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# Civil Justice for Victims of Crime in Oregon



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*The National Crime Victim Bar Association is an affiliate of the National Center for Victims of Crime, a 501(c)(3) not-for-profit corporation.*

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## 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 that 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

Almost nineteen 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 Americans \$450 billion annually.

### Restitution and Compensatory Fines

Under the Oregon Constitution, a criminal court must order convicted criminals to pay restitution to their victims. Restitution includes 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. Criminal courts may also order convicted criminals to pay compensatory fines to their victims in an amount up to the maximum statutory fine for the crime of conviction. Unfortunately, even when courts order convicted criminals to pay restitution and/or compensatory fines to their victims, the criminals often do not or cannot pay.

### State Crime Victim Compensation in Oregon

Compensation may also be available to crime victims from Oregon's crime victims' compensation fund. This fund is to reimburse victims for certain losses and expenses resulting from the criminal acts, such as expenses for mental health counseling, medical treatment, funeral expenses, lost wages, and certain other out-of-pocket costs incurred by crime victims. Oregon's fund does not cover property damage, and is only available to victims who have no other financial or other resources with which to pay for these losses and expenses. In addition, state law provides limits on how

much money can be given for an individual crime or a particular type of loss, and payments made from the crime victims' compensation fund must be repaid in the event of a civil recovery by the crime victim who received the benefits. Oregon's Crime Victims' Compensation Program is administered by the Oregon's Department of Justice's Crime Victims' Services Division

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[www.doj.state.or.us/victims](http://www.doj.state.or.us/victims)

## III. Why File a Civil Lawsuit?

Rarely does court-ordered restitution or crime victim compensation cover a victim's full economic losses, and neither source pays for hard-to-quantify damages such as pain and suffering. A civil lawsuit may provide more complete compensation to a victim, and offers other benefits as well. The benefits to crime victims of bringing a civil action include:

### Control of the Case

Victims have greater control in a civil suit than in a criminal case because they are parties to the civil case, make important decisions about the course of the case, and have final approval of settlement proposals.

### Greater Compensation

Civil actions can provide greater compensation for victims for all of the harms and losses caused by the crime, both monetary and non-monetary. For example, a victim can recover monetary damages for loss of future earning capacity in a civil action, whereas such damages are not available as restitution in a criminal case. Examples of non-monetary damages that may be sought in a civil action include compensation for emotional distress and for losses of care, comfort, companionship, and consortium.

### Justice and Accountability

Civil suits can hold offenders directly accountable to victims, and may provide a form of justice when the offender cannot be criminally prosecuted due to the passage of time. These suits give victims their "day

in court,” regardless of whether there was a criminal conviction – or any criminal prosecution at all – because the time limits for bringing civil suits are sometimes longer than for bringing criminal charges, and because the burden of proof in a civil suit is lower than in a criminal case.

### **Crime Prevention**

In addition to suing perpetrators, victims can often sue other responsible parties. Because of the potential for civil liability, 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, better screening practices for employers of those who work with vulnerable populations, and countless other safety and security improvements by businesses, nonprofits, and government agencies.

## **IV. Criminal Versus Civil Justice**

A significant difference between the criminal and civil justice systems is that in a civil case, the victim controls essential decisions shaping the case, while in a criminal case, those decisions are made by the prosecutor and the criminal defendant.

### **The Criminal Justice System**

The criminal justice process begins after a crime has been committed and is reported to law enforcement. If an arrest has been made, the offender may be prosecuted. The parties in a criminal case are the government (because crimes are considered to be offenses against the state) and the criminal defendant. Although crime victims have enforceable legal rights in criminal cases, their primary role generally remains that of being a witness for the prosecution. While most prosecuting attorneys are very helpful to crime victims and their families, the prosecutor’s primary responsibility is to represent the interests of the state, not the interests of crime victims.

The purpose of the criminal justice system is to judge the guilt or innocence of accused offenders, and when offenders are found guilty, to punish them, rehabilitate them, and/or deter them and others from similar conduct.

### **The Civil Justice System**

The civil justice system does not judge the innocence or guilt of an offender, but rather, whether the offender and/or a third party are liable for the harm suffered by the victim. Offenders are also not put in prison if they are found liable in a civil suit, but are ordered to pay money damages and/or to take or refrain from taking particular action(s).

A civil court’s finding of liability usually means that the offender and/or third-party defendant(s) must pay the victim, or the victim’s family, monetary damages. In this way, the civil justice system can provide victims with monetary resources necessary to rebuild their lives.

Additionally, the civil justice system often provides victims and their families with a sense of justice that the criminal justice system cannot provide. This is because the criminal justice system seeks to hold offenders accountable to the state, while the civil justice system seeks to hold both offenders and others who are responsible for their criminal acts accountable directly to the victims.

### **Burdens of Proof**

In the civil justice system, liability must generally be proven by a “preponderance of the evidence,” which simply means that the plaintiff’s evidence is more likely true than not true. In other words, the plaintiff must prove there is a greater than 50% 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 identified or prosecuted.

A good example of the differing burdens of proof comes from the criminal and civil cases against O.J. Simpson. Simpson was criminally prosecuted for the murders of his former wife, Nicole Brown, and her friend, Ronald Goldman. The jury in the criminal case found Simpson “not guilty” of the murders in 1995, which meant that the jury concluded that the prosecution had not proved the elements of the crime of murder “beyond a reasonable doubt.” Despite Simpson’s acquittal in the criminal case, the families of Nicole Brown and Ron Goldman filed a civil wrongful death lawsuit against Simpson. A civil trial was held in 1997, and Simpson was found liable for the

## 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 has rights to participate in some stages of 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 incarceration, and is held accountable to the State. The victim will not be compensated for economic losses if the court orders the defendant to pay restitution and/or a compensatory fine and the defendant actually pays it. The court cannot order restitution for non-economic damages.

...if a perpetrator is ordered to pay restitution or a compensatory fine to the victim and does not pay, the victim must rely on the State to undertake collection efforts.

...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 important decisions about the case, such as whether and on what terms to settle the claim, and whether to go to trial.

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

...the civil system makes no presumption of innocence, and will presume the perpetrator is liable for actions for which he or she pleaded or was found guilty. If there has been no criminal conviction, the victim and the perpetrator appear as equals.

...if the perpetrator or a responsible third party is found liable in a civil suit, they are held accountable to the victim, and may be ordered to compensate the victim for medical and therapy expenses, psychological damage, damage to family relationships, and lost wages. In some cases, a civil judgment can order the perpetrator or a responsible third party to pay punitive damages, although under Oregon law, most of the punitive damages collected are paid to the State and not the victim.

...if the defendant does not pay the amount awarded to the victim in a civil case, the victim can undertake collection efforts.

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

deaths of Brown and Goldman. The jury in the civil case awarded the victims' families \$33.5 million in damages.

A criminal conviction will often establish the civil liability of an offender for acts to which the offender was found or pleaded guilty, leaving only the question of damages to

be decided in the civil suit. However, as shown by the O.J. Simpson cases, a criminal conviction is not a requirement for bringing a successful civil action.

## V. Parties in a Civil Suit

The main parties in a civil suit are called plaintiffs and defendants.

### Plaintiffs

Plaintiffs are the individuals who file the suit. They control the suit, are entitled to all information relating to the case, and make important decisions such as whether to settle and on what terms. The plaintiff in a civil suit can be the victim, survivors of the victim, persons responsible for caring for the victim, and in some cases, someone appointed to help the victim.

### Defendants

The defendants are the parties against whom a civil suit is brought. The defendants in a civil suit can be the perpetrators, individuals who have assisted the perpetrators, employers who have facilitated the perpetrators' criminal acts, or persons or organizations who have caused or in some way have contributed to the commission of the crime. Defendants other than the perpetrator are known as "third party defendants."

A few examples of possible third-party defendants in a victim's civil suit 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;
- childcare centers, schools, churches, and government agencies that do not properly check the backgrounds of their employees, or who fail to take protective action following allegations of abuse; and
- tavern owners or social hosts who continue to serve alcohol to intoxicated persons who subsequently injure other people in drunk driving crashes.

## VI. Statutes of Limitations and Notice Requirements

The law sets time limits for filing civil suits, called "statutes of limitation." Any time after the expiration of the statute of limitations, unless a legal exception applies, the right to file a civil suit is "time-barred."

Although people often speak of "the statute of limitations," there are many statutes that apply limitations periods to different types of civil actions and to different types of plaintiffs and defendants.

In addition to statutes of limitation, some types of suits and some types of defendants have requirements that written notice of a claim be filed within a certain number of days or months of when the incident occurred. Examples of notice requirements are for claims against government bodies, and claims arising from overserving alcohol.

It is difficult to keep track of the various statutes of limitations, notice requirements, and their exceptions. Therefore, a qualified attorney should be consulted to determine which statutes of limitations applies and whether there is a notice requirement in order to help preserve your right to recover damages.

## VII. Types of Civil Lawsuits

There are numerous claims for which civil suits may be brought, including wrongful death, assault, battery, intentional or negligent infliction of emotional distress, negligence, and claims created by statute such as Abuse of a Vulnerable Person (physical, sexual, or financial abuse of vulnerable persons such as the elderly and disabled), Stalking, and Intimidation (assault and/or battery of persons because of their race, color, religion, sexual orientation, disability, or national origin). Some of these claims 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. In Oregon, the crime of assault is called "menacing."

- **Battery** - intentional or reckless physical contact with a person without that person's consent. In Oregon, the crimes involving battery include assault, strangulation, rape, sexual abuse, sodomy, and unlawful sexual penetration.
- **Wrongful Death** - a death caused by another person that occurs without justification or excuse. Oregon crimes that constitute wrongful death include aggravated murder, murder, manslaughter, criminally negligent homicide, and vehicular homicide.
- **False Imprisonment** - holding a victim against his or her will for any amount of time, no matter how brief. Oregon's corresponding crimes are called kidnapping and involuntary servitude.
- **Intentional or Reckless Infliction of Emotional Distress** - causing a victim emotional distress or anxiety through intentional or reckless acts. This tort may include criminal acts such as stalking, coercion, and reckless endangerment, but may also include non-criminal acts.
- **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 identity theft, forgery, telemarketing schemes, false claims for benefits, or financial crimes against vulnerable victims such as the elderly.
- **Conversion** - the theft or destruction of personal property or money. In Oregon, theft and criminal mischief are the most common corresponding crimes.
- **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 in cases involving criminal acts include negligent security and negligent hiring, supervision, and retention of perpetrators.
- **Statutory Torts** – these include civil liability created by state or federal law, such as Civil Rights Violations (42 U.S.C. § 1983), Abuse of a Vulnerable Person (ORS 124.100 *et seq.*), Stalking (ORS 30.866), Intimidation (ORS 30.198), and producing, distributing, or possessing child pornography (18 U.S.C. § 2255, aka Masha's Law).

## VIII. Common Defenses to Civil Liability

There are several defenses that defendants in a civil lawsuit may use in an effort to avoid or minimize civil liability, and they include the following:

- **Self Defense or Defense of Others** - 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, or the negligent conduct of another person or entity, caused or contributed to the victim's injuries.
- **Statute of Limitations** – all torts have time limits in which they must be brought or they are time-barred.
- **Damages Caps** – certain types of torts (such as wrongful death claims) and certain types of defendants (such as government agencies) have caps on the amount of damages that a losing defendant must pay.
- **Immunity** - Under certain circumstances, the law provides immunity from civil liability to government agencies, government employees, and certain other parties.

## IX. Filing a Civil Lawsuit

A victim begins the civil case by filing a document that in Oregon is called the "complaint." The 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 an "answer," or to file a motion that challenges parts or all of the victim's complaint. In the answer, defendants set forth their version of the facts and any defenses that may apply.

After the lawsuit is commenced by the filing of the complaint, either side can request information from the other side through the process of "discovery," which is further described below. In addition, either party can file motions asking the court to throw out certain claims or defenses, or to dismiss the entire case. Once these are decided, and if the entire case is not dismissed, the case proceeds to trial.

## **X. Victim Privacy**

Some victims wish to protect their privacy – even their identity – when filing a civil lawsuit. There are several methods that may be available to protect victims' privacy, including the use of pseudonyms, protective orders, and sealed documents. Each of these techniques allows victims to pursue civil justice without subjecting them to further harm.

## **XI. Discovery**

As part of the legal process, 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 using court rules and subpoenas to obtain documents, answers to written questions, and witness depositions. The legal standard for obtaining information in discovery is that the requested information must be “reasonably calculated to lead to the discovery of admissible evidence.” The most common discovery tools are:

### **Requests for Production of Documents**

Requests for production are written requests sent by one party to another party in which documents, photographs, and other materials relevant to the case are requested.

### **Depositions**

A deposition is a proceeding in which a party's attorney has the opportunity to question other parties and potential witnesses under oath. Deposition testimony is usually transcribed, and is often videotaped as well. The transcripts or videotapes may be used at trial for various reasons, including to present the testimony of the witness, or to impeach the witness if he or she testifies differently at trial than during the deposition.

### **Requests for Admission**

Requests for admission are a list of questions sent to another party asking that party to admit or deny certain items at issue in the case. They are limited in number by the court rules.

### **Subpoenas Duces Tecum**

Parties may obtain documents and other materials from non-parties using subpoenas duces tecum.

### **Other Discovery Techniques**

A party may also request to inspect items, places, or original documents that are relevant to the case.

In federal court but not in Oregon state court, one party may also submit interrogatories to another party, which are questions that must be answered in writing by the receiving party.

## **XII. Pretrial Resolution**

After discovery is completed, the parties often engage in negotiations that can lead to settlement of the case. In Oregon's state court system, the great majority of civil cases – more than 90% -- are resolved before trial.

## **XIII. Trial**

If a settlement is not reached, the case proceeds to trial. A plaintiff wins at trial if the plaintiff has met the burden of proof for one or more claims and the defendant has not successfully asserted a defense to the claims. If the plaintiff wins, the judge or jury awards damages and the matter is concluded 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 complete defense. If the defendant wins, the case is concluded unless the plaintiff appeals.

## **XIV. Damages**

The judge or jury has the power to decide how much money to award in damages if the plaintiff wins. There are two main types of damages, compensatory and punitive. Compensatory damages are to pay for the monetary and non-monetary harms and losses suffered by the injured party. Punitive damages are awarded to punish and deter perpetrators or responsible third parties. In Oregon, the State is entitled to 70% of punitive damages collected from civil defendants.

## **XV. Collecting the Judgment**

A victim considering a civil lawsuit should understand that obtaining a civil judgment is only half the battle – collecting the judgment may be the more challenging half.

Many defendants do not or cannot pay judgments entered against them, but they may have insurance, assets, or income from which a recovery may be obtained. Civil

judgments in Oregon are valid for ten years, and can be renewed for an additional ten years, so a victim has up to twenty years to attempt to collect a civil judgment.

## **XVI. When a Perpetrator Sues a Victim**

Occasionally, defendants may sue or countersue victims in order to harass or intimidate them into dropping charges or dismissing their civil suits. In Oregon, as in many other states, there are statutes that protect victims against lawsuits filed for purposes of harassment or intimidation, called anti-SLAPP laws (“SLAPP” stands for “Strategic Lawsuits Against Public Participation”).

Oregon’s anti-SLAPP laws are intended to thwart SLAPP suits by requiring expedited rulings on motions to dismiss, by forbidding discovery until motions to dismiss are decided, and by awarding attorney fees to a prevailing defendant in a SLAPP suit (i.e. to the victim who successfully moves to dismiss the SLAPP suit).

## **XVII. 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 a referral to an attorney experienced in handling civil cases arising from criminal acts should call the NCVBA at 202-467-8716.**

### **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 crime victims in civil lawsuits often requires diligence.

A productive attorney-client relationship is based on 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 (a contract to hire the attorney) before signing it. If victims have questions, they should feel comfortable discussing them with their attorneys. If questions persist, the Oregon State Bar’s website has information about lawyers’ fees in the portion of its website that is “For the Public,” found at: [www.osbar.org](http://www.osbar.org).

Victims should be clear about what they want 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 consider options 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 are likely to 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
- If a third party might bear some liability for the occurrence of the crime: details surrounding the crime, such as where it was committed and whether there was any security.

#### **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

#### **About Damages Sustained by the Victim:**

- Medical information: nature and degree of physical, emotional, and psychological injuries sustained, and extent and cost of anticipated treatment
- Identification of hospital and physician services
- Identification of property damage and other sources of recovery
- 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, Medicaid, and restitution

#### **Fees and Retainers**

Usually, attorneys are paid on a contingency fee basis for the types of civil cases brought by victims of crime. This means the attorney is only paid if the victim is awarded and collects a monetary settlement or judgment. Attorneys will be paid an agreed-upon percentage of the total award.

There are also costs, such as filing fees, deposition fees, service of process fees, and investigation expenses the victim might be asked to pay before a suit is filed, or during the course of the suit. Some attorneys require that plaintiffs pay a cost retainer, which is money held by the lawyer in a trust account to be used to pay costs as they are incurred. Money not used in the retainer will be returned to the client at the conclusion of the case.

Most crime victim attorneys will advance costs if their clients are unable to pay them, with the agreement that the costs advanced by the attorney will be repaid from the client's portion of any recovery obtained.

## **XVIII. 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 who have legitimate civil claims can bring their claims before the court and ask to have the responsible parties held accountable. While money recovered in civil lawsuits can never fully compensate victims for the trauma of their victimization or the loss of loved ones, it can provide valuable resources for crime victims to help rebuild their lives.