case itself.

**Q44 If a perpetrator sues a survivor for libel can she sue him back for the rape itself?**

Yes, this is called a counter-claim, see Q29. The defamation lawyer can consider whether to include a claim for the rape as part of the libel case, and this may well be a good idea. A lawyer who is a specialist in defamation claims usually won't have experience in a personal injury claim and vice versa for a lawyer who is a personal injury specialist, so it may be a good idea to have some advice from a personal injury specialist if the libel is being dealt with by a defamation lawyer.

**Q45 If the perpetrator has disclosed sexual images or detailed sexual information about her can she sue him for that?**

She could bring a claim for misuse of private information, see Q5 and Q11 above. Unlike defamation, a claim can be brought where the information that was disclosed is true. Therefore if the survivor has reported 'revenge porn' to the police and they have not prosecuted the perpetrator, she could in theory bring a civil claim for breach of privacy.

However the rules around legal costs are very complicated and the survivor would need to get detailed legal advice on whether she would be at risk of having to pay the perpetrator's legal costs if she were to lose the case.

In addition, some of the same issues about legal costs apply as for a civil claim for assault against a perpetrator, see Q42 above. In particular, solicitors may not take a case to court unless the perpetrator is either very rich, or is a professional with insurance, such as a doctor or therapist. However a solicitor may do more limited work such as sending a letter to a perpetrator or trying to get an out of court settlement.

**Q46 If the perpetrator sues a survivor or she sues him, can she get copies of the police records?**

She has the right to apply to the police for disclosure of all records that relate to her under the Data Protection Act. This is called a Subject Access Request and she can download the application form from her local police force website. She does not need a solicitor in order to make a request. She can do this at any time, whether she has a court case or not, after the criminal case is finished, including any Victim's Right to Review. When she completes the form she can say that she wants all documents relating to the police investigation into her report of a specific offence. However if she also lists any documents she can think of then you will be more likely to get them. For example, she can request a copy of her witness statement, or video-recorded interview, her victim personal statement, the crime report which will include all steps taken in the police investigation from start to finish, 999 tape, police officers' notebooks, risk assessments. The police only have to give her records that relate to her, and will not disclose records that relate to other people, such as the perpetrators' interview or statements by other witnesses. Obtaining disclosure can take many weeks so allow plenty of time for this.

To obtain evidence that she cannot receive under the Data Protection Act she would have to make an application to the court for an order that the police must disclose all their materials (known as third party disclosure). The court should order disclosure where the documents are likely to either support the case or undermine the case of one side or the other in the civil claim. She can apply for an order if she is planning to sue the perpetrator for assault, before she starts a case in court, in order to collect evidence, or after she issues her claim in court. However, she will have to pay the police legal costs, and this may well be regardless of whether she wins her case at the end of the day. This is because they are not a party in the case. Therefore she may only want to do this if she knows there is specific important evidence that the police have that she needs for her case. The police will not provide a copy of evidence without a court order if it does not come under the duty to disclose under the Data Protection Act.

If a case proceeds through the court, each side has to disclose to the other any documents that would assist their own or the other side's case, so if she has obtained documents from the police she will have to disclose them to the perpetrator whether they help her case or his case.

**Q47 Finally, how do I contact Centre for Women's Justice?**

The best way is through the 'contact us' page on our website here:

<https://www.centreforwomensjustice.org.uk/contact>

Send us a message with a summary of what the situation is, what is the last thing that happened and any urgent deadlines, and we will get back to you as soon as we can. You can also call our office number which is on the web page, but contacting us in writing is better.

**Disclaimer: These FAQs provide legal information but not legal advice. Every case is different and you should seek legal advice on the particular facts of the case. Centre for Women's Justice does not accept any responsibility for the implementation of these FAQs in individual cases.**