

A GUIDE TO AVOIDING RE-VICTIMIZATION BY THE CRIMINAL JUSTICE SYSTEM AFTER YOU HAVE BEEN THE VICTIM OF A SEXUAL ASSAULT

INTRODUCTION

You think the worst has happened! After all, what could be worse than being victimized sexually?

Unfortunately and tragically, for some there is something far worse, re-victimization by the criminal justice system. The cast of characters you encounter as a victim may include indifferent or skeptical police officers, overworked or inexperienced prosecutors and some judges who still believe that the way a woman dresses is relevant in determining whether a man is guilty of sexual assault or that she is responsible because she did not keep her legs closed.

What to do? Not report, report and seek therapy, seek therapy alone or bear it is tortuous silence. Perhaps retaining a lawyer to sue your assailant for damages in the civil justice system is an option. One of the most important things to consider is your own goals. So many women are talked into making a complaint with the claim that it will help them heal and get closure. The healing part is largely illusory, I have seen few victims walk away feeling 'healed' by their experience with the criminal justice system. Further, if your 'healing' is largely dependent on a guilty verdict, walk away. If that is your primary goal, forget it. If you can accept that accountability is achieved by simply exposing an abuser to the light (regardless of the verdict) in the form of a public trial then you have better odds of not feeling re-victimized.

Abusers are often acquitted in he said/she said situations.¹ He gets the benefit of the doubt while your clothing, alcohol use, lifestyle and mental health may all be placed under close scrutiny. Your social media accounts will be scoured for pictures of you partying or engaged in any behaviors or conversations that can be used to attack you.²

¹ Assuming your complaint even results in a charge that is prosecuted to conclusion.

² Consider making your social media account(s) privacy settings as strict as possible or deactivate the account(s).

You will have to testify, he likely will never take the stand.³ His lawyer will have a copy of every statement you gave to the police and will try and discredit you on cross-examination if you deviate from those statements to any degree.

Surprisingly, all of the above is not written for the purpose of discouraging complaints of sexual assault. Knowledge is power. Informed participation means that at least you will know what you are getting into and perhaps not say at end, as so many victims do, *if I had known at the beginning what I know now, I never would have went to the police.*

Decades of experience offer me some insights that may help you as a victim. My insights are not universal. My perspective is my own and may clash with the views of others. I have attempted to be as sensitive as possible but the topic sometimes requires blunt language.

My goal is simply to try and help victims decide whether they want to make a complaint and if so, empower them to avoid/lessen re-victimization. I hope this guide does that. If any of it is offensive to victims please know that was not intended.

AFTER THE SEXUAL ASSAULT

Physical evidence, critically important to prosecutions, is often absent in sexual assault cases. Torn clothes, clothes with semen on them, fresh bruises or other injuries are the best evidence.⁴ Semen alone can be helpful because it helps rebut an accused's claim that no sexual activity occurred. In the immediate aftermath, many women understandably want to get to safety, a shower, etc. Even if you think about physical evidence, you may be worried that if you go to see a doctor/nurse to get a 'sexual assault kit' done you will have no choice but follow through with a formal police complaint.

If there might be physical evidence and you feel you can do it, go to the hospital and ask to see a SANE nurse:

A Sexual Assault Nurse Examiner (SANE) is a qualification for forensic nurses who have received special training to conduct sexual assault evidentiary exams for rape

³ He will have to testify under oath at a discovery hearing if you sue him. While what he says cannot be used at his criminal trial as evidence, he can be stuck to that version of events if he does testify at the criminal trial. He can be cross-examined on his discovery testimony and may face a perjury charge if he gives a significantly different version of events at the criminal trial, see: *R. v. Nedelcu*, [2012] 3 SCR 311, 2012 SCC 59, <http://canlii.ca/t/ftmw1>.

⁴ Hopefully your sexual assault does not end up with these results but if it does, this evidence can be damning to the accused's defence.

victims. Not all, but many **SANE** programs are coordinated by rape crisis centers rather than hospitals.

After the examination, you can decide whether to give details of the sexual assault to the police at that time or ever. Frankly, taking detailed statements from victims in the immediate aftermath of significant trauma is questionable police work. Bear in mind however that if the accused might still have your DNA on him (for example, police can do penile swabs of a suspect) that is also good evidence and it might be better in that situation to give the police some details immediately. Absent that, after the nurse examines you it is your decision whether to give a statement to the police and to decide when you are ready to do so.

If physical evidence is not a consideration, or if you feel you cannot go to a hospital⁵, whether and when you complain is also totally up to you. You may wish to seek legal advice first. In some provinces victim services programs⁶ are available even though you have not made a complaint to the police. Perhaps counselling might be your first option? Bear in mind that if charges result, the accused's lawyer will often try and get your medical/counselling records pursuant to s.278.2 of the *Criminal Code*.⁷ If that happens you are entitled to 14 days advance notice and to be represented by your own legal counsel to appear in Court and challenge what very often are fishing expeditions.

At one time, the doctrine of recent complaint could result in a negative presumption regarding your credibility if you did not complain about the sexual assault at the first reasonable opportunity. The theory being that according to stereotypical victim myths, you are likely making the sexual assault up if you did not complain right away. Section 275 of the *Criminal Code* now precludes this presumption being made. The accused's lawyer will still ask why you delayed complaining in an effort to sway the judge/jury that your explanation does not make sense.

⁵ If so, do not wash or discard any clothing that you were wearing, seal them in an air tight bag. Remember however that the viability of any evidence and its usefulness will degrade over time. Defence lawyers will also question whether it was contaminated due to improper storage while in your possession and whether any later DNA results are reliable.

⁶ Please seriously consider using these services as soon as possible and continue working with them. Staff are incredibly knowledgeable, supportive and can help you get meetings with and information from overworked police officers and prosecutors.

⁷ The accused's counsel may also seek to get counselling/medical records that existed prior to the sexual assault. Again, you are entitled to be represented by your own counsel to challenge this.

In some instances, if you are alleged to have recently fabricated the sexual assault, the prosecutor can call other people to testify such as friends or family to confirm that you told them in the past about it.

A final consideration in the timing of your complaint is the distinction between summary conviction (less serious) and indictable (more serious procedure). If a charge is sworn within 6 months of the offence and any sentence imposed would likely not exceed 18 months imprisonment, a prosecution will normally proceed by summary conviction. This avoids a victim having to testify twice (at a preliminary inquiry and trial, possibly with a jury). If a charge is sworn outside of 6 months, indictable proceedings are mandatory absent the accused's consent. In this instance, a victim will likely testify twice (at a preliminary inquiry and trial, possibly with a jury) even though the anticipated sentence is less than 18 months imprisonment.

STATEMENT TO POLICE

Human nature dictates to us that in any situation involving strangers, we portray ourselves in a positive light. Admitting things that might reflect poorly on us is not easy to do. You must overcome this and consciously avoid it when giving your statement to the police.

It is irrelevant that you e-mailed, dated or had contact with the accused after the sexual assault happened. It is irrelevant that you may have been attracted to the accused and talked about it with your friends. What you wore is irrelevant. Worse still, considering these things as embarrassing or inconsistent with having been sexually assaulted tacitly accepts the rape myths and stereotypical thinking that is used to re-victimize survivors of sexual assault. Tell the police everything and avoid being portrayed as a liar by the accused's lawyer because s/he has been provided with evidence by the accused that you did have subsequent contact with the accused but did not mention it. This strategy was employed deftly and to devastating effect at Jian Ghomeshi's sexual assault trial.

Defence counsel cannot be faulted for relying on such evidence because their legal duty is to their clients. Do not give them ammunition by withholding something that is irrelevant to the case. Further, some judges and juries may mistakenly rely on the myths to consider you as more truthful because you did tell the police details that they consider embarrassing. Human experience is that if you say something about yourself perceived as negative, you inherently must be truthful.

Consider bringing a support person with you when giving your statement to the police. A victim support worker or other similar professional is best. Take your time in answering the questions.

We feel compelled to answer questions from police officers and may guess instead of admitting not remembering. **DO NOT GUESS**, either when talking to the police, prosecutors or when giving evidence in court. The honest answer when you honestly do not know or remember something is, *I don't know* or *I don't remember*. Guessing wrong on answers to often barely relevant questions is used by defence counsel to undermine your credibility if they can produce evidence that your guess was wrong.

AFTER THE POLICE INVESTIGATION

After taking your statement, conducting any forensic analyses available, attempting to interview the accused, interviewing witnesses and taking other necessary steps, the police investigator will decide whether reasonable and probable grounds exist to charge the accused with an offence. If they decide not to charge, you are entitled to a detailed explanation as to why not. If they decide to charge the accused in regards to some but not all of the sexual assaults, you are entitled to a detailed explanation. If investigators challenge this, refer them to section 7 of the *Canadian Victims Bill of Rights* (<http://canlii.ca/t/52hbr>). If you are not satisfied with the explanation, ask to speak to a supervisor. Ultimately, most police agencies have a formal complaint mechanism. Section 26 of the *Canadian Victims Bill of Rights* requires that a complaint mechanism exist. In British Columbia, New Brunswick and Quebec you will need to speak to a prosecutor as in those provinces, charges must be first approved by the prosecution service.

Ensure that if the accused is arrested at any point during or after the investigation, the investigator knows what your safety concerns are to ensure the prosecutor requests appropriate bail conditions if the accused is released. If the accused is denied bail, ensure that the investigator is aware that you want the accused prohibited from contacting you while in custody.

Finally, a publication ban is your choice. Many victims feel patronized by publication bans on their names being automatically imposed and then having to fight to have the ban lifted. Make sure the investigator writes in the file that goes to the prosecutor whether you want a publication ban. If unsure, go with a publication ban and revisit it later if you decide you no longer want it. The media can be insensitive to victims (i.e. trying to publish bikini pictures tendered at trial) and online trolls will slander and harass you on twitter, facebook and other platforms.

THE PROSECUTION

Now the ordeal starts in earnest, the procedures are often complicated and incomprehensible and to you it will appear that the only person whose rights matter is the accused. As it is the accused on trial, and his liberty at stake, the accused's rights have to be an important

consideration. That does not mean that victims have no rights and armed with knowledge, you can help ensure that yours are not forgotten.

The first decision to be made by the assigned prosecutor⁸ is whether to conduct a prosecution of any or all of the charges filed by the police. That decision is based on policies of each prosecution service. For example, British Columbia requires that there be a substantial likelihood of conviction (<http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf>) while on the country's other end, a less onerous reasonable likelihood of conviction is required (<http://www.justice.gov.nl.ca/just/prosect/guidebook/005.pdf>).

If the prosecutor decides not to proceed, you are entitled to a detailed explanation as to why not. If the decision is to proceed with some but not all charges, you are entitled to a detailed explanation. If prosecutors challenge this, refer them to section 7 of the *Canadian Victims Bill of Rights* (<http://canlii.ca/t/52hbr>). If you are not satisfied with the explanation, ask to speak to a supervisor. If you are not happy after that, ultimately you can go all the way up to the Attorney General. You will be better able to understand and challenge these decisions by reading the policies of your prosecution service. The policies of Canadian prosecution services are available online to the public. Acquaint yourself with essential information necessary to question and understand prosecutorial decisions.

Keep in mind that the prosecutor is not your lawyer. Prosecutors represent the public/community at large and have no notion of winning or losing. They must be scrupulously fair. They cannot, for example, introduce evidence that the accused sexually assaulted someone in the past, except in the rare exception when *similar fact rules* apply. An accused's prior convictions are inadmissible unless he testifies. Even then a judge may decide that a prosecutor cannot refer to prior convictions if their prejudicial effect exceeds their probative value.

Assuming the prosecutor decides to proceed, ask what s/he expects the likely sentence to be if the accused is convicted after a trial. If you go through the whole process expecting a 10 year jail sentence and 30 days in jail is the expected sentence, you will more likely feel victimized at the end. Ask the prosecutor if a sentence offer has been made to the accused on the condition that a guilty plea be entered and if so, the terms of that offer. If an offer has not been made or if any further offers may be made, ask that you be informed of the offer's details before an agreement is concluded. If faced with opposition, point to the *Canadian Victims Bill of Rights*. If you advise

⁸ Outside of British Columbia, New Brunswick and Quebec where a prosecutor will have made this decision prior to charges being sworn.

the prosecutor of your desire to be informed, section 606(4.2) of the *Criminal Code* may require the prosecutor to satisfy the court that reasonable steps were taken to advise you of the terms of a sentencing agreement.

To understand and question sentencing positions, do some research yourself, it is not difficult. CANLII (<http://www.canlii.org/en/index.html>) is a free service. Select the province you live in and in the box marked *Document text* enter the following “*sexual assault*” /s sentence. If you suffered bodily harm enter “*sexual assault*” /p sentence /p “*bodily harm*”. The case results become more relevant and specific according to the additional terms and search parameters you use. See Query Syntax (<https://www.canlii.org/en/info/search.html>) for information to aid you in focusing your search.⁹

If your matter proceeds by summary conviction there is only a trial (unless a guilty plea is entered). If it proceeds by indictment, there may be a preliminary inquiry and a trial (unless a guilty plea is entered). If there is a preliminary inquiry, ask the prosecutor if they can try and do a paper preliminary pursuant to section 540(7) of the *Criminal Code*. This may avoid you having to testify and be cross-examined twice (at the preliminary and at the subsequent trial). The likelihood of avoiding having to testify twice may be decreased if the police video record your statement with you under oath. Hopefully the Federal Government will change the *Criminal Code* and eliminate most preliminary inquiries. They are now generally irrelevant given the onerous disclosure obligations of prosecution services.

Regardless of whether it is at a preliminary and/or a trial, unless the accused pleads guilty, you will have to testify (absent very exceptional circumstances). Knowing your rights as a witness who was sexually assaulted is very important. Victim services workers are also very helpful in this area.

From a place of knowledge, insist that all mandatory protections that you want are extended to you. If you want them, insist as well that the prosecutor applies to the Court for any discretionary protections that may be available to you. Examples of various protections available pursuant to the *Criminal Code* include:

- Exclusion of the public from the court room – discretionary;
- Publication ban – mandatory but see above comments regarding whether you want one;
- Support person while testifying – mandatory if victim less than 18 years old, discretionary otherwise;

⁹ CANLII may be used to assess a prosecutor’s level of experience however generally it is not a reliable measure given that judges sometimes only provide oral reasons for their decisions.

- Screen/CCTV - mandatory if victim less than 18 years old, discretionary otherwise; and,
- Protection from personal cross-examination by the accused - mandatory if victim less than 18 years old or offence sexual in nature, discretionary otherwise.

You should know as well that the accused's lawyer cannot question you about any of your previous sexual history, including any prior sexual activity with the accused, without applying first to the Court of permission to do so pursuant to section 276.1 of the *Criminal Code*. You are entitled to advance notice of any such application from the prosecutor who must be served with a copy of it.

THE TRIAL

Consider your own human experience. How often have you formed a negative first impression of someone based on their mannerisms, posture, attitude or other external factors? How difficult is it to reconsider that first impression? Relate that experience to your entry into the court room to testify. The judge/jury has nothing other to go on than your appearance and behavior once you enter the court room. Dress as if court is like church/a parent teacher meeting/making a loan application, you don't have to wear fancy clothes but dress to demonstrate that you know that court has a more solemn atmosphere than that of a shopping mall.

Talk as you would normally talk when being asked questions. Use your own words and vocabulary. Be yourself, acting like someone different does not generally help. If you are normally quiet and timid that is who you are. If you are normally outgoing that is who you are. If you do not normally use 'fancy' words do not use them in court.

Answer the prosecutor's questions directly and fully as they are not allowed to ask you leading questions. Short, terse answers make the prosecutor's task very difficult.

Listen carefully to (before answering) the defence lawyer's questions as they can ask leading questions and may try and get you to agree to something that is not correct.

This is not the forum for a detailed explanation of rules for examining witnesses. You should¹⁰ be asked by the prosecutor to attend a witness preparation meeting before you have to attend court. These and other important points should be explained to you at that time. You should also be permitted to review your statements and refresh your memory prior to the trial.

¹⁰ At your initial meeting with the prosecutor remind him/her that you require a witness preparation meeting. Victim services workers can assist in arranging this meeting and should attend with you.

Do not be baited into getting angry, belligerent or disrespectful by defence counsel. There is too much of a risk that it will reflect poorly on the impression you make with the judge/jury. Most defence lawyers will be respectful and are simply doing their jobs, an essential part of any system of justice that can deprive a person of liberty, force them to provide DNA and require registration and reporting as a sex offender. There are very few defence counsel who act unprofessionally and they give the rest a bad name. Should you encounter belligerent/disrespectful defence counsel, not responding in kind will reflect favorably on you and may cause them to lose credibility and respect with the judge/jury. In that unenviable situation, the prosecutor should object and ask that defence counsel be reminded by the judge of your right to be treated respectfully.

Do not ask if you have to answer the defence lawyer's questions. Inappropriate questions must be first objected to by the prosecutor. After the prosecutor objects the judge will hear from both lawyers and decide whether or not the question may be asked.

If you do not understand any lawyer's questions ask them to repeat or rephrase the question. Ensure you understand what you are being asked, especially on cross-examination.

Remember the 'golden' rule discussed above, the honest answer when you honestly do not know or remember something is, *I don't know or I don't remember*

When answering any lawyer's questions try to regularly make eye contact with the judge/jury. Mainstream Canadian culture regards failure to make any eye contact as a sign of not telling the truth.

Once the prosecutor presents all of his/her evidence, the defence lawyer may or may not call any evidence. If the defence calls witnesses, the roles reverse and the prosecutor can cross-examine defence witnesses.

Once all the evidence is introduced and the lawyers make their final arguments the judge/jury will deliver a verdict.

THE VERDICT

Jury verdicts do not involve the giving of reasons and simply consist of the jury foreperson advising the judge if the jury found the accused guilty or not guilty.

Judge alone trials result in reasons as the judge must state orally or in writing why and how s/he came to find the accused guilty or not guilty. Those reasons will include references to the prosecutor's burden of proof being beyond a reasonable doubt. It is the highest burden of proof

in the Canadian justice system. In cases that lack physical evidence it is often a big challenge to meet this standard. Most often a not guilty verdict does not mean that a victim was disbelieved. It simply means there was a reasonable doubt. While this is absolutely true, I doubt that many of the victims I have told this believe me.

If an acquittal occurs, ask the prosecutor if there are any unreasonable factual findings or legal mistakes by the judge that would support filing an appeal. If there are, before the appeal is filed you will likely be asked if you are willing to go through the process again, including testifying and being cross-examined again.

CONCLUSION

The many nuances and complexities of the criminal justice system and its treatment of sexual assault victims cannot be explained in 4000 words. Trying to achieve that goal would likely result in a document of such length and complexity that it would be of little usefulness to the average sexual assault victim.

As a summary it is no substitute for obtaining advice from qualified professionals about your individual circumstances and what you should do if you are victimized sexually. Its usefulness is limited to providing you with some knowledge and insights that may empower you in dealing with those professionals.

A summary cannot address the infinite number of issues and variations that can arise. This summary also does not address in any way the many additional issues that arise when a child has been victimized sexually.



A friend to victims

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