National Victim Center
An advocacy and resource center
founded in honor of Sunny von Bulow

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February 13, 1992

Dear Colleague:

On behalf of the faculty and staff of the "Legal Remedies for Crime Victims Against Perpetrators: Basic Principles" conference series, I would like to thank you for joining us as we venture into this exciting new arena of victim assistance.

The National Victim Center especially wants to extend our thanks to the U.S. Department of Justice, Office for Victims of Crime, without whose sponsorship this conference series would not have been possible. Office for Victims of Crime Acting Director Brenda Meister and her staff -- especially the Project's Grant Monitor, Victoria O'Brien, esq. -- have supported us every step of the way, enabling us not only to provide this comprehensive 400-page *Manual* and training curriculum, but also, the first ever full academic credit for an Office for Victims of Crime-sponsored training conference.

The training curriculum and accompanying *Manual* are designed to help you develop a basic understanding of not only how civil remedies can help crime victims, but of your critical role as the bridge between victims and civil litigators willing to take victims cases. To this end, the project faculty reflects both your perspective as a service provider and that of civil litigators. I hope you will agree that the faculty we have been fortunate to assemble provides the combination of experience, knowledge, skills and understanding to make this a memorable conference.

Best wishes for a successful conference and for the implementation of the ideas included in this "Legal Remedies for Crime Victims Against Perpetrators: Basic Principles" *Manual*.

Sincerely, Christine Edmunds

Christine N. Edmunds
Project Director
National Victim Center

LEGAL REMEDIES FOR CRIME VICTIMS AGAINST PERPETRATORS: BASIC PRINCIPLES

A REGIONAL TRAINING CONFERENCE

PRESENTED BY

NATIONAL VICTIM CENTER

2111 Wilson Boulevard

Arlington, Virginia 22201

In Association With

Frank Carrington, Esquire

FRANK CARRINGTON
1936 - 1992

Frank Carrington was tragically killed in a fire at his house in Virginia Beach, Virginia on January 2, 1992. At the time of his death, Mr. Carrington was proud to see that his dream of providing civil remedies to crime victims was finally being realized. He not only authored this extensive Manual, but served as the senior legal advisor and leader of the project faculty on this innovative training series. Without Frank Carrington's twenty years of work as an attorney in the victims field, this training series could not have been possible. He developed the concept of civil remedies for crime victims, conducted years of research and tracked thousands of victim-related civil cases which serve as the backbone of this project. Frank also advised hundreds of attorneys, victim service providers and victims across the country on victim-related civil law. He is referred to by many as the "father of the victim rights movement." We are fortunate that his creativity led him, as his last major project, into the field of civil litigation for crime victims. We dedicate this training series to Frank Carrington, whose years of work made it possible for us to gather together to study, to learn and to practice.

At the time of his death, in addition to working as a legal Advisor to the National Victim Center, Mr. Carrington was serving as Executive Director of the Victims Assistance Legal Organization (VALOR) and as Counsel for Security on Campus, Inc.

He received his law degree from the University of Michigan and has a Master of Laws degree in Criminal Law from Northwestern University. He was a member of the bars of the Supreme Court of the United States and the states of Virginia, Illinois, Colorado, and Ohio.

After law school, he worked as a criminal investigator for the U.S. Treasury Department and the U.S. Marine Corps, and as Legal Advisor to the Chicago and Denver Police Departments.

Mr. Carrington was Assistant Director for Criminal Justice Policy in the Reagan\Bush Transition Team in 1980, served as a member of President Reagan's Task Force on Victims of Crime and as a Chairperson of the Victims Committee of the American Bar Association. In April of 1991, he was honored at the White House by President Bush for "outstanding service on behalf of victims of crime."

He was the co-author of *Victims Rights: Law and Litigation*, New York, Matthew Bender Company, (1989).

Kevin Washburn is a lawyer from Oakland, California. He represents several crime victims and their families in civil cases and is Chairman of the Committee on Legal Services for Victims of Crime of the State Bar of California. He was admitted into practice in California in 1977 and has written or co-authored articles and opinion pieces relating to the victims of school crime and violence.

Dr. Marlene A. Young, J.D. is Executive Director of the National Organization for Victims Assistance (NOVA). Dr. Young was a founding board of NOVA in 1975, and served as NOVA's President from 1979 to 1981. She has been its Executive Director since 1981. Dr. Young has published some 75 articles, chapters, and monographs dealing with victim issues and has made presentations at over 500 international, national, state and local trainings and conferences. Her innovations and leadership in the victims' movement has brought her many national and international honors.

Beth G. Baldinger is an attorney with Stark and Stark in Princeton, New Jersey, specializing in representing crime victims in civil cases in New York and New Jersey. Ms. Baldinger represents community service programs and conducts professional seminars on a variety of victims' rights issues. She also provides legal services to local and national victim groups.

Joyce Dale has served as Executive Director of Delaware County Women Against Rape, a private, non-profit rape crisis center in Pennsylvania, since 1974. She is a past president of the Pennsylvania Coalition Against Rape and currently serves as president of the National Network for Victims of Sexual Assault. In addition, Ms. Dale is attending law school.

Dr. Mario Thomas Gaboury is an attorney and consultant whose practice emphasizes representing victims of crime. Dr. Gaboury is Vice Chair of the Crime Victim Committees of the American Bar Association and the Connecticut Bar Association. Formerly, he has served as Deputy Director of the Office for Victims of Crime, U.S. Department of Justice, and as Legislative Specialist for the National Organization for Victim Assistance.

Jo Kolanda has served as coordinator of Victim/Witness Services for the Office of the District Attorney in Milwaukee since 1975. Ms. Kolanda is a former Board Member of the National Organization for Victim Assistance and current member of the american Bar Association Victims Committee. She was honored by the Governor of Wisconsin in 1983 for her work on behalf of crime victims.

Austin E. Catts is an Atlanta, Georgia trial lawyer who has a broad range of experience in civil and criminal litigation. He has tried complex tort and criminal cases in Georgia and beyond for the past 20 years. He has lately begun to concentrate on representing victims of violent and white collar crime in damage actions. Catts chairs the new Atlanta and Georgia Bar Crime Victims Legal Rights Committees, is a member of COVAC, the ABA Crime Victims Committee, and numerous other professional organizations.

Sherry Price, a victim of rape seven years ago, has held many positions in the victims' rights movement such as: Executive Director of the New York State Coalition for Crime Victims, Regional Director of the National Victim Center, and one of the founders of the New York chapter of Victims for Victims. Ms. Price also has conducted workshops and seminars throughout the United States and helped establish the organizations for the families and victims of Pan Am 103.

Judy Rowland, a former San Diego County prosecutor, is an author and lecturer on victims' rights. In 1984 she founded the California Center on Victimology and, in 1984, established the Crime Victims Legal Clinic as a Center project. Ms. Rowland set precedent by effectively utilizing the theory of rape trauma syndrome through expert testimony to benefit victim credibility in felony jury trials.

ACKNOWLEDGEMENTS

The Project staff and faculty want to thank the many wonderful people who contributed their time, energy and expertise to the "Legal Remedies for Crime Victims Against Perpetrators: Basic Principles" conference series and accompanying materials. Their immense support of this Project -- from offering advice, consultation and logistical coordination, to computer input, formatting and editing -- was the key to this Project's success.

The leadership initiated by the U.S. Department of Justice Office for Victims of Crime (OVC), in cooperation with the Bureau of Justice Assistance, provided a strong foundation for the entire "Legal Remedies" Project. OVC staff -- particularly Acting Director Brenda Meister and our Grant Manager, Victoria O'Brien, Esq. -- devoted countless hours to developing and implementing the crucial concepts of civil litigation that comprise this Project. And of course, Assistant Attorney General Jimmy Gurule's support for "Legal Remedies" is greatly appreciated. For their ongoing encouragement, we are very grateful.

Special thanks is extended also to Dr. Jane Nady Burnley, former director for the Office for Victims of Crime, for her vision in recognizing the possibilities and promise of this project. Without her leadership and guidance this project would not have been possible. In addition we would like to thank Dr. Mario Gaboury, Esq., a long-time friend and supporter of the National Victim Center. He spent considerable time with Project staff developing the curriculum and offering his support wherever it was needed.

We would like to thank the staff and consultants of the National Victim Center's Arlington, Virginia office. This *Manual* would not have been completed without the contributions of two individuals: Matthew P. Reed, Researcher, Programs and Policy, who has provided valuable assistance in every phase of this Project -- from helping to develop brochures and agendas to editing, formatting and on-site conference coordination; and graphic and layout expert John Patterson, National Victim Center Consultant, who designed and directed the production of this enormous publication. Their patience, skills and expertise are deeply appreciated.

We also want to thank Diane Alexander, the Center's Assistant Director for Information and Library Services, who helped organize and coordinate each of the four regional training sites; Anne Seymour, Director of Communications and Resource Development, who spent endless hours editing the *Manual*; Gary Markham, Library Technician, for his talents in creating the bibliography; Linda Peters, Office Manager and computer genius; and Carol Dorris, Susan Smith-Howley, D. Thomas Nelson, Rebecca Noack, and Dena Somers, Legislative Analysts at the Center, each of whom methodically edited and copy-proofed this publication. In addition, we would like to thank James Williams, CRT Operator, for assistance with data input; and Joanne Shaffer and Randi Raphael of the Center's Fort Worth office who, once again, provided incredible coordination of registration and conference mailings.

SPECIAL THANKS FROM FRANK CARRINGTON

The *Manual*, upon which this training series is based, could not have been completed without the assistance of several individuals. A special thank you is due to the two staff members from the Justice Department's Office for Victim of Crime who were most closely connected with work on this *Manual*. Grant Manager Victoria O'Brien, Esq. reviewed the text many times for legal theory and clarification of terms and concepts. Program Supervisor Melanie Smith reviewed the *Manual* from the perspective of an expert editor -- providing advice and clarifying technical wording to improve the readability of the legal concepts involved.

The author also gratefully acknowledges the assistance of Regent University Law School students Bonny Lightner, Kathleen Moraska, Carl Schwartz, Ronnie Clark, Brent and Decie Rowlands, Ed Stewart, and Christine Winters, all of Virginia Beach, Virginia.

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DISCLAIMER

THIS MANUAL, ANY OTHER MATERIALS, AND ANY ACCOMPANYING TRAINING SESSION, ARE NOT INTENDED TO RENDER ANY PROFESSIONAL ADVICE, LEGAL OR OTHERWISE. INDIVIDUALS MUST CONSULT COMPETENT PROFESSIONALS, LICENSED TO PRACTICE IN THEIR AREA, TO RECEIVE SUCH SERVICES RELATED TO THEIR CIRCUMSTANCES.

LEGAL REMEDIES FOR CRIME VICTIMS AGAINST PERPETRATORS: Basic Principles

COURSE CURRICULUM

National Victim Center

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National Victim Center

LEGAL REMEDIES FOR CRIME VICTIMS AGAINST PERPETRATORS:
Legal Principles

COURSE OUTLINE

TIME	DAY ONE	TIME	DAY TWO
30 Min	Module I: **Civil Litigation: Making the Headlines a Reality**	90 Min	Module VII: **Collecting Judgments Against Insured Perpetrators**
45 Min	Module II: **Establishing a Foundation: An Overview of Civil Litigation**	75 Min	Module VIII: **Principles in Practice -- Issues Facing the Plaintiff's Case: A Mock Trial**
60 Min	Module III: **The Critical Role of Service Providers**	120 Min	Module IX: **Lawsuits for Special Victim Populations**
45 Min	Module IV: **Compensation and Restitution Related to Civil Litigation -- Collection of Judgments: The Defendant's Ability to Pay**	45 Min	Module X: **Principles in Practice: Fact Gathering -- Case Interview Simulation**
90 Min	Module V: **Making Civil Law Work For Victims**	60 Min	Module XI: **Civil Litigation: Working for Victims**
75 Min	Module VI: **Principles in Practice -- Fact Finding: The "Who, What, Where, When and How" of Civil Cases**	30 Min	Module XII: **Closing Plenary Module: Networking to Develop Local, Regional, and National Resources for Information and Referrals**

National Victim Center

MODULE ONE:

CIVIL LITIGATION: MAKING THE HEADLINES A REALITY

TIME: **30 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

Over the past decade victim rights have become increasingly recognized by our civil justice system. Crime victims are now winning major lawsuits against perpetrators who have harmed them -- providing an entirely new avenue for financial relief from their physical and emotional injuries. This module will provide a brief overview of these historic changes as well as an introduction to the overall training conference.

OBJECTIVES OF SESSION	
1.	To provide an introduction and overview of this civil remedies training program;
2.	To introduce the faculty and sponsors; and
3.	To describe the rationale for this training conference.

MANUAL REFERENCES	
Section I. INTRODUCTION TO THE MANUAL	P. 1
Chapter 1. Purpose of the Manual	P. 1
Chapter 2. Content of the Manual	P. 4

MAJOR POINTS OF SESSION:

1. What is **Civil Litigation?**

   - A brief overview of civil litigation.
   - Why it is important to file a civil suit -- including filing for reasons other than obtaining monetary damages.

2. An Examination of the Reasons for this Training:

   - **Civil litigation** is important for victims because:
     - It **empowers** victims: Victims are in control of civil cases whereas the state is in control in a criminal cases.
     - Society will learn the impact of crime -- large verdicts **reinforce** the idea that victims have suffered important injuries and that **perpetrators should pay** for them.
     - **Civil remedies** provide victims with unique opportunities to recover **monetary damages** for the harm inflicted upon them by their assailants.
   - **Civil litigation** is important for ***Service Providers*** to be aware of because:
     - **Civil remedies** provide a broad range of **financial remedies** to victims. Service providers, in both public and private agencies, can better serve their own institutional goals by advising victims of their right to seek civil remedies.
     - Learning about **civil litigation** will equip service providers with the skills necessary to **serve a broader range of victims' needs.**

- Providing **civil remedies** for victims is **good for society** because:

  - The **deterrence factor** -- holding perpetrators financially accountable for their acts through the civil justice system reinforces the message that **crime does not pay** and may **reduce** future acts of **violence, negligence** and **intentional infliction of emotional harm.**

  - Civil litigation **promotes** enhanced **safety** policies and **practices** in society. Major lawsuits have resulted in increased security protection, better oversight and supervision of day care facilities, and countless other improvements which ultimately reduce criminal victimization in society (See page 14, of the *Manual* -- the Connie Francis case).

  - Finally, high profile civil suits which garner considerable media coverage help heighten national awareness of victim issues.

MODULE TWO:

ESTABLISHING A FOUNDATION: AN OVERVIEW OF CIVIL LITIGATION

TIME: **45 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

In order to understand the critical aspects of civil remedies for victims, it is important to have a basic understanding of civil law. This module will provide an introduction to civil law including: defining commonly used legal terminology, basic principles of civil litigation, and an overview of a typical civil case.

OBJECTIVES OF SESSION	
1.	To define commonly used legal terms (see glossary);
2.	To define and illustrate the differences between civil and criminal law;
3.	To describe the basic principles of civil litigation;
4.	To review the civil law process by walking the participants through a step-by-step description of a typical civil law case;
5.	To define and illustrate the difference between "First" and "Third-Party" lawsuits; and
6.	To discuss the pros and cons of seeking civil remedies -- including some cautionary notes.

MANUAL REFERENCE		
Section II.	OVERVIEW OF CIVIL LITIGATION ON BEHALF OF CRIME VICTIMS (2.1)	P. 13
Chapter 1	Victim Civil Actions Against Perpetrators and Third-Parties (2.2)	P. 13
Chapter 2	State Involvement on Behalf of Crime Victims: Compensation and Restitution (2.3)	P. 16
Chapter 3	Procedural Overview (2.7)	
	• Civil Actions Versus Criminal Actions	P. 18
	• Civil Proceedings	P. 21
	• Pros and Cons of Litigation	P. 24

MAJOR POINTS OF SESSION:

1. Examples taken from the Manual will be used to illustrate the various types of civil cases crime victims have brought against perpetrators. Note especially that in many of these cases, the offender was **never convicted of a crime.**

2.. How civil litigation **differs** from a criminal case -- a brief **ANATOMY OF A CIVIL CASE**, compared to a criminal case.

CRIMINAL CASE	CIVIL CASE
INITIATION OF CASE	
▪ Arrest ▪ Information or Indictment ▪ Arraignment	▪ Claim or Demand Letter ▪ Summons or Complaint

CRIMINAL CASE	CIVIL CASE
PRE-TRIAL	
▪ Discovery ▪ Preliminary Hearings ▪ Pre-trial Motions ▪ Pre-trial Conferences and Hearings ▪ Plea Negotiation	▪ Discovery ▪ Pre-trial Motions ▪ Pre-trial Conferences and Hearings ▪ Settlement
TRIAL	
▪ Selection of Jury ▪ Trial ▪ Verdict: Guilty/Not Guilty ▪ Pre-Sentence Investigation Report ▪ Sentencing	▪ Selection of Jury ▪ Trial ▪ Decision: Liability/No Liability ▪ Determination of Money Damages
POST TRIAL	
▪ Execution of Sentence: • Probation • Incarceration • Diversion ▪ Restitution Enforcement: • Garnishment of Income • Lien on Prisoners' Wages • Revocation of Probation, • Parole or Work Release	▪ Enforcement: • Garnishment of Income • Attachment of Financial Assets • Seizure and Sale of Personal and Real Property • Notoriety-For-Profit

3. The basic **PRINCIPLES OF CIVIL LITIGATION**:

- **TORTS:**

  For purposes of this training, a **tort** occurs when a person **intentionally injures** another, or when a person's **failure to perform** his or her **duty** of care is the **cause of injury** to another (**negligence**).

- **INTENTIONAL TORTS** Against a Person Include:

  - Battery
  - Assault
  - Wrongful Death
  - Intentional, Reckless Infliction of Emotional Distress

- **ELEMENTS** of a Tort:

  - **Act:** Prove that defendant committed an act.
  - **Harm:** Prove that harm was inflicted on plaintiff.
  - **Causation:** Prove that the defendant's action directly or indirectly caused harm or injury.
  - **Intent:** Prove that the defendant intended to inflict harm or injury.
  - **Damages:** The measure of the harm or injury. Damages may include the following:

    ✓ **Compensatory:**

    Payment -- for expected or incurred expenses.

    ✓ **Punitive:**

    Punishment -- if defendant acted maliciously.

    ✓ **Pecuniary:**

    Loss of potential income -- lost wages.

- **DEFENSES** to Torts:
  - ✓ Contributory Negligence
  - ✓ Assumption of Risk
  - ✓ Comparative Negligence
  - ✓ Statute of Limitations
  - ✓ Self Defense/Defense of Others

- The Tort of **NEGLIGENCE -- General Duty**: An act or omission of an act that breaches a "duty of care" and is the actual and proximate cause of plaintiff's injuries.
  - Different Types of **GENERAL DUTY NEGLIGENCE**:
    - ✓ **Duty of Care**: The ***Reasonable Person Standard*** -- Everyone owes a duty to act as a *reasonable person* would under similar circumstances.
    - ✓ **To whom is duty of due care owed?** Generally speaking, if a ***reasonable person*** would not foresee injury to another person as a result of his or her actions, then the actor is not liable for injuries that result from such actions.
    - ✓ **Breach of Duty**: Conduct that exposes others to unreasonable risk or harm.
  - **CAUSATION**:
    - ✓ **Actual Cause**: **Defendant's conduct** must be the **actual cause** of plaintiff's **injuries**. For example: plaintiff would not have been injured but for the defendant's conduct.
    - ✓ **Proximate Cause**: A **policy decision** as to who should bear loss for unexpected injuries or expected injuries caused in unexpected ways -- the ***foreseeability factor***.
    - ✓ **Indirect Causation**: Means that an **intervening force** extends the result of the defendant's act, or **combines** with the **defendant's act**, to produce the **injury**.

- **DAMAGES:**

  - ✓ **Special: Past, present** and **future** economic **losses.**
  - ✓ **General:** Inherent in the injury itself -- past, present, and future **pain** and **suffering, disfigurement** and **disability.**
  - ✓ **Punitive: Damages** awarded **to deter** similar actions by defendant and other as **a matter public policy.**

- **DEFENSES TO NEGLIGENCE:**

  - ✓ Consent
  - ✓ Self Defense
  - ✓ Defense of Third Persons

- **SPECIAL DUTY NEGLIGENCE:**

  - ✓ Duty to **Prevent Harm**
  - ✓ Duty by Defendant Charged with **Care of Third Parties**
  - ✓ Duty to **Control Third Parties**
  - ✓ Duties Related to **Emotional Distress**

D. **STEP-BY-STEP OUTLINE OF A CIVIL CASE**

STEP-BY-STEP OUTLINE OF A CIVIL CASE
PROCESS AND PROCEDURE
• Victim consults with and retains a civil attorney.
• Attorney conducts preliminary investigation into facts.

STEP-BY-STEP OUTLINE OF A CIVIL CASE

INITIATION OF A CIVIL SUIT

- Attorney files and/or serves defendants with a ***COMPLAINT*** setting forth allegations of tortuous acts committed by the defendants for which monetary damages are demanded.

- Defendants file an **ANSWER** to the complaint admitting or denying the allegations and raising defenses.

Note: The victim, as the **plaintiff** in a civil suit, is the party asserting claims against the **defendant** for the recovery of monetary damages. The **defendant** in a civil case may either be the **criminal perpetrator** or **others** who may, in some way, be responsible for the criminal act. The **defendant** attempts to counter the **factual claims** asserted by the **plaintiff** or by asserting justifications for their actions (i.e., "defenses").

BEFORE THE TRIAL BEGINS

- **Discovery:** Both sides exchange the factual information and evidence upon which they plan to prove their cases.

STEP-BY-STEP OUTLINE OF A CIVIL CASE

- The following procedures are commonly used during discovery process:

  ✓ **Interrogatories:** Written questions answered under oath.

  ✓ **Demands for Production:** Requests to produce documents, records, tapes and/or photos, such as medical data and expert reports.

  ✓ **Requests for Admissions:** Written requests to admit or deny certain facts pertinent to the case.

  ✓ **Depositions:** Opportunities for each party to have their attorney ask questions of the other parties, in person and under oath. This provides the opposing attorney with the opportunity to obtain sworn testimony which is used to ascertain what facts the parties and witnesses will testify to at trial.

  NOTE: Victims have the **right** to have their attorney with them at all times during the deposition -- to represent them, and to protect their rights and interests.

- **Motions:** At various stages of the civil lawsuit, either party may make ***motions***, which are formal *requests to the court* to intervene and resolve disputes between the parties concerning issues of law or procedure.

- **Pre-trial Conference:** Attorneys meet with the judge to discuss the status of the case, any problems concerning discovery, potential settlement and to agree upon other procedural matters such as trial dates.

STEP-BY-STEP OUTLINE OF A CIVIL CASE

THE TRIAL BEGINS

- **PLAINTIFF** presents the case by **offering witness testimony** and physical evidence. The **DEFENDANT** may **cross-examine** the witnesses and object to the introduction of evidence. The defendant then presents witnesses and evidence. Plaintiff's attorneys will then have an opportunity to cross-examine defendant's witnesses and object to the introduction of evidence.

- At the end of the trial, each attorney is allowed to present closing statements which summarize the evidence and ask the jury to find in their favor.

- The **judge** will then **instruct the jury** as to the **law** that is applied in the case. The **jury decides the facts** and applies the law to reach the final decision. The jury's decision is called a ***verdict***.

- **Jury Verdict:** If the jury finds in favor of the plaintiff, it may award a sum of money as damages to be paid by the defendant. If it finds in favor of the defendant, **no** damages are awarded to the plaintiff.

  - Jury verdicts that award damages are called **judgments**.

  - In order to collect awarded damages, civil judgments must be ***executed***.

STEP-BY-STEP OUTLINE OF A CIVIL CASE

AFTER THE TRIAL

- **Execution (or Collection) of Judgments:** The judgment is filed and recorded in the court, County Clerk's Office and by the Secretary of State.

- **Discovery of defendant's assets** may be conducted under oath. **Plaintiff's attorney** may **ask** for all **information** about **any and all of defendant's assets** and **sources of income.**

- If the **defendant appeals** the verdict, then judgment **collection efforts must be suspended** until all appeals are completed.

- Judgments may be **satisfied** by:

  - Defendant's **Insurance Company**

  - Defendant's **Personal Assets**

A COMPARISON OF FIRST AND THIRD-PARTY LAWSUITS

FIRST-PARTY

Plaintiff vs Defendant
or
Victim vs Perpetrator

THE TERM "PERPETRATOR", AS USED IN THIS PROJECT, ALSO INCLUDES OTHERS WHO CONSPIRE WITH, AID, OR ABET THE PERPETRATOR IN THE COMMISSION OF THE CRIME. LIKEWISE, PARENTS WHO FAIL TO CONTROL THEIR CHILDREN WHO COMMIT CRIMES, AND PERSONS WHO ENTRUST DANGEROUS INSTRUMENTALITIES (AUTOMOBILES, FIREARMS) TO PERPETRATORS, MAY ALSO BE CONSIDERED PERPETRATORS FOR THE PURPOSES OF THIS TRAINING.

THIRD-PARTY

Plaintiff vs Defendant
or
Victim vs. Third-party

THE TERM "THIRD-PARTY DEFENDANTS" INCLUDES PERSONS WHOSE NEGLIGENCE OR GROSS NEGLIGENCE HAS CAUSED OR FACILITATED THE PERPETRATOR'S INFLICTION OF THE VICTIM'S INJURIES.

THIRD-PARTY DEFENDANTS MAY INCLUDE THE FOLLOWING:

- **Government:** for Failure to Protect
- **Correctional Officials:** for Release of Dangerous Prisoners
- **Mental Health Officials:** for Release of Dangerous Patients
- **Landlords:** for Failure of Security
- **Innkeepers:** for Failure of Security
- **Schools:** for Failure of Security
- **Hospitals:** for Failure of Security
- **Premises:** for Failure of Security
- **Employers:** for Negligent Employment or Retention of Dangerous Employees

MODULE THREE:

THE CRITICAL ROLE OF SERVICE PROVIDERS

TIME: **60 MINUTES**

FORMAT: **PANEL DISCUSSION** Featuring the Perspectives of a Victim Service Provider and a Civil Litigator.

SUMMARY:

This module is intended to give victim service providers some practical guidelines concerning their role as a vital link between victims in need of legal assistance and the attorneys willing and able to provide such assistance. Discussion will address the issue of how to build productive working relationships with not only victims, but civil litigation attorneys as well.

OBJECTIVES OF MODULE	
1.	To illustrate how **service providers** can begin or enhance their **relationships with attorneys;**
2.	To explain how **service providers** can serve as a **vital information link** between attorneys and victims;
3.	To identify the **types of questions** service providers need to ask victims in order elicit essential information about the case **before** making a referral to a civil attorney;
4.	To explore certain **ethical issues** that may arise in the context of making attorney referrals; and
5.	To obtain a **civil litigator's** perspective as to what information is most useful and the kinds of questions that will most likely elicit such information.

IMPORTANT CASE INTAKE INFORMATION FOR VICTIM RELATED CIVIL CASES

Data About Victim	
✓ Name, address telephone number	✓ Date of birth, social security number
✓ Employer: name, address, telephone	✓ Work start date
✓ Marital status: ✓ If married: • Name of spouse • Employment history of spouse? • Lost time from work as a result of criminal event?	✓ Lost time from work: from_____to_____ • Lost wages? • Filed for disability?
✓ Dependents: names and ages	✓ If victim is deceased: • Same as preceding information • Date and time of death • Cause(s) of death • Autopsy report if available • Death certificate • Names of decedent's immediate family members • Dependent's will or administrator/executor of the estate • Funeral home and funeral home receipts

IMPORTANT CASE INTAKE INFORMATION FOR VICTIM RELATED CIVIL CASES

Criminal Event Data

✓ General description of criminal occurrence(s)

- Date and time.
- Location of events, addresses and description of premises from onset to conclusion.
- Why victim was at the location/premises.
- Why perpetrator was at the location -- how did perpetrator gain access to premises and to victim.
- What happened to victim.
- Any witnesses to any stage of occurrence and to any statements made by victim(s) or offender.
- Any known physical evidence.

✓ Reported to Police

- Police department where complaint was filed.
- Detective or officer assigned to the case.
- Complaint or report number.
- Date reported to police.
- Statements taken as part of investigation.

IMPORTANT CASE INTAKE INFORMATION FOR VICTIM RELATED CIVIL CASES

Perpetrator Information

✓ If victim knows who the perpetrator is:

- Nature of relationship on basis of knowledge.
- Name, address, aliases.
- Date of birth, Social Security number.

✓ If victim does not know perpetrator:

- Physical description.
- Any identifying features details.

✓ At time of event, was perpetrator employed or acting on anyone else's behalf?

✓ Prosecutor

- Any criminal case investigation conducted?
- Current stage of criminal case.
- Prosecutor assigned to the case.

Medical Information

✓ Injuries for criminal occurrence

- Physical.
- Emotional.
- Psychological.

✓ Any injuries or disabilities of any nature prior to criminal occurrence? If so, describe and give approximate date(s) of onset.

IMPORTANT CASE INTAKE INFORMATION FOR VICTIM RELATED CIVIL CASES

✓ Treatment for Injuries

- Ambulance?
- Hospital -- emergency room?
- Date of admission and discharge.
- Treating physicians and/or counselors --
  - Names
  - Addresses
  - Approximate dates of treatment
  - Specialty

✓ Sources of payment (received or automatic)

- Health insurance company
- Policy number

✓ If insured

- Claim number
- Other Sources
  - Crime victim compensation programs
  - Medicare
  - Restitution

SUGGESTED CRITERIA TO CONSIDER WHEN SELECTING AN ATTORNEY:

- ✓ Look for attorneys who have **experience** handling **personal injury, wrongful death** and/or **professional malpractice** claims on behalf of plaintiffs. Attorneys who have **experience** working with **crime victims,** *i.e.*, former prosecutorial experience and attorneys in other civil crime victim cases are preferable.

- ✓ A productive attorney-client relationship is based upon the **ability** of both sides **to communicate** fully and effectively with each other. Victims should feel comfortable fully disclosing all details and information to their attorney. Attorneys should be able to fully explain all aspects of legal proceedings so that the victims understand. They must be **responsive** to victims' needs and requests.

- ✓ Victims should fully **understand** all details of any **retainer agreement** prior to signing it. If victims have **questions,** they may call the local **bar associations** about laws and regulations involving contingency fee arrangements, retainers and distribution of profits.

- ✓ Victims should be **clear** about what they **expect their attorneys** to do, and attorneys should be clear about what services they are rendering and the likelihood of obtaining desired results. For example, the civil attorney may be retained on a **contingency fee** basis to **sue the perpetrator**, but not retained to handle crime victim compensation claims, accompany clients to criminal court, etc.. These services may be available but may be charged for separately. **Reasonable expectations** on both sides can avoid later disappointment and frustration.

- ✓ Victims should feel free to **consult** with **several lawyers** before selecting one in particular. Lawyers are professionals, like doctors, and good consumer practice is to get a **second opinion.**

- ✓ Victims should **cooperate,** as fully as possible, with their attorneys, -- such cooperation is **necessary** for successful representation of their interests. Victims have the right to expect their attorneys to be understanding, respectful, and responsive to their needs.

MODULE FOUR:

COMPENSATION AND RESTITUTION RELATED TO CIVIL LITIGATION -- COLLECTION OF JUDGMENTS: THE DEFENDANT'S ABILITY TO PAY

TIME: **45 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

An ever increasing number of violent crime victims are successfully pursuing civil suits against perpetrators who have injured them. Obtaining a judgment for damages in a civil case is only half the battle. In many cases, the real battle begins when victims attempt to collect those hard-won judgments. While most victims feel that obtaining a judgment for damages is a significant moral victory, many victims feel that true justice demands that such judgments be fully satisfied. This section will present an overview of issues relating to collecting judgments against perpetrators.

OBJECTIVES OF SESSION	
1.	To destroy the **MYTH OF UNCOLLECTABILITY** by emphasizing that many defendants do indeed have the financial resources and assets necessary to satisfy civil judgments awarded to crime victims;
2.	To develop a basic **understanding** of the theories related to the concepts of ***liability*** and ***collectability***;
3.	To alert participants to the fact that **civil litigation** offers victims a viable **alternative** which compliments **compensation** and **restitution** as options to recover damages;
4.	To help attendees establish **realistic expectations** concerning victims' **prospects** of collecting **full payment of judgments** in civil cases;
5.	To provide detailed **instruction** about how to **locate assets**;

OBJECTIVES OF SESSION

6. To develop awareness of **factual information** that would enhance **damage awards**; and

7. To **identify** possible **sources** which might be available to **satisfy victims' civil judgments.**

MANUAL REFERENCE

Section VI OTHER LAW-RELATED MEANS OF RECOMPENSE FOR VICTIMS: COMPENSATION AND RESTITUTION

Chapter 1. Compensation P. 321

Chapter 2. Restitution P. 330

Section III COLLECTION OF JUDGMENTS

Chapter 1. The Importance of Collectability: The Uncollectability Myth P. 31

Chapter 2. Important Aspects of Collection P. 39

- ***Dark Side*** Perpetrators P. 39
- ***Part-Time*** Criminals P. 42
- Professional Criminals P. 42
- Insured Perpetrators P. 44
- **Perpetrators** as **Plaintiffs** P. 46
- ***Windfall*** Assets P. 49
- Family Wealth P. 50
- ***Notoriety-for-Profit*** Laws P. 52
- **Forfeitures**: Other Means of Collection P. 53

MAJOR POINTS OF SESSION:

- Usually, **after the verdict in a criminal case,** the convicted offender's **financial information** is **no longer confidential.**

- In most cases, the only **information needed** to conduct an investigation into the **defendant's assets** is the following:

  - **Name/** First, Middle, and Last
  - **Date of Birth**
  - **Social Security Number**

- **Remember the importance of precautionary attachment:** Courts may issue orders which temporarily ***freeze*** defendants' assets **pending the outcome** of a civil suit to **prevent** defendants from **transferring, hiding,** or **wasting** such assets in order to avoid payment of civil judgments.

- **Service providers** need **not** themselves **identify and locate** the defendants' assets, but they are in an **excellent position** to provide victims' attorneys with valuable **leads** they need to pinpoint assets and seize such assets.

- In cases where they **know** their **assailants,** victims can provide insights into the defendants' **personality traits,** which will allow their attorneys to develop litigation strategies **exploiting** those **traits.**

- Even though **defendants/offenders** may **not have** sufficient **assets** to satisfy civil judgments when first issued, judgments provide victims with the means to **seize any assets** the defendants may acquire far into the **future.**

- Note also that **financial information** about the offender may be **accessible** through the **criminal justice system.** In many cases probation departments compile financial profiles of defendants as part of **presentence reports** and restitution orders. Victims may be allowed access to these financial records as a matter of right or privilege.

LIST OF POSSIBLE SOURCES TO SATISFY CIVIL JUDGMENTS	
Defendant/Offender's Assets	
SOURCES OF INCOME	Wages Benefits (pension payment, annuities) Unearned Income (dividends, interest, gifts) Dispersals from Trust Funds Tax Refunds Government Entitlements
PROPERTY AND HOLDINGS	Personal Property (cars, boats, jewelry, furnishings) Real Property (home, land, etc.) Future Interests in Real and Personal Property Through Wills, Trusts, etc. Interests in Partnerships (especially doctors, lawyers) Bank Accounts Financial Holdings (stocks, bonds, mortgages) All Other Debts That Are Owed to Offender/defendant

LIST OF POSSIBLE SOURCES TO SATISFY CIVIL JUDGMENTS

OFFENDER'S INSURANCE POLICIES

Homeowner's

Automobile

Personal Liability
(Umbrella Policies)

Business/Partnership

Malpractice

MODULE FIVE:

MAKING CIVIL LAW WORK FOR VICTIMS

TIME: **90 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

This module describes the substantive legal principles involved in *victim versus perpetrator* litigation. It presents the broad spectrum of tort actions available to victims against perpetrators, focusing on first-party remedies that victims can pursue. Armed with this information, victim service providers will have a basic foundation of knowledge about legal and factual issues relating to civil lawsuits.

OBJECTIVES OF SESSION	
1.	To learn to **identify who can sue** whom in civil cases arising from criminal acts;
2.	To clearly **define** the legal **elements** relating to the following types of civil ***causes of action***: • Wrongful Death; • Assault and Battery; • Intentional, Reckless, or Negligent Infliction of Emotional Distress; • Civil Conspiracy/Aiding and Abetting; • Parental Liability; and • Negligent Entrustment.
3.	To examine the **effect of criminal** proceedings on civil suits;
4.	To explain the **nature and structure** of civil suits;

5.	To make service providers aware of issues involved in *third-party* liability cases;
6.	To develop an appreciation for the **importance of obtaining** a full **factual account** from victims concerning the crime and the parties involved; and
7.	To convey to service providers the importance of advising victims that it is in their **best interest** to tell the **truth** in civil cases.

MANUAL REFERENCE

SECTION IV. MAKING THE CIVIL LAW WORK FOR VICTIMS

Chapter 1. Introduction P. 59

Chapter 2. Direct Cases P. 59

- Wrongful Death p. 66
  - Parties: Who Can Sue? p. 68
  - Unjust Enrichment: Who Can Inherit? P. 70
  - Effect of Criminal Proceedings P. 71
  - Effect of Pending Divorce P. 73
- Assault and Battery P. 74
  - Overview: "Assault" and " Battery" P. 74
  - Provocation/Excessive Force P. 81
  - "Escape"/Leaving the Scene P. 83
  - Threats P. 84
  - Character and Reputation of Victims/ Perpetrators P. 85
  - Collateral Estoppel P. 90
- Damages in Assault and Battery Cases P. 91
  - Jurisdictional Amounts P. 91
  - Validity of Punitive Damages P. 92
  - Appellate Action on Trial Court Awards P. 92

MANUAL REFERENCE

- Intentional, Reckless, Negligent Infliction of Emotional Distress P. 93
- Civil Conspiracy/Aiding and Abetting P. 104
  - The Torts Defined P. 105
  - Parental Liability P. 113
    - Statutory P. 114
    - Common Law P. 118
- Negligent Entrustment P. 119
- Defenses P. 124
  - Self Defense and Defense of Others P. 127
  - Assumption of the Risk; Consent P. 128
  - Contributory and Comparative Negligence p. 130

MAJOR POINTS OF SESSION:

1. **Time is of the essence.** Be sure to **recognize** the importance of **statutes of limitation** and claim notices. Keep in mind the following time considerations:

   - **Intentional** torts usually have **shorter time limits**;
   - Torts involving **negligence** or **emotional** distress may have **longer time limits**;
   - **Each state differs** with respect to time limits;
   - Factors such as the victim's age, **mental state** or **mental duress** may extend or *toll* the statutes of limitations. *Tolling* has the effect of **delaying the start** of the **statutory period**; and
   - Some states, in certain cases, (i.e., cases against licensed professionals -- doctors, dentists, attorneys, etc.), require that victims file a ***notice of claim*** within a specified time period before they are allowed to file a civil suit.

2. The following list provides an **overview** of the legal **elements** of seven types of **civil issues:**

- **Wrongful Death:** The civil action for the killing of one human by another, without justification or excuse.

- **Assault and Battery: Assault** -- The civil action against the perpetrator for intentionally putting the victim in fear of a battery, coupled with the apparent ability to commit the battery. **Battery** -- the intentional, offensive, unpermitted touching of the victim by the perpetrator.

- **Intentional, Reckless, or Negligent Infliction of Emotional Distress:** Intentional infliction of emotional distress occurs when the perpetrator, by extreme and outrageous conduct, **intentionally or recklessly** causes someone emotional distress. **Reckless infliction of emotional distress** arises when the perpetrator causes emotional distress willfully and with a callous disregard of the consequences.

- **Civil Conspiracy/Aiding and Abetting:** Torts in which one or more persons actually commit the physical acts constituting the crime while others, although not physically participating, agree to and assist the actual perpetrators (civil conspirators.)

- **Collateral Estoppel:** A legal doctrine which provides that, in some cases, the criminal convictions of perpetrators will be considered proof of those perpetrators' legal liability in civil actions brought by the perpetrator's victims.

- **Parental Liability:** A legal doctrine that holds parents civilly liable for the torts and crimes of their children.

- **Perpetrators:** Persons who have criminally injured victims.

- **Negligent Entrustment:** A tort in which one or more persons give, lend, or allow someone to use, or should have anticipated that that person would use a dangerous instrumentality to injure another.

- **Defenses:** Legal doctrines that relieve defendant/perpetrator of liability for having committed a tort.

3. Legal **Defenses** used **by Perpetrators:**

- For each of the ***causes of action*** listed above, the defendant may be able to offer a legal ***defense*** excusing their actions. If successful, such defenses may defeat the victim's/plaintiff's cause(s) of action.

- Common ***defenses*** include:

  - **Provocation** -- defendants who have physically injured their victims claim that their **acts were justified** because their victims **provoked** them.

  - **Self-Defense and Defense of Others** -- defendants who claim their actions were justified because they were **defending themselves** or someone else.

  - **Assumption of Risk/Consent** - defendants claim they should not be held liable to plaintiffs because the **plaintiffs voluntarily** and **knowingly** exposed themselves to the danger or, in other words, they ***assumed the risk.***

  - **Contributory and Comparative Negligence** -- defendants claim that **plaintiffs'** negligent conduct caused or **contributed to their own injuries.**

4. Victims should **not be deterred** from pursuing civil cases even if the prosecutor does not file a criminal action against the perpetrator. Because the **standards of proof** for **civil cases** are much **lower** than in criminal cases, victims may well win their civil suits even though criminal charges were never filed -- or even when the defendant is found innocent of such criminal charges.

- **Civil Burden of Proof = PREPONDERANCE** of Evidence

- **Criminal Burden of Proof = BEYOND A REASONABLE DOUBT**

5. Bear in mind the potential **consequences** of pending **divorce** or **legal separation** of **spousal rights of inheritance** in circumstances which involve the **death of a spouse.**

6. Remember **SLAYERS LAWS**: a person cannot profit from an illegal act -- murderers cannot collect from the insurance policies of persons they have murdered.

7. **Family members** pursuing civil suits should **always** seek to **identify all** the victims' possible **heirs** -- even illegitimate children can recover for wrongful death. Their rights to causes of action may well affect the rights and interests of other family members.

MODULE SIX:

PRINCIPLES IN PRACTICE - FACT FINDING: THE "WHO, WHAT, WHERE,WHEN AND HOW" OF CIVIL CASES

TIME: **90 MINUTES**

FORMAT: **Attendees divide into small working groups for case discussions.**

SUMMARY:

The factual scenarios used in this working group are based on the legal issues covered so far. Participants will use knowledge obtained during the previous lecture to identify facts and issues related to civil litigation. REMEMBER: This is not a law school type of examination designed to test your memory. You may use your manual at all times. There are **no** trick questions. Identification of the exact causes of action is less important that learning to analyze situations for information that might be relevant to establishing legal liability in general, and developing this factual information for the use of victims' attorneys.

OBJECTIVES OF SESSION	
1.	Help participants become more comfortable with the investigation of factual situations related to victims' potential civil claims;
2.	Assist participants in learning to identify the critical facts of a case as they relate to causes of action against perpetrators in civil cases; and
3.	Provide participants with some basic training on how to develop questions that will help shed light on complex factual and legal issues arising out of criminal cases.

Process of Implementation:

- The working group module will be conducted in the following manner:
  - Participants will be assigned to rooms in groups of

no more than 40. These groups of 40 will then be assigned to tables of 10 forming four sub-groups.

- The facilitator will open the working module by presenting the first case scenario to the entire group. The facilitator will then identify the facts and causes of action, and then suggest possible factual questions service providers might pose.

- Participants will then be asked to duplicate the same process of identification and question development in the next two case scenarios.

- Participants will learn the following:

  - How to recognize facts that identify specific causes of action as illustrated in the manual and the previous plenary session;

  - How to identify additional information needed to further clarify and establish the victim's case; and

  - How to develop the kinds of questions which elicit the additional information needed.

- The facilitator will then ask each sub-group to examine and discuss the second case scenario for 15 minutes. Each sub-group will examine the same case and develop answers to the following questions:

  - What are the key facts in this case and how do they relate to possible causes of action on behalf of the victim?

  - What additional information is needed to further clarify and establish causes of action related to this case?

  - What specific questions will you ask the victim in order to elicit the additional information needed?

- At the end of the 15 minute small group discussion, the facilitator will lead all four groups in a discussion of the case. Each sub-

group will be asked to report back its findings. This discussion is expected to last for approximately 15 minutes.

- Each sub-group will then discuss the third case scenario, following the same format as before. The facilitator will then lead all four groups in a general discussion of the case scenario.

MODULE SEVEN:

COLLECTING JUDGMENTS AGAINST INSURED PERPETRATORS

TIME: **90 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

The previous sessions have provided instruction on what information is most useful to victims' attorneys in establishing the legal liability of perpetrators. This module will focus on the kind of factual information that is most helpful in determining whether the perpetrators' insurance policy will cover the victims' injuries.

OBJECTIVES OF SESSION	
1.	To increase service provider's knowledge of the types of **factual issues** involved in successfully recovering from **insured perpetrators policies**;
2.	To make participants aware that the availability of coverage from perpetrators' **insurance policies** may provide civil **attorneys** with the necessary **incentive** to accept victims' cases -- even on a contingency fee basis;
3.	To discuss the major types of insurance policies against which victims may file claims;
4.	To provide a detailed explanation of the **exceptions** to **exclusions** in perpetrators' insurance policies that may affect **victims' ability** to collect; and
5.	To **explain** the ongoing interplay **between insurance companies** which try to exclude coverage for expected or intended injuries, **and victims' attorneys,** who try to find exceptions to those exclusions in order to secure coverage for victims' injuries.

MANUAL REFERENCE

Section IV: MAKING THE CIVIL LAW WORK FOR VICTIMS

Chapter 3: Insured Perpetrators P. 133

- Crime and Insurance Overview P. 133
- Homeowners' Policies P. 138
  - Pleading P. 142
  - Actual and Inferred Intent to Injure P. 145
  - Intended Act/Expected Injuries P. 147
  - Special Circumstances P. 149
    - ✓ Insanity: Mental Defectiveness P. 150
    - ✓ Voluntary Intoxication P. 158
    - ✓ Self-Defense P. 159
    - ✓ Mistake of Fact P. 162
- Life Insurance P. 164
  - Circumstances of Insureds' Deaths P. 164
  - Negligence in Issuing Policies P. 167
- Automobile Insurance P. 169
  - Accidental or Expected Injuries P. 170
  - Arising out of the Use, Occupancy of Vehicles P. 176

MAJOR POINTS OF SESSION:

1. **Definition** of **INSURANCE**:

   - Insurance is a **contract** between an **insurance company** (the carrier) and the **insured.**

   - The contractor insurance company promises to protect the insured from incurring financial liability for the occurrences of the events enumerated in the policy.

2. Who is **insured**? The terms ***insured*** and ***insureds*** may include:

   - **All parties NAMED** in policies; and
   - Other, **UNNAMED parties** (such as a victim of the insured).

3. Generally, **three conditions** must be met before victims can collect from insurance carriers:

   - First, the perpetrators must be **insured**;
   - Second, the policy must provide **coverage for the act** committed by the perpetrator that caused the harm to the victim/plaintiff; and
   - Third, the insured perpetrator must have been **found to be liable** to the plaintiff.

4. **EXCLUSIONS** and **EXCEPTIONS** to Insurance Coverage:

   - Insurance policies are designed to protect people from the financial consequences of *accidental* injuries they have caused to others. Policies are not designed to protect people from their own willful, criminal behavior. Therefore, almost all policies contain **exclusions for injuries** that are **EXPECTED** or **INTENDED** by the person insured.
   - Common exclusions of coverage contained in insurance policies cause victims, their service providers and their lawyers to greatly underrate the possibility of collection on the perpetrators' policies. These ***exclusions*** include:
     - **Intended Acts** of the Insured; and
     - **Expected Injuries** Caused by Acts of the Insured.

- However, exceptions to these exclusions exist which may still allow victims to collect on perpetrators' policies. Those ***exceptions*** are:
  - **Mental Deficiency**: Inability to form intent;
  - **Mistake of Fact or Law**: Unexpected or unforeseen injuries; and
  - **Self-Defense**: Unintended or unexpected consequences.

5. The ***UNCOLLECTABILITY MYTH***

- **Never assume**:
  - You cannot recover on insurance policies of criminal perpetrators;
  - The perpetrator has no insurance;
  - The perpetrator has only one policy;
  - The perpetrator is the only one insured under the policy; and/or
  - Insurance will not cover the injury because it was not an accident.

6. Major questions **service providers should ask**:

- Do I know **all the facts** about:
  - The **incident?**;
  - The **perpetrator?**; and
  - The perpetrator's **relationship** to the victim?
- Is the perpetrator **liable** to the victim?
- Is the perpetrator **insured**?
- Are there **multiple** insurance policies?

- **Who** is covered by the insurance policies?
- Remember, do not get hung up on the title of the policy. The acts covered by the policy are often much broader than the policy's title suggests.

TYPES OF INSURANCE	
Homeowners'/ Renters'	Coverage for homeowners and renters. Incidents need not occur on policy holders premises.
Automobile	Covers injuries "arising out of the use" of automobiles. Policyholder need not be driving. Policyholder may be liable for crimes in which auto was involved.
Professional Liability	Covers liability arising from "malpractice" in professional capacity. Malpractice may include the abuse of a professional relationship.
General Liability	Similar to homeowner's insurance but usually carried by businesses.
Life	Covers loss of life. Murderers are precluded from collecting under such policies.

MODULE EIGHT:

PRINCIPLES IN PRACTICE -- ISSUES FACING THE PLAINTIFF'S CASE: A MOCK TRIAL

TIME: **75 MINUTES**

FORMAT: **SMALL WORKING GROUP DISCUSSION**

SUMMARY:

The factual scenarios used in this working group are based on the legal issues covered thus far. Participants will use knowledge obtained during the previous lecture to identify facts and issues related to civil litigation. REMEMBER: This is not a law school type of examination designed to test your memory. You may use your manual at all times. There are no trick questions. Identification of the exact causes of action is less important than learning to analyze situations for both information which might be relevant to establishing legal liability in general, and developing this factual information for the victim attorneys' use.

OBJECTIVES OF SESSION	
1.	To provide participants with the opportunity to experience a sample of the case analysis and preparation process that both plaintiff and defense attorneys go through prior to trial;
2.	To give the participants a working knowledge of how different types of insurance policies (Homeowners', Life, and Automobile) can be used to satisfy civil judgments;
3.	To allow participants a chance apply insurance related principles and concepts in factual situations which reflect real life cases; and
4.	To further enhance the participants' abilities to develop questions related to critical factual issues.

Process of Implementation:

- Participants will return to their working groups of no more than 40 participants in each room.

- Participants will receive three hypothetical case examples and a worksheet for each case.

- Participants will be divided into two groups. For the first hypothetical case, one group will be assigned to represent the plaintiff/victim. The other group will be assigned to represent the defendant or the defendant's insurance carrier.

- With guidance from the facilitator assigned to each group, participants, working as a group, will use the work sheets provided to develop their respective clients' cases as they relate to possible causes of action, defenses, insurance coverage, and possible exclusions to coverage.

- Once each group has prepared its case, they will present them to the facilitator (now playing the role of judge) in a similar fashion as they might be presented in a real civil trial, i.e.:

    - The Plaintiff group will present its client's causes of action and the facts that support its claims. The Defense group will then offer any defenses to Plaintiff's claims, along with the facts that support their contention.

    - The Plaintiff group will then offer facts that establish that its client's perpetrator was covered by an insurance policy that should be used to satisfy plaintiff's judgement. The Defense group may offer facts to counter plaintiff's claims of coverage.

    - The Defense Group may then offer any exclusion within the insurance policy that might relieve defendant's insurance carrier of liability under the policy, along with the facts which support that assertion. Plaintiff group will then have the opportunity to claim an exception to the exclusion and offer facts to bolster its claim. Defense will then have the opportunity to counter these factual claims.

For the second hypothetical case, the groups will switch roles, with the group which originally represented the plaintiff/victim representing the defendant/insurance company.

MODULE NINE:

LAWSUITS FOR SPECIAL VICTIM POPULATIONS

TIME: **120 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

This module discusses particular classes of cases -- child sexual abuse, domestic violence, sexual assault, campus crime and hate violence -- crimes with unique factors that make them stand out from traditional types of *victim versus perpetrator* litigation. These factors are:

- The crimes are highly sensitive and emotionally charged;
- The cases typically involve instances in which the perpetrators seek out the most vulnerable kinds of victims;
- The perpetrators are presumably collectable; and
- Currently, litigation in each area is occurring with increasing frequency.

OBJECTIVES OF SESSION
1. To familiarize victim advocates with the ***Three C's of Crimes***: ▪ **CONCEALED CRIMES:** Where the veil of secrecy is most often impenetrable. The dominant positions of abusers -- family members, teachers, clergy, youth group leaders and other authority figures -- almost guarantee the secrecy of the violations. Child sexual abuse is a classic example of a concealed crime.
▪ **CONCEALABLE CRIMES**: These include crimes predominantly against **adults** where the victims are **able** to report the crime, but are **reluctant** to do so because of countervailing circumstances, such as **intimidation.** Crimes against women, especially **domestic violence** and **sexual assault**, fall into this category.

OBJECTIVES OF SESSION

- **COVERED-UP CRIMES**: Generally these are crimes that occur on college **campuses**. They include crimes where the victims wish to report but are frequently **dissuaded** from doing so **by officials** who are more concerned with the *image* of the institution or organization they represent than with the welfare of the victim.

- **Hate crimes**, in which the victims are singled out because of their **race, religion,** or **sexual preference**, fall into all three classes of cases because they **include elements** of **concealed, concealable** and **covered-up** crimes.

2. To review **issues** relating to emotional distress in **child abuse cases.**

3. To highlight **new developments** with respect to liability for **incest** and abuse by **authority figures** and how these cases fare from the standpoint of collectability.

4. To **define** and discuss the importance of ***statutes of limitations*** and the ***delayed discovery rule*** as they relate to the viability of victims' cases.

5. To **define** the **legal** and **factual issues** involved in physical assault in *special cases* that will be most helpful to attorneys in establishing liability.

6. To explore how the law views the following **psychological syndromes** and to what extent they are being recognized by the courts:

   - **Post Traumatic Stress Disorder**
   - **Rape Trauma Syndrome**
   - **Battered Women's Syndrome**

7. To discuss the recently-evolving **case law** relevant to **victims of sexual abuse** by professional perpetrators -- **doctors, therapists and dentists.**

8. To provide a brief overview of the **newly-emerging** area of case law relating to covered-up crimes. Specifically, two types of **liability** will be discussed:

   - **Failure** to **make student aware** of the dangers on college campuses; and
   - **Preventing** or **dissuading** students from **reporting** crimes.

9. To review cases in which state or Federal **civil rights** laws have been used effectively to recover damages for **hate violence.**

MANUAL REFERENCES

SECTION V. SPECIAL CASES

- ***Three C's* Crimes**: Concealed, Concealable, and Covered-up P. 199

Chapter 2. Children as Victims: Sexual Abuse P. 202

- Emotional Distress P. 204
- Parental Liability Issues P. 214
- Damages P. 216
- Special Defendants: Authority Figures P. 218
- Child Sexual Abuse: Insured Perpetrators P. 227
  - Overview: Inferred Intent P. 227
  - Child-Care Entities: Insurance, Business, Babysitters; Foster Parent's Policies P. 233
- Child Abuse and Incest: Statutes of Limitations and the *Delayed Discovery Rule* p. 244

Chapter 3. Women as Victims: *Concealable Crimes* P. 264

- Physical Assaults: Evidentiary and Procedural Issues P. 266
- Emotional Trauma P. 270
- Women Victims Versus Professional Perpetrators P. 275

MANUAL REFERENCES

Chapter 4. Crimes on Campus: A Matter of National Concern	P. 290
▪ Campus Victimization: *Covered-up Crimes*	P. 292
▪ Campus Violence and the Law	P. 297
• Failure of Security Actions	P. 297
• **Date** and **Acquaintance Rape** on Campus	P. 300
Chapter 5. Hate Crimes	P. 306

MAJOR POINTS ON CHILD ABUSE CASES:

1. **Courts** are extremely **receptive** to **emotional distress** claims in child abuse cases.

2. Generally, **parents** may only recover damages for **negligent infliction of emotional distress** if they actually witness the child abuse while in progress. **Parents** may, however, **recover** for intentional or reckless infliction of **emotional harm.**

3. **Child molestation** victims can **receive damages** for future **loss of earning** capacity.

4. With respect to child abuse cases, ***INFERRED INTENT*** to injure prohibits collecting damages under insurance claims:

   ✓ Courts consider the crime of **child abuse** so **horrible**, that they will automatically **infer an intent** by the perpetrator **to injure** the victim. Therefore, the "inferred intent" **exclusion** in the home-owner's policy will apply, thus **barring** insurance **coverage**. Under these circumstances, the only **option** available to recover damages may be through the filing of a **third-party** lawsuit against some party other than the perpetrator (i.e., a *third-party*).

5. **Third-party** lawsuits can be brought against the following entities:

✓ Clergy	✓ Child Care	✓ Private Sitters
✓ Teachers	✓ Youth Groups	✓ Camps
✓ Schools	✓ Foster Parents	✓ Businesses
✓ Health/Mental Health Centers	✓ Transportation (personnel, *i.e.*, school bus driver)	

6. **Do not presume** a victim has lost his or her opportunity to file a civil suit simply because the victimization happened long ago. **Special statutes** and **court rules** (i.e., the ***delayed discovery rule***) allow victims to file suits many years after the crime was committed. **The statute of limitations deadline for filing a civil case may be extended through an application of the DELAYED DISCOVERY rule in two types of child abuse cases:**

   - **Type 1 -- Recollection** -- The plaintiffs/victims have a recollection of the sexual assaults but do not know that their current psychological problems were caused by the assaults.

   - **Type 2 -- Complete repression of memory** -- The plaintiffs/victims repress recollections of the assaults to the extent that they have no memory of them at all until some later event triggers recall.

   Note: Particularly in **child abuse** cases, you need to be aware that the accusation of the counselor's ***power of suggestion*** is used by defendants to **undermine** the credibility of child witnesses. Therefore, be careful in counseling and interviewing child victims to **AVOID LEADING QUESTIONS** that may jeopardize both civil and criminal cases against the abuser.

MAJOR POINTS ON WOMEN AS VICTIMS

1. Remember, a victim **can** bring a civil lawsuit for **damages** even if the perpetrator is **acquitted** in a criminal case.

2. It is important to **understand** the bridge between the **professional/clinical** definition of **Rape Trauma Syndrome, Battered Women's Syndrome** and **Post Traumatic Stress Disorder,** and their applications in civil cases. Especially important is their role in establishing:

   - Damages; and/or
   - Insurer liability.

3. **Remember:** Your understanding of the degree of victims' **psychological injuries** is critical. You, as a counselor or advocate, will have unique **insight** into the question of whether victims could indeed be experiencing these syndromes. Such expertise can greatly assist attorneys and strengthen civil cases.

MAJOR POINTS ON PROFESSIONALS AS PERPETRATORS

1. Be sure to find out if the victimization **occurred during the course of the perpetrator's professional employment** or in the performance of his or her professional duty.

2. Victim service providers will want to ask questions which help determine whether the victimization involved the abuse of a professional relationship between the offender and the victim, *i.e.*, doctor-patient.

3. Find out **where** the victimization occurred, *i.e.*, in the professional's offices. Look at circumstances surrounding the relationship between the professional perpetrator and the victim.

4. Be alert to the **possibility** that victims may have to report violations to **professional review boards** before they are allowed to file a civil suit. Victims should also be aware that such ***reporting requirements*** often have time limitations much shorter than the statute of limitations for the underlying civil cause of action. Victims should be referred to the appropriate professional organizations to file a claim, as well as victims' attorneys.

5. Victims of this class of perpetrator have a good chance of collecting from either offenders' professional insurance carriers and/or their private assets.

MAJOR POINTS ON CAMPUS CRIME

1. Because campus crime has been ***covered up*** for so long, very few civil cases have been filed based on this class of crimes.

2. The vast majority of **campus crime civil cases** will fall within the category of **third-party** litigation. Causes of action against third-party defendants may include:

   - **Failure of Security** - private institutions as landlords;
   - **Cover-ups** - discouraging the victim from reporting the crime; and
   - **Stonewalling** - suggesting to the victim that he or she is responsible for the crime for the following reasons:
     - **Assumption of risk**: such as going to the perpetrator's room; and/or
     - **Contributory negligence**, such as drinking.

3. Victims should not be deterred by **sovereign immunity** -- even public institutions can be sued for failure to protect and negligence in certain cases, *e.g.*, **landlords of dormitories.**

4. Most colleges and universities carry **general liability insurance** which may be tapped to satisfy judgments won by students who have been victimized on campus.

MAJOR POINTS ON HATE CRIME

1. Filing civil suits based on ***hate crimes*** is a relatively new phenomenon -- so much so, that very little case law exists on the subject. However, **Federal Civil Rights Acts** have been used for years to provide civil remedies for hate crime victims.

2. Most cases have been brought as **civil rights violations** based on race, religion, sexual preference, gender, and age for the following injuries:

   - Assault and Battery;
   - Wrongful Death;
   - Intentional Infliction of Emotional Distress; and
   - Other Violations of Federally Protected Civil Rights.

MODULE TEN:

PRINCIPLES IN PRACTICE: FACT GATHERING -- CASE INTERVIEW SIMULATION

TIME: **45 MINUTES**

FORMAT: **SMALL WORKING GROUP DISCUSSION**

SUMMARY:

The factual scenarios used in this working group are based on the legal issues covered so far. Participants will use knowledge obtained during the previous lecture to identify facts and issues related to civil litigation. REMEMBER: This is not a law school type of examination designed to test your memory. You may use your manual at all times. There are **no** trick questions. Identification of the exact causes of action is less important that learning to analyze situations for information that might be relevant to establishing legal liability in general, and developing this factual information for the use of victims' attorneys.

WORKING GROUP GOALS	
1.	**Provide** participants with a simulated **experience** illustrative of their role as a vital **communications** link between the victim and the civil attorney; and
2.	To help participants develop interviewing techniques regarding information related to prospective victims civil cases and to help them **gain confidence** in persuading attorneys to take victims cases.

Process of Implementation

1. Participants will return to their working groups of 40 and divide further into sub-groups of 10.

2. Each sub-group will receive a different fact pattern illustrating the following types of cases:

   - Adult Survivor of Sexual Abuse;
   - Child Sexual Abuse;

- Female Victim of Professional as Perpetrator; and
- Battered Woman.

3. One member of each sub-group will receive the fact pattern of the case and will play the role of the *victim* for purposes of the simulation.

4. Other group members will receive an *abridged* version on the same fact pattern. The abridged version will provide participants with **factual clues** about key issues. The participants objective will be to ask their *victim* questions which will allow them to discover all the facts pertinent to a potential civil suit.

5. After each sub-group interviews the *victim* for approximately 20 minutes, the facilitator will then call on each sub-group to report back. The facilitator will play the role of a civil attorney. Each sub-group will try to convince the attorney to take its victim's case.

MODULE ELEVEN:

CIVIL LITIGATION: WORKING FOR VICTIMS

TIME: **60 MINUTES**

FORMAT: **PANEL DISCUSSION**

SUMMARY:

This module involves a discussion of *victim versus perpetrator* civil suits from the prospective of a victim service provider, a prosecutor, and a civil litigator. A moderator will facilitate the exchange of opinions among panel members through a series of questions.

OBJECTIVES OF SESSION	
1.	To provide a forum to discuss the pros and cons of civil litigation from the perspective of **three critical players** in the justice process: ✓ A **VICTIM SERVICE PROVIDER** ✓ A **PROSECUTOR** ✓ A **CIVIL LITIGATOR**
2.	To develop attendee's **confidence** in **civil remedies** as a **viable option** for the **recovery** of victims' damages;
3.	To provide an opportunity for victim service providers to express the victims' perspective in pursuing civil remedies;
4.	To **illustrate relationships** between parties who are part of, or influenced by, the **civil litigation process** and to show that each individual's role is distinct but compatible; and
5.	To introduce the **variety** of victim-related **issues inherent** in **civil litigation.**

MANUAL REFERENCE	
Section II, Chapter 3. Procedural Overview	P. 18
Pros and Cons of Civil Litigation	P. 24

MAJOR POINTS OF SESSION:

- **Each Panelist will respond to the following questions:**
  - How do you **view civil litigation** brought **by crime victims**?
  - What is the victim service provider's **role** in **civil litigation**?
  - Who do you represent?
  - What **chance** does the ***average victim***, who brings a civil case, **have of proving the defendant's liability**?
  - What **chance** does the ***average victim*** have of collecting on a **judgment** won **in a civil case**?
  - What can be done to **enhance victims'** chances of overall **success in civil actions**?
  - Are there potential areas of **conflicts of interest**? If so, how might they be resolved?
  - What are the **advantages and disadvantages** of **civil suits** on behalf of victims?
- **The following points will be addressed with respect to the victim service provider's point of view:**
  - The **importance** of understanding the **appropriate** scope of service provider **assistance** regarding civil litigation -- including: How to ask the **right questions** and how to make appropriate referrals **without giving legal advice** -- or, "How to provide victims with law-related information without being sued for unauthorized practice of law;"

- How to **avoid re-victimization** of victims by raising **unrealistic expectations** concerning the nature and prospects for success in civil cases;

- The importance of providing **basic information** about the possible **rights and interests** victims may realize through civil litigation. Also, the parallel importance of providing information about **victims' rights to compensation and restitution**;

- How civil litigation can help **empower victims** and enhance their **sense of justice** by allowing victims to have their *day in court*;

- How civil litigation may help **expand the options** available to victims in the **aftermath of their victimization**;

- The importance of **explaining the procedures** involved in **civil suits** to the victim; and

- What **kind of support**, if any, can victim service providers extend to victims during the course of their civil suit?

- **The following points will be discussed with respect to prosecutors:**

  - **Prosecutorial concerns** about civil cases jeopardizing criminal cases, *i.e.*, victim **monetary motivation**, evidentiary issues and the **influence of media coverage** on civil trials on criminal trials;

  - The danger of undermining **victim credibility** in a criminal case due to contradictory statements made in civil cases;

  - The **appropriate time** to file a civil case -- from the **prosecutor's perspective**; and

  - Making the **relationship work** between the **prosecutor, service provider, and civil attorney.**

- **The following points will be discussed from a civil litigator's perspective:**

  - The importance of **service providers** not making definitive judgments concerning issues affecting the **viability** or **advisability** of victims' potential civil suits;

- The importance of appropriate **note taking** procedures to **protect the confidentiality** of victims during counseling and how the release of certain types of factual information can injure a case;

- Defining the **relationship** and timing of a **criminal and civil** case;

- Key questions from the **civil litigator's** perspective:

  - ✓ How **bad** is the injury?
  - ✓ How **clear** is the **liability**?
  - ✓ Can the **victim recover** from the injuries?
  - ✓ Is there a **defendant** and if so, **where** is he?
  - ✓ What are the **damages**?
  - ✓ What **facts** about the case are **critical**?
  - ✓ Are there **resources** to **satisfy a judgment**?

- The effect of a criminal case on a victim's civil claim:

  - ✓ **Collateral Estoppel**
  - ✓ **Prior Statements** of **Victims, Perpetrators**, and **Witnesses**
  - ✓ **Restitution** Issues
  - ✓ **Collectability**
  - ✓ **Jury Influence** in High Profile Media Cases

- How civil litigation can affect **changes in public policy**.

MODULE TWELVE:

CLOSING PLENARY MODULE -- NETWORKING TO DEVELOP LOCAL, STATE, REGIONAL AND NATIONAL RESOURCES FOR INFORMATION AND REFERRALS

TIME: **30 MINUTES**

FORMAT: **LECTURE**

SUMMARY:

The purpose of this module is to provide participants with some basic strategies for developing attorney referral networks. Presenters will identify potential resources on the local, state and national levels for finding civil attorneys and will discuss critical issues involved with making such referrals.

OBJECTIVES	
1.	Discuss the **importance** of creating **networks** of **COMPETENT** victim attorneys so there will be resources to turn to when service providers need to make referrals.
2.	Discuss the **liability** associated with making referrals: ■ Follow state **laws and rules** relating to referrals; and ■ Remember, **do not** try to **give legal advice**. Simply ask the right questions and then make a referral.
3.	Review and discuss avenues for beginning a referral network of **civil attorneys** willing to take victim cases.

MAJOR POINTS IN MAKING REFERRALS

1. Make sure you know the **needs of the victim** -- does the victim have realistic expectations about the civil justice process? Remember, you never want to create unrealistic optimism concerning the possible outcomes of victims civil claims.

2. Make sure you **protect yourself** from liability by constantly staying alert to the evolving standards governing referrals in your jurisdiction.

3. Always try to get **feedback** from the victim after you make a referral to find out if he or she was satisfied with the attorney to whom you referred them. This will help ensure that your attorney referral list is effective.

4. Establish a process for getting feedback from attorneys. It is important to make sure you are sending the right types of cases to attorneys. Always try to find out if they are following through on your referrals.

5. **Remember, call *COVAC* for referrals if you need help in locating qualified victim litigation attorneys in your area. Don't assume that all civil attorneys know victim litigation. *COVAC* serves as a nationwide referral network and was created to help you and the victims you serve!!!**

CIVIL ATTORNEY REFERRALS
SOURCES TO BUILD YOUR NETWORK

- Local:
  - City/County Bar Association
  - Lawyer Referral Services
  - Law Schools
  - Young Lawyers Association
  - Social Service Agencies
    - ✓ Domestic Violence Shelters
    - ✓ Sexual Assault Centers
    - ✓ Anti-Drunk Driving Groups
    - ✓ Parents of Murdered Children
    - ✓ Other Private Non-profit Groups That Refer to Attorneys.
- State:
  - Statewide Bar Association (Personal Injury Sections)
  - Statewide Trial Lawyers Association (Personal Injury Sections)
- National:
  - **COVAC -- THE COALITION OF VICTIMS' ATTORNEYS AND CONSULTANTS**
  - American Trial Lawyers Association (Personal Injury Section)
  - American Bar Association (Personal Injury Section)
  - Trial Lawyers for Public Justice
  - Other National Organizations Specializing in Women's, Children's and Other Crime Victims' Legal Rights (See National Resource List)

GLOSSARY OF TERMS

All of the definitions in this glossary deal with terms that are specific to the subject of this manual: civil lawsuits by victims of crimes against their perpetrators, or against third parties whose negligence caused or facilitated the commission of the crimes against them.

These definitions further elucidate definitions found in the manual.

Aiding and Abetting	See **Civil Conspiracy.**
Abscond	To go in a secretive manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process.
Assault	The civil action against the perpetrator for intentionally putting the victim in fear of a battery, coupled with the apparent ability to commit the battery.
Assumption of Risk	A legal doctrine that may relieve perpetrators of liability for injuries to victims if the victim voluntarily entered into a situation knowing that there was a risk of foreseeable injury **(see also: Defenses; Rescue Doctrine).**
Automobile Insurance	Insurance Policies that cover injuries "arising out of the use, operation, or maintenance" of the vehicle.
Battery	The intentional, offensive, unpermitted touching of the victim by the perpetrator.
Burden of Proof	The amount of evidence that one party must present in order to win his or her case. In criminal cases, the burden of proof is very high: "beyond a reasonable doubt," or nearly 100% of the evidence. In civil cases, however, the burden of proof on the victim/plaintiff is "a preponderance," or more than 50% of the evidence.
Causes of Action	The legal basis for a civil suit brought by the victim against the perpetrator.
Civil Actions	Lawsuits filed by victims to recover from injuries sustained and damages incurred as a result of the perpetrator's crime.

Civil Conspiracy	Torts in which one or more persons actually commit the physical acts constituting the crime while others, although not physically participating, agree to and assist the actual perpetrators (civil conspirators.)
Collateral Estoppel	A legal doctrine which provides that, in some cases, the criminal convictions of perpetrators will be considered proof of those perpetrator's legal liability in civil actions brought by the perpetrator's victims.
Collectability	A general term meaning the extent to which defendants/ perpetrators have the financial means to pay judgments from assets on hand, assets reasonably to be expected in the future, or financial assistance from such sources as insurance coverage.
Comparative Negligence	A legal doctrine, adopted in most jurisdictions, which modifies the strict rules of **contributory negligence** by allowing negligent plaintiffs/victims to recover damages from defendants/perpetrators, but reducing the amounts of damages by the applicable percentage of the plaintiff's/victim's negligence. **(see also: Defenses; Contributory negligence).**
Complaints	The formal written pleadings filed in civil courts alleging that the defendant(s) injured the plaintiff(s), and that they should be liable in damages.
Compensation	Monetary reparations made to crime victims by a state or a governmental entity to recover "out-of-pocket" expenses incurred as a result of the crime.
Compensatory Damages	Damages paid to compensate victims for losses caused by the torts of the perpetrator. Such losses include: out of pocket losses, loss of income; expenses such as medical bills, therapy, funeral costs, etc.; loss of present and future earning capacity; conscious pain and suffering; financial support; and, "consortium," the loss of the affection and society of loved ones.

Contributory Negligence	A legal doctrine, now modified in most jurisdictions, that any negligence on the part of the plaintiff/victim will bar civil lawsuits against defendant/perpetrators. (see **also: Defenses; Comparative Negligence**).
Criminal Action	Cases in which the state prosecutes perpetrators of criminal acts, committed in violation of the state's laws.
Damages	Amounts of money awarded to winning parties in civil suits.
Defendants	Parties against whom civil actions are brought.
Defendants' Responsive Pleadings	Formal written responses the defendants/perpetrators file in response to plaintiff's **complaints**. These pleadings may deny some or all of the allegations; they may raise **defenses** such as self defense or assumption of risk, or they may allege that even if all of the plaintiff's allegations are true, there is no liability. These pleadings are usually accompanied by legal memoranda and briefs. The names of these pleadings vary from jurisdiction. "Demurrers," "motions for summary judgment," "motions to dismiss," and "answers" are all descriptions of responsive pleadings.
Defenses	Legal doctrines that relieve defendant/perpetrator of liability for having committed a tort.

Delayed Discovery Rule (Discovery Rule)	A legal doctrine that suspends the running of **statutes of limitations** during periods of time in which the victims did not discover, or by the exercise of reasonable diligence, could not have discovered, the injuries that would lead to their causes of action against the defendant/perpetrator. For purposes of this Manual, the terms apply to child molestation cases. **Type II Discovery** refers to cases in which victims repressed all memory, even the act of molestation. **Type I Discovery** refers to cases in which victims may recall the acts of molestation, but were unable to make the connection between those acts and the victim's current emotional trauma.
Depositions	Pre-trial proceedings in which attorneys for parties in a civil case have the opportunity to examine, under oath, the opposing parties and potential witnesses in the case. Depositions are sworn and reduced to writing. The transcripts may be admissible in evidence at trials if the witnesses are no longer available, or for purposes of impeachment.
General Liability Insurance	Insurance policies covering whatever losses are enumerated in the policy.
First Party Action	Lawsuits brought by victims directly against their perpetrators.
Homeowner's Insurance	Broad based insurance policy which contracts to protect the insured from enumerated causes of accidental injuries to others. The accidents usually are not only confined to acts which happen on the insured's "home" premises, but also cover accidents that happen elsewhere. Renters of premises can obtain **Renter's Insurance**.
Insurance Carrier	See **Insurer**.
Insured	He or she who has contracted to receive insurance coverage from the **Insurer** whose actions are otherwise covered by an insurance policy.
Insurer	The business entity which has contracted to provide insurance coverage to the **insured**. (**Insurer**, for the purposes of this Manual, is synonymous with **Insurance Carrier**.)

Intentional, Reckless, and/or Negligent Infliction of Emotional Distress	Intentional infliction of emotional distress occurs when the perpetrator, by extreme and outrageous conduct, **intentionally or recklessly** causes someone emotional distress. **Reckless infliction of emotional distress** arises when the perpetrator causes emotional distress willfully and with a callous disregard of the consequences. **Negligent infliction of emotional distress** arises when the perpetrator acts negligently, causing emotional distress.
Judgments	The formal recitations of the outcomes of civil cases. They are almost always reduced to writing, and recorded as a part of the legal record of the cases.
Negligence	A legal doctrine providing that one may be liable to another if he or she: 1) owes a legal duty to the other; 2) materially breaches that duty; 3) the breach is the **proximate cause** of the other's injury; and, 4) the other person suffers damages.
Negligent Entrustment	A tort in which one or more persons give, lend, or allow someone to use, or should have anticipated that that person would use a dangerous instrumentality to injure another.
Negligent Infliction of Emotional Distress	See **Intentional Infliction of Emotional Distress**.
Parental Liability	A legal doctrine that holds parents civilly liable for the torts and crimes of their children.
Perpetrators	Persons who have criminally injured victims.
Plaintiff	Party bringing civil actions.
Professional Liability Insurance	Insurance coverage issued to "professional" persons: doctors, dentists, lawyers, architects, etc., to cover any losses caused by "malpractice" in the course of their professional services.

Provocation	A legal doctrine that may excuse defendant/perpetrator from the consequences of his/her crime/tort if the plaintiff/victim instigated a confrontation, or otherwise caused or provoked the defendant's actions. (**See also: Defenses**).
Proximate Cause	The "cause in fact" of injury to victims; a "cause" without which the victim's injuries would not have occurred.
Punitive Damages	Damages awarded to victims against perpetrators, over and above compensatory damages, in order to "punish" or "make and example of the perpetrators."
Reckless Infliction of Emotional Distress	See **Intentional Infliction of Emotional Distress**.
Relevance	A rule of evidence. For purposes of this Manual, it simply means any evidence that might tend to prove the truth of the matter.
Renters Insurance	See **Homeowner's Insurance**.
Rescue Doctrine	A legal doctrine which allows one to recover for injuries suffered in coming to the rescue or assistance of others in peril. It is used as a counter to the defense of **Assumption of Risk. (see also: Defenses; Assumption of Risk)**.
Restitution	Court action that requires perpetrators to make financial payments to their victims, usually as a condition of probation or leniency in sentencing.
Self Defense	The legal doctrine which relieved defendants/perpetrators of liability for torts if they acted in the reasonable belief that they had to use force to defend themselves, or others (loved ones, etc.), from death or great bodily harm.

Settlements	Agreements among the parties to lawsuits to end the suits without trial; usually the plaintiff agrees to drop the lawsuits for a fixed sum of monetary damages paid by the defendants.
Statute of Limitations	Periods of time, set by law, after which civil actions cannot be brought. **(See also: Defenses).**
Third Party Actions	Lawsuits brought against persons whose negligence or gross negligence has facilitated the commission of a tort by a defendant.
Tolling of Statutes of Limitations	The running of statutes of limitations is suspended. (see **also: Statutes of Limitations).**
Torts	Civil wrongs (as opposed to criminal offenses) committed by perpetrators against victims.
Trier of Fact	In civil cases, evidence is heard as to the facts, and the facts must be applied in the context of the applicable law. The entity that decides which facts are true is called the "Trier of Fact." This usually is the jury but, in non-jury cases, the trier of fact will be the judge "sitting without a jury." The **Trier of Law**, always the judge, then applies the relevant law to the facts as determined by the trier of fact.
Trier of Law	See **Trier of Fact.**
Uninsured or Underinsured Motorists	State law usually makes it compulsory that drivers have enough insurance to cover damages if they, or others defined in the policies, injured by motorists who have no insurance, or not enough insurance, to cover injuries that they have caused.
Victims	Persons who have been injured by the criminal acts of perpetrators.
Wrongful Death	The civil action for the killing of one human by another, without justification or excuse.

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NATIONAL ORGANIZATION DIRECTORY

National Association of Crime
Victims Compensation Boards
1601 Connecticut Ave N.W. Ste.204
Washington, D.C. 20009
(202) 332-9070
Addresses victim compensation issues on a national basis.

National Organization for Victim Assistance
(NOVA)
1757 Park Rd. N.W.
Washington, D.C. 20004
(202) 232-6682
A private, non-profit organization of victim and witness assistance practitioners, criminal justice professionals, researchers, former victims and others committed to the recognition of victim rights in four areas: national advocacy, victim assistance, member support, local services support.

National Self-Help Clearinghouse
25 West 43rd Street
Room 620
New York, N.Y. 10036
(212) 642-2944
Provides assistance in locating self-help groups.

National Crime Prevention Council
1700 K Street, N.W., 2nd Floor
Washington, D.C. 20006
(202) 466-NCPC
Provides crime prevention information on a wide range of subjects.

National School Safety Center
Pepperdine University
16830 Ventura Blvd. Suite 200
Encino, CA 91436
(818) 377-6200
Serves as a national clearinghouse on school crime and violence. Provides training and technical assistance to school districts, law enforcement agencies, professional organizations and citizens nationwide.

National Victim Center
307 W. 7th Street
Ft. Worth TX 76102
(817) 877-3355
Serves as an information clearinghouse and research center for grass roots organizations, individuals and state and federal agencies.

ADULT SURVIVORS OF INCEST

The Chesapeake Institute, Inc.
11141 Georgia Ave., Suite 310
Wheaton, MD 20902
(301) 949-5000
Provides evaluation and treatment of adult & jury offenders of children sexual abuse victims and their families. Also provides services to adult survivors.

Incest Survivors Resource Network International
P.O. Box 7375
Las Luces NM 88006-7375
(505) 521-4260
Serves as an educational resource through serving communities and conferences of national and professional organizations.

Survivors of Incest Anonymous, Inc.
World Service Office
P.O. Box 21817
Baltimore, MD 21222
(301) 282-3400
SIA is a 12-step, self-help recovery program for women and men 18 years of age and older. They define incest very broadly.

CHILD ABUSE/NEGLECT/ABDUCTION

Adam Walsh Child Resource Center, Inc.
319 Clamatis Ste. 409
West Palm Beach, FL 33401
(407) 833-9080
Dedicated to serving families of missing and exploited children, legislative advocacy and education.

American Humane Association
P.O. Box 1266
Denver, CO 80201
(303) 792-9900
Dedicated to building an aware and caring society. Has 113 yrs. of experience, expertise and leadership in the systematic approach to finding and fighting the causes of social apathy and neglect.

The Center for Child Protection and Family Support
714 G Street, S.E.
Washington, D.C. 20003
(202) 544-3144
Works toward the prevention of all forms of child maltreatment through community program development, technical assistance, research, training and material development. Specific focus on inner-city disadvantaged children in the metropolitan Washington D.C. area.

Child Find of America, Inc.
7 Innis Ave.
New Paltz, NY 12561
(914) 255-1848
(800) I-AM-LOST
(800) A-WAY-OUT
One of the oldest national, non-profit, private organizations dedicated to registering, investigating and locating missing children; promoting child safety and public awareness; and offering family mediation to prevent parental abduction/ return abducted children.

Child Welfare League of America
440 First Street, N.W., Ste 310
Washington, D.C. 20001-2085
(202) 638-2952
An association of children's service agencies: community groups, universities, corporations and foundations. Conducts research and works to create bipartisan support for programs beneficial to all children.

Clearinghouse on Child Abuse & Neglect Information
P.O. Box 1182
Washington, D.C. 20013
(703) 821-2086
Serves as a resource center for the acquisition and dissemination of child abuse and neglect materials. They develop publications and services to meet the needs of users. Catalogue available at no charge.

American Association for Protecting Children
63 Inverness Dr. East
Inglewood CO 80112
(800) 227-5242
The children's Division of the American Humane Association. Works to help public and private agencies respond effectively to child abuse.

American Professional Society on the Abuse of Children
332 S. MI Ave., Ste. 1600
Chicago, IL 60604
(312) 554-0166
A professional society which brings together all disciplines which deal with child abuse on a daily basis. Provides information, research and professional assistance.

The Chesapeake Institute, Inc.
11141 Georgia Ave. Suite 310
Wheaton, MD 20902
(301) 949-5000
Evaluation and treatment services are available to child victims of sexual abuse, adult and juvenile child sexual offenders, non-offending spouses, non-abused siblings, extended family members and adult survivors.

ChildHelp USA
6463 Independence Ave.
Woodland Hills, CA 91367
(800) 4-A-CHILD
(818) 347-7280
Works in the area of treatment, prevention of and education about child abuse. They are involved in art and animal therapy, as well as standard psychotherapy.

Children's Defense Fund
122 C Street, N.W. Ste. 400 Washington D.C. 20001
(202) 628-8787
Children's Defense Fund is a unique organization that exists to effectively represent America's children, particularly the poor, minorities, and the handicapped. Goal is to educate the nation concerning these children and to encourage preventive investments in these children. CDF delivers technical assistance, support, and strategic guidance to groups and individuals, including parents, children's advocates, and elected officials.

C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect
1205 Oneida Street
Denver, CO 80220
(303) 321-3963
Established to provide education, clinical services and research on child abuse and neglect

National Assault Prevention Center
P.O. Box 02005
Columbus, OH 43202
(614) 291-2540
Works on preventing interpersonal violence through resource development, community education and professional training. Coordinates a national network of over 200 Child Abuse prevention projects.

National Center for Missing & Exploited Children
2101 Wilson Blvd.
Suite 550
Arlington, VA 22201
(703) 235-3900
(800) 843-5678
Clearinghouse for information on missing and exploited children. Offers training and technical assistance, publications, photo dissemination and legislative advocacy.

National Child Abuse Coalition
733 15th Street, N.W. Ste.938
Washington, D.C. 20005
(202) 347-3666
Coordinates organizations nationally to lobby Congress on legislation.

National Coalition Against Domestic Violence
P.O. Box 34103
Washington, D.C. 20005
(202) 638-6388
A membership organization which provides technical assistance, public education and national advocacy for victims of child abuse.

Operation Lookout
National Center for Missing Youth
P.O. Box 231
Mountlake Terrace, WA 98043
(206) 771-7335
(800) 782-SEEK
Provides 24hr crisis intervention to legal custodians of missing children. Maintains speakers bureau and media list. Also provides seminars for family law attorneys on parental kidnapping.

National CASA Association
2722 East Lake Ave. East
Ste. 220
Seattle, WA 98102
(206) 328-8588
A non-profit organization which supports the development, growth, and continuation of programs that recruit and train volunteers to serve as court appointed special advocates for abused and neglected children in juvenile dependency proceedings.

CHILD ABUSE/NEG...con't

National Center for Prosecution of Child Abuse
American Prosecutors Research Institute
1033 N. Fairfax Street,
Suite 200
Alexandria, VA. 22314
(703) 739-0321
The center is a program of the American Prosecutors Research Institute. Established to promote the prosecution and conviction of child abusers coupled with aggressive advocacy on behalf of the child victim. Focusses on training and providing technical assistance to prosecutors and investigators handling criminal child abuse cases.

National Children's Advocacy Center
106 Lincoln Street
Huntsville, AL 35801
(205) 533-5437
Provides direct services regionally, victim assistance to child abuse victims and non-offending family members, legal services, advocacy, counciling and crisis intervention for child physical/sexual abuse victims, training and technical assistance

National Committee for Prevention of Child Abuse
332 South Michigan Avenue
Suite 1600
Chicago, IL 60604
(312) 663-3520
Dedicated to preventing child maltreatment in all forms. Maintains a nationwide chapter network.

CULTS

American Family Foundation
P.O. Box 2265
Bonita Springs, FL 33959
(212) 249-7693
Provides referral and information on cult related issues.

Cult Awareness Network
2421 W. Pratt Blvd. Suite 1173
Chicago, IL 60645
(312) 267-7777
A non-profit organization dedicated to educating the public about destructive cults.

DOMESTIC VIOLENCE

Clearinghouse on Family Violence Information
P.O. Box 1182
Washington D.C. 20013
(703) 821-2086
Provides information services to practitioners and researchers who work to prevent family violence and assist its victims. Also works in the arenas of sibling abuse and parent abuse. Offers free publications.

National Coalition Against Domestic Violence
P.O. Box 34103
Washington, D.C. 20043-4103
(202) 683-6388
Provides technical assistance, public education and national advocacy for battered women, their children and their advocates. A membership organization.

DOMESTIC VIOLENCE ...con't

Michigan Coalition Against Domestic Violence
P.O. Box 463100
Mt Clemens, MI 48046
(313) 954-1180
(800) 333-7230
National 24-hr hot line number which makes referrals to 1200 domestic violence shelters in the U.S.

The National Council on Child Abuse and Family Violence
1155 Connecticut Ave., N.W.,
Suite 300
Washington D.C. 20036
(800) 222-2000
Serves as a referral to victims or others seeking information relating to child abuse, domestic violence or elderly abuse. Provides fact sheets free of charge.

DRUNK DRIVING

Alliance Against Intoxicated Motorists (AAIM)
P.O. Box 250
870 East Higgins Ste. 131
Schaumburg, IL 60173
(708) 240-0027
Provides counciling and support to victims of drunk or drugged driving accidents. Also provides court advocacy, public education and lobbies for related legislation.

National Families in Action
2296 Henderson Mill Rd.,
Suite 204
Atlanta, GA 30345
(404) 934-6364
Created and leads a nationwide, volunteer, grass roots movement which ordinary citizens organize to prevent drug abuse in their families and in their communities. Its purpose is to educate society about the dangers of drug abuse by disseminating accurate information and by helping empower citizens to work for change.

Mothers Against Drunk Driving
511 E. John Carpenter Fwy
Ste. 700
Irving TX 75062
(214) 744-MADD
MADD has approximately 400 chapters which assist victims of drunk driving crashes at the local level. Victims from communities without a chapter may receive telephone support, information and literature by calling the number listed.

RID-USA (Remove Intoxicated Drivers)
P.O.Box 520
Schenectady, NY 12301
(518) 393-4357
The oldest anti-drunk driving organization operating in the U.S. Provides help and information to victims of driving while impaired and other alcohol-related crimes. Membership includes a quarterly newsletter and bulletins.

ELDER ABUSE/NEGLECT

American Association for Retired Persons
601 E St., N.W.
Washington D.C. 20049
(202) 434-2277

Serves members through legislative representation, educational and community service programs and direct membership benefits. Criminal Justice Services, an affiliated organization, addresses crime and the elderly.

ELDER ABUSE/NEGLECT...con't

Clearinghouse on Family Violence Information
P.O. Box 1182
Washington, D.C. 20013
(703) 821-2086
Provides information services to practitioners and researchers who work to prevent family violence and assist its victims. They maintain several databases from which annotated bibliographies are generated. For a free list of publications contact the Clearinghouse at the above number

Clearinghouse on Abuse & Neglect of the Elderly
College of Resources
University of Delaware
Newark, DE 19716
(302) 292-3525
Produces annotated bibliographies based on a computerized search of over 100 code words in the area of elder abuse. It also contains over 2500 printed materials which are available for a small fee.

National Aging Resource Center on Elder Abuse c/o APWA
810 1st Street, N.E.
Wash., D.C. 20002-4267
(202)682-0100
Provides training and technical assistance to adult protective service and aging agencies. Develops and disseminates information about elder abuse. Publishes a quarterly newsletter, NARCEA EXCHANGE, and operates a Clearinghouse on Abuse and Neglect of the Elderly (CANE). Provides an automated search and retrieval system and conducts research studies of national significance.

GOVERNMENT AGENCIES

Department of Human Services
Child and Family Services
609 H Street, N.W.
Washington, D.C. 20002
(202) 727-0995
Investigates reported cases of general neglect of a child.

Executive Office for U.S. Attorneys
LECC/VICTIM-WITNESS STAFF
Rm. 1612, Main Justice Bldg.
10th & Pennsylvania, NW
Wash., D.C. 20530
(202)514-3982
Provides technical assistance to victim-witness coordinators in U.S. Attorneys' Offices.

National Center on Child Abuse and Neglect
P.O. Box 1182
Washington, D.C. 20013
(202) 245-0813
Provides funding for state grants, challenge grants, demonstration projects; operates resource centers, clearing houses; advocates for children who must appear in court as witnesses.

National Criminal Justice Reference Service
Box 6000
Rockville, MD 20850
(800) 732-3277 (800) 851-3420
Distributes extensive information obtained through surveys and published in the criminal justice field.

GOVERNMENT AGENCIES ... con't

National Institute of Mental Health
Department of Health & Human Services,
Alcohol, Drug
Abuse and Mental Health Admin.
Park Lawn Bldg.
Room 15 CO5
5600 Fishers Ln.
Rockville, MD 20857
(301) 443-4513
Knowledge development, synthesis, and dissemination for utilization by mental health and victim service providers on the topic of the mental health consequences of crime victimization.

National Victims Resource Center
Box 6000
1600 Research Blvd.
Rockville, MD 20850
(800) 627-NVRC
Provides referral services to victims and information on all issues dealing with the criminal justice system.

Office for Victims of Crime, U.S. Department of Justice
633 Indiana Ave., N.W., Rm. 1342
Washington, D.C. 20024
(800) 627-NVRC
(202) 307-0603
Provides information on individual compensation or assistance programs.

HATE VIOLENCE

Center for Democratic Renewal
P.O. Box 50469
Atlanta, GA 30302
(404) 221-0025
A national clearinghouse which monitors hate groups. Provides victim assistance, leadership training and education.

Human Rights Resource Center
30 N. San Pedro Rd., Ste.140
San Rafael, CA 94903
(415) 499-7463
Provides unique historical and
current information, technical assistance, and "state of the art" training programs to law enforcement agencies, schools and human rights organizations throughout the U.S, Canada, England and New Zealand seeking to prevent and solve various human rights problems within their respective communities.

National Gay & & Lesbian Task Force
1734 14th St. N.W.
Washington, D C. 20009
(202) 332-6483
Provides services for gay & lesbian crime victims.

National Institute Against Prejudice and Violence
31 South Green Street
Baltimore, MD 21201
(301) 328-5170
Conducts research on victimization and provides consultation and training to law enforcement personnel, victim assistance providers, and other agencies and community organizations.

Southern Poverty Law Center
P.O. Box 548
Montgomery, AL 36101
(205) 264-0286
Provides legal services in discrimination, civil rights and class action cases. Works to educate the public through films and publications.

LAW ENFORCEMENT

Concerns of Police Survivors, Inc.
9423-A Marlboro Pike
Upper Marlboro, MD 20772
(301) 599-0445
COPS is a national peer support, self-help organization comprised of the surviving families of law enforcement officers killed in the line of duty.

International Association of Chiefs of Police
1110 N Glebe, Ste 200
Arlington, VA 22201
(800) 843-4227
Resource for names, addresses and phones for any group which wants
police department. Cannot do tracking because of limited resources.

International Conference of Police Chaplains
Route 5, Box 310
Livingston, TX 77351
(409) 327-2332
Provides training for law enforcement chaplins in the area of victim assistance.

National Sheriffs Association
1450 Duke St.
Alexandria, VA 22314
(703) 836-7827
(800) 424-7827
Provides training and information to law enforcement agencies on victim assistance.

LEGAL SERVICES

California Center on Victimology
1221 22nd street
San Diego, CA 92102
(619) 235-4459
Assist victims of crimes throughout court process and after; legal clinic advocates; counseling for victims; media advocacy; legislation; "It's a Fact" program for children as secondary victims with counseling services.

Coalition of Victims' Attorneys & Consultants (COVAC) 2111 Wilson Blvd. Ste.300
Arlington, VA 22201
Assist attorneys, consultants and other victim advocates in enforcing crime victims' legal rights, w/special emphasis on the area of civil litigation.

SEXUAL ASSAULT

National Assault Prevention Center
P.O. Box 02005
Columbus, OH 43202
(614) 291-2540
Works to prevent interpersonal violence through resource development, community education and professional training.

National Coalition Against Sexual Assault
P.O. Box 21378
Washington, D.C. 20009
(202) 483-7165
Founded in 1979 to lead a national movement to end sexual violence and promote services for survivors. Members include rape crisis centers, counseling services, educational programs, women's shelters and concerned individuals.

SEXUAL ASSAULT ...con't

National Center for Women Policy Studies
2000 P St. N.W. Ste. 508
Washington, D.C. 20036
(202) 872-1770
Conducts analyses of social issues and public policies that affect the social and economic status of women, designs model legislation, develops and disseminates program models and technical information.

SURVIVORS OF HOMICIDE VICTIMS

Children of Murdered Parents
P.O. Box 9317
Whittier, CA 90608
(213) 699-8427
Maintains contact with survivors of victims of homicide throughout the United States. Assistance to victims includes evaluation of various sources of therapeutic help as well as suggestions concerning possible practical referrals.

The Compassionate Friends, Inc.
P.O. Box 3696
Oakbrook, IL 60522-3696
(708) 990-0010
Provides referral to local chapters, resource guides and brochures.

Parents of Murdered Children
100 E 8th St.
Cincinnati, OH 45202
(513) 721-5683
Offers support for families as they work through the grief process and learn what to expect from the criminal justice system. Helps with practical information, referrals, telephone contact, legal ramifications of murder and any other problems that may be faced by the bereaved families of homicide victims.

TRAINING/INFORMATION/REFERRAL FOR PROFESSIONALS

American Correctional Association (ACA)
8025 Laurel Lakes Court
Laurel, MD 20707-5075
(301) 206-5100
(800) ACA-JOIN
A multi-disciplinary organization consisting of correctional professionals, individuals, agencies, and organizations involved in the entire spectrum of correctional activities. ACA Task Force On Victims Of Crime addresses critical victim rights issues.

National Drug Prosecution Center
1033 N. Fairfax St., Ste. 200
Alexandria, VA 22314
(703) 549-6798
A project of the American Prosecutors Research Institute, which is affiliated with The National District Attorneys Association.

TRAINING/INFORMATION/REFERRAL FOR PROFESSIONALS

Human Rights Resource Center
30 N San Pedro Rd., Ste. 140
San Rafael, CA 94903
(415) 499-7463
Provides unique historical and current information, technical assistance, and "state of the art" training programs to law enforcement agencies, schools and human rights organizations throughout the U.S., Canada, England, and New Zealand seeking to prevent and solve various human rights problems within their respective communities.

National School Safety Center
16830 Ventura Blvd., Ste 200
Encino, CA 91436
Serves as a national clearinghouse on school crime and violence. Provides training and technical assistance to school districts, law enforcement agencies, professional organizations and citizens nationwide.

VICTIMS WITH DISABILITIES

Association for Retarded Citizens
P.O. Box 1047
Arlington, TX 76004
(817) 261-6003
Refers victims to the appropriate affiliated organizations.

National Assault Prevention Center
P.O. Box 02005
Columbus, OH 43202
(614) 291-2540
Works on preventing interpersonal violence through resource development, community education and professional training. Coordinates a national network of over 200 Child Abuse Prevention Projects.

OTHER

American Social Health Association
P.O. Box 13827
Research Training Park,
NC 27709
(919) 361-2742
(800) 277-8922
(800) 342-AIDS
Provides information and referral about AIDS and other sexually transmitted diseases.

Crisis Management Group, Inc.
99 Russell Ave.
Watertown, MA 02102 (617) 926-7672
(800) 444-7262
Provides crisis intervention services for companies and communities that have experienced a traumatic event.

Justice for Surviving Victims, Inc.
P.O. Box 1503
Salida, CO 81291
(305) 587-7144
Limits efforts to helping state organizations work toward amending the U.S. Constitution for victims' rights.

OTHER ... con't

Committee to Halt Useless College Killings
(C.H.U.C.K.)
P.O. Box 188
Sayville, NY 11782
(516) 567-1130
An anti-hazing organization that provides information, education and assistance.

General Federation of Women's Clubs
1734 N. St, N.W.
Washington, D.C. 20036-2990
(202) 347-3168
The oldest and largest service organization of volunteer women in the world. Programs are supported on the national level and implemented locally. Clubs may work independently or network with other groups in their communities.

Justice Fellowship/Neighbors Who Care
P.O. Box 17500
Washington, DC 20041-0500
(703) 834-3650
Provides trained church volunteers to assist victims of property crime with crisis intervention services.

National Association of Attorney's General
Hall of the States
444 North Capitol Street,
Ste. 403
Washington, D.C. 20001
(202) 628-0435
Refers individual to appropriate state AG office for rights of victims in that state.

National Association of Town Watch
P.O. Box 303
7 Wynnewood Road, Ste. 215
Wynnewood, PA 19096
(215) 649-7055
Heighten crime prevention awareness.

National District Attorney's Association
1033 North Fairfax Street, Ste.200
Alexandria, VA 22314
(703) 549-9222
Purpose is to help prosecutors to help victims; cannot help victims of crime directly.

National Coalition Against Pornography
800 Compton Road, Ste. 9224
Cincinnati, OH 45231
(513) 521-6227
Provides victim referrals and information on resources available for victims of sexual abuse and sexual addiction. Primary focus on educating citizens about the harmful effects of pornography.

Trial Lawyers for Public Justice
1625 Massachusetts Ave., N.W.,
STE. 100
Washington, D.C. 20036
(202) 797-8600
Provides assistance in obtaining legal representation.

The Wake County Juvenile
Restitution Program
P.O. Box 550
Raliegh, NC 27608
(919) 856-5590
Advocates for a comprehensive system of justice including: victim participation into judicial process; restitution program involving victim and perpetrator; community protection program; increased level of competency of offender.

LEGAL REMEDIES FOR CRIME VICTIMS AGAINST PERPETRATORS: Basic Principles

BY

FRANK CARRINGTON

National Victim Center

THIS MANUAL, ANY OTHER MATERIALS, AND ANY ACCOMPANYING TRAINING SESSION, ARE NOT INTENDED TO RENDER ANY PROFESSIONAL ADVICE, LEGAL OR O THERWISE. INDIVIDUALS MUST CONSULT COMPETENT PROFESSIONALS, LICENSED TO PRACTICE IN THEIR AREA, TO RECEIVE SUCH SERVICED RELATED TO THEIR CIRCUMSTANCES.

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DEDICATION

This Manual is respectfully dedicated by the author to two persons who lost their lives in service to others: one in the recent crisis in the Persian Gulf, the other on the streets of New York. Both were victims.

New York City Police Officer **Edward R. Byrne**, age 22, was shot and killed in the line of duty on February 26, 1988. He was protecting a witness in a drug case when two men appeared, one on each side of his radio motor patrol car, and, without warning, shot him five times.

President George Bush has stated that he keeps Eddie Byrne's badge in his desk to remind him of the sacrifices made by law enforcement officers.

The United States Department of Justice, Office for Justice Assistance has dedicated one of its major grant programs to the memory of Officer Byrne.

Lt. Mark Jackson, United States Navy Reserve, age 27, was killed in an automobile accident in Saudi Arabia on February 24, 1991. His reserve unit had been called to active duty toward the end of the Desert Storm operation.

Mark was a second-year law student at Regent University in Virginia Beach, Virginia, and worked as a legal intern for the author of this Manual. He had planned to pursue his legal career in the field of crime victims litigation, and shortly before he was called to the Persian Gulf, he had been appointed as the law student representative to the Victims Committee of the American Bar Association.

Frank Carrington

National Victim Center

National
Victim Center

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SECTION I. INTRODUCTION TO THE MANUAL

Chapter 1. Purpose of the Manual

The past decade and a half has witnessed the creation of a number of programs designed to do something constructive about the plight of victims of violent crimes. Innovations such as victim/witness programs, crisis centers for victims of domestic abuse, sex crimes and child abuse, victim impact statements, compensation, and restitution -- unheard of not long ago -- are now firmly established in our justice system.[1] Recently, ***Victims' Bills of Rights***,[2] and state constitutional amendments[3] have codified the principle that the system should accord victims **at least** the same rights accorded to criminals.

A parallel enhancement has occurred in the area of crime victims' **legal** rights. Today, our civil courts are more disposed than ever before to extend favorable consideration to victims' remedies against perpetrators or against third-parties whose negligence caused victimizations.[4]

The news media have introduced the public to the concept of victims' rights litigation by publicizing cases in which victims have been successful in suing perpetrators.[5] Even so, many of the legal issues involved in victims' litigation remain somewhat a mystery, simply because the law itself tends to be technical and difficult for the average person to understand. As a result, while many victims may have a general feeling that the legal system provides them with various rights and remedies, they may not be absolutely certain about the nature and scope of those rights and remedies.

There has never before been any sort of coordinated national program created to apprise victims of their rights and remedies as civil plaintiffs. This *Manual* is intended to remedy that situation by training Service Providers about victims' legal rights and remedies so that they will be able to:

1) Help victims understand their rights;

2) Elicit from victims the information that will be of most importance to attorneys in evaluating victims' cases; and

3) Assist victims in obtaining qualified legal counsel to enforce their rights.

The term Victim Service Providers, as used here, is generic, referring to the cadre of individuals -- professional and volunteer -- who are usually closer to violent crime victims than other people in the more formally-structured components of the criminal justice system. The term includes, but is not limited to, people who work with victims on a more or less continuing basis in such public or private entities as:

- Victim/witness programs in prosecutors' offices and law enforcement agencies;
- Crisis intervention and counseling services for victims of violent crimes generally, or for specific categories of victimization such as sex crimes, child abuse, and campus violence;
- Psychological and psychiatric counselors in programs assisting violent crime victims with their emotional difficulties; and
- Professionals and volunteers involved in victim-related programs established by such institutions as colleges and universities, medical facilities, and churches.

Not-for-profit victims' organizations such as the National Victim Center, Inc.;[6] Security on Campus, Inc.;[7] the National Organization for Victim Assistance (NOVA)[8]; and the Victims Assistance Legal Organization, Inc. (VALOR), form important co-partnerships with all of these direct Service Providers.[9]

Victim Service Providers personify commitment, compassion and concern -- many having been victims themselves. Significantly, they have the distinct advantage of meeting and counseling victims immediately after the commission of the crimes, when the facts and circumstances -- often of critical importance in developing viable civil actions -- are fresh in the victims' memories.

Service Providers are ideally qualified to build ***bridges*** of information, knowledge and understanding between crime victims and the legal profession, by establishing the kind of rapport with victims that encourages them to seek out Service Providers' advice about important subjects such as their legal rights and remedies. Thus, the *Manual* has been developed to train Service Providers about the basic issues involved in *victim versus perpetrator* litigation so that they will be able to recognize and develop -- from interaction with the victims themselves -- the kinds of background information that will be of most value to the attorneys to whom those victims are referred.

This *Manual* adds a new dimension to victim services by developing and facilitating a flow of communication **from** victims of violent crimes, **through** trained and strategically placed Service Providers, **to** attorneys willing to consider victims' cases. When this kind of communication occurs, Service Providers not only help crime victims who seek assistance, but also help to create a relationship of understanding between victims' advocates and legal professionals. This type of communication is of unprecedented benefit to all parties concerned.

Any book, treatise, manual, etc. that purports to discuss general topics of the law needs to have a ***disclaimer***. This is a statement to the effect that because the law varies so significantly from jurisdiction to jurisdiction, local counsel, familiar with the statutes, case law, administrative rulings, etc. of his or her particular jurisdiction, **must** be consulted for authoritative legal advice.

This is as true of this Manual as any other legal work, but in addition, the ***disclaimer*** here is even more important in this particular Manual because its purpose is not to **teach law, as such**, to its Service Provider/readers, but rather to instruct them how to recognize and elicit **factual** information from their victims/clients that will motivate attorneys to take victim cases and to assist those attorneys in successful representation of victims. Consequently, since the purpose of the Manual is to train Service Providers as intermediaries between violent crime victims and the legal profession, the entire course of instruction is based on the premise that Service Providers, armed with pertinent facts of victim cases, will, **by definition**, be seeking the advice of local counsel.

Chapter 2. Content of the Manual

Section II of this *Manual*, *OVERVIEW OF CIVIL LITIGATION ON BEHALF OF CRIME VICTIMS*, provides a **framework** of the general legal issues involved in civil litigation. Later, the framework will be filled in with specific information about those areas of victim litigation that will be most useful to Victim Service Providers in identifying potentially successful cases to be referred to attorneys.

Section III, COLLECTION OF JUDGMENTS, addresses the concept and importance of ***collectability*** -- the ability of defendants/perpetrators to satisfy judgments against them with assets currently on hand, or reasonably to be expected. The ***Uncollectability Myth*** -- the erroneous belief that all violent crime perpetrators, **as a class**, are too poor to satisfy judgments -- is

examined and refuted. Principle sources of collection of judgments from defendants/perpetrators are described, with suggestions about ways and means of collecting.

Section IV, MAKING THE LAW WORK FOR VICTIMS, begins the substantive instruction about specific types of victims lawsuits, and the legal issues that most commonly arise in civil suits against perpetrators. This Section emphasizes those aspects of *victim versus perpetrator* litigation which most frequently confront Service Providers engaged in eliciting pertinent legal and factual information from victims, and then **translating** it into a form most useful to attorneys.

Section IV is divided into chapters covering:

- General principles;
- Cases filed directly against perpetrators by their victims; and
- Cases in which perpetrators are insured, and the issue is whether the ***deep pockets*** of the criminals' insurance carriers are available for collection of judgments.

Section V, SPECIAL CASES pertains to classes of crimes of such frequency and importance that they merit special consideration, including:

- Children as victims;
- Women as victims;
- Campus victims; and
- Hate crimes.

Section VI, OTHER LAW-RELATED MEANS OF RECOMPENSE FOR VICTIMS involves legal aspects of crime victim ***compensation*** and ***restitution*** for victims from perpetrators.

The *Manual's* format is designed to teach readers, in non-technical terms, about the major legal issues involved in obtaining and collecting judgments against perpetrators. These issues are defined in general terms, then illustrated by examples taken from current appellate cases involving victims' legal rights and remedies. The examples will be followed by practical suggestions about the kind of information to be gathered from victims that is of maximum value to attorneys. Legal authority is provided in the form of notes and case citations found at the ends of Sections and Chapters.

The success of the *Manual* depends on how well it prepares Service Providers to persuade attorneys to accept victims' cases. This, in turn, requires that Service Providers know the right questions to ask their victim/clients in anticipation of the kinds of information attorneys themselves will be looking for in deciding whether to accept victims' cases. If the effects of the Service Providers acting as victim advocates leads to greater numbers of successful lawsuits on behalf of crime victims, the *Manual* will have accomplished its purpose. While the *Manual* is not intended to transform Service Providers into instant trial lawyers, it **will**, hopefully, create for the first time, a well-informed cadre of in-place advocates for victims' legal rights.

Chapter 3: Resources for Legal Remedies; Coalition of Victims' Attorneys and Consultants

The principal legal resource for the development of the *Manual*, and for the implementation of its purposes described in the previous chapter, is the **Crime Victims Litigation Project** of the National Victim Center.

THE NATIONAL VICTIM CENTER

The National Victim Center is dedicated to reducing the consequences of crime on victims and society by promoting victims' rights and victim assistance, and enhancing the dignity and value of human life by eliminating America's acceptance of violence.

With offices in New York City, suburban Washington, D.C., and Fort Worth, Texas, the Center is one of the nation's largest crime victims' advocacy and assistance organizations.

Today, nearly 8,500 victim service and criminal justice organizations benefit from the Center's programs. Beneficiaries of the Center's initiatives and activities include groups and individuals concerned with: child abuse and neglect; sexual assault; domestic violence; drunk driving; hate crimes; elder abuse and neglect; homicide survivors; and violent crime victims generally.

Programs of the **Center** include:

- **Training** and **technical assistance** to enhance the abilities of victim advocates to assist violent crime victims;

- A **resource library** containing over 10,000 documents covering all aspects of victimology and victims' rights;

- A **legislative database** containing 17,500 state and federal statutes which strengthen the rights of violent crime victims;

- A **public awareness** program providing resources and expertise to news media professionals representing over 1,500 print and electronic outlets nationwide; and

- A **National Speakers Bureau** of experts on the various aspects of violent crime victimization.

In 1986, the National Victim Center began the important initiative to enhance and enforce violent crime victims' **legal** rights:

THE CRIME VICTIMS LITIGATION PROJECT

The Crime Victims Litigation Project (CVLP) was established by the Center to serve as a national legal service for attorneys who are involved in, or contemplating, civil litigation on behalf of violent crime victims. Prior to the establishment of the CVLP, there had been no central resource of legal information pertaining specifically and exclusively to victims' rights and remedies under the law.

The ***cornerstone*** of the CVLP is its database of victims' law consisting of appellate cases, and other legal authorities, to which victims' attorneys can turn for up-to-date research assistance. There are presently some 3,000 cases and authorities in the database.

The information in the database is divided into two main classes of cases:

1) ***Victim versus perpetrator.*** *Also called* ***first-party*** cases, these involve lawsuits filed by victims:

   - Directly against those who have criminally injured them;
   - Against persons who conspire with, aid, or abet perpetrators; and
   - Against perpetrators' insurance carriers. (This part of the database is structured in the same manner as is this *Manual.*)

2) ***Third-party Lawsuits.*** These are cases in which victims are injured by perpetrators who ***got to*** them through the negligence of third-parties who were not themselves involved in the crime. Examples of this are lawsuits by violent crime victims against landlords or innkeepers for failure to provide proper security for tenants or guests. (An overview of crime victims' litigation describing all of the various civil actions available is the subject of the next Section).

The database is kept current through a weekly review of **all** appellate cases decided in the country that involve civil suits by crime victims.

COVAC: THE COALITION OF VICTIMS' ATTORNEYS AND CONSULTANTS

The establishment of the Crime Victims Litigation Project was merely the first step in the National Victim Center's long-range plan to provide full-service assistance to victim litigators. In 1988, the **Coalition of Victims' Attorneys and Consultants (COVAC)** was formed as the education, information and referral arm of the Crime Victims Litigation Project.

COVAC is a membership organization, and is the only such organization in the country geared specifically to providing services for attorneys and consultants (i.e. Service Providers, security experts, etc.) who specialize in, or have a particular interest in, crime victims' litigation. Over 200 attorneys, consultants and Service Providers have become members of COVAC since its inception.

COVAC provides a cadre of attorneys from across the nation who have demonstrated an interest in enforcing victims' legal rights and remedies. Hundreds of victims cases have been referred by COVAC to its members. It is this pre-existing network of knowledgeable lawyers that will provide the initial impetus in the legal profession for the implementation of the Manual's program.

COVAC members are kept current about developments in the area of victims law -- both first-party and third-party -- through its quarterly newsletter ***COVAC UPDATE***. COVAC members have unlimited free access to its database of case law, and free consultation with its legal staff, in order to assist them in their efforts to assist their victim/clients.

Service Providers, particularly those who are using the *Manual,* also have free access to COVAC and all of its services. Of course, Service Providers from all victim-related disciplines are most welcome to become COVAC members.*

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* The CVLP and COVAC are directed on a day-to-day basis by Frank Carrington, Legal Consultant to the National Victim Center and author of this *Manual.*

SECTION I. ENDNOTES

1. **See, generally:** *Final Report: President's Task Force On Victims of Crime*, The White House, Washington, D.C., 1982; Carrington and Nicholson, *Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1, (Symposium, 1984); Stark and Goldstein, *The Rights of Crime Victims: An American Civil Liberties Union Handbook*, New York, Bantam Books, 1985; (hereafter: "Stark and Goldstein; *Rights*".); Austern, *The Crime Victims' Handbook*, New York, Viking Press, 1987; Carrington and Nicholson, *Victims' Rights: An Idea Whose Time Has Come-Five Years Later: The Maturing of An Idea*, *17* ***Pepperdine L. Rev. 1*** (1989).

2. Gann, *Justice For the Accuser: Proposition 8-The Victims' Bill of Rights*, 4 Benchmark 69 (1988).

3. Lamborn, *Victim Participation In The Criminal Justice Process: The Proposals For A Constitutional Amendment*, 34 Wayne L. Rev. 125 (1987).

4. **See generally**: Carrington and Rapp, *Victims' Rights: Law and Litigation*, New York, Matthew Bender Company, 1989, (hereafter: "Carrington and Rapp, *Victims' Rights*".)

5. -"Judge Upholds Jury Verdict of $8.5 Million Rape Award," *Virginia Lawyer's Weekly*, April 1990.
-Eric Freedman, "Rapist Must Pay Victim $200,000," *Detroit News*, January, 1990.
-"Victims of Abuse find Hope Doesn't Run Out," *Colorado Springs Gazette Telegram*, May, 1990. ($2.5 million judgment for daughters against sexually abusive father.)

6. National Victim Center, Inc., 2111 Wilson Boulevard (#300), Arlington, VA 22201, (703) 276-2880.

7. Security On Campus, Inc., 618 Shoemaker Rd. (#105), Gulph Mills, PA 19406; (215) 768-9330.

8. National Organization for Victims Assistance (NOVA), 1757 Park Rd. N.W., Washington, D.C. 20010; (202) 232-6682.

9. Victims Assistance Legal Organization, Inc. (VALOR), 4530 Oceanfront, Virginia Beach, VA 23451; (804) 422-2692.

SECTION II. OVERVIEW OF CIVIL LITIGATION ON BEHALF OF CRIME VICTIMS

Chapter 1. Victims' Civil Actions Against Perpetrators and Third-Parties

Victims have always sought redress of one kind or another from those who have injured them. In days gone by, this often became somewhat messy: if A cut off B's arm, B, usually with his family and friends in tow, went after A in order to reciprocate. Things have become more civilized with the passage of years. Today the government takes care of punishing criminals (or tries to) and victims are left to enforce their remedies against perpetrators in civil actions for money damages. **Civil** wrongs (as opposed to **criminal** offenses) are called ***torts***.

Generally speaking, the forms of such civil actions are dictated by what was done to the victims. In homicide cases, the survivors of deceased victims sue for wrongful death. When physical injury is caused by unwanted contact (ranging from forcible rape accompanied by a sadistic beating to a playful but injurious slap on the shoulder), the form of the action is assault and battery. When victims are abducted or otherwise held against their will, actions for false arrest or false imprisonment arise.

Recently, courts have begun to recognize causes of action involving the intentional, reckless, and negligent infliction of emotional distress.[1] Such cases usually require that **some** physical injury accompany the emotional trauma,[2] but in particularly outrageous circumstances, mental anguish alone may be compensable.[3]

When crimes involve multiple perpetrators, victims can sue as many of them as they can serve with process and bring into court. Additionally, in a surprisingly little-used class of cases, recovery has been allowed for torts such as civil conspiracy or aiding and abetting,[4] wherein one defendant actually commits the criminal act but another assists or participates without physically taking part. For example, a master burglar's paramour, who never accompanied him on forays, but knew about them and helped him tabulate and dispose of the proceeds, could be civilly liable to the survivors of a victim who was murdered by the burglar during a burglary.[5]

The foregoing cases are known as ***first-party*** actions. The legal theory is uncomplicated: victims bring lawsuits for money damages against defendants who have actually caused injury, or against those who assist them. These civil actions are the primary subject of this *Manual*.

Victim Service Providers should also be aware of another class of cases, called ***third-party*** actions. In these, the perpetrators themselves are still the villains; however, if the perpetrators gained access to their victims through the **negligence** of others, those ***others***, referred to as ***third-parties***, may also be held legally responsible because their conduct assisted or facilitated the victimization.[6]

One of the most notorious examples of third-party liability is the case of the internationally renowned singer Connie Francis who, in the mid-1970's, was tortured and sexually assaulted in her motel room in Long Island, New York. The assailant, who was never caught, gained entry through a sliding glass door that was known by the management to be defective. The singer sued the motel chain for negligent failure to provide adequate security for guests. A jury awarded her $2.5 million, which was affirmed on appeal.[7]

Third-party liability has also been established in suits by tenants against landlords who fail to provide adequate security,[8] by customers against stores and other places of business,[9] by students against schools,[10] patients and employees against hospitals,[11] and other victims whose injuries were occasioned by the negligence of the third-party defendants. The common denominator in these suits is that defendants had a duty to protect plaintiff/victims from foreseeable harm but failed to do so. Other areas of third party liability include the failure of the police to provide protection to certain victims,[12] negligent handling of dangerous prisoners and mental patients[13] and the negligent employment of dangerous persons who gain access to their victims through their jobs.[14]

Not all third-party situations result in liability to victims. To be held liable, third-party defendants must owe a **duty** to the individual victim, or to a specific class of victims, and defendants' negligence must have been the ***proximate cause*** -- or, ***cause in fact*** -- of the plaintiffs' injuries. If these or other legal preconditions are not met, there is no liability for the criminal acts of others.

Nonetheless, while the *Manual* primarily addresses first-party (*victim versus perpetrator*) remedies, Service Providers should keep in mind that third-party and first-party lawsuits are **not mutually exclusive**. If the facts and circumstances of first-party cases presented in the *Manual* might also give rise to third-party liability, this fact is noted in order that Service Providers will become acquainted with third-party concepts, and recognize them when victims are recounting the facts and circumstances of the crimes committed against them. Attorneys handling victims' cases are just as interested in third-party involvement, because it may be easier to collect damages from solvent third-parties, such as landlords, innkeepers, government entities, etc., than from the perpetrators.

Some cases have characteristics of both third-party and first-party actions, and two of these are close enough to pure first-party situations to be included in the *Manual*. The first class of cases, **Negligent Entrustment**, arises when defendants give, lend or otherwise provide the actual perpetrators with dangerous instrumentalities -- usually vehicles or weapons -- knowing that the recipients are dangerous or that they are likely to cause injury with them. If injury is in fact caused, both the perpetrator and the negligent entrustor may be liable to plaintiff/victims.[15] The defendant/entrustors are usually sufficiently close in their personal relationships to defendant/perpetrators -- family, friends, lovers, -- to warrant including these cases in the *victim versus perpetrator* category.

Similarly, in **Parental Liability** cases, the close relationship between parents and children may give rise to liability of parents when their children commit crimes. Parental liability is usually premised on certain preconditions, such as the parents' knowledge of their children's dangerous propensities or the requirement that the defendant/parent have custody of the child, before liability is imposed.

Chapter 2. State Involvement on Behalf of Crime Victims: Compensation and Restitution

Victim versus perpetrator lawsuits are almost invariably filed by victims, or their survivors, against the **individuals** who caused the harm. In two other areas involving victims' legal rights -- compensation and restitution -- the state itself becomes involved in redressing criminal injuries. Forty-nine states have established special funds from which eligible victims of violent crimes can be compensated for out-of-pocket losses caused by those crimes. Pain

and suffering are not usually compensated under these programs. Compensation boards administer the funds in accordance with the directions of the applicable statutes. The claims process is usually uncomplicated and legal assistance may not be necessary in filing the majority of claims.[16]

Service Providers should, however, be alert to factual issues that may affect the validity of victims' claims. For example, because almost all statutes deny compensation to victims who have themselves *instigated* or otherwise participated in the confrontations in which they were injured, the factual setting of the victimization becomes a critical issue. It is just as important for Service Providers to ask the right questions for the purposes of compensation, as it is when they are eliciting information for use in lawsuits against perpetrators.

Compensation is paid directly from the state to the victim. Restitution, on the other hand, is paid to victims by perpetrators when the state exercises its coercive power during the sentencing process. Restitution orders require that criminal defendants repay victims for the losses that they have suffered as a result of the crimes committed against them. Restitution, like compensation, is based on state and federal statutes. Issues in restitution cases are somewhat more complicated than compensation issues because the *rights* of the defendants are also involved in restitution cases. For example, restitution may not always be ordered for crimes for which defendants were not actually charged or convicted. Service Providers should warn victims that if charges against defendants are dropped as a result of plea negotiations, the victims may not receive restitution for those crimes.[17]

Chapter 3. Procedural Overview

CIVIL ACTIONS VERSUS CRIMINAL ACTIONS

This Chapter offers a general perspective designed to put the substantive legal issues, discussed later, into their proper procedural contexts.

It is important for Service Providers to understand the difference between criminal and civil cases. In the former, the state is the **plaintiff**, because criminal defendants violate **state** laws when they injure their victims. The victims, thus, are merely the complainants in criminal proceedings and witnesses for the prosecution. Recent trends favoring recognition of victims' rights have provided victims with the opportunity to provide their own input into their cases. For example, direct victim input into plea negotiations and the submission of victim impact statements are frequently utilized. Still, in the final analysis, the prosecuting attorney, as the state's representative, calls the shots in criminal cases.

The state **punishes** convicted criminals for breaking its laws. In civil cases, victims/plaintiffs seek **monetary damages** to redress the wrong done them. These are called ***compensatory*** damages which are awarded for out of pocket losses, pain and suffering, extended medical care, loss of earning capacity and so on. **Punitive damages**, in addition to compensatory damages, are imposed in order to punish perpetrators and to make examples of them so as to deter similar conduct by others. These damages may be awarded when defendants act with a "conscious, intentional disregard of, or indifference to, the rights and safety of others"[18] or when their conduct is particularly horrifying to judges and jurors.

One of the most important distinctions between criminal and civil cases lies in the differing burdens of proof. Criminal defendants must be proven guilty **beyond a reasonable doubt.** Their guilt must be shown by roughly 90-plus percent of the evidence. In civil cases, however, victims only need to prove their cases by a **preponderance** of the evidence: 51 percent or more. Once this burden is met, the defendants must then **disprove** (or explain away) the plaintiffs' allegations. In civil cases, the burden of proof may shift back and forth during the trial, **but** in the final analysis, plaintiffs need only come up with that single percentage point -- **over fifty percent** -- to win their cases.

Acquittals of criminal defendants, dismissals, reductions of charges, or outright refusal to file charges by prosecutors because of lack of evidence often occur because of the staggering burden on the state. The burden on victim/plaintiffs in civil cases is much less. There is a lot of leeway between the ***90 plus percent*** criminal burden and the 51% civil burden, and for this reason **the fact that there has not been a conviction in the criminal case will not automatically foreclose a civil action based on the same crime.**[19] Indeed, as a general rule, the fact of an acquittal in the criminal case is not even admissible in the underlying civil suit.[20]

The lesser burden on plaintiffs in civil cases obviously works to the benefit of crime victims who are enforcing their legal remedies. What about reverse situations, however, where there have been convictions or guilty pleas in criminal cases and victims are now pursuing civil actions? The law varies from jurisdiction to jurisdiction, but as a general rule, **guilty pleas** in criminal cases may be used as evidence in civil cases as admissions against the defendants' interest, provided that the criminal and civil cases were based on the same facts. There is a trend in the law that convictions and pleas of ***no contest*** will have the same effect.[21] The Supreme Court of Massachusetts, in a recent case, explained

the legal rationale underlying the doctrine allowing criminal convictions to be utilized to establish liability. The court said that to do so will:

> *. . . conserve scarce judicial resources, prevent people from profiting from their criminal conduct, and, perhaps most importantly, prevent the diminution of public confidence in our judicial system that would result if civil juries repeatedly found by a preponderance of the evidence that a convicted criminal defendant had not done something that a criminal jury had found beyond a reasonable doubt that he had done.*[22]

Another doctrine working for victims'/plaintiffs' benefit is the position taken by some (but not all) courts that evidence illegally seized from defendants and held inadmissible in the criminal cases against them may nevertheless be used in civil cases based on the same facts.[23]

The effect of prior criminal proceedings is one of major importance to victims in deciding whether or not to pursue their civil remedies against perpetrators. There are a number of ***pros*** and ***cons*** involved in these decisions. One of the principal disincentives to undertaking civil litigation is that victims will have to testify in court and confront their perpetrators. Victims who have experienced the trauma of facing their assailants in criminal proceedings may be reluctant to repeat the process. If, however, convictions or guilty pleas in **criminal** cases conclusively establish the **civil** liability of the perpetrators, then such confrontations may be avoided. This is because the only remaining issue to be decided is the extent of the victims' damages. Attorneys should be consulted as to whether prior pleas or convictions will eliminate the necessity of proving civil liability, thus avoiding victim/perpetrator confrontations during litigation and creating major incentives for victims to file civil suits.

In addition to the **outcome** of the criminal case, the **fact** that criminal proceedings are usually disposed of prior to civil trials benefits victims in yet another manner. Because the state's evidence against the perpetrators, together with any defenses that they may raise, have already been aired in the criminal trials, victims' attorneys in civil cases will have a sort of "preview" of the legal situation. This preview can be extremely helpful to victims' attorneys in preparing and litigating victims' civil actions arising out of the same facts as the criminal cases presented.

CIVIL PROCEEDINGS

Plaintiffs initiate their civil cases by filing **complaints** alleging that they were injured by the wrongful conduct of the defendants and asking for damages from them. Defendants must respond to the allegations within a certain time or default judgments are entered against them. While complaints need not be formal or elaborate, they must set forth sufficient information about the allegations so that defendants can properly prepare a defense. Defendants then file responsive pleadings, usually asking the court to dismiss the case because of **procedural** deficiencies in plaintiffs' pleadings -- for example, lack of jurisdiction, improper service of process, statutes of limitations, or because of **substantive** legal defenses. Other examples include: no duty was owed to plaintiffs, the defendants acted in self-defense, the defendants' actions were not the legal cause of plaintiffs' injury, and so on. These responses are generally accompanied by briefs or memoranda of law, to which plaintiffs must reply.

The courts, adhering to the theory that persons who have been injured by others are entitled to their day in court, are reluctant to dismiss plaintiffs' complaints at the pleading stages of cases. On occasion, however, defendants will argue in their responsive pleadings that **even if** all of the plaintiff's allegations are taken as

true, the law is such that defendants cannot be held liable. These defensive motions are called ***demurrers***, motions to dismiss or motions for summary judgment. If trial courts grant such motions, plaintiffs lose before they have the opportunity to present evidence. Trial courts' rulings on these motions are almost always appealable, and many are, in fact, appealed.

After the courts have ruled on the preliminary motions (and assuming plaintiffs' cases have not been dismissed), pretrial preparation begins. This includes legal research, making any necessary investigations as to facts and circumstances of the cases, interviewing witnesses, obtaining relevant documents, and taking depositions of parties and witnesses. All of this is called ***civil discovery***.

Depositions are like *mini-trials*. Witnesses or parties are called by the lawyers who wish to question them. Witnesses, who may be accompanied by counsel, are sworn and examined under oath, just as they would be in the courtroom. Depositions are enormously useful to counsel for both sides, because usually after deposition (and production of documents), each side will know almost everything there is to know about the other's case. At this point, attorneys engage in negotiations that often lead to settlements. Perry Mason-type surprises are frowned upon in civil cases. The burden on courts is so huge that were it not for pre-trial resolution of a good proportion of cases, the system would collapse of its own weight.

In a number of cases, defendants will **counterclaim**, alleging that the plaintiffs were the ones who injured them. All of the pleading and pretrial activity discussed above is the same, except that the parties are reversed.

If cases are not settled, they eventually go to trial before a judge or jury. If the defendant prevails, the matter is over unless the plaintiff appeals. If the plaintiff prevails, the **trier of fact** -- the judge or jury -- awards damages and the matter is over unless the defendant appeals. Judges and juries have extremely far-ranging discretion in assessing damages and awards. These are rarely disturbed unless they bear no rational relationship to the injury done. Punitive damages generally do not **need** to bear any relationship to injury because their primary purpose is to punish and deter criminals rather than to compensate victims.

Service Providers who have established rapport, or close relationships, with victims often observe first hand the extent of injury suffered by crime victims. Additionally, victims may be more willing to describe the impact of crimes to Service Providers than to other individuals involved in the system. It is not unusual for victims to be somewhat inarticulate when testifying about how the crimes affected them, both physically and emotionally. Consequently, **information gathered from victims by Service Providers to assist judges and jurors in determining the amount of harm the victims actually suffered, will also measurably assist attorneys in determining the kinds and amounts of damages to allege and attempt to prove.**

Judgments are the formal recordings of verdicts and awards in civil cases. They are usually enforceable in the courts of other states through the ***Full Faith and Credit*** clause of the *United States Constitution*. Judgments for willful and malicious acts, like most judgments awarded to violent crime victims, may not be dischargeable in bankruptcy.[24] However, since this is a complex area, expert legal opinion should be obtained if the issue arises.

PROS AND CONS OF LITIGATION

The close personal and professional relationships shared among victims of violent crimes and their Service Providers qualify the latter -- perhaps more than anyone else in the system -- to help victims understand and appreciate just what is involved in suing perpetrators.

Once victims are made aware of their legal rights and remedies, another critical aspect of the victim/Service Provider relationship surfaces. This involves fundamental questions as to whether or not it would be in the victims' best interest to pursue litigation against perpetrators. Attorneys have the expertise to evaluate the **legal merits** of prospective *victim versus perpetrator* lawsuits, as well as the victims' chances of winning and collecting judgments, which is an important factor in the decision-making process. Nonetheless, basic questions about the **effects** of the civil litigation process on victims' physical and mental well-being often fall within the province of Service Providers and other counselors.

Many of the factors, legal and otherwise, which bear on the advisability of civil litigation are uniquely within the expertise of Service Providers and merit careful consideration.[25] On the ***down-side***, civil litigation is a laborious process, involving complex legal and procedural hurdles which may, understandably, frustrate victims. Pre-trial discovery, depositions, responding to interrogatories, interviews, etc., are time-consuming processes which may upset victims by compelling them to re-experience physically and emotionally traumatizing events.

Confrontations with perpetrators may also be inevitable in first-party actions, although many perpetrators, particularly those who are incarcerated, or truly indigent, simply default by failing to answer victims' pleadings. This cannot be taken for granted;

however, it is an unfortunate fact that those perpetrators with the most to lose financially may likewise be the ones most motivated to fight it out in court. A prisoner/perpetrator serving twenty years might well default, whereas a wealthy realtor, who doubles as a child molester, might be able to afford defense counsel in his attempt to defeat the victim's actions. On the other hand, if the perpetrator's reputation and stature in the community are more important to him than his money, he might be motivated to settle out of court in an effort to avoid a civil trial with its attendant adverse publicity. In this instance, the victim is spared the rigors of litigation.

On the ***plus side***, as victims have become more aware of their legal rights, there is a corresponding desire to sue for damages, if for no other reason than to prove that the legal system can be made to work on the victim's behalf. This is especially true when perpetrators, whose guilt is not really in question, have by some means evaded conviction and punishment, or have been shown unwarranted leniency despite the injuries caused to their victims.

Two commentators on victims' legal rights have noted the positive psychological impact of *victim versus perpetrator* lawsuits:

1) *Nevertheless -- a growing number of crime victims-- motivated by a desire to see that* ***justice is done*** *and to make up for the powerlessness that they legitimately feel as a result of their victimization, first by the criminal, and then by the criminal justice system -- have found compelling personal, moral, emotional, and psychological reasons for pursuing such civil actions. Victims are increasingly bringing such suits even where it is obvious that the criminal does not have the resources to satisfy a substantial judgment of damages. Such civil suits are now being regularly recommended by police*

> *or prosecutors if there are substantial reasons for not bringing a criminal prosecution and many commentators have argued that they represent a reasonable and practical means for allowing victims to express a deeply felt moral indignation.*[26]

and:

> 2) *The potential psychological difficulties for a victim involved in a civil suit may be outweighed by a number of possible psychological gains; a feeling of renewed control over her life; satisfaction in an effort to prevent other such attacks; release of vengeful and angry emotions; and restoration of faith in justice through the legal system. These gains may make the suit worthwhile to the victims despite the emotional difficulties, and even if she never collects a penny for damages.*[27]

The principal incentive for suing perpetrators is, of course, the anticipation that lawsuits will result in realistic recompense from perpetrators or their insurers. Whereas victim compensation awards are usually limited to the amounts of money that the law allows to be paid, compensatory and/or punitive damages in *victim versus perpetrator* lawsuits may, and often do, run to six or seven figures.[28] In those tragic cases where crimes have resulted in either permanent or long-lasting damage -- physical or emotional -- civil lawsuits may be the **only** possible means for meaningful recovery.

So many intangible factors govern victims' decisions whether or not to sue perpetrators that it is difficult to establish any hard and fast rules. The instruction which follows, covering such substantive issues as liability, damages, insurance, and the generalized views of attorneys about litigation, develop further

perspectives about the pros and cons involved. The principal purpose of this overview has been to emphasize the importance of victims' litigation and to underscore the unique contribution that Service Providers can make on behalf of their victim/clients.

SECTION II ENDNOTES

1. ***Delia S. v. Torres***, 184 Cal. Rptr. 787 (Cal. App. 1982).

2. ***Garland v. Herrin***, 724 F. 2d 16 (2d Cir. 1983).

3. *Shamloo v. Lifespring*, Inc., 713 F. Supp. 14 (D.D.C. 1989).

4. ***Burton v. DePew***, 547 N.E. 2d 995 (Ohio App. 1988); ***Bergnon v. Anderson***, 411 N.W. 2d 336 (Neb. 1987).

5. ***Halberstam v. Welsh***, 705 F. 2d 472 (D.C. Cir. 1983).

6. See: Generally, Relating to Third-party Liability, Carrington and Rapp, *Victims Rights*, Section 6, ff.

7. ***Garzilli v. Howard Johnsons Motor Lodge***, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976). and see, Carrington and Rapp, *Victims Rights'*, p. 11-16.

8. ***Kline v. 1500 Massachusetts Ave.***, 439 F. 2d 477 (D.C. Cir. 1970).

9. ***Jardel Co. v. Hughes***, 523 A. 2d 518 (Del. 1987).

10. ***Miller v. State***, 467 N.E. 2d 493 (N.Y. 1984).

11. ***Small v. McKennan Hospital***, 403 N.W. 2d 410 (S.D. 1987).

12. ***Wood v. Ostrander***, 879 F. 2d 583 (9th Cir. 1989).

13. ***Grimm v. Arizona Board of Pardons and Paroles***, 564 P. 2d 1227 (Ariz. 1977).

14. ***Cramer v. Housing Opportunities of Montgomery County***, Inc., 501 A. 2d 35 (Md. 1985).

15. ***Foster v. Arthur***, 519 So. 2d 1092 (Fla. App. 1988); ***Dickens v. Auvil***, 508 So. 2d 638 (La. Ap. 1987).

16. Carrington and Rapp, *Victims' Rights*, at p. 3-12.

17. *id.*, at p. 3-4.

18. ***Patrick v. Williams***, 402 S.E. 2d 452 (N.C. App. 1991).

19. For example, in March of 1990, a Circuit Court jury in Henrico County, Virginia awarded a rape victim $8.5 million against Cornelius F. Florman, Jr. Florman had been acquitted of the rape of the same victim in an earlier criminal trial. "Judge upholds jury verdict of $8.5 million rape award", *Virginia Lawyers' Weekly*, April 2, 1990, p. 799, col. 1. In civil cases in Evansville, Indiana in 1983 and Mount Propect, Illinois in 1981, juries awarded money damages to parents of murdered girls against men who were never charged -- but merely listed as "suspects" by the police. **See:** Deborah Hines, Kohin suit part of trend of victims who fight back", Indianapolis Star, December 4, 1983.

20. *American Jurisprudence 2d*, Evidence, Acquittal in Criminal Cases, p. 384.

21. **See, e.g.** Jonathan J. Thau, "How Lawyers Can Benefit From Trends in Collateral Estoppel", *National Law Journal*, November 7, 1983, p. 22, col. 1.

22. Aetna Casualty and Surety Co. v. Niziolek, 481 N.E. 2d 1356 (Mass. 1985). See, generally: Carrington and Rapp, *Victims' Rights*, p. 5-4, ff.

23. **Ibid.**

24. Carrington and Rapp, *Victims' Rights*, p. 5-22, ff.

25. See, generally, on the issue of whether or not to sue; Carrington and Rapp, *Victims' Rights*, Section 5.01; Stark and Goldstein,pp. 190-198; LeGrand and Leonard, *Civil Suits for Sexual Assaults: Compensating Rape Victims*, 8 Women's L.F. 479 (1979).

26. Stark and Goldstein, p. 195.

27. LeGrand and Leonard, *Civil Suits For Sexual Assaults: Compensating Rape Victims*, 8 Women's L.F. 479 (1979); **See Also:** Comment: *The Civil Action for Rape: A Viable Alternative for the Rape Victim?*. 1978 S. Ill. L.J. 399 (1978).

28. **See, e.g:** Cases cited in Note 5, **Supra.**

SECTION III. COLLECTION OF JUDGMENTS

Chapter 1. The Importance of Collection: The Uncollectability Myth[1]

The purpose of this *Manual* is to increase the number of successful *victim versus perpetrator* lawsuits. ***Successful*** means that victims not only recover damage awards but, equally important, that they are also able to collect the damages awarded to them. While some victims may obtain psychological satisfaction from the mere fact of winning judgments, most victims sue because they **need** the financial means to put their lives back together -- emotionally as well as physically.

This kind of rehabilitation, whether in the form of extended psychological counseling, long term medical treatment, or both, costs money -- lots of it. Consequently, ***collectability*** -- defined as defendants' ability to satisfy judgments through assets currently on hand, or which they have a reasonable expectation of obtaining in future -- becomes an integral part of this *Manual's* ultimate goal: the enhancement of victims' legal rights.

Victims' legal remedies are almost invariably derived from a blend of the **facts** and the **law**. Thus, the more factual information that Service Providers are able to learn about perpetrators' financial resources, the greater the victims' chances are of collecting judgments. Financial resources information is not only vital in deciding whether or not to file lawsuits in the first place -- it is of equal importance to attorneys in discovering and tracing perpetrators' assets -- or in countering attempts by perpetrators to conceal or dispose of assets in fraudulent anticipation of judgments that victims may win.

This Section discusses possible sources of perpetrators' income so that Service Providers can ask their victim/clients the right questions in order to furnish their attorneys with information that will be of the greatest assistance, thereby enabling them to make judgments won by crime victims as meaningful as possible. When eliciting financial information, Service Providers should bear in mind that it is **not** necessary to present attorneys with ***iron clad*** proof that perpetrators currently possess or have access to assets. In most cases it will suffice to furnish attorneys with **leads,** developed from victims or other sources, as to **potential** resources for collection. Lawyers, in turn, can make the necessary investigations based on the information that has been supplied to them.

Service Providers should remind victims that patience is a virtue for plaintiffs who have won judgments which may appear to be worth very little at the time that they are obtained. No one knows what the future may bring, and it is quite possible that perpetrators may come into money long after judgments in favor of victims have been recorded. Judgments for intentional crimes and torts are almost always renewable over the years, and are **generally** not dischargeable in bankruptcy. Judgments that are valid in one state are entitled to enforcement in other states if they are properly recorded in the latter. Consequently, even if perpetrators or victims move about after judgments are awarded, this, in and of itself, will probably not bar collection at a later date. This information should be stressed when victims are in doubt over suing perpetrators who may appear to be **presently uncollectable.** Service Providers counseling victims can legitimately advise them that, if there is **any** chance of **future collectability**, that chance should weigh heavily in favor of filing suit.

Before proceeding further, it is necessary to explore, and then rebut, a prevalent mind-set about collectability that may have

caused more *victim versus perpetrator* cases to be rejected than any other single factor: the ***Uncollectability Myth***, which is the wholly erroneous impression shared by many -- including Service Providers, victims' attorneys, and victims themselves -- that **all** perpetrators of violent criminal acts, **as a class**, do not have assets with which to pay judgments. This misconception has convinced far too many victims that there is nothing to be gained from suing perpetrators -- or, worse, nothing to be gained even by **investigating** the issue of their collectability.

By the time that people in the criminal justice system got around to thinking about crime victims' legal rights -- roughly the mid-1970's -- a mind-set had become established to the effect that those who committed violent crimes against others were -- **as a class** -- uncollectable. This misconception led to the rejection of a lot of otherwise meritorious *victim versus perpetrator* lawsuits -- by victims, in their own minds, and then by attorneys, because no one had really bothered to investigate the facts about the collectability of judgements against perpetrators.

The ***Uncollectability Myth*** probably took root about a decade earlier when the nation as a whole started thinking seriously about violent crime. By the mid-1960's, numbers of crimes were skyrocketing and all violent crimes began to be referred to generically as *street* crimes. Indeed, pollsters measured violence in terms of "Are you afraid to walk your **streets** at night?" The ***street criminal*** began to personify crime itself.

Our preoccupation with street crime led to a novel social theory. Since the impact of violent crime was felt principally by the poor and powerless living in the *inner cities*, then it followed that such sociological ills as poverty, ignorance, slums, disease and unemployment **caused** crime. The idea came full circle: since poverty caused crime, all criminals are poor; hence there was no

use suing them. This theory caught on, and fathered the ***Uncollectability Myth.***

The premise underlying the ***Myth*** is flawed, at least in the view of two commentators. One of them is William Raspberry, a nationally syndicated columnist for *The Washington Post.* Raspberry earned his solid journalistic credentials in large measure through tough-minded commentary about crime victimization *vis-a-vis* minorities, particularly black and inner city dwellers.

In a 1980 column, "Jobless and Criminal?", Mr. Raspberry discussed the theory that poverty and unemployment caused crime. He wrote:

> *Some things are so obvious that whether they are true or not seems almost beside the point.*
>
> *Take the link between unemployment and crime. Even if a number of researchers hadn't documented the fact that crime rates and jobless rates often rise and fall in tandem, you would know instinctively that the two had to be linked.*
>
> *And you would go right on knowing it after a careful study demonstrated that it wasn't so -- at least not to the extent commonly believed. For a couple of years now, New York's Vera Institute has been trying to determine just how real the link is. The study still has a couple of years to go, but preliminary results cast doubt on the notion that the jobless are drawn into criminal activity because of their joblessness. For instance, in one of its pilot studies, Vera interviewed some 60 inmates of Rikers Island just before and again just after their release, trying to learn why they chose to commit crimes.*
>
> *According to project director James Thompson, only three or four of the inmates said they committed crimes because they had lost or could not find jobs.*

Several said they engaged in criminal activity to supplement their legitimate income; some said they had given up on work because the benefits of crime were more attractive; many said they either worked or stole to support themselves, though not at the same time. One young man was quoted as saying: "If you're working and you see something you want, you wonder how you're going to pay for it. If you're not working and you see something you want, you wonder how you're going to take it." Said another: "If the job pays good, I'll go to the job. If the street is good, I'll go to the street."[2]

The other commentator, Mr. Warren Brookes of the Boston *Herald-American*, explored and then rebutted the poverty-causes-crime myth from a different perspective: a comparison of crime rates with poverty statistics. Citing numerous studies, he wrote:

One of the sociological myths that doesn't seem to want to go away is that poverty causes crime -- and that we don't reduce crime unless we first reduce poverty.

To the simplistic, the theory seems valid. Most people in prison are from a background of poverty -- ergo, poverty must be the main cause of crime.

Right?

Wrong.

Because if that theory were literally true, crime would be decreasing in this country -- instead of increasing, since poverty has been going down for 40 years or more. Unfortunately, for the theory's sake, as well as for the country's sake, exactly the opposite phenomenon has taken place.

The greatest decline in poverty has directly coincided with the greatest rise in crime in this nation's modern history!

As evidence of this, Mr. Brookes cited statistics to the effect that:

> *. . .in the period when poverty in this country declined by 55%, violent crime rose by 160 per cent and property crime rose by 124 per cent.*[3]

These commentators cast serious doubt on the premise that poverty and criminality are intertwined in all instances. If this is true, the rationale for the ***Uncollectability Myth*** is likewise of dubious validity.

Our preoccupation with *street* crime may have fostered the ***Uncollectability Myth*** in yet another way. The ultra-high visibility of *street* oriented lawlessness distracted our attention from other areas of victimization in which the possibility of collection of judgments is a very real one. These crimes, which are often as traumatic for their victims as violence at the hands of street criminals, may be collectively described as the ***Three C's*** crimes: **Concealed, Concealable,** and **Covered-up**. The ***Three C's*** crimes break down as follows:

- **Concealed** crimes are typified by those involving child sexual molestation by family members and others in positions of authority, such as youth group leaders, clerics, teachers, and so on. The *essence* of these crimes is concealment which is made possible by the nature of the relationship shared between the victim and the violator.

- **Concealable** crimes, such as domestic abuse by spouses, live-in companions, or paramours, are not quite so secretive as those involving child molestation because the victims, being adults, **could** report such abuse if they wanted to do so. They choose not to report, however, because of pressures such as: fear of retaliation, losing financial support, a desire to keep the family together, or based on their hard-won knowledge that the authorities are often reluctant to act.

- **Covered-up crimes** are typically date and *acquaintance* rapes on college campuses involving situations in which it is in the self-interest of the campus authorities to prevent the facts of criminal activity from becoming public. At many colleges, officials suppress rape reports in order to protect the institutional image and to avoid *scaring off* prospective students and their parents.[4]

Three C's crimes are by no means limited to the examples cited above; other categories such as *hate crimes*, intimidation, harassment, and intentional infliction of emotional distress also fall within this class of violent activity because of the secretive nature of the criminal activity or because of the manner in which it is covered up. Child abuse, crimes against women, campus violence and hate crimes are so prevalent and devastating to victims that each will be considered separately as Special Case categories in the substantive sections of the *Manual*.

Whatever validity may be ascribed to the premise of uncollectability of *street* criminals, there is little basis for that rationale insofar as perpetrators of most ***Three C*** crimes are concerned. These violators cause incalculable misery to their victims because of the *dark sides* of their psychological makeup -- deep-seated, psychotic, personality defects often made known only to their victims. Their dark sides, however, do not prevent many of these perpetrators from becoming *pillars* of their communities (or campuses), holding down well-paying jobs, engaging in the professions and generally leading enviably successful lives insofar as their financial well-being is concerned. **Presumptively**, these *dark side* criminals are eminently collectable.

One recent development has done much to debunk the ***Uncollectability Myth***. The news media have suddenly taken an enthusiastic interest in collection efforts on behalf of crime victims. Reporters

seem to be intrigued that crime victims can not only **win** judgments but actually **collect** on them. The following headlines illustrate this recently attracted media interest:

VICTIMS OF VIOLENT CRIMES INCREASINGLY SUE FOR DAMAGES - AND MANY WIN BIG AWARDS

Wall Street Journal, December, 1986.[5]

DEVELOPING 'DEEP POCKETS' LAW AIDS VICTIMS OF CRIME

Los Angeles Daily Journal, 1988.[6]

CRIME VICTIMS FIGHT ATTACKERS WITH LAWSUITS FOR DAMAGES

Detroit News, 1988.[7]

This kind of media attention can be used to gain the attention of attorneys who have not previously given much thought to the concept of *victim versus perpetrator* litigation. The mere fact that major newspapers are publishing stories about this developing area of law may raise sufficient interest among legal professionals that actions on behalf of victims will receive more favorable consideration than in the past.

As was noted at the outset of this Chapter, in the past, the ***Uncollectability Myth*** cost uncounted violent crime victims their *day in court*. This *Manual*, however, is written for **today's** victims, and emphasizes the **positive** side of *collectability* by describing a number of potential sources for collecting damages from perpetrators. Sources which may be of particular assistance to Service Providers who are consulting with victims about the

collectability aspects of their legal rights and remedies are described in the next chapter.

Chapter 2. Sources of Collection

The scope of sources of collections of judgments in *victim versus perpetrator* actions is as broad as the ingenuity of those who are assisting the victims in recovering appropriate amounts of money in satisfaction of their judgments. The examples which follow serve as a sort of ***check list*** of possible sources of assets for Service Providers to explore with their victim/clients. The examples may even inspire other approaches toward turning judgments into meaningful resources for making victims whole again.

DARK SIDE PERPETRATORS

Dark side criminals may appear to be normal, even highly respected, members of their communities. Their *salt of the earth* facade masks violence and criminality which they reveal only to their victims. Their crimes are, for the most part, the ***Three C's*** crimes described above:

- **Concealed**: as in child sexual molestations;
- **Concealable**: as in domestic abuse; and
- **Covered-up**: typified by clean-cut campus rapists.

These criminals' victims usually suffer some physical injury. However, many of them are even more likely to suffer extreme emotional trauma that can take years to remedy. ***Dark side*** perpetrators **are presumptively collectable**, and should continue

to be so presumed until investigation reveals that they really do not have assets, insurance, or any expectations of assets.

Service Providers should direct their discussions about collectability with **Dark Side** victims into three major channels:

- **Current assets and expectancies** should be assessed. These include those resources that perpetrators can readily **put their hands on**; *i.e.*, cash, wages, salaries, annuities, securities, real estate and so on, together with whatever **expectancies** perpetrators may have, such as inheritances, interests in estates, pensions, annuities, or even financial intervention by a perpetrator's family to avoid prosecution or publicity.

- **Insurance.** It is likely that most *dark side* perpetrators will have some kind of coverage: homeowners', automobile, professional, general liability, etc. It is true that many violent crimes involve intentional acts, and that insurance carriers try their best to exclude intentional acts from coverage. Nevertheless, there is an emerging ***groundswell*** of legal doctrine which avoids these exclusions and enables victims to recover from the insurance carriers' *deep pockets*. These kinds of cases will be discussed in detail later in the *Manual*.

- Finally, Service Providers should ascertain information to indicate whether defendants might be willing to settle, or **buy out** of, a criminal prosecution or civil suit in order to maintain their public image, jobs, professional reputations, or standing in the community. If settlements appear to be possible, protracted civil trials with the attendant trauma to their victims can be avoided. On the other hand, it is also useful for attorneys to know whether perpetrators might take the opposite approach and fight their victims' accusations -- criminal and civil -- at every turn. This kind of

information, based on victims' knowledge of perpetrators' various personalities, is valuable to attorneys' long-range strategy decisions.

This information, of course, depends on the nature and duration of victims' relationships with perpetrators. Molested children or battered wives who have lived with the violators for long periods of time may be able to anticipate perpetrators' reactions more accurately than, say, the victim of a ***date rape*** on campus. Still, in this area particularly, the quality of background information obtained will often have a major impact on the success of victims' cases.

EXAMPLES OF COLLECTABILITY INVOLVING *DARK SIDE* PERPETRATORS

✓ *An 18-year-old San Jose, California girl sued her stepfather alleging that he molested her as a child. The perpetrator settled for $210,000 -- his entire net worth. He was left with his car, tools, clothing and pension. The victim said that she still suffered emotional damages. The settlement was obtained despite the fact that statute of limitations for criminal sexual assault had expired.*[8]

✓ *An actress in New York sued the president of a record company for $18 million; he had been found guilty of related criminal charges. The victim alleged that the perpetrator lured her to his apartment where he sexually assaulted and degraded her.*[9]

✓ *A rape victim, known as "Jane Doe" for purposes of anonymity, sued the man who had been convicted of assaulting her. A jury awarded $200,000, and this award was upheld by the Michigan Court of Appeals. The victim's attorney said it is likely that she would collect because the perpetrator and his wife owned a successful sporting goods store in downtown Ann Arbor.*[10]

PART TIME CRIMINALS

The article *Jobless and Criminal* by William Raspberry, cited previously, advanced the theory that many perpetrators turn to crime in order to **supplement** their otherwise legitimate incomes. This contention is not far-fetched. Being a **professional** and devoting **all** of one's energies to villainous enterprises (burglary, narcotics, loan-sharking, hijacking, etc.) is difficult, time-consuming and dangerous. Not everyone is up to the rigors of this kind of life. Thus, for many perpetrators, it is far easier to engage in regular non-criminal employment most of the time, preying on innocent targets of opportunity only when they arise, and it is reasonably safe to do so.

If persons who assault victim/plaintiffs have regular jobs, wages can be garnished after judgments have been entered against them. Additionally, perpetrators may be motivated to settle matters with their victims in order to retain their legitimate jobs or to avoid being saddled with criminal records when seeking employment. If victims have even a nodding acquaintance with the perpetrators of crimes against them, **or** with others who may know those perpetrators, (for example, people from the same neighborhood), it may be easy enough to find out whether and where the latter are employed. Service Providers should gather as much of this information as possible when discussing crimes and perpetrators with victims.

PROFESSIONAL CRIMINALS

These perpetrators are somewhat the opposite of the ***Part-Time*** Criminals just discussed. The former are often characterized by the sporadic violence of their activities; ***professional*** criminals, on

the other hand, pride themselves on the fact that they **personally** do not resort to violence in the course of their illegal enterprises. They hire others to do that sort of thing for them.

Professional criminals commit crimes for a living. They include organized crime overlords, burglary and hijacking ringleaders, vice entrepreneurs, large volume drug dealers, etc. These criminals acquire extensive resources from their criminal activities and often conceal them behind a facade of legitimate business operations. They are, of course, adept at concealing assets -- probably more from fear of the tax collectors than from any real fear of *victim versus perpetrator* lawsuits. These criminals like to think of themselves as ***above*** the kinds of violence that their operations engender; however this does not mean for a moment that they are not violent people themselves. Almost by definition, they are arrogant, evil-tempered and cruel, with no consideration whatsoever for the feelings of others. Without these attributes, they probably wouldn't have gotten as far as they have in the criminal milieu.

Professional criminals don't like to be crossed. A *date* who does not submit to sexual advances may be casually raped. A fender-bender automobile accident may escalate into a beating of the other driver. These perpetrators are, as a rule, eminently collectable insofar as assets are concerned; however, their capacities as ***professional*** criminals may work against victims because they are often expert at the art of intimidation. On the other hand, because their illicit activities are so shadowy, the publicity associated with criminal or civil complaints may be the last thing in the world that they want, and they may be willing to settle with their victims in order to avoid the limelight that litigation might force on them.

Reader's Notes

EXAMPLES OF COLLECTABILITY INVOLVING *PROFESSIONAL* CRIMINALS

✓ *A 19-year-old Florida woman was abducted and raped by a man who was convicted of the crime. She sued him for assault and battery. When he was arrested, the rapist was in possession of $115,000 worth of uncut heroin. In addition, $39,000 cash was seized from him; it was later returned to him on the order of a judge.*[11]

INSURED PERPETRATORS

If it can be established that the criminals involved in victims' lawsuits are insured -- through homeowner's, automobile, professional liability, general liability or other policies -- **and** that their policies provide coverage for the acts alleged by their victims, then collectability may cease to be a major problem because the ***deep pocket*** of the insurance carrier is available to pay judgments.

Most liability policies exclude from coverage injuries that are expected or intended by the insured; these exclusions usually encompass the kinds of criminal violations that lead to lawsuits in the first place. A number of plaintiff-oriented legal doctrines have developed, however, whereby courts have ruled that such ***expected/intended*** injuries exclusions do not apply to the facts of a given case. For example, a majority of courts hold that if the assailants are insane or are of unsound mind, they may not have been capable of forming the intent necessary to ***trigger*** their policies' exclusions of coverage. Similarly, if assailants act in self-defense, or under a reasonable mistake of fact, some courts have held that there is no criminal intent and the exclusion does

not apply. Additionally, intentional act exclusions do not apply to **negligent** acts. Thus, the victim/plaintiff in a tavern assault case might allege not only the intentional tort of assault and battery, but also that the assailant was negligent in allowing himself to get so drunk that he started a fight.

A cardinal principle of insurance law in this area is that, if the plaintiff alleges **any facts** that might bring the action under the coverage of the policy, then the insurer must **defend** the insured against the allegations contained in the lawsuit.[12] The question of whether the carrier must actually pay damages usually depends on the outcome of the liability issue: did the defendant do the act complained of? This may be a question for the jury. Since juries may not be overly sympathetic to insurance carriers, plaintiffs may also prevail on liability questions.

The ***duty to defend*** doctrine may also result in offers to settle out of court simply because insurance carriers do not want the trouble and expense of defending lawsuits against perpetrators. Additionally, if the facts of the crime are particularly horrifying -- as is often the case in *victim versus perpetrator* lawsuits -- insurers may settle to avoid the negative publicity associated with such crimes.

The key role for Service Providers in situations where there is even a remote possibility of perpetrators being insured, is to elicit from victims every bit of information that they have to offer about the insurance coverage. At the same time, Service Providers should develop complete and detailed information about the backgrounds of the perpetrators, and of their crimes, in order to furnish attorneys with the ***ammunition*** necessary to defeat policy exclusions, and to bring the perpetrators' criminal acts within the coverage of the policies involved. This entire subject will be covered in detail below.

EXAMPLES OF COLLECTABILITY IN CASES INVOLVING INSURED PERPETRATORS.

✓ *A jury in Dane County, Wisconsin, ordered a convicted rapist* ***and his insurance carrier*** *to pay $90,000 to the victim; the jury held the carrier liable despite the intentional nature of the crime.*[13]

✓ *The attorney for a woman in Ann Arbor, Michigan, who was suing the man convicted in the hit-and-run death of her son, told a reporter that the existence of automobile insurance on the car that the killer was driving was the only reason that he considered filing the lawsuit.*[14]

✓ *A couple in Bellevue, Illinois, sued the homeowners' insurance carrier of the parents of two teenagers who burned their house during a burglary; a jury awarded $288,000 against the carrier.*[15]

✓ *In 1978, San Francisco City Supervisor Dan White shot and killed that City's mayor George Moscone and fellow Supervisor Harvey Milk. In 1981, White's homeowners' carrier settled with Moscone's widow for $80,000. White had been tried for murder, but was convicted of the lesser offense of voluntary manslaughter, based on his* ***Twinkie Defense****, that is, his mind was affected by eating junk food.*[16]

PERPETRATORS AS PLAINTIFFS

No matter how vile the perpetrators of violent crimes appear to be, they are still as vulnerable to physical trauma and emotional distress as were their victims. Thus, when perpetrators are themselves injured, they may very well become plaintiffs in their own civil actions: automobile accidents, medical malpractice, defamation, and other personal injury claims. They may even

become victims of violent crimes themselves and sue those who did to them what they did to others.

If these situations arise, there is no reason why their initial victims should not be able to seize upon the newly-enhanced financial worth of perpetrators in order to satisfy their earlier judgments against those who injured them.

Prisoners, in particular, are extremely litigious people. They have a lot of time on their hands, and they enjoy the fruits of the efforts of well-meaning individuals who have discovered prisoners as a ***cause***, and who work to create and establish novel ***rights*** for the objects of their concern. Prisoners often sue law enforcement and correctional officers, other prisoners, and even their victims. On occasion, they win very large judgments. The rationale that this bounty should be shared with their victims is particularly strong in these cases, because, the mere **fact** of imprisonment will usually mean that the injury that prisoner-turned-plaintiffs inflicted on their victims was serious indeed.

The source of collection in this instance is, of course, impossible to predict. Two contingencies, over which the original victims have no control, must occur:

1) The original perpetrators must have been injured; and

2) They must themselves have received and collected judgments.

Service Providers should be aware that the possibility of this source of collection might serve to reinforce the resolve of victims who are considering litigation against perpetrators.

The contention that it is ***unfair*** for the initial victims/plaintiffs to capitalize on the ***suffering*** of perpetrators who are now themselves plaintiffs, is nonsense. The initial perpetrators have no one but themselves to blame for having to repay their original victims for the harm they caused.

EXAMPLES OF COLLECTION SOURCES IN PERPETRATORS AS PLAINTIFF SITUATIONS

✓ *A convicted child rapist serving a life sentence in Ohio received $12,011 from the state crime victim compensation fund for injuries to his legs sustained in an unrelated altercation with a neighbor.*[17]

✓ *The Contact Center, Inc., which publishes a monthly corrections journal reported that in the two-year period 1983-1984, state and federal inmates were awarded $2,713,215 in monetary damages from state officers and agencies, $2,317,392 in lawsuits, and $113,196 in settlements.*[18]

The following list of newspaper and magazine headlines reports judgments won by present and former prisoners against various governmental authorities:

INMATE AWARDED $ 1 MILLION; WRONGFUL JAILING SUIT SETTLED

Corrections Digest, October 14, 1987, p. 5.

TWO INMATES AWARDED $107,000 AGAINST CITY OF ALBUQUERQUE FOR SEPARATE INCIDENTS OF SEXUAL ASSAULT, BROKEN JAW

AELE Law Enforcement Legal Defense Manual, April 1980, p. 6.

EX-JAILHOUSE LAWYER WINS $90,000 SUIT AGAINST GUARDS
Corrections Digest, September 12, 1984, p. 2, col. 2.

VIRGINIA SETTLES LAWSUITS DEALING WITH TAPPING OF PHONES ON MECKLENBERG'S DEATH ROW
Corrections Digest, December 18, 1985, p. 6, col. 1.
(Amount of Settlement: $51,000.)

7,000 PRINCE WILLIAM PRISONERS IN OLD JAIL AWARDED $210,000
P. Smith, *Washington Post*, June 17, 1982, p. B8, col. 1.

VA. PRISONS SUED FOR $2 MILLION; ACLU ATTACKS MEDICAL CARE
G. Frankel, *Washington Post*, April 21, 1980, p. C1, col. 4.

***WINDFALL* ASSETS**

This class of sources of collection involves somewhat unusual situations whereby perpetrators come into sums of money that no one could have anticipated. Examples of "windfalls" include cases in which violent criminals:

- Win lotteries;
- Receive sudden, unexpected inheritances;
- Invent something of real monetary value; and
- Experience similar "bolts from the blue".

These, and other unanticipated sources of income prove the value of securing easily-renewable judgments from perpetrators who may initially appear to be virtually uncollectable. Service Providers should emphasize this possibility when victims are considering civil litigation.

EXAMPLES OF SOURCES OF COLLECTION IN *WINDFALL* SITUATIONS

- ✓ *Roy Wilson received a one-year sentence on his guilty plea of felony sexual assault against a church school worker in Ventura, California. He then won $5.86 million in a California lottery. His victim's lawsuit against him was settled when he agreed to pay her $990,000 for counseling, lost wages and emotional pain and suffering.*[19]

- ✓ *Luck seems to follow California criminals. A convicted burglar in Newport Beach won $50,000 in a lottery game. A judge released him from jail long enough to collect his winnings. The convict said that henceforth he would stay out of trouble.*[20]

- ✓ *In 1986 an Oklahoma murder suspect fled to Oregon where he was eventually arrested. While in jail awaiting extradition, he turned up with a winning lottery ticket in a local TV game.*[21]

- ✓ *A man serving an 8 to 20-year sentence in a Pennsylvania prison for the murder of a young woman won a $12,000 Dodge automobile in a promotional drawing. The victims' parents agreed to accept the car in settlement of their $350,000 civil suit against the killer.*[22]

FAMILY WEALTH

Occasions may arise in which perpetrators, while not exceptionally well off at the time that litigation is being considered, may have some future expectation of receiving money because they come

from wealthy families. Wealthy people often hire attorneys and accountants to keep their money out of ***other people's*** (including victims') hands. However, they may also make financial provisions for their children, grandchildren, nieces, nephews, etc. while the latter are still very young. Should these fortunate beneficiaries mature into a life of crime, they may nonetheless attain quite large sums of money when they reach a specific age, or upon the deaths of their relatives.

When victims have maintained long-standing relationships with the individuals who have injured them, they may know a great deal about perpetrators' family backgrounds, and about the possibility of future income from inheritances and future sources. The same victims may also be more aware than they realize about family relationships that might lead to settlements in order to protect the family's ***good names***, or to protect ne'er-do-well relatives from the consequences of their crimes. This kind of information is extremely important to attorneys in evaluating the potential of victims' cases.

EXAMPLES OF COLLECTION SOURCES IN *FAMILY WEALTH* SITUATIONS

✓ A certain Cornelius F. Florman Jr. was ordered by a Henrico County, Virginia, Circuit Court jury to pay $8.5 million to a woman who sued him civilly for raping her. Florman had been acquitted of the criminal rape charge but because of the lesser burdens of proof in civil cases, the civil verdict was sustained. This case received considerable interest because Florman is the great-grandson of the founder of the Richmond-based Reynolds Metals, Inc. Counsel for plaintiff stated that they were investigating the matter of collection from Florman.[23]

Reader's Notes

EXAMPLES OF COLLECTION SOURCES IN *FAMILY WEALTH* SITUATIONS

✓ A prisoner in Arkansas inherited a large sum of money while in jail. In a suit by the state to collect from the inmate the costs of confining him, the court held that it could seize only the amount currently in the prisoner's account at the correctional facility. Presumably, the balance of the inheritance would be the prisoner's own money, and could be used to satisfy his obligations, including any judgments that his victim might have been awarded.[24]

NOTORIETY FOR PROFIT LAWS

Notoriety-for-profit, or ***Son of Sam*** laws, are based on the principle that criminals should not profit from literary, media, or other exploitation of their crimes. In practice, ***Notoriety for Profit*** laws require that any funds, royalties or rights that would be payable to criminals for their *stories* must be placed in escrow pending the resolution of any claims against the perpetrators of the crimes by their victims.

The popular name for such notoriety-for-profit legislation derives from the crimes of David Berkowitz, a deranged multiple murderer in New York City who claimed that he was driven to kill by a certain dog named ***Son of Sam***. After his capture, it appeared that Berkowitz might profit from books and media exploitation. The ensuing public outrage led New York legislators to pass the nation's first ***Notoriety for Profit*** law in 1977. The idea caught on across the nation. Currently, over forty states and the federal government have enacted some form of ***Notoriety for Profit*** laws.

Service Providers should be able to determine, from the outset, if the crimes committed might command the kind of visibility and notoriety that calls for ***Notoriety for Profit*** treatment. In such instances it is unlikely that victims or their Service Providers will encounter any difficulty in finding attorneys who are interested in pursuing the victims' legal rights and remedies.[25]

FORFEITURES; OTHER MEANS OF COLLECTION

Currently, some doctrines, formerly considered primarily within the province of the **criminal** law, have been applied to assist victims in collecting **civil** judgments from perpetrators. One example is the use of the criminal law's sentencing process as a vehicle for ordering restitution to victims of violent crimes.

EXAMPLES OF COLLECTION SOURCES IN THIS AREA

✓ *Solange Landau, a New York investor was defrauded by a securities firm. She filed a civil suit against the firm and its members, one of whom had pled guilty to securities law violations in the scheme to defraud her. The United States Court of Appeals for the Second Circuit held that $350,000 bail money posted by the defendant could be held in custody by the trial court until the civil matter was resolved. If money damages were assessed, the victim would be assured that the defendant would be able to pay the judgment against him. The court noted: "we are not comfortable with the notion of indicted defendants using funds that may be the fruits of their crimes as bail while the alleged victims are denied provisional relief that might otherwise be available to help redress their damages".*

Forfeitures -- the taking of property of criminal wrongdoers by the state -- was historically a function of the criminal law. However, New York and other states now allow receipts from the sale of property, used by convicted criminals in committing their crimes, to recompense victims of those crimes.

Similarly, a United States Court of Appeals has ruled that bail money held by the court in a criminal case may be impounded and held pending the outcome of a civil case filed by the victim of that crime. If the victim wins, that money could be applied to the judgment. Other courts have ordered or upheld **pre-judgment seizures** of defendants' assets pending the outcome of civil cases.

Legal issues involved in forfeiture and seizure situations are technical and complex. Service Providers are well-placed to learn from victims about bail requirements or any other collectability-related conditions imposed on perpetrators. Any information of this nature should be relayed to attorneys as soon as possible, so that they are able to initiate procedures to impound bail money or other assets that are proper objects for seizure.

CONCLUSION

If Service Providers approach collectability issues with the following principles in mind, this Section will have accomplished its purpose:

- Perpetrators, as a class, are more collectable than most people imagine;
- Victims' civil actions should never be rejected out of hand without **some** prior investigations into the perpetrators' financial resources; and

Reader's Notes

- Service Providers are probably better situated than anyone in the system to develop from victims financial resource information about perpetrators that may make the difference in obtaining meaningful civil recovery for victims.

SECTION III ENDNOTES

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3. Warren Brookes, "The Myth That Poverty Causes Crime", *Human Events.*

4. A recent, seven-day series in *USA Today* documents the shocking crime situation on college campuses nationwide. **See:** Denise Kalette, Pat Ordovensky, et al. "Dangerous Lessons", 7 Part Series on Campus Crime, *USA Today*, November 29 - December 7, 1990, p. 1. ff each day.

5. Andy Pasztor, "Victims of Violent Crimes Increasingly Sue For Damages--and Many Win Big Awards", *Wall Street Journal*, December 5, 1986, p. 25.

6. Carol Angel, "Developing 'Deep Pockets' Law Aids Victims of Crime", *Los Angeles Daily Journal*, March 31, 1988 p. 1.

7. Eric Freedman,"Crime Victims Fight Attackers with Lawsuits for Damages", *Detroit News*, March 1, 1988, p. 1, col. 2.

8. "Molested, Wins 210 G", *New York Daily News*, January 10, 1984.

9. Frank Fase, "She Sues Her Rapist for 18 M", *New York Daily News*, February 8, 1983.

10. Eric Freedman, "Rapist Must Pay Victim $200,000", *Detroit News*, January 11, 1990, p. 1, col. 6.

11. Susan Denley, "Rape Victim Files Against Alleged Rapist", *St. Petersberg Times*, August 4, 1977.

12. ***Gray v. Zurich Insurance Co.***, 65 Cal. 2d 623 (Cal. 1966).

13. Eric Freedman, "Crime Victims Fight Attackers with Lawsuits for Damages", *Detroit News*, p. 1, at 2B.

14. **Ibid.**

15. "Couple Wins $288,000 from Burglars", *Chicago Daily Journal*, October 28, 1986, p. 1, col. 1.

16. Lewis Leader, "He Wants Moscene to Get Full Settlement.", *San Francisco Examiner and Chronicle*, April 26, 1981, p. B1.

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19. Jeff Sturgeon, "Lottery Winner Settles Sex Suit, Will Pay Victim", *Ventura County (CA) Star * Free Press*, July 7, 1990.

20. "Inmate Wins California Lottery", *Corrections Digest*, January 15, 1986, p. 4.

21. "Slaying Suspect Holds Hot Ticket", *Norfolk Virginian-Pilot*, February 22, 1988, p A.6., col. 1.

22. "Parents Take Car, Drop Suit", *USA Today*, June 4, 1984.

23. "Judge Upholds Jury Verdict of $8.5 Million Rape Award", 4 *Virginia Lawyers Weekly* 799, August 2, 1990.

24. *Burns v. State*, 793 S.W. 2d 779 (Ark. 1990).

25. **See, generally**: Paul S. Hudson, *The Crime Victim and Criminal Justice System: Time For a Change*, 11 Pepperdine L. Rev. 23, "Statutes That Prevent Enrichment of Criminals at the Expense of Crime Victims" at p. 47; Carrington and Rapp, *Victims' Rights*, Section 5.02(2)(d).

SECTION IV. MAKING THE CIVIL LAW WORK FOR VICTIMS

Chapter 1. Introduction

This section describes and discusses the substantive legal principles involved in *victim versus perpetrator* litigation. Its purpose is to provide Service Providers with enough basic knowledge about the pertinent legal and factual issues that they are able to effectively assist violent crime victims in enforcing their civil remedies against those who have injured them.

Service Providers can, and should, function as far more than *mere conduits* of information between victims and attorneys. By the nature of their jobs, they are uniquely positioned and qualified:

(1) To assess victims' **factual** situations in light of the basic **legal** principles that have the greatest impact on successful civil litigation; and

(2) To assist victims in presenting their cases to attorneys in a manner best calculated to obtain qualified counsel for litigation against perpetrators.

Instruction herein is case-specific and highly selective. Practical considerations that directly relate to successful litigation are emphasized over legal theory. The format for each of the topics discussed consists of:

(1) A brief **synopsis** of the law involved;

(2) **Examples** of the application of the law and the facts of victims' civil actions taken from current cases decided by trial and appellate courts; and

(3) **Notes and suggestions** for Service Providers that will assist them in eliciting and evaluating the kinds of information that convince attorneys of the potential worth of victims' cases.

Legal citations to the cases used in the textual examples, along with citations to other pertinent cases and authorities, are found in endnotes following each sub-section. These can be shared with attorneys to whom victims' cases are presented, as a kind of legal ***back up*** to Service Providers' evaluations.

The extensive use of examples taken from actual cases is the single most important aspect of the *Manual's* presentation. Case examples which illustrate how law and facts combine to produce a given result are probably the **only** way that abstract legal principles can be made interesting. The success of **lawyer shows**, from *Perry Mason* to *L.A Law,* lies in the fact that they ***tell a story***. The examples presented here try to do the same, albeit in less dramatic fashion. Nothing in this *Manual* is presented in a theoretical vacuum; everything written is designed to stimulate and assist the efforts of Service Providers on behalf of victims' legal rights.

For the most part, the case examples involve instances in which victims/plaintiffs prevailed. This is intended to keep the presentation ***upbeat*** in order to demonstrate to the *Manual*'s primary readers -- Service Providers -- and to its ultimate beneficiaries -- victims and their attorneys -- that *victim versus perpetrator* litigation is an extremely viable concept.

Additionally, the emphasis on cases in which victims won illustrates legal strategies and initiatives that have been successfully used by victims' attorneys in the past. These cases will assist Service Providers in recognizing those factual scenarios with the

most potential for success. This, in turn, will suggest what kinds of questions to ask victims in order to maximize that potential.

On the other hand, situations in which victims/plaintiffs did **not** prevail are useful because they alert Service Providers and attorneys to ***pitfalls*** that may arise in certain classes of cases. Examples of ***losing*** cases may assist attorneys in anticipating possible defenses raised by perpetrators, and illustrate for Service Providers the kinds of factual information needed to overcome those defenses.

Finally, the sheer number of successful cases illustrates for readers the numerous means by which civil law can be made to work for victims, adding a whole new dimension to Service Providers' efforts on behalf of their clients.

The importance of the role of Service Providers in this major initiative for successful litigation against perpetrators cannot be overstated. Violent crime victims and their survivors are extraordinarily vulnerable, physically and emotionally. In addition to bodily injuries inflicted on them, they may be confused and disoriented by shock and grief caused by the crimes. Almost invariably, victims are totally unsophisticated about matters such as the enforcement of their legal rights and remedies in both the criminal **and** civil justice systems. **As a result, Service Providers are often the only ones who are in a position to do for victims what they cannot do for themselves: make the law work for them.**

Chapter 2. Direct Cases

The term ***Direct Cases*** describes Victim versus Perpetrator litigation in a general sense, as distinguished from the more specific issues covered in the succeeding chapters: **Insured Perpetrators**, focusing mainly on collectability of perpetrators' insurers, and **Special Classes of Victims**, which discusses legal issues involved in areas such as child abuse and women as victims. Discussion of direct cases presents an overview of the issues that Service Providers are most likely to encounter, and delineates the major legal and factual aspects or the many causes of action available to victims of violent crimes. A brief introductory survey of direct cases places these issues in their overall perspectives:

- **Wrongful Death** - The **crime** involved is homicide: the unlawful killing of one human being by another. The **civil action** for wrongful death arises when defendants cause the deaths of others through their intentional acts, omissions or negligence. This *Manual* is concerned primarily with first-party actions in which the civil defendants **intentionally** killed their victims.

- **Assault and Battery** - These crimes include any and all violent offenses against a person, short of murder: rape, aggravated assault, abduction, etc. In civil law terminology, **battery** is any intentional, offensive, non-consensual touching, ranging from a brutal beating to an overenthusiastic pat on the back. Here, we deal primarily with violent felonies causing serious bodily injury. An **assault** is defined legally as putting one **in fear of** a battery through threats, gestures, pointing a pistol, and similar acts, although through common usage over the years the two terms are now nearly synonymous.

- ***Intentional*** **Infliction of Emotional Distress** - These cases are those in which perpetrators have willfully, and with malice, set out to injure the feelings and sensibilities of their victims in a manner so outrageous that the behavior goes beyond normal standards of decency. Such cases usually arise in connection with violent crimes against persons, the kind which comprise the majority of cases that the *Manual* describes. Suits for **Negligent Infliction of Emotional Distress** are recognized by some, but not all, courts when perpetrators act with such willful and wanton disregard of the consequences of their actions that they should also be held responsible for the emotional injury caused. A child who witnessed her parent being brutally assaulted **might** have a cause of action in Negligent Infliction, depending on the law of the jurisdiction in question.

The foregoing torts -- **Wrongful Death, Assault and Battery,** and **Infliction of Emotional Distress** -- are all based on the acts or omissions of **individual perpetrators.** Actions for Civil Conspiracy and Aiding and Abetting are derived from concepts of criminal conspiracy, and cover situations in which criminal acts committed by one perpetrator are materially assisted by another. The latter parties -- **civil conspirators** or **abettors** -- can be held liable even though they did not physically participate in the commission of the crime. For example, a professional burglar's paramour, who did not go on *jobs*, but who handled the proceeds of his crimes, was held liable for civil conspiracy when the thief murdered his victim during a burglary.

Other causes of action against persons who don't actually participate in the crime involve **Negligent Entrustment** and **Parental Liability.** In the former class of cases, perpetrators are the direct actors but others who have negligently entrusted them with dangerous instrumentalities (such as firearms and automobiles) can also be held liable for doing so. In some

jurisdictions, the law creates a **Parental Liability** cause of action allowing recovery from parents for crimes committed by their children. The cause of action is based on the theory that their parents should have, but did not, control them.

Defenses. The unique nature of this *Manual* lies in the fact that it has been written not to teach **law** to Service Providers, but rather to teach them how to **evaluate** situations **against a background of the law.** Obviously, knowledge of **defenses** that perpetrators might raise to defeat victims' actions is an integral part of the evaluation process.

Victims who describe for Service Providers the facts and circumstances of the crimes against them may appear to have stated absolutely ***iron clad*** civil cases against perpetrators, only to run afoul of **complete** defenses, such as self-defense or statutes of limitations; or of **partial** defenses (that may also reduce amounts of damages) such as contributory negligence where the plaintiffs' own negligence helped to cause their injuries or assumption of risk where plaintiffs voluntarily enter into situations that they know to be dangerous. Service Providers who are eliciting facts and evaluating victims' cases for presentation to attorneys will better serve both victims and lawyers if they are alert for facts that may give rise to such defenses to victims' allegations. Knowledge of these defenses will enable Service Providers to anticipate possible **pitfalls**, and to acquire from victims specific information that attorneys can use to counter the defenses.

The final topic in this overview is **Damages.** Victims' attorneys usually possess finely-honed knowledge (and instincts) about kinds and amounts of damages to request on behalf of their clients. Their legal decisions about these matters, however, **must** be made against a background of the **facts** of each case; hence, Service Providers are **most** strategically placed to furnish critically

important information, relative to damages, based upon their objective evaluations. Indeed, Service Providers often are in positions to make evaluations similar to those that **jurors** will later make about the actual extent of victims' physical and emotional sufferings.

The relationships of Service Providers to victims may also be invaluable to attorneys in determining the **types** of damages to request. For example, if punitive damages are a possibility, Service Providers -- who talk to victims reasonably contemporaneously with the commission of crimes -- may acquire information about the cruelty, willfulness, or malice of the perpetrators' activities that victims might forget with the passage of time, deny or block out of their memories, or simply be unable to articulate later to attorneys.

The issue of damages is a generalized one, common to almost all *victim versus perpetrator* actions, and the issue is a recurrent theme throughout the *Manual.* Service Providers do not, of course, need this *Manual* to instruct them about how to measure human grief and suffering; these are matters about which they are already experts. The *Manual* merely serves to ***translate*** these emotions into **legal** concepts involved in damage issues.

From the foregoing discussion, it is apparent that there is much to learn. However, Service Providers probably know a lot more about the subject matter of this Manual than they realize, simply because of the nature of the work that they are already doing. An experienced sex crime crisis counselor, for example, does not need a semester of tort law to know that rape is a battery, or that a consistent pattern of threats, verbal harassment and stalking of a former girlfriend constitutes intentional infliction of emotional distress.

As the *Manual's* instruction unfolds, Service Providers will discover that each topic is geared to providing a basic legal ***framework*** to which they can add their common sense evaluations of relevant facts and circumstances of the victims' cases for the general benefit of both victims and their attorneys.

WRONGFUL DEATH

Wrongful death actions are filed by the survivors, or the estates, of homicide victims against those who caused the death through their intentional or negligent acts. All states have wrongful death statutes which allow recovery for pecuniary loss that survivors suffered, or will suffer, as a result of the death. ***Pecuniary loss*** **generally** includes loss of the victims' companionship, support, services and present and future contributions. In some jurisdictions, victims' estates can recover for conscious pain and suffering before death.

The actual litigation of wrongful death cases follows the procedural pattern described above in the *Overview Section*. Liability for the death must be proven -- that is, did the defendant kill the deceased victim without excuse or justification? If this is affirmatively established, then damages must be proven. The monetary stakes are usually higher in wrongful death cases than in others and, almost invariably, emotions of parties on both sides of the issue run at a higher pitch than in, say, assault and battery cases of a less severe nature.

Since the actual victims in wrongful death cases are unavailable, Service Providers will of course be dealing with survivors: family, friends, etc. Their efforts to elicit facts about the crime will of necessity be quite limited, especially in those situations where the victims have been murdered by strangers. Service Providers **may** get a chance to talk to witnesses, but this is usually

the function of police officers and prosecutors. As a consequence, wrongful death cases are often those in which the law-related assistance of Service Providers will consist principally of evaluating the **impact** of the crimes on the survivors so as to assist attorneys in translating the survivors' losses into legally recoverable damages.

There is, however, a class of wrongful death cases in which Service Providers may be of material assistance to attorneys. This class involves homicides in family or domestic situations where the survivors of victims, with whom Service Providers are counseling, may be witnesses, or even principals, in the cases. These cases constitute a major portion of those that are litigated, and issues involving liability may be less important than those involving such matters as eliciting factual information relevant to determining the proper parties to bring suit, the effects of homicide on inheritance and pending divorce situations, and the consequences of prior criminal proceedings. Probate law involving wills, trusts and estates, and domestic relations law regulating marriage and divorce, often play as large a role as do the more traditional personal injury doctrines.

As a consequence, Service Providers assisting homicide survivors should have a basic knowledge of the **practical** application of the facts to the kinds of legal issues mentioned above. This is particularly true in cases involving prior familial relationships among victims and survivors, because Service Providers, as a part of their counseling function, are able to acquire a great deal of background information that may be useful to the plaintiffs/survivors and their attorneys. Such matters as family feuds, love hate relationships, infidelities, mental conditions of family members, and financial information, may significantly affect survivors' legal positions. In addition to Service Providers' ability to evaluate survivors' grief and emotional trauma for

purposes of establishing damages, the impact on survivors of the loss of victims' companionship and support are also necessary elements of damages to be considered. Service Providers' insights into these losses are also extremely valuable to attorneys.

The following discussion describes some of the pertinent legal and factual issues involved in family-related wrongful death litigation.

Parties: Who Can Sue?

Wrongful Death statutes establish the classifications of persons who have the right to file suit against perpetrators (or others, such as third-party defendants). These statutes also establish the order of priority among those individuals who are proper plaintiffs. Typically, such a ***pecking order*** would be: surviving spouses first, then children, followed by parents, siblings and so on down the line.

Problems arise when the parties who have the primary right to sue are also the murderers: suspected, accused or convicted. They can't very well sue themselves, so the courts step in to resolve the situation.

A basic principle of the *Common Law* called the doctrine of ***Unjust Enrichment*** provides that persons -- here murderers -- shall not be permitted to profit from their own wrongdoing, nor are they allowed to shelter themselves behind technical legal doctrines in order to avoid the consequences of their criminal acts. As a consequence, courts do not hesitate to ***do the right thing***, and intervene whenever inflexible applications of the law would prevent intra-family killers from being held accountable in wrongful death cases.

EXAMPLE # 1[1]

Sometimes wrongful death statutes simply ignore the possibility that one family member might murder another. A Wisconsin husband fatally shot his wife. The state statute said that **only** a surviving spouse -- in this case the killer himself -- could sue for wrongful death. The victim's children by a prior marriage sued the husband, who argued that the statute barred their action because he couldn't sue himself and, under the statute, no one else could sue him. The Wisconsin Supreme Court made short work of that argument, holding that the legislature did not **intend** to insulate spouse murderers from liability for their crimes and that the children had a right to sue the husband.

EXAMPLE # 2[2]

For years, Virginia law clung to a legal doctrine that spouses could never sue one another for assaults committed during marriage; each was immune from liability to the other. A husband murdered his wife, and her parents sued him. The husband argued that he was immune from liability for the assault that had caused his wife's death. The Virginia Supreme Court held that the doctrine of ***interspousal immunity*** was originally created to **save** marriages, and that it was pretty hard to ***save*** a marriage that had been ended by a murder. The parents were allowed to proceed against the husband.

NOTES FOR SERVICE PROVIDERS

When the law becomes as technical as is illustrated by these two examples, the best thing that Service Providers can do for the survivors is to emphasize to them just how tricky matters can become in such situations and advise them to consult counsel as soon as possible.

Unjust Enrichment: Who can Inherit?

Just as the law does not allow legal technicalities to bar homicide survivors from **suing** perpetrators for wrongful death, so does it prevent murderers from **inheriting** from their victims. The doctrine of ***unjust enrichment***, holding that one cannot profit from his illegal acts, applies to these situations. (This is also the case when beneficiaries murder to collect on insurance policies.)

The ***unjust enrichment*** doctrine is enforced either by ***Slayer's Statutes***, in which the doctrine has been formally enacted into law[3], or by ***Slayer's Rules***, created by the courts to prevent murderers from profiting from their crimes.[4] The following examples show how the doctrine works in practice.[5]

EXAMPLE # 3[6]

A husband murdered his wife and then hung himself. All property that the husband would have inherited from the wife, had he not killed her, became a part of the **wife's** estate in order to prevent unjust enrichment of the husband's estate. The law ***presumed*** that the husband died simultaneously with the wife to prevent his inheriting from her.

EXAMPLE # 4[7]

A husband who murdered his wife sued to become the administrator of her estate. The court rejected this claim because he had been convicted of her murder.

NOTES FOR SERVICE PROVIDERS

Greed is so often the inducement for murder in cases such as these. When interviewing survivors, Service Providers should be alert to any information that might help to prove the motive of

murder-for-gain such as the killers' financial condition, lifestyle and spending habits. Additionally, any information about prior attempts on victims' lives, or suspicious events that **might** have constituted attempts, are extremely useful to attorneys representing the survivors.

Effect of Criminal Proceedings

It has been pointed out that acquittal in a criminal case will not bar a civil action for the same crime because the plaintiff's burden of proof in a civil case -- a ***preponderance***, or 51% of the evidence -- is so much lower than the proof-beyond-a-reasonable-doubt burden required to convict in a criminal case. It is also the view of a majority of American courts that the acquittal of a person charged with murder does not bar a subsequent action for wrongful death.

EXAMPLE # 5[8]

A man suffering schizophrenic delusions murdered his father-in-law but was acquitted by reason of insanity. The Connecticut Supreme Court held that, despite the not guilty finding, the survivors of the victim could bring a wrongful death action against the killer.

However, when the issue is not whether a wrongful death **suit** can be brought but, rather, whether the acquitted killer can **inherit** from the victim, a number of courts hold that an **acquittal by reason of insanity** will allow the killer to inherit.

EXAMPLE # 6[9]

A woman stabbed her mother to death and burned the body in her back yard. She was found guilty but insane. In a suit contesting her right to inherit from her mother's estate, the Maryland Supreme Court ruled in her favor. The Court granted full recognition to the State's Slayer's Rule

barring killers from inheriting in most cases; however, in a lengthy and scholarly opinion, it reasoned that an insane person cannot form the necessary **intent** to kill, and since *Slayer's Rules* prevent only **intentional** killers from inheriting, the deranged murderess could share in her mother's estate. (The court cited similar decisions from 16 other state Supreme Courts all holding that Slayer's Rules did not apply in cases in which the killer was insane).

EXAMPLE # 7[10]

A man was tried for the murder of his mother and acquitted. His children sued to prevent him from inheriting her estate. The Nevada Supreme Court held that he could inherit. The applicable Slayer's Statute prohibited only those who had been ***convicted*** of murder from inheriting. The court held that the statute meant exactly what it said: The suspect had not been **convicted**, so he could inherit.

NOTE FOR SERVICE PROVIDERS

Examples 5 and 6 involve questions about the effect of perpetrators' mental conditions on civil lawsuits brought by survivors of homicide victims. Issues involving perpetrators' insanity or other psychological deficiencies have a major impact in such areas of *victim versus perpetrator* litigation as liability, insurance coverage, and inheritance.

As a general legal rule, insanity does not insulate perpetrators from the **civil** consequences of their crimes; however, as Example #6 indicates, sometimes a defendant's inability to form a specific intent, due to alleged mental defects, may protect the defendant from liability. These issues will be discussed as they arise in the substantive instruction that follows.

Cases involving *insanity* issues are often those in which Service Providers are best equipped to assist attorneys by developing information which can lead to evidence of perpetrators' mental

conditions. This information may have a very significant impact on the outcome of cases like those just described.

Effect of Pending Divorce

Husbands and wives who file for divorce do so in the belief that their marriages are at an end; however, the law in most jurisdictions considers them to be married until a final-decree of divorce has been entered by a court. Thus, if one spouse dies during the pendency of divorce, the general rule is that the other spouse inherits as if the marriage was not about to be legally terminated. Suppose, however, one spouse kills the other while divorce is pending. Obviously, if the murderer should inherit, he or she would be ***unjustly enriched.***

Courts apply *Slayer's Rules* to situations involving pending divorces, just as they would to other marital homicides in order to prevent the guilty spouses from profiting from their crimes.

EXAMPLE # 8[11]

While divorce was pending, a husband murdered his wife and then killed himself. The divorce proceedings and the jurisdiction of the divorce court were terminated, the court holding that the rights of the victim's heirs must be decided pursuant to the state's Slayer's Act.

NOTES FOR SERVICE PROVIDERS

Service Providers often counsel battered spouses, primarily wives, many of whom live in mortal fear of their partners. Even so, victims/spouses are often reluctant to take the final steps necessary to obtain a divorce. In such instances, Service Providers should advise their clients of the risk that, if either spouse should die

during marriage **either** through foul play or natural causes, marital property may be disposed of as if they were still married.

Service Providers should also remember that *Slayer's Rules* may not apply if the killer is insane. If a husband should kill his wife and ***beat the rap*** because of an insanity plea, the husband may very well inherit. This information might spur action by battered or abused spouses to end the marriage in order to protect their estates.

In the foregoing cases, the law of wrongful death is primarily concerned with protecting victims' estates from murderous family members. The situations discussed here are those that are peculiar to intra-family wrongful death cases involving primarily the **aftereffects** of the murders in which such doctrines as *unjust enrichment* and *Slayer's Rules* are applied. Many of the topics that follow, for example, **Civil Conspiracy**, **Negligent Entrustment**, **Insurance**, and **Damages**, also involve homicides. We will see, from these cases, how the rather specific situations described here give rise to more generalized wrongful death issues that are common to **all** *victim versus perpetrator* cases.

ASSAULT AND BATTERY

Overview: *Assault* and *Battery*

This *Manual* addresses primarily cases involving violent crimes against persons. ***Assault and battery*** is the *catch-all* category for those crimes (excluding only wrongful death cases). **Criminal** law neatly defines the categories of crimes against persons, ranging from the most serious offenses (such as attempted murder and aggravated assault) through such specific crimes such as robbery,

rape and other sexual assaults, and child molesting, all the way down to simple battery, *i.e.*, a fist fight at the local tavern.

The civil tort of battery (or assault and battery) arises from all of the above crimes, and any others that involve an **intentional, offensive, unprovoked, and non-consensual touching** that is not excused by the law, such as striking another in self defense. The *touching* -- some form of interference with the victim's bodily integrity -- is essential to constitute a battery, although it need not be ***hands-on***. If A strikes B with his fist or a baseball bat he commits a battery. The term also applies when the victim is struck by a thrown rock, a fired bullet or even administered poison in his or her coffee. Almost all of the wrongful death cases discussed will, by definition, **arise out of** batteries: shootings, stabbings, beatings -- with or without weapons -- and so on.

An ***assault***, in the strict legal sense, is defined as ***putting one in fear of a battery***. **Threats** are the bases of assault charges.

EXAMPLE # 9[12]

Randall Schneider and George Middleswart were neighbors, occupying adjoining properties, who had been feuding for years. One day Randall and his two sons were hunting on someone else's property. Middleswart drove up and told them to get the hell off of that property, that they were trespassing. Schneider responded that, since it wasn't Middleswart's property, he had no business telling them to get off. Middleswart got out of his truck with a shotgun. Schneider testified that he was afraid that the other would shoot him. He was leaving when Middleswart called out: "Next time I'll get my gun and I'll blow your ass off."

Schneider sued Middleswart for assault and was awarded $1,500 compensatory, and $20,000 punitive damages by a jury. The Court of Appeals of Iowa upheld the verdict both as to liability and damages. Middleswart's conduct fell within the definition of assault, *an act*

threatening violence to the person of another, coupled with the means, ability and intent to commit the threatened violence. The $20,000 punitive damage award was upheld; the court said that "Middleswart's actions in angrily confronting Schneider with a shotgun at the ready were ***shocking and reprehensible,***" noting that the situation could easily have escalated to bloodshed.[13]

Note that Middleswart did not actually **shoot** Schneider, or even hit him with the gun; if he had done so, that would have constituted a battery. He did, however, put Schneider **in fear of** a battery because he had the **apparent ability** to injure him.

EXAMPLE # 10[14]

A divorced husband, in his car, chased his former wife in her car at high rates of speed, coming within a short distance of her. The court held that the car chase qualified as an ***assault*** for purposes of the former wife's application for an injunction prohibiting further domestic abuse. The husband had the ***apparent ability*** to injure the plaintiff by ramming her car, whether or not he actually carried out the threat.

Factual situations in assault and battery cases are extremely important because, in this ***catch all*** area, the facts often determine the degrees of defendants' liability for injuries caused, and the amounts of damages to be awarded against them.

A recent, well-written case decided by the Illinois Court of Appeals presents a workable overview of the subject and illustrates a number of the more important points that are involved in battery actions. *Hough v. Mooningham* is, in effect, a microcosm of the components of the tort of battery.

EXAMPLE # 11[15]

Jerry Hough, a ***self-described neighborhood busybody***, was resting in his backyard. He told an acquaintance, Leonard Mooningham, a professional building contractor, that the latter's work was reputed to be shoddy and that he *ripped people off*. Mr. Mooningham had been trained in personal combat techniques and knew how to use a shovel. He struck Hough on the head with one blow of a shovel and, when Hough fell to the ground, hit him again on the arm. Although this attack clearly amounted to a battery, Hough filed suit for:

(1) Negligence; and

(2) Willful and wanton misconduct.

(The *negligence* allegation may have been an attempt to collect from Mooningham's insurance policy This will be discussed in the next section, which addresses **Insurance**.) The case was tried without a jury, and the trial court awarded $30,000 **compensatory** damages for negligence and $30,000 **punitive** damages for willful misconduct. The defendant appealed.

- **Negligent Battery**. The appellate court held that, since **intent** to touch another is an absolute requirement for battery, the pleadings and verdicts were inconsistent. There can be no such thing, legally speaking, as a **negligent battery**.[16]

- **Common Sense Approach**. However, the court held that this inconsistency was a matter of **form**, rather than **substance**, and there was no necessity to send the case back just to retry exactly the same factual issues. The court simply consolidated the damages under the second more serious count, willful and wanton misconduct, so that Mr. Hough received a total of $60,000 damages: $30,000 compensation for his actual injuries and $30,000 punitive damages, to teach Mr. Mooningham a lesson and to deter others from hitting people with shovels.

- **Willful and Wanton Misconduct.** Remember that the **facts** are often the critical elements of cases such as this one. Here the court took into account:

  (1) The fact that Hough had made no attempt to strike Mooningham;

  (2) Mooningham's proficiency in personal combat;

  (3) His knowledge of the use of shovels;

  (4) Mooningham's guilty plea to aggravated battery; and

  (5) The fact that the second blow was struck after Hough had been knocked to the ground and was trying to get up.

  Willful and wanton misconduct was amply established here and was utilized by the court to enhance the seriousness of the offense and the amount of damages.

- **Fighting Words.** Mooningham argued, apparently with a straight face, that Hough's words about shoddy construction and ***rip offs*** provoked him to the extent that he **had** to hit his victim and, therefore, Hough was contributorily negligent. The court made short work of this, saying that: ". . . mere words, no matter how abusive, are not sufficient justification for the use of force." [17]

- **Compensatory Damages.** These damages are awarded for actual loss. The court's assessment of compensatory damages in this case illustrates some of the factors that are considered:

  > The record showed that plaintiff was approximately 36 at the time of trial. After defendant attacked him, plaintiff was taken to a hospital emergency room for treatment. His face was swollen for four months, and his arm was bruised

> and painful. The attack aggravated dental problems, requiring extraction of teeth. Plaintiff's car cleaning business lost an estimated $1400 income because plaintiff could not work for one to two weeks and could not take on cleaning jobs for approximately three weeks. The attack also caused permanent injury to plaintiff's back, requiring periodic doctor visits and physical therapy, and hampering plaintiff's work. Medical testimony established that plaintiff will have to continue physical therapy in the future and that surgery may ultimately be necessary. Under these circumstances, we cannot say that the court's compensatory damage award of $30,000 is unreasonable or against the manifest weight of the evidence.[18]

- **Punitive Damages**. Again, the appellate court's opinion gives further insight as to how judges view these first-party cases with regard to injury and damage assessments:

> When punitive damages may be assessed, they are allowed in the nature of a punishment and example to deter the wrongdoer and others from committing like offenses in the future.
>
> In evaluating a punitive damage award, each case must be considered in its own context. Here, we note again that defendant deliberately struck plaintiff in the head with a shovel, a potentially lethal instrument in the hands of someone with defendant's training and experience. Defendant admitted doing so simply because he was angry at plaintiff, who impugned his honesty and craftsmanship as a contractor, and felt that plaintiff was interfering with the progress of defendant's construction work.

> Plaintiff made no physical threat of any kind and interrupted defendant only out of concern that a temporary electrical hookup that defendant was planning to erect might pose a threat to children who played in the area. Plaintiff had called the power company and requested that a representative be sent to check the placement of defendant's proposed hookup, and plaintiff so advised defendant. But defendant was concerned only with continuing his work and stated that he *couldn't wait to satisfy all these bellyachers*.
>
> Plaintiff was attacked in a utility company easement in his own backyard. The first blow from defendant's shovel knocked plaintiff to the ground. As plaintiff attempted to get up, defendant stood over him, took aim, and struck plaintiff with the shovel yet a second time. As a result of these blows, plaintiff suffered serious and permanent injury.
>
> Such conduct is an anathema to civilized society. It is also a crime, and defendant did in fact later plead guilty to criminal charges of aggravated battery. Despite defendant's professed contrition at trial, the record shows that he told the police to whom he surrendered that he would do it again under the same circumstances.[19]

Thus, the same **factual** picture that persuaded the court to uphold Mooningham's **liability** for willful and wanton misconduct was utilized a second time to justify the award of punitive damages.

NOTES FOR SERVICE PROVIDERS

In modern civil practice, courts generally look behind the **form** of complaints and pleadings, and place far more emphasis on their **substance.** Here, the technically inconsistent pleading of negligence **and** battery could have resulted in the entire case being sent back for a new trial; however, the court said, in effect: ***Why bother? The outcome will be the same and it will just take up scarce judicial resources to retry it.*** This flexibility, as opposed to the kind of formal -- even nit-picking -- pleading requirements of the old-fashioned common law, characterizes most civil litigation today. Because of this, Service Providers should **never** discount or ignore any facts learned from victims even though those facts may appear to be ***irrelevant*** or ***immaterial.*** Under the more relaxed standards applicable to civil pleading and practice, almost **anything** that victims have to say about the crimes committed against them should be transmitted to attorneys.

Like Scheherazade's tales told to the Sultan, there are 1,001 stories involving in assault and battery litigation. No two cases are exactly alike, and tiny factual differences can spell victory or defeat for plaintiffs/victims. Below are descriptions of legal principles which, in combination with the factual scenarios involved, can have a major effect on the success of victims' cases. They also help to fill in portions of the entire ***mosaic*** of assault and battery litigation.

Provocation/Excessive Force

Plaintiffs/victims suing for battery must prove that they did not **provoke** defendants into hitting them. A defendant will thus be motivated to allege that he or she should not be held liable (or that

the amount of their damages should be mitigated) because the plaintiff ***started it***. A colorful case from the Louisiana Court of Appeals illustrates the lengths to which defendants may go in their claims of ***provocation***.

EXAMPLE # 12[20]

Plaintiff, Grover Sills, self-described as a ***little, short, fat boy*** (5'9" tall, 240 pounds, 40-years-old), was at a wrestling match with his wife and brother-in-law. Defendant, one Hacksaw Duggan, was a ***bad guy*** professional wrestler. He was 30 years old, 6'3", 270 pounds, and a former linebacker for the Atlanta Falcons.

Hacksaw was leaving the ring when someone threw a cup of ice, hitting him on the head. The wrestler advanced toward the plaintiff's brother-in-law saying: "There the little SOB is!" Plaintiff (demonstrating considerable bravery) placed himself in the path of the charging Hacksaw, raised his hands to shoulder level and said: "Don't hit the kid!"

Hacksaw punched plaintiff twice in the face, fracturing his eye socket. Sills sued his assailant and was awarded $25,432 in damages. On appeal, Hacksaw alleged that he was merely ***defending*** himself when Sills raised his arms. The appellate court upheld the trial court's finding that Hacksaw provoked the fight by moving in a hostile manner in the direction of the boy and even if Hacksaw believed in his own mind that he was defending himself, he used far greater force than was necessary against Sills under the circumstances.[21] The court also upheld the amount of damages awarded.[22]

NOTES FOR SERVICE PROVIDERS

The facts in *Sills* are outrageous. Nonetheless, they furnish us with an excellent example of just how far defendants will go to cast the blame on the other guy. Service Providers who are counseling their clients should remain alert to the fact that victims have a natural tendency to tell their stories so as to put themselves

in the best possible light, and may downplay facts that would constitute provocation. If a case looks like a good possibility for litigation, Service Providers should develop sufficient factual information so that they can tell what **really** went on and anticipate defenses such as that of provocation.

Sills illustrates another area of battery law: **excessive force.** Even if the victim in some manner provoked the attack, if the other party responded excessively (like Hacksaw did), he may still be liable. This kind of factual information can be quite useful for attorneys in developing successful cases.

Escape/Leaving the Scene

Generally, if an assault and battery plaintiff can establish that defendants tried to ***escape*** by leaving the scene of the an assault before the police have had time to question them, this fact will be admissible as evidence of guilt. However, this is not a hard and fast rule, and its application may depend on the facts involved.

EXAMPLE #13[23]

Plaintiff alleged that three defendants had battered him. The evidence was confusing, with each of the participants telling often contradictory stories. The trial judge dismissed the case. On appeal, the plaintiff argued that the fact that one of the defendants, Losito, left the scene before the police could interview him, was sufficient evidence of guilt that the case should not have been dismissed. The appeals court disagreed, holding that since the plaintiff introduced no evidence that Losito even knew that the police wanted to talk to him about the incident, his failure to stick around could not be used to establish his guilt in the assault.

NOTES FOR SERVICE PROVIDERS

This is an example of yet another case in which seemingly **minor** variations in the facts make potentially major differences in the outcome of cases -- in this instance **unfavorably to the plaintiff.** Actually, the court's rationale is based on nothing more than pure common sense: *an act can't be interpreted as evading the police, if you don't know that they're after you.*

This kind of practical analysis should come naturally to Service Providers who routinely apply common sense principles to every other aspect of their efforts to assist their victims/clients.

Threats

Threats, by themselves, constitute the tort of assault: **putting the victim in fear of a battery.** (Other verbal intrusions in the form of threats often form the basis of actions for negligent and intentional infliction of emotional distress, as will be covered below.) Pertinent here is the fact that threats can also have a significant bearing on battery actions because they are useful to litigators, for example, in proving the states of mind of assailants, and to undercut defendants' false claims of psychological impairment based on mental disability.

EXAMPLE # 14[24]

Plaintiff sued the defendant for personal injuries. The defendant ***defaulted***, that is, he failed to answer the pleadings, and a judgment was entered against him. Later the defendant tried to excuse his failure to answer on the grounds that he was in a state of ***clinical depression*** which caused a *diminished ability to think, concentrate and make decisions.*

The plaintiff overcame the defendant's contention that he was some sort of mental basket case by proving that, after the defendant received notice of the lawsuit, he called the plaintiff and threatened to kill her if she did not withdraw the complaint. The court held that if he was sufficiently aware of things to make that kind of threat, he was also aware enough to answer the complaint. The default judgment was affirmed.

NOTES FOR SERVICE PROVIDERS

Battery cases, in particular, often occur when there is ***bad blood*** or ongoing feuds among the parties. Unlike stranger-to-stranger ***street crimes***, altercations among people who know each other will often involve prior episodes of charges and counter-charges, threats and counter-threats, and other contentious behavior. Most of the time this is simply human nature demonstrating itself; however, in other cases, situations may explode into violence, serious bodily injury, and even death. Events leading up to such tragedies -- threats, harassment, complaints to the police on both sides -- often provide invaluable background information for attorneys. Information about this should be developed while the memories of events are fresh in victims' minds.

Parties' Character and Reputation

The case of ***Hacksaw*** Duggan versus the ***little fat boy***, reported above [25], illustrates the point that physical size and occupation are important factors for courts in sorting out things like provocation and excessive force. The same is true of character and reputation evidence: was the assailant (**or** the victim) the neighborhood tavern brawler, or was he the local ***98-pound weakling***?

The admission into evidence of such matters as prior crimes, or the character and reputation of the parties, is strictly governed by case law, statutes and rules of evidence in each jurisdiction, and these rules vary significantly among different jurisdictions. For every court that rules in one way, another court in another jurisdiction may rule precisely the opposite way. Of primary importance for our purposes is not so much **how** the courts rule in each case, but rather the kinds of **factors** that the courts rely on in making their rulings.

Character and Reputation of Victims

EXAMPLE #15[26]

In a civil suit for battery, the defense introduced evidence that the **victim** was of a violent character. The appellate court held that this evidence should not have been admitted because evidence of the **victim's** bad character in general was irrelevant to the issue.

In two other cases, however, courts held that prior crimes, or bad acts, of victims **were** admissible when they were offered to prove **specific points** raised by the defense.

EXAMPLE #16[27]

Hensley was shot to death by Harbin. Hensley's wife brought a wrongful death suit, and a jury awarded her $330,000 compensatory and $450,000 punitive damages. This was reversed on appeal. The defendant had offered evidence that the victim had committed a burglary but the trial court refused to accept that testimony. This was held to be in error. Evidence of the commission of a crime was held to be important, because, if the victim had been convicted and sent to prison, this would affect his ability to provide for his family. This would, in turn, be a critical factor in determining how much future support the dead man **would have** provided for the family.

EXAMPLE #17[28]

Plaintiff was shot during a fight, and sued his assailant. Plaintiff introduced evidence relating to damages which attempted to show that he was a loving father who would no longer be able to play sports with his son. The appellate court, reversing a judgment for the victim, held that evidence that the victim was an abusive father who hit his son, should have been admitted to counter the ***loving father*** claim.

Character and Reputation of **Perpetrators**

The foregoing cases involve situations where defendants sought to introduce evidence of **plaintiff's** bad reputation, acts and character, usually in order to mitigate damages. The following cases involve the reverse scenario: plaintiffs/victims attempting to prove how terrible the **defendants/perpetrators** were, in order to strengthen their cases for liability or damages.

In **criminal** cases, strict rules prevent admission of prior crimes against defendants on the theory that they are being tried only for the crimes charged, and not for anything else they may have done. In **civil** cases, however, where the issue is money damages, as opposed to locking defendants up (or executing them), the rules concerning admission of defendants/perpetrators' bad character are far more flexible and favorable to victims.

EXAMPLE #18[29]

Plaintiff's son was shot to death in the course of robbing a restaurant. His mother sued the restaurant and the employee who shot him. A jury found the shooting justified. On appeal, this verdict was affirmed. The court held that once the plaintiff introduced testimony that her son was a ***good boy*** and a ***kind, well-respected individual***, it was proper for the defense to prove that the robber had a record of 21 arrests.

EXAMPLE #19[30]

A former wife and her son sued her former husband, the boy's father, for assault and battery committed against them during the marriage. The wife was awarded $119,000 in compensatory and $75,000 in punitive damages; the son, $20,000 compensatory and $35,000 punitive. The trial court admitted into evidence testimony about extremely abusive acts which had been committed by the husband in the past. The appellate court held that these acts were properly admitted to prove the extent of the **fear** that the defendant caused his wife and son.

EXAMPLE #20[31]

In an assault and battery action, the defendant's karate manual was properly admitted into evidence.

NOTES FOR SERVICE PROVIDERS

Note the great emphasis on damages in these cases. As they illustrate, liability is generally a rather straightforward issue. Facts concerning such things as threats and evidence of the defendants' character are often important in determining amounts of damages to which plaintiffs may be entitled.

These cases highlight the need for Service Providers to learn **as much as possible** about what victims know personally, or have learned from other sources, about their assailants. The cases also reinforce the point made earlier that Service Providers should **assume** that everything that they learn from victims is admissible in evidence.

On the other hand, cases in which the issues involve allegations of the **victims'** bad character underscore the need to encourage victims to be completely candid about any negative information about themselves so that attorneys can anticipate and counter

possible defenses. This may be easier said than done. Victims of violent crimes often have every reason to feel outraged by what the perpetrators have done to them, and perhaps even more aggrieved by a criminal justice system that failed to protect them. Their outrage may lead to ***us against them*** attitudes on the part of the victims, who may then feel justified in concealing or even falsifying pertinent information about themselves.

Service Providers may be reluctant to moralize to people who have been badly injured by criminal violence. They should, never-the-less, convince victims that playing around with the truth can actually **hurt** their cases.

EXAMPLE #21[32]

Plaintiff sued defendant for hitting her three times in the face with a pistol, causing serious injuries. She lost the case because the trial court found that everybody involved, including the plaintiff and her witnesses, lied so much that he had no choice but to rule **against** the plaintiff. The court's recorded opinion, not unsympathetic to the plaintiff, follows:

> THE COURT: From the evidence that I've heard I believe that Mr. Eaglin did, in fact, hit Miss Crochet with a pistol on the night in question. What I believe, however, cannot support the case. I have never heard so many lies in one case in my time on the bench. I think nearly all of the witnesses in this case have lied on material points. I have been able to pick up some threads of truth as we went along, but as a recent Court of Appeal, Third Circuit case pointed out, when the evidence is so confusing that the Court cannot tell who is lying, then the plaintiff has **not borne the burden of proof that is imposed upon him by law**, and the Court cannot render a verdict in favor of the plaintiff. I find that to be the situation in this case. I feel sorry for the plaintiff. I think she is entitled to a judgment, but I can't render a judgment because I feel that way, and it will be necessary that I dismiss plaintiff's action with

prejudice and tax her with costs in accordance with the Rules of Civil Procedure.cause I feel that way, and it will be necessary that I dismiss p ^F sued by their victims, the defendants' criminal convictions may be used to prove the defendants' civil liability for those crimes.

EXAMPLE #22[33]

The defendant, a candy store owner, shot the plaintiff during an altercation in the store. The defendant pled guilty to assault in the second degree, specifically, that he ". . . under circumstances evincing a depraved indifference to human life . . . recklessly engaged in conduct that created grave risk of death to [the plaintiff]."

Plaintiff sued his assailant for negligence, arguing that the defendant's guilty plea prevented the defendant from litigating the issue of negligence (or recklessness) all over again in the civil trial. The court agreed, holding that the doctrine of Collateral Estoppel proved the defendant's civil liability for the shooting.

NOTES FOR SERVICE PROVIDERS

It is easy to grasp just how helpful to plaintiff/victims the doctrine of Collateral Estoppel may be. For example, rape victims may be in mortal fear of confronting their perpetrators, but nonetheless also wish to sue them. If the perpetrators have been convicted or pled guilty to the crime, **and** if, in the applicable jurisdiction, the doctrine of Collateral Estoppel applies, then the defendants' convictions may be used to prove the civil wrongs without the need for the victims' testimony. The only issue remaining is the amount of damages. It is quite likely that, in those circumstances, the victims would prevail civilly, yet not have to confront their assailants at all.

Collateral Estoppel does not apply in all instances and, as noted, the rules regarding the doctrine's applicability are complex and

confusing. Service Providers should, however, keep in mind the possibility of its use in shielding victims from unwanted confrontations, as this could be a major incentive for victims to consider filing lawsuits against perpetrators. Counsel should be asked about Collateral Estoppel in each case in which there has been a criminal conviction or guilty plea, or even the **possibility** of either of these happening in the criminal proceeding. (You may find that attorneys are surprised that you even know the **words** ***collateral estoppel.***)

Damages in Assault and Battery Cases

The foregoing examples illustrate the near-limitless combinations of factual situations that arise with respect to proving **liability** in assault and battery cases. The same factual variety exists in situations involving damages issues: how to evaluate them, how much to ask for, punitive and compensatory damages, and so on.

A detailed elaboration on the ***nuts and bolts*** of civil damages is beyond issues: how to evaluate them, how much to ask for, punitive and compensatory damages, and so on.

A detailed elaboration on the ***nuts and bolts*** of civil damages is beyong the scope of this *Manual.* However, there are some basic legal principles which arise in assault and batery (and other *victim versus perpetrator* cases that may be useful in establishing and overall perspective for service providers about damages in general.

Jurisdictional Amounts

Most courts acting in a sort of ***monetary self-defense*** set minimum dollar amounts that must be claimed, in good faith, before the courts will hear the cases. These are referred to as ***jurisdictional***

amounts, and they have been established to keep the courts from becoming clogged with frivolous claims. For example, in order to state a cognizable claim in United States District Courts, the amount in question must be $50,000 or more.

EXAMPLE # 23[34]

Plaintiff sued for assault and battery in a state court. The trial court judge dismissed the case on the grounds that no jury would award her the $5,000 jurisdictional amount. The appellate court reversed, holding that the question was not what that particular judge thought, but rather whether the plaintiff's damage claim of $5,000 or more **was made in good faith.**

Validity of Punitive Damages

On occasion, disgruntled defendants challenge the validity of legal theories underlying the assessment of punitive damages by arguing that they are unconstitutional. These challenges are usually rejected.

EXAMPLE # 24[35]

Seiber struck Jines with his walking stick. In an *Assault and Battery* suit, a jury awarded Jines $2,000 compensatory and $6,500 punitive damages. Seiber, who had been acquitted of criminal assault and battery, claimed that the punitive damage award constituted ***double jeopardy***. He also argued that punitive damages constituted ***cruel and unusual punishment*** under the *Eighth Amendment* to the *U.S. Constitution*. The appellate court rejected both arguments and affirmed the punitive damages award.

Appellate Action on Trial Court Awards

A cardinal rule of civil litigation is that appellate courts usually uphold the awards of damages made by juries (or trial courts).

This is because the fact finders at the trial level have actually seen and heard the witnesses, and are in a far better position to evaluate credibility and candor of testimony, degrees of injury, and pain and suffering. There are limits, however, to appellate courts' deference to juries awards, **or non-awards**, of damages.

EXAMPLE # 25[36]

Bolfa shot Fontenot with a shotgun. The victim threw up his arm to protect his chest and took the full force of the blast in his arm, necessitating placement of steel rod and skin grafts. The jury found Bolfa totally at fault; but inexplicably awarded zero damages. The Court of Appeals found that Fontenot had incurred medical expenses, had lost wages totalling $74,050, and that he had experienced considerable pain and suffering. It awarded him $74,050 in special damages and another $75,000 in general damages.

NOTES FOR SERVICE PROVIDERS

These cases serve as a general overview of how appellate courts treat damages issues. They underscore the point emphasized above, that Service Providers, because they are so close to victims, should be alert to **anything** that might have a bearing on damages.

INTENTIONAL, RECKLESS, OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Battery involves an intentional, offensive touching. There must be some degree of invasion of the victim's bodily integrity whether by fist, knife, bullet, thrown rock or some other means. Assault is committed when the victim is put in fear of an **imminent** battery (*"I'm going to punch you in the nose next week"* is **not** an assault.) Both of these torts involve **physical** injury or at least the immediate threat thereof. We now turn to a consideration of situations wherein perpetrators deliberately or recklessly set out to

wreck someone's emotional well-being or grossly disturb their peace of mind -- cases in which the mental anguish caused may be more painful than a blow.

The tort is Intentional (or Reckless) Infliction of Emotional Distress, sometimes referred to simply as ***Outrage***. We will be looking primarily at cases involving emotional distress that has been caused by violent crimes. Suppose that your credit card company makes ". . . a mistake in bookkeeping followed by failure to correct it, 42 threatening letters and bills, and reference of the claim to a collection agency . . . ." This could certainly cause plenty of distress, and indeed was held to create a cause of action for intentional or reckless infliction of emotional distress.[37] However, such a sorry situation is beyond the scope of the discussions here because this *Manual* addresses almost exclusively those injuries which arise from the commission of **crimes of violence**.

It should also be noted that intentional infliction of emotional distress generally constitutes a **separate tort**, one that is actionable **in addition to** the personal violence that has been inflicted on the victims or, as we shall see, on others who are close to the victims. Of particular importance is the fact that plaintiffs in intentional infliction cases **need not have been, themselves, the physical targets of the violent crimes that were involved.**

EXAMPLE # 26[38]

Plaintiff's 11-year-old daughter was abducted and murdered. Plaintiff alleged that the local police chief, when informed of the abduction, failed to initiate a search for the child, physically prevented plaintiff and her husband from conducting their own search, and told the plaintiff: ***We know who (the abductor) is. After we find her body, we'll get him.***

The Supreme Court of Vermont held that the plaintiff had stated a cause of action against the chief for intentional infliction of emotional distress.

Note that the victim of the battery -- the actual physical crime -- was the little girl, and that the actual perpetrator was a stranger. Nonetheless, the defendant police chief who willfully impeded the family's investigation could be held liable to the **mother** for the emotional distress that **his** actions caused **her**.

This case involves another important aspect of emotional distress actions. Often different torts will have different statutes of limitations. In the case just described, the victim's mother's action against the police chief for the **wrongful death** of her daughter was barred because the limitations period for that tort had run. However, the statute of limitations for intentional infliction of emotional distress was longer; consequently, the plaintiff's cause of action for the separate and distinct tort of intentional infliction of emotional distress was not barred.

The perceptiveness of Service Providers -- as those who are usually closest to the victims -- is at an **absolute premium** in emotional distress cases. The very nature of the tort itself places it within the purview of victim Service Providers' primary area of expertise: assistance and counseling of victims regarding their psychological needs. Indeed, one might argue that actions dealing with emotional distress are the ***Service Providers' torts***. Recognition of this fact goes a long way toward the enhancement of Service Providers' well-deserved stature within the justice system.

Intentional infliction, for our purposes, includes the general area of reckless infliction of emotional distress, where something more than mere negligence is involved, such as the defendants' willful and wanton disregard of the consequences of their acts. Another

name for intentional infliction of emotional distress is ***Outrageous Conduct Causing Severe Emotional Distress*** or, more simply, ***outrage***. These terms will be used interchangeably in the *Manual*. The tort of **Negligent Infliction of Emotional Distress** is also recognized by the courts. It differs from intentional infliction and is often harder to prove because, in most cases, the person negligently inflicting the emotional distress did not act **deliberately**. A number of cases involving really hideous crimes, are based on allegations of **both** intentional and negligent infliction These situations are also discussed.

Intentional Infliction of Emotional Distress: Definitions

Cases in which emotional injury forms the basis of the cause of action are by definition more nebulous and less finite than, for example, cases in which the victim had 18 stitches taken in his scalp. We can measure physical injury, if not precisely, then at least with some uniformity. The same cannot be said when the injury is purely, or primarily, to the psyche. The effects of trauma on the human mind vary according to the widest possible swings of our emotional pendulums. This is why courts deciding emotional distress cases interpret the doctrines quite strictly, and rely on a standard that measures victims' distress not in terms of **subjective** measurement of the individual victims' emotional damage, but rather by an **objective** standard: *how would the **community as a whole** view the perpetrator's conduct?*

The first example of this, a case in which plaintiffs did **not** prevail, illustrates how carefully courts scrutinize cases involving allegations of intentional infliction of emotional distress. It presents clear, non-technical definitions of elements of the tort which will serve as legal ***yardsticks*** by which to measure subsequent examples.

EXAMPLE # 27[39]

Ryan Reed, 2 1/2- years-old, lived with his mother, Angela, and her fiance, Bobby Gann. The boy died of suspected child abuse. Bobby Gann was shot to death by Angela's father, Ryan's grandfather, who believed him responsible for the death. The police chief released derogatory statements to the media connecting the deceased Bobby Gann with the abuse and death of the child. Bobby Gann's parents sued the chief and a police captain for outrageous conduct, intentionally causing them serious emotional distress. After their complaint was dismissed, the plaintiffs/parents appealed.

The court made a lucid analysis of the law involved. It began with the **Restatement of Torts**, a compendium of scholarly **and practical** definitions of the elements of personal injury law, which serves as a ***Bible*** for courts and litigators in this area.

The **Restatement's** definition of ***Outrageous Conduct Causing Severe Emotional Distress*** is refreshingly straightforward:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.[40]

The *Restatement* gives a workable definition of the tort. Liability exists:

> . . . where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of human decency, and to be regarded as atrocious, and utterly intolerable in a **civilized community**. Generally the case is one in which the recitation of the facts to an **average member of the community** would arouse his resentment against the actor and lead him to exclaim ***Outrageous!***[41] (Emphasis supplied)

The bold face wording above illustrates the **objective** standards used to evaluate the perpetrators' behavior. ***Outrage*** does not depend on how badly the particular plaintiff's feelings were hurt, but rather on how the

acts of perpetrators would affect the perception of the ***average member of the community***. The *Restatement* helpfully lists what **does not** constitute outrageous conduct:

> . . . mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.[42]

The court in this example utilized these guidelines to make an exhaustive and thoughtful application of the law to the facts of the case and concluded that, while the defendant/police officer's statements may have had ***regrettable effects*** on the plaintiffs, these effects were not so ***extreme and devastating*** as to constitute a cause of action for ***outrageous conduct***.

Cases in Which Plaintiffs Prevailed

EXAMPLE # 28[43]

B. T., a dentist and family friend, raped Delia S. When B.T. believed that Delia was going to tell her husband, he told the husband that Delia needed psychiatric care. In a civil suit for battery and for intentional infliction of emotional distress against B.T., Delia was awarded damages on both counts. On appeal, these awards were affirmed.

B.T. had argued that the recovery for both battery and intentional infliction of emotional distress constituted an impermissible ***double recovery***. However, the court found that there was other evidence, separate from the rape, to justify the intentional infliction of emotional distress award:

(1) B.T.'s abuse of a position of friendship, trust, and influence to place Delia in a sufficiently vulnerable position so that she submitted to the rape; and,

(2) B.T.'s advising the husband that she needed psychiatric care. (NOTE: Delia's husband's recovery for loss of consortium and intentional infliction of emotional distress was also affirmed.)

NOTES FOR SERVICE PROVIDERS

The last case illustrates the nature of intentional infliction of emotional distress as a tort that is separate and distinct from other allegations such as assault and battery. The actual rape constituted the battery, but the events that occurred **before** and **after** the rape led to the emotional distress awards.

Note that B.T. was a professional person -- a dentist. As we address other topics such as *Child Abuse* and *Women as Victims,* it will become evident that courts are not reluctant to find that perpetrators' professional stature and substantial psychological influence over their victims often constitute major contributing factors to the outrageous nature of their torts.

The opinion in the above case also contains an interesting discussion upholding expert testimony about how rape victims may be expected to act when they have been sexually assaulted.

In the following example, the Supreme Court of Nebraska addressed the special nature of the tort of outrage in sexual assault cases.

EXAMPLE # 29[44]

Plaintiff, an Army reservist, was sexually assaulted by a male soldier. After the statute of limitations for assault and battery had run, she sued her assailant for intentional and reckless infliction of emotional distress, a tort which had a longer limitations period. A $60,000 damage award for plaintiff was affirmed. The court rejected the defendant's argument that assault and battery was the **only** action available to the plaintiff, stating:

The very nature of the tortious act involved herein, while it does involve elements sufficient to constitute an assault and battery, is ***uniquely appropriate*** *for a suit based upon a theory of intentional infliction of emotional distress.*[45] *(Emphasis supplied).*

NOTES FOR SERVICE PROVIDERS

This is yet another example of how longer statutes of limitations for intentional infliction of emotional distress may ***come to the rescue*** of a plaintiff's cause of action when recovery for the substantive tort, in this case assault and battery, is barred. The court noted that sexual assaults, as a class of cases, are particularly likely to involve initial hesitation on the part of victims to sue and found that this fact made the use of the emotional distress claim ***uniquely appropriate***. Whenever a lengthy period of time has lapsed since the commission of the criminal act, Service Providers should begin automatically to think in terms of intentional infliction of emotional distress or outrageous conduct in order to take advantage of longer limitations periods. They should also obtain from victims **any** factual information that would help to establish the nature and extent of the emotional injury caused by the battery.[46]

Other cases illustrate the scope of the tort:

EXAMPLE # 30[47]

Defendant shot at, and hit, plaintiff's car while plaintiff was in it. Although not himself hit, plaintiff fell into the seat because he ***thought he was dead***. Damages of $20,000 for ***mental anguish***, together with $30,000 punitive, were affirmed. Interestingly, the court did not refer to ***intentional infliction of emotional distress*** as such; however, it described the defendant's conduct as

. . . completely unacceptable and repugnant to normal response in civilized society."[48]

EXAMPLE # 31[49]

Defendant, an automobile manufacturing company, ordered an employee to work under the supervision of a man who had raped her daughter. A federal appellate court held that she had stated a cause of action for Outrage.

EXAMPLE # 32[50]

A 13 year-old girl/parishioner was sexually seduced by her pastor. She stated a cause of action against the minister for intentional infliction of emotional distress **and** against his employer, the church, for negligent failure to supervise its employee.

EXAMPLE # 33[51]

Plaintiff was an African-American man whose parked car was struck by defendant National Insurance Company's insured. When plaintiff called the adjuster, Manning, the adjuster cursed him and made racial insults.

Plaintiff sued the insurer and its employee, Manning, for intentional infliction of emotional distress. The court held that the language used by the adjuster, when the plaintiff called him was sufficiently outrageous to allow a cause of action for intentional infliction of emotional distress against the adjuster and his employer.

NOTES FOR SERVICE PROVIDERS

The case of the sinister minister, (*Example # 32* above) provides an excellent example of how first-party and third-party liability are created by a single fact situation to which different, **but not mutually exclusive**, legal principles apply.

In the case involving the pastor, the first-party defendant -- the molester himself -- certainly inflicted grievous emotional damage upon his young victim and was properly held liable for this intentional and outrageous conduct. The defendant church, on the other hand, presumably did not wish this kind of harm to come to the child; however, church officials were negligent in hiring, retaining, and failing to supervise a pastor (by definition, a person who is an authority figure, able to gain people's confidence more easily than most) whom they knew or **should have** known might molest children. Negligence in employing and retaining such an employee -- who can be expected to have contact with others whom they might harm -- will often create a valid third-party cause of action. [52]

Cases in Which Defendants Prevailed

The *Restatement of Torts* makes clear that what does or does not constitute outrageous conduct is based on judges' individual perceptions of whether the ***average member of the community*** would consider defendant's actions ***outrageous***. A few examples of cases in which appellate courts found for defendants in outrageous conduct cases highlight the disparate nature of judicial perceptions in this volatile area of crime victims' law.

EXAMPLE #34[53]

Two rape victims agreed to appear on a television show and talk about the crimes committed against them, provided that their faces not be shown. Their faces were pictured during one showing. They complained to the station and asked that this not reoccur. The station showed their faces again. Their suit for intentional infliction of emotional distress was dismissed and the appellate court affirmed the dismissal. There is, however, an indication in the opinion that the plaintiffs might have a cause of action against the station for breach of contract.

NOTES FOR SERVICE PROVIDERS

Justice Rosenberger, dissenting in the case, pointed out that one victim had not even told her family about the rape. He discussed the impact of the station's activities upon the victims generally and suggested that juries would be better positioned to decide if the defendant's behavior was outrageous. This is the kind of case in which Service Providers should use their expertise in helping to build a ***picture*** of the emotional distress caused not only to the victims, but also to their families.

EXAMPLE # 35[54]

This example deals with **reckless** infliction of emotional distress.

Bonnie Garland, a college student, was bludgeoned to death in her parents New York home by a former boyfriend, Richard Herrin. The murder took place at night, Herrin fled, and the victim's parents discovered her battered body, barely alive, the next morning. Herrin was convicted in her death.

Mr. and Mrs. Garland sued Herrin for emotional distress under *Restatement (2d) of Torts # 46* alleging that Herrin's outrageous conduct caused them serious emotional distress. Herrin stipulated that he ***recklessly*** caused them ***severe emotional distress***. New York law holds that there could be no liability for negligent **or** reckless infliction of emotional distress, hence, a jury verdict for the parents, which had been based on a theory of ***reckless*** infliction, was reversed.

NOTES FOR SERVICE PROVIDERS

A number of states do allow a cause of action for ***Negligent Infliction of Emotional Distress*** for injuries to close family members which were witnessed by the plaintiffs.[55] Most such

cases involve true ***accidents***, for example, cases in which defendants' automobiles strike plaintiffs' children in full view of the parents. Thus negligent infliction cases rarely arise in the context of violent crimes. Nonetheless, insofar as Service Providers are concerned, **any** facts suggesting the infliction of emotional distress that is even remotely related to the crime should be developed and passed along to attorneys who are in the best position to sort out whether an emotional distress cause of action exists.

The extensive utilization of the torts of intentional, reckless and negligent infliction of emotional distress in cases involving victims of violent crimes is a legal phenomenon of relatively recent vintage. Nonetheless, as the ***plaintiff prevailed*** cases demonstrate, this is a fertile area of Service Providers to exercise their knowledge and expertise of the nature and extent of the emotional distress suffered by violent crime victims.

CIVIL CONSPIRACY/AIDING AND ABETTING

Wrongful death and assault and battery cases involve direct, physical injuries to victims that are committed by one or more perpetrators. This subsection deals with cases in which certain individuals have physically committed the criminal acts while others, not **physically** participating, have sufficiently encouraged or assisted the unlawful acts to be held responsible, and liable, along with the actual perpetrators.

The Torts Defined

The following classic case illustrates the nature of civil conspiracy and aiding and abetting and how they apply specifically to violent crime victims' lawsuits:

EXAMPLE #36[56]

Dr. Michael Halberstam was a prominent District of Columbia physician who was murdered by one Bernard Welch during a burglary of the doctor's home. Mrs. Halberstam sued Welch, a ***master burglar***, for wrongful death. She also sued Welch's paramour, Linda Hamilton for civilly conspiring with Welch, alleging that the two of them engaged in a joint criminal venture which led to Dr. Halberstam's death. Welch, who had been convicted of murder in a criminal prosecution, defaulted in the civil case. Hamilton defended but was found jointly liable with Welch for $5,715,188.05 damages on the wrongful death/civil conspiracy allegations. She appealed.

The United States Court of Appeals for the District of Columbia began its opinion affirming the judgment against Hamilton in colorful language:

> This case arises out of the shocking climax to a coldly efficient criminal campaign that had confounded, frustrated, and ultimately terrorized the Washington area. We are asked to determine the civil liability of the passive but compliant partner to this rampage that left widowed the wife of one of the community's most eminent physicians. As a result of Welch's innumerable burglaries over the course of five years, he and Hamilton acquired a fortune that would have been the envy of a Barbary brigand. In the words of the district court, Hamilton:
>
> > . . .knew full well the purpose of (Welch's) evening forays and the means by which she and Welch had risen from ***rags to riches*** in a relatively short period of time. She closed neither her eyes nor her pocketbook to the reality of

> the life she and Welch were living. She was compliant, but neither dumb nor duped, so long as her personal comfort and fortune were assured. She was a willing partner in his criminal activities.[57]

The Court of Appeals recounted how Welch and Hamilton met in 1976 and lived together until 1980, when Welch murdered Dr. Halberstam during a burglary. The opinion went into more than usual detail. The pertinent information may be summarized: Welch stayed around the house all day, but four or five times a week, for five years, he left the house at about 5:00 p.m. and returned around 9:00 p.m. During those five years, their annual income increased from almost nothing to well over a million dollars. Welch, with Hamilton's knowledge, set up a smelting furnace in the garage and refined items of gold, which he certainly didn't **buy**, into nuggets which they then sold. Hamilton did all of the paper work for this ***business***. A search after his arrest for Dr. Halberstam's murder revealed 50 boxes containing some 3,000 stolen items in their basement. Hamilton denied any knowledge of this but, as the appellate court noted:

> The district court concluded that this loot ***was the source of (Welch's) and Hamilton's livelihood, income and investments. Disposing of the loot was the principal business in which Welch and Hamilton engaged while at home.***

The court's legal analysis involved two basic issues:

(1) The kind of activities by Hamilton that would establish her liability for Welch's continuing burglaries; and

(2) To what extent Hamilton would be liable for the murder committed by Welch in the course of his criminal conduct.

These, in turn, involved questions about Civil Conspiracies, Aiding and Abetting and, the distinction between the two. According to the court:

> The prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity.

> Aiding-abetting focuses on whether a defendant knowingly gave ***substantial assistance*** to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.[58]

The court's opinion analyzed the law of civil conspiracy, and aiding and abetting, by reviewing and discussing appellate cases across the country. It then applied the law to the facts of the case. It upheld the trial court's finding that Hamilton:

(1) Knew the purpose of Welch's evening forays;

(2) Helped Welch dispose of the loot by handling the gold-smelting business; and

(3) Knowingly and willingly assisted in the burglary enterprise.

All of this made her a ***willing partner*** in his criminal activities -- in short, a Civil Conspirator.

Insofar as the ***substantial assistance*** necessary to prove Hamilton as an aider and abettor is concerned, the court found that her " . . . invaluable service to the enterprise as banker, bookkeeper, recordkeeper and secretary", her sharing in the profits and numerous other activities clearly established ***knowing assistance*** to substantiate her participation in the burglaries.

With regard to her liability for the murder, the court held that, as a conspirator, she could be liable if the murder was a foreseeable act to advance the purpose of the conspiracy -- burglary. Reasoning that a burglar might murder while trying to escape, the court held that Hamilton could be liable.

Finally, the court, made a profound statement -- perhaps a predication about the implications of *victim versus perpetrator* law: ". . . *as a supplement to the criminal justice process and possibly as a deterrent to criminal activity*".[59]

This quote, in its entirety, deserves the readers' careful consideration:

> Tort law is not, at this juncture, sufficiently well developed or refined to provide immediate answers to all the serious questions of legal responsibility and corrective justice. It has to be worked over to produce answers to questions raised by cases such as this. Precedent is largely confined to isolated acts of adolescents in rural society. Yet the implications of tort law in this area, as a supplement to the criminal justice process and possibly as a deterrent to criminal activity, cannot be casually dismissed.
>
> We have seen the evolution of tort theory to meet twentieth century phenomena in areas such as product liability; there is no reason to believe it cannot also be adapted to new uses in circumstances of the sort presented here. This case is obviously only a beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime.
>
> For present purposes, we are satisfied that the district court's factual findings and inferences fit into existing concepts of civil liability for conceded tortious actions through conspiracy and aiding-abetting. The judgment of the district court imposing civil liability on Hamilton for Halberstam's death is therefore affirmed.

NOTES FOR SERVICE PROVIDERS

Halberstam v. Welch is an example of cases that are well worth taking the time to read. The court's opinion is lucid and non-technical (it reads like a little mystery story). The opinion is also important because, throughout, it is a classic example of victim-oriented jurisprudence by high-level courts.

The ***Halberstam*** opinion is also valuable because it broadens Service Providers' perspectives about a new class of perpetrators who can be brought into the **civil** justice process: conspirators, and aiders and abettors. When discussing the violent crimes that

have been committed against them, victims may tend to emphasize only the role of the **actual** assailants, either because those who ***struck the blows*** are etched so firmly in their victims' minds, or because they have no notion of the wide reach of actions based on civil conspiracy and aiding and abetting. This is an area of law that is wide open for development when Service Providers are eliciting information from violent crime victims.

The cases digested below expand on the legal vistas encompassed by the civil conspiracy and aiding and abetting theories of liability. (Remember, even cases in which victim/plaintiffs did not prevail are helpful as indications of various legal theories that might have been successful had the facts been slightly different.)

Cases in Which Plaintiffs Prevailed

EXAMPLE #37[60]

Mrs. Murphy seriously beat Mrs. Yaeger in the face. Mr. Murphy, who was Mrs. Yaeger's former husband, had earlier agreed with the present Mrs. Murphy that his former wife ***needed to be taught a lesson*** and needed ***to die***; he was present at the scene of the assault. He ***cranked up*** the getaway car for his wife and urged her to leave the scene in furtherance of the ***getaway***. The court held that Mrs. Yeager, who had already been awarded judgments of $45,000 compensatory and $5,000 punitive damages from Mrs. Murphy, had also stated a cause of action against her former husband for civil conspiracy.

NOTES FOR SERVICE PROVIDERS

Neither Service Providers nor victims should be diverted or deterred by technical legal terms: ***civil conspiracy*** or ***aiding and abetting***. The appellate court in the above case defined the elements of civil conspiracy with admirable simplicity:

(1) A combination of two or more people;

(2) For the purpose of injuring the plaintiff; and

(3) Which causes the plaintiff special damage.[61]

EXAMPLE #38[62]

Ms. Sauers was accused of aiding and abetting a certain Rhett DePew in causing the wrongful death of the plaintiff's decedents. The trial court dismissed the complaint because it could find no specific authority in Ohio's wrongful death statute to allow a cause of action for aiding and abetting. The appellate court reversed that decision; it held that the wrongful death statute should be broadly interpreted to embrace a ***spectrum*** of substantive law, imposing liability for intentional torts, including murder. Aiding and abetting constituted a part of this broad spectrum.

NOTES FOR SERVICE PROVIDERS

The common law did not recognize a cause of action for wrongful death; all such actions are based on statutes. In the above case, the appellate court interpreted the wrongful death statute broadly so that those who assist killers are considered to be liable as aiders and abetters. This case re-emphasizes the earlier note advising Service Providers to think in equally broad terms when eliciting information from victims about anyone who may have contributed to the commission of crimes against them.

EXAMPLE #39[63]

Anderson, accompanied by a number of youths, dragged Bergman from his car onto the ground. The youths beat Bergman badly. Bergman sued Anderson for aiding and abetting the assault and recovered an $8,000

jury verdict. Relative to the tort of aiding and abetting the trial court instructed the jury that: *Mere encouragement or assistance was sufficient to establish liability for that tort*. The Nebraska Supreme Court held that this definition which had previously been applied for **criminal** aiding and abetting, should likewise apply in cases of **civil** aiding and abetting.

EXAMPLE #40[64]

The plaintiff Riggs was being slashed by a knife-wielding assailant, in a tavern fight. Plaintiff's friend, Knapp, started to come to his assistance but was stopped by Colis who prevented him from attempting to rescue his friend. The Idaho Court of Appeals held that by preventing Knapp's effort to rescue his friend, Colis could be held civilly liable for aiding and abetting the assault.

NOTES FOR SERVICE PROVIDERS

These two cases illustrate just how victim-oriented some courts can be in allowing recovery for aiding and abetting. The ***mere encouragement or assistance*** standard in the first case, and the ***prevention of rescue*** doctrine applied in the second, illustrate the courts' willingness to hold civil conspirators and aiders and abettors liable even though they may not be involved to any great extent in the actual, ***hands-on*** aspects of physical batteries. The second case highlights the importance of eliciting information from victims about so-called ***bystanders*** in affray situations. They may be more involved in the action, legally speaking, than they might at first appear to be.[65]

Cases in Which Defendant Prevailed

An appreciation of cases in which defendants prevailed is useful in understanding the legal and factual aspects of the topic as a whole and to assist Service Providers in anticipating weaknesses in

plaintiff/victims' cases which may be overcome if sufficient information is developed.

EXAMPLE # 41[66]

Defendant ***masterminded*** a burglary of plaintiff's home. In their suit for outrage, based on the civil conspiracy, plaintiffs were awarded zero dollars compensatory, and $3,700 punitive damages. On appeal, defendant prevailed because Arkansas law does not permit an award of punitive damages in the absence of compensatory damages.

EXAMPLE # 42[67]

Plaintiff's father shot and killed plaintiff's husband while plaintiff's mother looked on and made no effort to stop the shooting. Plaintiff's suit against her mother for failing to rescue her, and for aiding and abetting, was dismissed. The appellate court affirmed the dismissal because the mother had taken no **active** part in the crime.

EXAMPLE # 43[68]

Gang members assembled for a fight, but then moved on to another location where Lataille shot Curtin. Lataille settled with Curtin and then attempted to sue others present as third-party defendants. The state Supreme Court affirmed a trial court decision that plaintiff had stated no cause of action; the tort of ***aiding and abetting*** requires more than mere presence at the scene.

NOTES FOR SERVICE PROVIDERS:

These examples simply demonstrate the fact that some courts are less willing than others to extend the reach of the doctrines of civil conspiracy, and aiding and abetting. The no-punitive-damages-without-compensatory-damages case illustrates how ***Catch-22*** situations sometimes arise in *victim versus perpetrator* lawsuits. Plaintiffs win on the merits only to find themselves confounded by

technicalities of the law. In the gang-fight situation, it is possible that if information had been developed to show that others present at the scene of the shooting participated to a greater extent than merely ***standing by***, the outcome might have been different.

PARENTAL LIABILITY

Most jurisdictions, either by statute or court decision, recognize the doctrine that parents can, and **should**, be held liable for the crimes and torts of their children, at least in certain circumstances. Theories underlying the doctrine of parental liability affirm the fact that most parents are in a better position than anyone else to control their children. There is also the expectation that if parents know that they may be held liable they will, in fact, exercise greater control of children's behavior.

Parental liability laws and court decisions vary widely from state to state and from jurisdiction to jurisdiction. Variations involve such issues as: whether parental liability is absolute or whether their children's acts must have been foreseeable by the parents; whether parents can be held liable for **all** injuries or only property crimes; monetary limits on recovery against parents, and so on. Service Providers need to consult with counsel about the specific provisions of the law of parental liability in their jurisdictions.

As a consequence of these variations, the discussions here are confined to basics: primarily the kinds of factual information that should be elicited from victims and witnesses so that intelligent decisions can be made by attorneys about whether parental liability claims are worth pursuing. Certainly, Service Providers should be alert to the existence of this cause of action.

Cases in Which Plaintiffs Prevailed: Parental Liability Imposed By Statute

EXAMPLE # 44[69]

Juveniles, 14 and 16 years old, attempted to steal guns and ammunition from a military ammunition depot. They shot and wounded military guard personnel in the course of their attempt. Hawaii's parental liability statute provided that parents of unmarried children ". . . *shall jointly and severally be liable in damages for tortious acts committed by their children.*"[70] The constitutionality of this broad basis of liability was upheld by a United States District Court, interpreting Hawaii law. (The court's opinion cites numerous parental liability statutes and court decisions from other states.)

NOTES FOR SERVICE PROVIDERS

The statute in this case is very broad, appearing to cover **all** tortious acts for any amount of damages. Other statutes more narrowly define the crimes covered and damages that may be awarded.[71] Service Providers are well-placed to develop and evaluate useful information, from victims and witnesses, as to the defendant/childrens' relationships with their parents, and with others. In addition, parental liability cases often involve questions about whether parents should have foreseen the tortious behavior of their children and the degree of control the parents exercised over them. This is an area in which Service Providers' special expertise in responding to children and family situations is of major assistance to victims and their attorneys.

Cases in Which Plaintiffs Prevailed; Parental Liability Based on General Principles of Law

In most cases, liability for tortious or criminal acts of children is based on parental liability **statutes**, and almost all of these statutes apply only to minor, unmarried children. There is, however,

another class of cases in which parents may be held liable under general principles of law. These cases involve parents' failure to supervise children or failure to warn of their dangerous tendencies, even when their children are adults, together with situations in which children's mental states are such that parents have been forced by circumstances to assume the duty to care for them.

EXAMPLE # 45[72]

Plaintiff's mentally ill former wife lived with her parents. Plaintiff, who had custody of their two minor sons, allowed his ex-wife weekend visitation with the boys at her parents' (the Spiveys') home. When her condition deteriorated and she bought a gun, plaintiff refused visitation. The Spiveys prevailed on him, telling him that they couldn't find the gun, and that they would be responsible for the boys if he allowed visitation. He did, and his ex-wife murdered the boys with the gun she had bought. The court held that the Spivey's were liable to plaintiff for failure to supervise because they had assumed the obligation to do so. Their negligence was found to be the proximate cause of the boys' deaths.

EXAMPLE # 46[73]

Plaintiff/therapist was assaulted by defendants'/parents' 22-year-old autistic son whom parents failed to supervise. The court held that insane persons may be held liable for their torts and, since their mental state is such that they cannot form an intent, the **negligence** statute of limitations, three years, rather than the intentional tort statute, one year, applied. The court held the parents liable for failure to supervise the assailant, stating that imposition of liability would encourage persons to exercise more care over their mentally disabled children.

NOTES FOR SERVICE PROVIDERS

These are tragic cases, indeed, with psychological overtones involving not only the mental states of the assailant children, but also the parents who are forced to care for them. Needless to say, Service Providers' psychological training and expertise is of more than usual value in evaluating these factual situations and in asking the right questions of victims. The cases also point out the use of analogy in analyzing cases. Here the mental age levels of the **adult** children can perhaps be equated with those of the errant **minor** children with which most parental liability cases are concerned. That is to say, the **dependence** of the assailants on their parents, and their need for supervision, plays a more important factual role than does their chronological age.

Of course, non-statutory liability for action based on parental liability also arises in situations involving minor children:

EXAMPLE # 47[74]

Two minor boys burglarized plaintiffs' home, stealing their jewelry. The court held that the boys' parents were liable for the value of the property stolen and for emotional distress caused by the loss. The defendants' status as parents created the liability.

EXAMPLE # 48[75]

Parents of children who were assaulted by another child stated a cause of action against the other child's parents. There was a duty to control the activities of the assailant child.

Cases in Which Defendants Prevailed: Parental Liability Imposed By Statute

Most parental liability statutes require that parents have some degree of custody or control over the offending children. Failure to prove custody may defeat a parental liability claim.

EXAMPLE # 49[76]

A juvenile escaped from state custody and burned down a house. In an action based on a parental liability statute, the court held that since the parents did not have custody and since the escapee had not contacted them, there would be no liability. (NOTE: This case contains a good historical discussion of the issue).

EXAMPLE # 50[77]

The Johnson's minor son hit Mr. Toth with a pop bottle causing injury. The Toths sued the Johnson parents under the state's parental liability statute. The court held that, since the Toths did not prove that the Johnson's had ***custody*** of their own minor child, a $2,500 award to the Toths was reversed.

NOTES FOR SERVICE PROVIDERS

The ***custody*** requirement of Parental Liability is not unusual, and is based on considerations of ordinary fairness. Nonetheless, this issue can turn out to be one of those ***little things*** that are often overlooked. Service Providers handling cases of victims who have been injured by juveniles should routinely ascertain information about the defendant/perpetrators' custody status.

Cases in Which Defendants Prevailed; Parental Liability Based On General Principles of Law

Because parental liability in the absence of a statute is generally based on such general law principles as failure to warn or failure to supervise, if plaintiffs are to prevail it is necessary to prove that the torts or crimes committed by children were **foreseeable**. If this element of the plaintiff's case is not proven there is no liability.

EXAMPLE # 51[78]

Parents of a 15 year-old son who murdered another child were not liable under parental liability theory because they had no notice of the boy's dangerous tendencies.

EXAMPLE # 52[79]

Plaintiff was raped by a 15 year-old high school student with a history of truancy and drug abuse. The court held that she stated no cause of action against the rapist's parents or the school for negligent supervision because there was no evidence of prior sexually assaultive behavior.

EXAMPLE # 53[80]

Parents of a 18 year-old who burned plaintiff's farm were not liable for failure to supervise because they had no reason to know of son's tendencies to set fires.

NOTES FOR SERVICE PROVIDERS

Foreseeability is possibly the most important word in the area of parental liability litigation. When inanimate objects injure plaintiffs (an automobile tire exploding, for example) there is usually some scientifically measurable reason (wear and tear, negligent

manufacture). When the injury is caused by a **person**, however, the law requires plaintiffs to prove that whatever the assailant did could have been **foreseen** by the defendants. Only then, in the absence of a statutory provision, does the law impose a duty on parents to prevent the injury that was caused. When counseling victims, Service Providers often discover as much or more information as police interrogators. When talking to victims about the habits, attitudes, prior anti-social behavior, etc. of juvenile perpetrators, questions should not be limited to actual **crimes**. A school yard bully who constantly pushes people around might have exhibited enough of a violent nature to cause a subsequent violent assault and battery to be considered ***foreseeable***.

NEGLIGENT ENTRUSTMENT

When one person, the entrustor, permits another person, the entrustee, to use a certain potentially dangerous instrumentality, and the latter injures the plaintiff/victim with it, the entrustor may be liable to the plaintiff. The key to liability is that the entrustors had control over the instrumentality **and** that they knew, or should have known, that the perpetrator intended, or **was likely** to use it to cause injury. To be held liable, entrustors need not know with **certainty** that the perpetrators **will** use the dangerous instrumentality they gave to them to injure someone. Under the facts and circumstances of the case, if the entrustors **should have known** of the likelihood of illegal or injurious use, a cause of action exists.

Cases in Which Plaintiffs Prevailed

EXAMPLE # 54[81]

Plaintiff Bumpass had words with Shim; he asked him to step out of his car and the argument continued until it escalated into a full scale fistfight. Shim shouted to his defendant/girlfriend to get a gun out of his car; she did and handed it to Shim who shot Bumpass. In Bumpass' suit for negligent entrustment, the court held that the defendant/girlfriend was liable for ***entrusting***, that is, handing the gun to Shim. It was not necessary that the defendant herself owned the gun, only that it was foreseeable that harm could follow her giving it to the shooter.

NOTES FOR SERVICE PROVIDERS

The court emphasized that **ownership** of the negligently entrusted object was not a prerequisite to liability. When the defendant took the gun from the car, she had enough ***control*** over it that she could be liable for ***entrusting*** it to the shooter. When situations involving negligent entrustment arise, Service Providers should gather information to prove that defendants had actual access to or control over the instrument.

EXAMPLE # 55[82]

Carolyn Foster was a ***housemate*** of Merchant who had previously been convicted of the wounding and fatal shooting of another. She brought a gun into the house and ***hid*** it in a bed. She then asked Merchant to fix the bed. Merchant found the gun and shot plaintiff with it. The court held that Foster was liable to plaintiff for negligent entrustment.

NOTES FOR SERVICE PROVIDERS

In this case, the defendant ***entrusted*** the weapon to the killer because she directed him to its hiding place, where he was very likely to find it. This fact, coupled with her knowledge of his character and dangerous nature, created liability, proving yet again the critical importance of this kind of background information obtained from victims.

This case illustrates another point: at least **some** courts hold that it is not necessary to prove that the perpetrator had the intent to injure any specific person. If the instrument -- here, a firearm -- is sufficiently dangerous in itself, then liability will be found if it is used against any person. This is not universally true, however. Other courts require more specificity in the identification of potential victims. All information that Service Providers can elicit that tends to prove that the entrustor knew that a specific victim, or **class of victims**, was endangered will be helpful to victims' causes of action.

Cases in Which Defendants Prevailed

EXAMPLE # 56[83]

Earl and Ursula were getting divorced; Earl threatened Ursula with death, so Fred (whom Ursula later married) loaned or gave her a shotgun which Ursula kept in the back seat of her car. Ursula's and Fred's son, Ricky, who had a criminal record, were in Ursula's car and were threatened by Earl. Ursula asked Ricky to help her; Ricky found the shotgun in the car and hit Earl with it. Earl sued Fred for negligent entrustment of the gun to Ricky and Ursula. As to Ricky, the court held that Fred simply did not entrust the gun to him, period, under the facts of the case. As to Ursula, Fred entrusted the gun to her, all right, but the entrustment was not negligent because Ursula was not ***emotionally unstable*** or otherwise impaired.

Earl also sued Ursula for entrusting the gun to Ricky. The court held that Ursula did not entrust the gun to him and anyway, there was no proof that she knew of Ricky's criminal record.

NOTES FOR SERVICE PROVIDERS

This case differs from the two cases reported above where the entrustor either ***gave*** the gun to the shooter, or directed him to a place where it was hidden. The mere availability of a weapon, in and of itself, generally does not constitute negligent entrustment, absent at least **some** reason to suspect that it will be improperly used.

EXAMPLE # 57[84]

Defendant's 15 year-old son shot plaintiff/ policeman while fleeing from a burglary, using a stolen gun that the son had purchased. The court held that, while a judgment against the **son** for willful and wanton misconduct should be affirmed, the boy's parents could not be held liable for negligent entrustment, or negligent supervision, because they were unaware of the boy's possession of stolen guns.

The court in this case explained its decision in terms of basic fairness to the defendants/parents:

> From the evidence presented, it is clear that the defendants cannot be liable for negligent entrustment. Michael Massa shot the plaintiff with a stolen handgun which he purchased one or two weeks prior to the shooting. Michael testified that his parents were unaware of the existence of the pistol. Maynard and Sara Massa also testified that they had no knowledge of Michael's possession of the gun. Clearly, the defendants cannot be liable for negligent entrustment of an article which they did not only not control, but did not even know existed.[85]

NOTES FOR SERVICE PROVIDERS

This holding is reasonable, but remember that liability for negligent entrustment **may**, in fact, be established if the defendants **should have known** of the presence of the weapons, or of dangerous characteristics of the perpetrators. Proof of what defendants **should have known** is essential to successful civil actions on behalf of crime victims. Under any other rule, defendants may falsely deny that they actually **knew** something, and thus escape liability if they are believed. However, under the ***should have known*** standard, the law requires more than mere denial if defendants are to avoid liability. If, in the circumstance, there was enough information available to defendants that a reasonable person, in the same situation, would have known that the object given to the perpetrator might have been utilized to injure another, then the ***should-have-known*** rule can be invoked to prove liability for negligent entrustment.

It is important that Service Providers who are interviewing victims in negligent entrustment cases try to develop a ***should-have-known-mentality***, looking beyond what defendants **say** about what they know, to what the hypothetical ***reasonable person*** should have known.

The foregoing examples have involved negligent entrustment of weapons which have been used to injure plaintiffs. The doctrine of negligent entrustment is, however, not limited to weapons. Indeed, **most** negligent entrustment cases arise when entrustors let someone else use their automobiles, or other vehicles, and the entrustees **negligently** injure the plaintiffs with them. Occasionally cases arise wherein entrustees use vehicles as a weapon, for

example, intentionally ramming someone else. If this occurs the same rules noted above apply. The principal issue to be addressed is whether such intentional and unlawful use of the vehicle was reasonably foreseeable.[86]

DEFENSES

The preceding instruction pertained to **plaintiffs**: those whom perpetrators have injured and who have responded by filing civil suits for damages. This subsection presents a brief consideration of the opposite side of the coin: defenses that perpetrators can -- and most assuredly will -- raise in order to defeat plaintiffs' actions.

There are two purposes for this section. First, although Service Providers are concerned primarily with eliciting information from victims that will enhance their chances of winning civil actions, ***winning*** also includes overcoming the defenses raised by defendants. Consequently, as a practical matter, it just makes sense to know something about the spectrum of potential defenses available to perpetrators so that those defenses may be anticipated and countered. This is, to be sure, primarily the function of attorneys; however, on occasion, information of a **defensive** nature gathered by Service Providers is extremely useful.

The other reason to discuss defenses is that perpetrators may, in their turn, sue or countersue their original victims. Sometimes alleged perpetrators believe in good faith that **they** were actually the ones who were wrongfully injured. On other occasions perpetrators countersue for purpose of pure harassment, or to intimidate victims into dropping charges or withdrawing **their** civil suits. In view of this possibility, it is useful for those counseling victims to know something about defenses.

Topics discussed here presume that the alleged crimes were, in fact, committed against the victims/plaintiffs by the defendant/ perpetrators. Consequently, we will be discussing primarily ***procedural*** defenses. Alleging that:

(1) Defendants were justified in inflicting the injury -- provocation, self-defense or defense of others; or,

(2) The victims were wholly or partially responsible for their own injuries -- contributory or comparative negligence, assumption of the risk.

Provocation

We saw in the above discussion of Assault and Battery that mere words never justify a battery.[87] We will see shortly that force, up to and including deadly force, may be lawfully used to defend oneself or others from death or great bodily harm, or even to defend one's home from destruction. There is also a ***gray area*** lying somewhere between ***mere words*** on the one hand, and the perceived danger of great bodily harm on the other. These are situations in which defendants who have physically injured their victims claim that their acts were justified because their victims ***provoked*** them.

EXAMPLE # 58[88]

Thigpen, in a bar, poured beer over 16-year-old Stern, as a prank. Stern punched Thigpen once, causing serious injury. The court held that beer pouring was not sufficient provocation to warrant a battery. However, general damages were mitigated from $20,000 to $10,000.

EXAMPLE # 59[89]

Plaintiff crossed the wires on defendant's truck, causing him to have an accident. When confronted by the defendant, plaintiff replied defiantly and profanely. Defendant hit him in the face. The court held that the ***hot wiring*** and profane response were not sufficient provocation to justify the battery: $90 medical and $1,000 general were adequate damages.

NOTES FOR SERVICE PROVIDERS:

Courts do not condone the use of force to settle arguments. In both of these examples, the initial victims would have had civil causes of action: battery for pouring beer, trespass or malicious destruction of property for crossing wires. However, the courts are not blind to the fact that pranks and jokes can be extremely aggravating. This is evidenced in the first example where, in reducing plaintiff's damages, the court commented:

> At the time of this incident, Thigpen was 23-years-old and larger than the 16-year-old Stern. The prank was the source of embarrassment to the juvenile who lashed out in retaliation after only a few seconds delay.[90]

The rule that pranks do not justify physical response is well established. When questioning victims who have been injured as a result of having done something which they considered to be merely humorous activity or a practical joke, Service Providers should be particularly aware of any facts which may help to prove the inappropriate nature of the response by the perpetrator. The lapse of time between the prank and the battery is important, as are words used by the assailant: *That (the prank) was the last straw. I've been meaning to get you for a long time*, or similar statements that might demonstrate a level of animosity over and

above that which could have reasonably been expected in response to the incident that triggered the assault. Such evidence may be especially helpful in preventing damages from being reduced by the courts.

Self-Defense and Defense of Others

The legal doctrine of ***Self-defense*** was first codified in England in 1532[91] and, ever since then, has remained one of the thorniest issues in personal injury law. Variations on fact patterns are innumerable, and their interpretations differ from case to case and jurisdiction to jurisdiction.

The right of innocent persons to defend themselves from unlawful attacks is unquestioned in the law, so long as the response to the attack is in proportion to the force used by the attacker. From this point on, problems begin: May a victim shoot someone threatening him with fists? Probably not. Suppose the intended victim is a hemophiliac whom a nosebleed might kill? A threatens B with a knife; B draws a gun and shoots him. The shooting would probably be justifiable in self-defense. Same facts, except that B is a black-belt karate instructor for the Marine Corps. Must B rely on his unarmed combat skills at the risk of being cut up, or may he go ahead and shoot the knife-wielding assailant? One can see how this sort of conjecture could continue *ad infinitum.*

These hypothetical situations illustrate the innumerable factual variations that may arise in cases involving self-defense. The legal aspects of the defense are fairly technical, usually focusing on such issues as whether the force used by perpetrators to defend themselves and their families was reasonable under the circumstances.

The *Manual*'s instruction in this area will be confined principally to cases involving the question of whether perpetrators' insurance carriers should be required to provide coverage for injuries inflicted when the perpetrators reasonably believed that they were acting in self-defense. A number of courts have held that, despite the fact that homeowner's and other policies exclude coverage for ***expected*** or ***intended*** injuries, coverage may be available if an assailant's intent to ***injure*** is negated by his belief that he was lawfully defending himself or his family. This is discussed in detail below.

Service Providers should be alert to any factual issues that might give rise to claims by defendant/perpetrators that they were defending themselves (or their loved ones), when they assaulted their victims. Information about potential self-defense claims may be useful to victims' attorneys in countering these claims.

Assumption of Risk; Consent

Certain defenses often raised by perpetrators allege that they should not be held liable to plaintiffs because the plaintiffs, through their own actions, were wholly or partially responsible for the injuries that the defendants inflicted upon them. These defenses usually involve allegations that plaintiffs voluntarily and knowingly exposed themselves to the danger, or that they ***assumed the risks***.

The elements of the defense of assumption of risk are:

(1) A situation of danger must have existed;

(2) The danger of the situation must have been fully known to the plaintiff: and,

(3) Plaintiff must have voluntarily exposed himself to the danger.

EXAMPLE # 61[92]

Plaintiff went to the aid of his neighbor to assist him in subduing a would-be burglar. During the ensuing altercation, **the neighbor** hit plaintiff with a gun, injuring his hand. Plaintiff could not recover from the neighbor for negligence because the court held that he had assumed the risk.

The unfairness of this holding is obvious. While it is true that the plaintiff knew of the risk involved, he assumed it for the most well-intentioned reason: to help his neighbor. In light of this kind of result, some jurisdictions have adopted the ***Rescue Doctrine*** which provides that:

> *. . . a rescuer is justified in exposing himself to danger in a manner that would deprive him of recovery for his injuries in other circumstances, if the peril threatening the victim is imminent and real, not merely imaginary or speculative, and the rescuer has not rashly or recklessly disregarded all consideration for his own safety.*[93]

EXAMPLE # 62[94]

Defendant, in his car with his wife, was attacked by ***bikers***. The plaintiff came to the defendant's rescue. The latter, while attempting to escape in his car, struck plaintiff. The court held that plaintiff had stated a cause of action. The ***rescue doctrine***, which holds that one who comes to the aid of another who is in peril is not precluded from recovery by the doctrine of assumption of risk, was applied in order to allow the plaintiff to recover for his injuries.

The outcome in this case is certainly more humane and victim-oriented than in the preceding example in which an individual attempting to assist his neighbor, whom he believed to be in

danger, was penalized for his efforts. Both of the foregoing examples involve situations in which the rescuer was negligently injured by the party whom he was attempting to rescue. At least in jurisdictions that have adopted the ***rescue doctrine***, it seems clear that the rescuers could also recover if they were injured by the person whose intentional crimes caused the rescue attempt in the first place.

NOTES FOR SERVICE PROVIDERS

The **motivations** of rescuers who entered into perceived danger situations in order to assist others may be critical to the application of the rescue doctrine. Service Providers should attempt to gather this kind of information that would establish that the rescuers were acting out of a desire to assist and were not simply ***piling on***.

Consent is a defense that is similar to assumption of the risk: if two or more people agree to engage in a fight or an affray, none of the participants can recover from others, unless unanticipated force in excess of what was necessary or expected was used.

EXAMPLE # 63[95]

Two teenage boys engaged in a fistfight. One plaintiff's eye was badly injured. The court held that neither the parents of the boy who struck the injuring blow, nor their insurance carrier, was liable because the injured boy consented to the altercation and the force used by each was neither unanticipated or clearly excessive under the circumstances.

Contributory and Comparative Negligence

Contributory and comparative negligence issues involve questions concerning whether, and to what extent, the plaintiffs' negligence should be the basis for denying recovery from defendants.

Under the older contributory negligence doctrine, **any** negligence on the part of plaintiffs, no matter how slight, served as a complete bar to recovery when both plaintiffs and defendants were negligent.

Comparative negligence is a doctrine that is more favorable to plaintiffs. It allows the triers of fact -- judges and juries -- to **apportion** negligence among plaintiffs and defendants according to the degree of the negligence of each. Thus, if a jury set damages at $10,000 but found a plaintiff to be 30 percent negligent, that plaintiff's actual award would be $7,000.

Fortunately for crime victims who are suing perpetrators, most jurisdictions do not apply either contributory or comparative negligence principles in cases involving **intentional** torts or to awards of **punitive damages.**

EXAMPLE # 64[96]

In an assault and battery action, the defendant admitted that he intentionally hit the plaintiff. The judge gave a jury instruction about comparative negligence on the part of the plaintiff. The appellate court held that this was reversible error. Comparative negligence is not a defense to intentional torts and a jury verdict should have been directed for the plaintiff.

EXAMPLE # 65[97]

Defendant, who was drunk, intentionally assaulted and battered plaintiff by driving his car at him and dragging him while he was hanging onto the car. A jury awarded plaintiff $30,000 compensatory, and $12,000 punitive damages, but found plaintiff 50% at fault for fighting with defendant. The court held that the punitive damage award should not have been reduced by the 50% comparative negligence figure.

NOTES FOR SERVICE PROVIDERS

The significance of the doctrine that contributory and comparative negligence may not apply in intentional tort cases is readily apparent. Because the *Manual*'s instruction is focused almost exclusively on **violent crimes**, most of the torts arising out of those crimes will, by definition, be ***intentional.*** Consequently, in many instances, judges' and jurors' decisions as to whether crimes were intentional or not may make the difference between whether plaintiff/victims are awarded full damages because the acts are found to be ***intentional***, or are entitled only to reduced damages because defendants' acts were merely ***negligent.***

Whenever there is the slightest question of contributory or comparative negligence on the part of victims, Service Providers should be especially alert for any and all information, whether about actions, words, or both, which will be useful in proving defendants' actual or perceived **intent** to injure the plaintiffs/ victims.

This section's overall purpose has been to convince readers that our civil law system can and does work for crime victims who wish to sue those who have injured them. We have seen how courts nationwide have ruled in favor of victims in a wide-ranging spectrum of cases. The examples reported here were selected at random from a review of *victim versus perpetrator* cases decided by the courts in the last few years. No effort has been made to paint an unrealistically rosy picture of victims' litigation, by selecting **only** those cases that were strikingly favorable to plaintiff/victims. Indeed, as has been pointed out, cases in which **defendants** prevailed can be considered as a part of the ***learning process*** because they help to illustrate legal ***pitfalls*** that may be anticipated and countered.

Readers should have noted by now that the **law** governing liability in *victim versus perpetrator* cases is relatively straightforward, premised, in large measure, on common sense applications of what goes on in our daily lives. First-party victim cases become complicated only because of the limitless variations of **factual** situations that arise; and even these are generally resolved based on the law's realistic assessment of what goes on in the world. For example, the standard applied in cases involving infliction of emotional distress is based on what would appear ***outrageous*** to the **average member of a civilized community** rather than to the individual plaintiffs or defendants.

The importance of the **facts** in *victim versus perpetrator* cases, of course, highlights the importance of the new (and long overdue) role that this *Manual* proposes for Service Providers. Their experience and expertise, their dedication and ability to relate to victims, and their unique involvement in the criminal justice system, all combine to place them in **the** most strategic position to gather, evaluate, and refer to potential victims' attorneys the kinds of facts that will create the new dimension in victim services that this *Manual* contemplates.

Chapter 3. Insured Perpetrators

CRIME AND INSURANCE: OVERVIEW

The foregoing chapters demonstrate that violent crime victims often win civil suits against perpetrators who have injured them. Winning, however, is only half of the battle. The other half consists of collecting those hard-won judgments. Winning **and** collecting are essential before it can be said that the civil law really ***works*** for the victims. *Section III* presented an overview

picture of Collection of Judgments, emphasizing that all violent criminals are **not** uncollectable, and describing various ways to collect from various categories of perpetrators.

A significant but often overlooked option for judgment collection involves **Insured Perpetrators**: violators who are covered by insurance policies that **may**, in certain instances, provide funds from the ***deep pockets*** of perpetrators' insurance carriers, with which to compensate victims for their injuries.

Three conditions must be met in order to collect from insurance carriers.

- First, of course, perpetrators must be insured.
- Second, their policies must provide coverage for whatever it was they did to the plaintiff/victims.
- Third, the insured perpetrators must have been found to be liable to the plaintiffs, or at least, their insurers must have decided that it is likely enough that they **will** be held liable that it is in the insurance company's best interests to settle the victims' cases.

If these conditions are satisfied, the only issue left to resolve is the amount of damages to be paid by the insurers to the victims pursuant to verdicts or settlements.

The previous chapters have provided instruction about what information is most useful to victims' attorneys in establishing the **legal liability** of perpetrators. This chapter focuses more on the kind of factual information that is most helpful in establishing whether the perpetrators' insurance coverage must compensate

their victims for their injuries. Consequently, the factual scenarios here emphasize the specific principles of crime-related insurance law, as opposed to the more generalized liability issues discussed earlier.

The importance of the Service Providers' knowledge about the factual issues involved in insured perpetrator situations cannot be overemphasized. The possibility that a perpetrator's insurance carrier will, or **might**, be obligated to pay damages awarded to a crime victim is often **the** major determinative factor in a lawyer's decision to accept the victim's case. A Service Provider's insight into, and evaluations of, insurance-related information elicited from a victim often leads to favorable consideration of the victim's case by attorneys. This, in turn, may result in the realistic possibility of compensation for eligible crime victims.

The general legal principles involved in insured perpetrator situations are straightforward. One writer summarized the rationale adopted by judges who favor a victim-oriented position with respect to insurance coverage of perpetrators of violent crimes:

> . . . the public policy of compensating injured victims favors insurance protection of those causing the harm. Those who cause damage or injuries frequently cannot afford to compensate the victim for the loss and depend on their insurance for coverage. In furtherance of their sympathy and desire to award restitution, courts are more comfortable holding an insurance company liable than they are placing the risk wholly on the insured or the victim. Additionally, insurance companies are able to bear the loss because they are in the business of spreading risk.[98]

The importance of the Service Provider's role in insured perpetrator cases is underscored by the fact that courts which favor insurance coverage often rely on the nuances of a case's facts as justification for insurance coverage. Hence, Service Providers who know how to ask the right questions about factual situations involved in *victim versus perpetrator* cases are often able to elicit extremely useful information which may later convince the courts to rule in favor of the victims on insurance issues.

Insurance policies are designed to protect people from the financial consequences of ***accidental*** injuries that they have caused to others. Carriers have no desire to protect insured clients from their own willful, criminal behavior. The mere suggestion of ***armed robbery policies*** purporting to insure people who have decided to embark on careers of crime is ridiculous. In addition, statutes[99] and public policy generally prohibit any such coverage. Consequently, almost all policies contain **exclusions** for injuries that are ***expected*** or ***intended*** by the insureds.

These ***exclusions***, and the manner in which courts interpret them, form the basis for almost all of the litigation involving insured perpetrators of violent crimes. Since most such crimes involve acts that the insured perpetrators ***intended*** to commit, and since the injuries caused by such acts are rarely ***unexpected***, insurance companies urge the courts to interpret very broadly the exclusions for acts that are ***expected***, ***intended***, ***criminal***, or ***willful***, thus enabling them to deny coverage for injuries caused by criminal acts.

On the other hand, lawyers for victims urge the courts to interpret exclusions for ***expected*** or ***intended*** injuries very narrowly so that innocent victims of insured perpetrators may be compensated.

There is a trend to develop **exceptions** to the policy exclusions for ***expected*** or ***intended*** injuries among those courts which favor extending coverage for victims' losses and suffering. For example, suppose that "A" murders "B". "A" is insured, but his policy contains an exclusion for *injuries that are expected or intended by the insured.* There is, however, evidence that "A" was insane at the time he killed his victim. A majority of courts today hold that insane perpetrators may be unable to form the specific **intent** to injure, and hence, ***intended injury*** exclusions will not apply to deny coverage. In effect, these courts have created ***exceptions*** to the ***exclusions.***

This chapter will focus on the ongoing interplay between insurance companies trying to exclude coverage for expected or intended injuries, and victims' attorneys, who are trying to carve out **exceptions** to those exclusions so that the perpetrators' acts are covered.

The *Manual*'s instruction adds a new dimension to this ***see-saw*** battle: the much-needed assistance of Service Providers in gathering information from the victims which will be useful to their attorneys to win their clients' lawsuits **and** collect from perpetrators' insurers.

The type of policies most often encountered in *victim versus perpetrator* litigation are Homeowner's, Life, and Automobile policies. These are discussed in this chapter. Special types of policies, such as those issued to professional persons (doctors, dentists, etc.) who are accused of sexually assaulting patients, or those issued to day care centers at which children are molested, will be considered in the next section dealing with **Special Cases** involving **Child Abuse** and **Women as Victims.**

HOMEOWNER'S POLICIES

Homeowners policies are written to protect individuals and their families from liability for injuries to others that arise in the course of the insureds' general, day-to-day activities. Similar policies are issued to ***renters*** or ***apartment owners***. These policies usually do not cover ***business pursuits***, such as ***day care*** of children, even if conducted at the insureds' homes. The term ***homeowner's*** as applied to these policies is broad in scope. It does not generally limit coverage to those incidents that happen at the insured's ***residence***, or other home. ***Homeowner's*** policies usually include all kinds of accidents **wherever they may happen.** Most litigation under ***homeowner's*** policies involves the **nature** of the acts that caused injuries, not where they happened.

Because homeowner's policies are designed to protect the insureds from liability for ***accidental*** or ***unexpected*** injuries to others, they usually **exclude**, by their terms, liability for ***expected*** or ***intended*** injuries. Such ***expected/intended injury*** exclusions in homeowner's policies are often said to be based on public policy considerations to the effect that insured perpetrators would be ***rewarded*** if their insurance carriers paid damages to victims of their criminal acts. Furthermore, it is argued, insuring against intentional behavior would remove the financial deterrent to criminal activity that would otherwise dissuade perpetrators from engaging in such activity.

This viewpoint, however, is at odds with the victim-oriented interpretations of insurance policies described above, wherein insurance coverage is viewed by many courts as a completely acceptable, and often necessary, substitute for other avenues of collection that may not be available to victims. These courts' liberal interpretations are based on the theory that when victims are permitted to collect from perpetrators' policies, they will be

receiving necessary and much-needed financial assistance as recompense for criminally-caused expenses, such as medical costs and loss of work, and to assist them in putting their lives back together. In this victim-oriented view, it is more important to consider victims' needs than to worry about ***rewarding*** perpetrators.

Courts wishing to interpret insurance contracts in favor of victims can rely on the established rules governing interpretations of all contracts of insurance. These contracts must be interpreted in a common sense, practical manner that will give effect to the intent of the parties; all questions or ambiguities must be resolved against the insurance companies whose attorneys drafted the wording of the policies. Since provisions which **exclude** coverage are certainly **not** what people had in mind when they bought the policies, exclusions from coverage are not favored and are interpreted **strictly** against the insurance companies.

As a practical matter, almost every issue involved in interpreting ***expected/intended injury*** exclusions in homeowners' policies revolves around the single word ***intent***: what was **really** going on in the perpetrators' minds when they injured their victims?

The kinds of analysis made by courts in these cases fall very roughly into three main categories:

(1) **Actual or Inferred Intent to Injure.** These are cases in which the intent to injure is clear beyond any doubt **or** where the crime involved is of such a horrible nature that the intent to injure may be **inferred,** as a matter of law. Insurance carriers usually win in these cases.

(2) **Intended Act/Unexpected Injury.** In many cases there may be an intent on the part of perpetrators to do the particular **act,** but an intent to **injure** does

not necessarily follow. A jury must decide whether the perpetrators actually intended the resulting **injury**. Plaintiffs have a good chance of winning in these cases.

(3) **Special Circumstances.** This is a class of cases involving special circumstances in which intentional acts committed by the perpetrators would ordinarily deny coverage under ***expected/intended injuries*** exclusions. However, in certain circumstances such as those involving perpetrators' insanity or intoxication, policies are interpreted by some courts so as to negate the perpetrators' intent and thus to allow recovery by the victim.

The examples which follow illustrate how the above three interpretative categories of policy interpretations are applied in actual cases. In almost all of these examples the **legal liability** of perpetrators has been established. The question then becomes whether ***expected/intended injury*** exclusions in perpetrators' policies will relieve the insurance carriers of their obligation to defend perpetrators or to pay judgments against them, or whether **exceptions** to the exclusions will allow victim/plaintiffs to collect under the policies.

The following example illustrates how courts may apply the ***intended act/unexpected injury*** interpretation (number 2 above) in order to require insurance coverage.

EXAMPLE # 66 [100]

Wayne and William Dyer were brothers and close friends. They were drinking vodka one night with another friend, Tommy Long, when the brothers got into a minor dispute over a water ski. Wayne reached into his pocket, produced a revolver and shot William to death. Wayne, visibly shocked and upset, asked Tommy Long to call an ambulance for William. He then turned the gun on himself and committed suicide.

Wayne had been insured under a homeowner's policy issued by the Alabama Farm Bureau Mutual Insurance Company. The policy contained an exclusion that provided:

> This policy does not apply, . . . to bodily injury or property damage which is either expected or intended from the standpoint of the insured."[101]

Gracie Ann Dyer, William's wife, sued Wayne's estate and his insurance carrier. The carrier argued before the trial judge, sitting without a jury, that the ***expected/intended injury*** exclusion in the policy relieved it of any obligation to defend Wayne's estate or to provide any coverage for damages. The trial court ruled that, **under the facts** of this case, the exclusion in the policy did not apply and that the carrier was liable.

The Alabama Supreme Court affirmed the trial court's ruling. First, it noted that the question whether the perpetrator actually ***expected*** or ***intended*** to injure the victim was a question of **fact** (as opposed to a purely legal issue) which must be decided by the trier of fact: a jury or a court sitting without a jury.

The court then analyzed the facts found by the trial court:

> Even though the evidence established that Wayne deliberately pulled a gun from his pocket, pointed the gun at his brother, and pulled the trigger, additional evidence admitted at trial of the brothers' amicable relationship, Long's indifference to Wayne's act of aiming his gun at his brother, and Wayne's suicide immediately following his brother's death tends to negate the inference that Wayne intended or expected to injure his brother. Thus, the *ore tenus* presumption of correctness attends the trial court's ruling on this controverted factual question.[102][103]

The Alabama court looked at the **subjective** intent of the killer: did he really expect or intend to shoot his brother to death? In light of the brothers' amicable relationship, Wayne's habit of playing with guns when drinking, and Wayne's reaction after the shooting, the court found in the negative. The exclusion did not apply and the insurance company had to pay.

NOTES FOR SERVICE PROVIDERS

This case provides an example of those situations in which **some** courts try to do justice to victims by finding ways to affirm insurance coverage despite ***expected/intended injury*** exclusions in homeowner's policies. The court based its holding on its own perception of the **facts**, underscoring for Service Providers the critical importance of ascertaining from victims all information that might be useful in defeating policy exclusions.

Victims' attorneys win insured perpetrator cases because they are able to convince courts and juries that the facts of the cases should be interpreted to require coverage. So long as there is **any possibility** at all that factual scenarios may assist in defeating ***expected/intended injury*** exclusions (or other types of exclusions), Service Providers should assume that their elicitation and evaluation of these facts may make the difference between coverage and non-coverage for victims' injuries.

Pleading

All of the instruction presented here with respect to policy exclusions, and exceptions to those exclusions, involve **intentional** acts by perpetrators. If it were otherwise, exclusions for ***expected or intended injuries*** would not even be in issue. Suppose, however, that crafty attorneys for victims/plaintiffs, knowing that perpetrators policies contain ***expected/intended injury*** exclusions, decide to allege that what might appear to be an **intentional** act was really the result of the defendant's **negligence**. Since ***expected/intended injury*** exclusions do not apply in negligence situations, victims' attorneys may ***bypass*** those exclusions, materially enhancing victims' chances of collecting from perpetrators policies.

The courts are divided on the issue of whether plaintiffs' attorneys can utilize allegations of ***negligence*** in *victim versus perpetrator* cases to undercut ***expected/intended injury*** exclusions in perpetrators homeowner's policies. Some courts reject such pleadings:

EXAMPLE # 67[104]

Plaintiff/Insured's girlfriend sued him for ***negligent*** assaults and batteries. The court held that this was a ***transparent attempt*** to trigger insurance coverage and the carrier was not obligated to defend the perpetrator or pay damages.

EXAMPLE # 68[105]

A businessman struck and badly injured the plaintiff/policeman who was arresting him. In an attempt to reach the assailant's homeowner's policy, the plaintiff argued that the businessman was ***negligent*** in thinking that he could lawfully resist arrest. The court rejected this argument and applied the ***expected/intended injury*** policy exclusion to relieve the carrier of its obligations under the policy.

Other courts, however, accept the argument that, **for insurance purposes**, allegations of negligence will bring insurance coverage issues into the case.

EXAMPLE # 69[106]

The son of insured parents struck a younger boy. The victim sued the assailant for assault and battery and for negligence. The parent's homeowner's insurance carrier defended the assailant, and a jury found for the plaintiff on the grounds of **negligence**. On appeal, the court held that the carrier was bound by the verdict and could not relitigate whether the blow was intentional.

EXAMPLE # 70[107]

Homeowner's insured injured plaintiff during an altercation. The court held that the negligence allegation was sufficient to defeat the expected/intended injury exclusion, because under the negligence theory, the defendant might not have expected or intended that the plaintiff would be injured.

NOTES FOR SERVICE PROVIDERS

The last example illustrates the fact that some courts will permit pleadings in crime victims cases that are, on their face, inconsistent: an intentional tort -- battery -- and an unintentional tort -- negligence. In cases in which this is allowed, jury awards in favor of the victims on the courts alleging negligence (as opposed to those alleging **intentional** acts) must be paid by perpetrator's insurers. Juriés are fairly sophisticated about insurance coverage these days, and it is possible that they may reach ***negligence*** verdicts in order to assist plaintiffs in collecting from insurance carriers.

Of course, there must be some **evidence** of negligence before any court allows that issue to be brought into the case. Service Providers should be alert for any information indicating that injuries to plaintiffs **may** have been negligently inflicted. Perpetrators' statements such as: "I didn't mean to hit you so close to your eye"; "I didn't know the gun was loaded"; or, "I thought you were a burglar when I shot you", may be of critical importance in obtaining recompense from perpetrators' insurance policies.

Actual and Inferred Intent to Injure

As one would imagine, the more villainous the crime, the less chance there is of convincing courts that the resulting injury was not ***expected*** or ***intended***. Consider these factual situations:

EXAMPLE # 71[108]

Four men conspired to the robbery of a liquor store, during which plaintiff's son, a clerk, was murdered. The victim's parents sued one of the conspirators, Moe, who had remained in the car and did not take part in the actual shooting. They also sued Moe's homeowner's carrier. A jury found that Moe did not ***intend or expect*** the killing; however, this finding was reversed on appeal. The Wisconsin Supreme Court ruled that Moe's participation in an armed robbery was so ***substantially certain*** to cause injury that intent to injure would be **inferred** and the carrier was relieved of liability by the ***expected/intended injury*** exclusion in the policy.

EXAMPLE # 72[109]

Homeowner's insureds planned and participated in an armed robbery in which the plaintiff's decedent was murdered. The Minnesota Supreme Court held that even though Minnesota follows the ***intended act/unexpected result*** rule (when the *act is intended but the result is not*, the expected/intended injury exclusion does not apply). In this instance, the intent to injure could be inferred from the circumstances.

EXAMPLE # 73[110]

Grasfeder, at the urging of the deceased's wife, wired up deceased's car with explosives, killing him. The court held that there was no coverage under the Grasfeder's homeowner's policy. Intent to injure would be **inferred**; the insured **must** have expected the injuries that resulted.

EXAMPLE # 74[111]

Plaintiff was in bed with Morrison's estranged wife when Morrison showed up with a gun. Plaintiff ran in the bathroom and shut the door. Morrison shot through the door, hitting the plaintiff. The court held that the ***Intentional Act*** exclusion in Morrison's homeowner's policy relieved the carrier of a duty to defend him or to pay any damages awarded against him.

NOTES FOR SERVICE PROVIDERS

None of the holdings in the previous cases should come as a surprise. No matter how victim-oriented courts and attorneys may be, the clear language of most homeowner's policy's ***expected/ intended injury*** exclusions would certainly apply to car bombers and armed robberies.

Nonetheless, when Service Providers are confronted with cases, like those above in which it appears that there cannot possibly be any insurance coverage, they should continue to elicit any further insurance-related information that might be useful to attorneys. There may be other aspects of the cases which might produce positive results. For example, as noted above, some courts have held that if the perpetrator was insane and could not form the intent to commit the act or to cause the injury, then the ***expected/intended injury*** exclusions may not apply. Special situations such as insanity, intoxication and self-defense may arise in which the perpetrator's mental condition, or perception of the situation, will allow recovery even in the face of ***expected/intended injury*** exclusions. Service Providers should seek as much information as possible; their persistence may discover something, even inadvertently, that will put victims' cases into entirely different perspectives.

Intended Acts/Unexpected Injuries

Cases often arise in which there is little question that insured perpetrators intended to do certain acts; however, the evidence also indicates that they did not intend the **type** or **degree** of injury that resulted from those acts.

Most courts hold strictly to the rule that a person is presumed to intend all of the consequences of **his** acts. Many of these courts extend this presumption when interpreting ***expected/intended injury*** exclusions in insurance contracts.[112] Recently, however, an increasing number of courts have taken a more flexible, victim-oriented view of insurance-related victim cases where the act was clearly intended but the extent of the injuries was not. This trend is of great importance to victims, their Service Providers and their attorneys.

EXAMPLE # 75[113]

Feher dressed up in commando clothes and went on a shooting spree with a rifle, hitting some people and killing a jogger, apparently with a ricochet. In a suit by Feher's victims, it was held that the intentional act exclusion did not relieve the carrier. The trial court found that Feher intended to shoot at people but not necessarily to injure them. The appellate court upheld that ruling. Additionally, Feher's mental condition might have prevented him from forming an intent (Feher killed himself after the spree).

EXAMPLE # 76[114]

Police officer Pique was arresting Saia. The latter resisted and, in pushing himself away from a fence, seriously injured Pique. The court held that the expected/intended injury exclusion did not excuse the carrier; ***intended*** means consciously causing injury or acting with the

knowledge that injury is substantially certain. This kind of ***intent*** was not present in this case.

EXAMPLE # 77[115]

A juvenile threw a piece of blacktop at a car injuring the driver and her daughter. In the victims' lawsuit, the court held that the ***expected or intended*** exclusion did not automatically relieve the carrier. Whether the thrower actually ***expected*** or ***intended*** the injury must be decided by a jury.

EXAMPLE # 78[116]

Davis, after a quarrel, first shot out the windows of Talley's car with a shotgun; then returning, he shot at the car again, this time hitting Talley and another. In Talley's lawsuit, the court held that under the ***intentional act/unexpected injury*** doctrine, a jury must decide whether the policy's ***expected or intended*** injury exclusion applied.

A number of *intended act/unexpected* injury situations revolve around misuse of firearms, usually in the context of defendants using them to ***frighten*** plaintiffs, with tragic results. Courts in these cases have flexibly interpreted ***expected/intended injury*** exclusions in homeowners' policies in favor of the victims:

EXAMPLE # 79[117]

Rice fired a shotgun *at a 45 degree upward angle* toward Gary Hart, a minor, solely in order to frighten him. Some pellets hit Gary. In Hart's lawsuit, the court held that the injury was neither expected nor intended for purposes of the exclusion; the carrier would be liable.

EXAMPLE # 80[118]

Homeowner's insured, a 17-year-old boy, pointed a gun at plaintiff and fired it, intending to frighten her but not to shoot her. In her lawsuit, the court held that the fact that the insured was found to be delinquent did not trigger the ***criminal acts exclusion***, nor did the ***expected/intended injury*** exclusion prevent coverage.

NOTES FOR SERVICE PROVIDERS

Intentional act/unexpected injury cases often challenge the ingenuity and expertise of Service Providers. Usually, victims who have been shot, or otherwise seriously injured by perpetrators, are furious at them, and are likely to go around talking about just how **bad** the perpetrators are: *I don't care what he says, he shot me on purpose!* Service Providers, with an eye to future collectability, should try to tone things down somewhat if there is any possibility of insurance coverage.

Service Providers should elicit any information they can that might bolster a later claim that the seriousness of the victim's injuries really **was** unexpected by their assailants. Statements from victims such as: *"We were just fooling around"* or *"I popped my head up just as his arm swung around"* can be of measurable value if insurance/collectability issues arise in the future.

Special Circumstances

We have seen the two basic theories that courts apply in their interpretations of ***expected/intended injury*** exclusions when violent crime victims attempt to collect from perpetrators homeowners' policies:

(1) Actual or Inferred Intent, which usually defeats coverage; and

(2) Intended Act/Unexpected Injury situations where a number of courts have ruled that the expected/ intended injury exclusions do not apply and that the carrier is liable.

In most of the situations we have previously discussed, the perpetrators' mental condition (insanity, intoxication), or their perceptions of situations giving rise to liability (self-defense, mistake of fact) were not at issue. Whether the perpetrators committed the acts, and whether they intended to injure their victims, were the principle areas of concern. In attempting to inject some needed flexibility into their interpretations of exclusionary clauses in perpetrators' insurance policies, courts have developed some special circumstances in which the actual intent of the perpetrators may be qualified by their mental condition at the time they did the acts. These special circumstances -- insanity, intoxication, self-defense and mistake of law or fact -- may appreciably increase victims' chances of collecting from insured perpetrators' policies.

Insanity: Mental Disability

Insanity is not only an area in which the law favors collectability by victims from perpetrators' insurance policies; it is also an area in which Service Providers can be most helpful to their clients by asking them the right questions and by utilizing their professional skills to evaluate and interpret the facts that they have gathered.

The common law has long recognized that persons who are insane or suffering from overpowering mental or emotional defects should not be held **criminally** responsible for their acts. Thus, criminal

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perpetrators, whose **factual** guilt is not in doubt, may be found not guilty ***by reason of insanity*** or by similar criminal law doctrines. However, doctrines that hold perpetrators unaccountable for **criminal** purposes do not have the same effect in **civil** actions for damages. In civil cases, the majority rule is that insane persons **may** be held civilly liable for their torts and crimes.[119] As one court has noted:

> Public policy places upon one with impaired mental powers the same liability for assault and battery as it places on those of normal mentality. There is no sound reason, it is said, why the victim of the violence of an insane person should bear the loss caused by the act instead of the offender.[120]

Consequently, victims may sue insane perpetrators who have injured them. In addition, the law has opened up wide new vistas of collectability from perpetrators' insurance carriers when the issue of insanity or mental defect is involved A victim-oriented doctrine has developed whereby victims suing perpetrators, and/or their carriers, may be able to collect from their homeowner's policies if the victims can prove that the perpetrators were unable to form the ***intent*** that would normally invoke ***expected/intended injury*** exclusions relieving the carrier of liability.

The trier of fact (a jury, or a judge sitting without a jury) will usually hear testimony from both sides about perpetrators' mental states. If after hearing this testimony, the fact-finders decide -- based on the facts of the case -- that the perpetrators were unable to form the necessary intent to injure that would ***trigger*** the expected/intended injury exclusions, then the insurance carrier will be liable.

The following examples will show how this works in practice:

EXAMPLE # 81[121]

A certain Mr. Maguire, who lived with his sister and her daughter, murdered the sister and shot his niece. He was found to have been insane at the time of the killing, because among other things *"...he bathed only once a month -- and then only in oatmeal."* The daughter sued Maguire's Homeowner's carrier; the appellate court held that since the perpetrator could not form an intent to injure, the policy's ***expected/intended injury*** exclusion did not bar coverage.

EXAMPLE # 82[122]

Homeowner's insured, Kintop, shot Peterson in the head, seriously wounding him, and then killed himself. Peterson sued Kintop's estate. The carrier filed a ***declaratory*** action asking the court to rule that, as a matter of law, the ***expected/intended injury*** exclusion in Kintop's policy relieved the carrier of any liability. The court refused to make such a ruling. In an opinion that presents an exhaustive analysis of the law regarding insanity *vis-a-vis* ***expected/intended injury*** exclusions, the court concluded that the majority of courts nationwide have held that insanity may negate such exclusions. The court ruled that it was up to a jury to decide whether Kintop was so mentally deranged that he could not form the intent to injure.

EXAMPLE # 83[123]

Dr. Cayer murdered his wife and then committed suicide. The wife's parents sued Dr. Cayer's liability insurer. The court held that evidence that Dr. Cayer was insane at the time he committed the crime negated the ***expected and intended*** injury exclusion in the policy because he could not form an intent; damages of $20,000 from the carrier were awarded to the victim's parents.

EXAMPLE # 84[124]

Homeowner's insured's son accosted plaintiff and shot her in the head. The court held that his mental state was such that he could not form an intent so the intentional act exclusion of the policy was inapplicable.

EXAMPLE # 85[125]

Steven, a 15-year-old, burned a church when he intentionally set the contents of a wastebasket on fire. In an action against Steven's father's homeowner's insurer, the court held that the trial court should have instructed the jury that the injury was not ***intentionally*** caused, for purposes of an ***intended harm*** exclusion, if Steven had a mental defect that prevented him from governing his own conduct.

Readers should understand that an **allegation** of insanity by victims will not, in and of itself, defeat ***expected/intended injury*** exclusions in perpetrator's policies. The **fact** of insanity must be proven in order to negate the exclusion. Thus, even in states which clearly recognize the ***insanity exception*** to the exclusions, plaintiff/victims may lose on the **facts.**

EXAMPLE # 86[126]

Homeowner's insured (the defendant), upset over the break-up of his marriage, confronted the plaintiff in his wife's home and punched him in the face. Psychologists testified that insured intended to hit the victim, but had ***lost control of his actions***. The court held that the policy's ***expected/ intended injury*** exclusion relieved the carrier from liability because, while self-defense **and mental impairment** will both defeat the exclusion, neither was established by the facts of this case.

EXAMPLE # 87[127]

Granger attacked plaintiffs with a machete. In a suit by plaintiffs against the assailant's homeowner's carrier, a jury found that Granger was sane and hence the expected/intended injury exclusion relieved the carrier. This was affirmed on appeal. The court found no error in the jury's finding of sanity.

NOTES FOR SERVICE PROVIDERS

The ***insanity exceptions*** to ***expected/intended injury*** exclusions in perpetrators' policies often result in collection from the carriers where it would otherwise be denied. Because of this, Service Providers' insight, expertise, and close relationships with victims may make the difference between adequate compensation for victims and no compensation at all. Service Providers are not only in positions to **elicit** important information from victims, but also to **evaluate** it with an ***expert's eye***. Even Service Providers who have not been formally trained in psychology and related disciplines will begin to develop the kinds of skills and insights necessary to help them recognize indicators of insanity or mental instability from victims' descriptions of perpetrators.

In many cases, victims know or are acquainted with perpetrators because the latter are family members, business associates, neighbors, paramours, etc. Service Providers should obtain as much information as possible about what the victims know of the perpetrators' mental states. Such information as the perpetrators' reputation for mental instability, drug and/or alcohol abuse, deviant conduct, violent temper, or use of weapons, will be extremely valuable to an attorney in defeating ***expected/intended injury*** exclusions.

Even if the victims do not know the perpetrators personally, specific information about their demeanor during the commission of the crime (mannerisms, threats, ranting and raving, use of weapons, smell of alcohol, etc.) is also useful. To the extent possible, victim's knowledge of, or impressions about, perpetrators' states of mind should be elicited as soon as possible after the crime, while they are fresh in the victim's memories. This information may be of major assistance to victim's attorneys at a later date when the mental state of perpetrators may well determine whether or not ***expected/intended injury*** exclusions can be overcome by the perpetrators' insanity or mental state.

Some courts, a minority of them, refuse to recognize ***insanity exceptions*** to ***expected/intended injury*** exclusions holding that the word ***intent*** means exactly what it says and, if there was an intent to injure, the perpetrators' mental state is not legally relevant.

EXAMPLE # 88[128]

Eubanks intentionally shot plaintiff's decedent while in a delusional state. The jury found for the carrier based on the ***expected/intended injury*** exclusion. It also found for the carrier on the issue that Eubanks fired under the delusion that he was acting in self-defense. The jury verdict was affirmed. If the jury believed that the shooter intended to commit the act and cause injury, then, in its discretion, it could find that the exclusion barred coverage.

EXAMPLE # 89[129]

Davis shot his friend Johnson six times with a pistol; he was found not guilty by reason of insanity. In Davis' parents' action, the court held that, since Davis intended to shoot Johnson, the ***expected/intended injury*** exclusion excused the carrier despite the fact that the shooter believed that God told him to do it.

NOTES FOR SERVICE PROVIDERS

The positions taken by these courts are fairly rigid; **however**, the same admonition applies here as in other situations in which the law may appear to be structured against victims. **Do not give up eliciting any potentially helpful facts, on the assumption that they will not be of any use.** There are **no** rules that are so hard and fast that they might not be overcome by some novel and ingenious argument developed by attorneys **or by Service Providers.**

Furthermore, it is not unknown for courts which have clung to archaic legal rules for years suddenly to reverse themselves and rule in a victim-oriented manner. Often such rulings come about in the context of cases in which the facts are so horrifying that judges themselves can't stand the results of their former doctrines. Service Providers are ideally placed to spot such situations and to bring them to the attention of attorneys, and they should never hesitate to give the attorneys for victims the benefit of their knowledge and expertise.

Intoxication

While a clear majority of courts hold that the insanity of perpetrators may defeat ***expected/intended injury*** exclusions, a more narrow division of authority exists when the issue is defendants' intoxication by alcohol or drugs. The critical difference is the **voluntary** nature of the act of getting intoxicated. Many courts reason that although insanity can override a person's will, merely getting drunk or high on dope is entirely voluntary and, hence, should not be allowed to defeat the clear language of intended injury exclusions.

EXAMPLE # 90[130]

Insured, while in a drunken blackout stage hit a woman with a hammer, and she sued him. The court held that the ***expected/intended injury*** exclusion barred coverage, stating that voluntary intoxication may not be used to deny intent to injure if other circumstances would compel the inference that the act was intentional.

Attorneys have at times attempted to circumvent exclusions by arguing that the act of getting drunk, **itself**, constituted negligence and therefore ***expected/intended injury*** exclusions should not apply. A number of courts have rejected this approach on the theory that the connection between getting drunk and punching the plaintiff is too remote.

EXAMPLE # 91[131]

Homeowner's insured, while drunk, punched plaintiff breaking his jaw. In an attempt to avoid an intentional act exclusion, plaintiff advanced the theory that:

(1) The defendant knew he had a tendency to fight while drunk;

(2) He got drunk anyway; and

(3) He assaulted the plaintiff.

The court would not accept this. The insured's intentional act of hitting the plaintiff broke any causal connection with the drinking.

Other courts, however, have taken a more flexible approach and held that voluntary intoxication may create enough doubt about perpetrators' intent to injure their victims that a jury should make the decision whether the defendant was able to form the intent to injure or whether his intoxication overrode his will to the extent that ***expected/intended injury*** exclusions should not apply.

EXAMPLE #92[132]

Father, a chronic drunk, shot his daughter and her husband for no apparent reason. Father's blood alcohol content was .25. The court held that whether voluntary intoxication could negate intent for purposes of the policy's ***expected/intended injury*** exclusion was a jury question.

EXAMPLE #93[133]

Mr. House became voluntarily intoxicated, murdered two others and then killed himself. To House's homeowner's carrier's contention that it was not liable for the killings, the court responded that the fact of House's intoxication raised a jury question as to whether he could form an intent for purposes of the ***expected/intended injury*** exclusion.

NOTES FOR SERVICE PROVIDERS

The entire area of alcohol abuse and alcoholism is under close scrutiny by medical and mental health authorities. Alcoholics, for example, have been recognized as coming within the legislative definition of ***persons with disabilities*** people. It may not be long before this is translated into the more flexible view of voluntary intoxication *vis-a-vis* ***expected/intended injury*** exclusions which are currently adopted by some courts. In addition, it has been established that in some cases, alcohol abuse can form a component of much more serious mental and emotional conditions. For purposes of developing information that will be useful in establishing exceptions to ***expected/intended injury***, Service Providers should equate, in their own minds, alcoholism and drug abuse with the kinds of **insanity** that courts have held will defeat such exclusions.

Self Defense

The foregoing chapter briefly discussed self-defense and defense of others as possible responses by defendants to plaintiffs' complaints. Self-defense is clearly recognized in the law. The principal issue in most such cases is whether the **amount** of force used was reasonable or whether it was excessive under the circumstances.

Here we deal with self-defense as an insurance-related issue. Cases may arise in which plaintiffs sue defendants for physical injuries, and the defendants (often joined by the plaintiffs) allege that they were acting in self-defense, and that their homeowner's carriers should defend them and pay any damages awarded to the plaintiffs. They argue further that ***expected/intended injury*** exclusions in defendants' policies should not apply when defendants were merely defending themselves.

A number of courts have agreed, holding that if the insureds can prove that they either **acted** in self-defense, or **reasonably believed** that they needed to defend themselves from the plaintiffs, the ***expected/intended injury*** exclusions in their policies are not applicable. According to these courts, self-defense (like insanity) constitutes an ***exception*** to the exclusion. The legal theory underlying this doctrine is simply that when the insureds purchased their insurance policies, they never meant to bargain away, or give up, coverage for doing a lawful act, and since self-defense is a **lawful** use of force, courts reason that it should be covered even if the use of force was intentional.

EXAMPLE # 94[134]

Rita killed her former husband with a shotgun after he had forced his way into the house. The husband's current wife sued Rita. Rita's homeowner's carrier sought to prove that an ***expected/intended injury*** exclusion excused it from coverage. A jury found that the shooting was covered by the policy. The appellate court affirmed the jury verdict stating that whether Rita expected the injury was properly submitted to the jury. Also, the fact that Rita had asked for a self-defense instruction in her criminal trial was ruled as inadmissible.

EXAMPLE # 95[135]

Two acquaintenances, Berg and Fall, got into an altercation and Fall slugged Berg (who was much larger); Berg sued Fall and his insurer. Fall claimed that he hit Berg in self-defense. The court held that self defense was a question for the jury and if Fall could prove that he acted in self-defense, the ***intentional act*** exclusion would not apply.

EXAMPLE # 96[136]

The insured, acting in self defense, intentionally swung a handgun at a man who was forcibly entering his home. The gun accidently fired hitting the intruder. The court held that since plaintiff was acting in self-defense the intentional act exclusion in his homeowner's policy was not applicable.

Other courts take the view that an action that is intentional does not become any less intentional just because it was taken in self-defense. They distinguish self-defense cases from ***insanity*** cases where the issue is whether perpetrators were even **capable** of forming an intent. This more rigid interpretation relieves carriers of the obligation to provide coverage under ***expected/intended injury*** exclusions in their policies.

EXAMPLE # 97[137]

Brosseau shot his son-in-law to death, allegedly in self-defense. The court held that the ***expected/intended injury*** exclusion in his homeowner's policy excused the carriers. The shooting was intentional, not an ***accident***, and self-defense did not take it out of the exclusions.

EXAMPLE # 98[138]

Insured intentionally hit another in self-defense. The court held that the homeowner's carrier was excused by the ***expected/intended injury*** exclusion. Self-defense, even if proven, would not negate the exclusion.

NOTES FOR SERVICE PROVIDERS

Self-defense cases are tricky because, in many situations, the ***victims*** will have been the initial aggressors and it is often difficult to sort out who did what to whom. Additionally, many cases involve acquaintances and family members, so there may well be hidden agendas, such as feuds, domestic problems and other potential problems.

In this class of insurance-related cases, the principal aim is to develop information to negate the ***expected/intended injury*** exclusions in perpetrators policies, without having to referee a lot of extraneous matters. Remember that the issue most often litigated in many self-defense cases is the degree of force -- whether or not it was ***excessive***. This, in turn, may depend on such factors as the size and temperament of victims and perpetrators, use of weapons, opportunity, or need to retreat, and all of the other circumstances that so often result in violence. Attorneys handling victims' cases in this particular area of law will be well served if Service Providers can develop comprehensive pictures of what **really** happened.

Mistake of Fact

Mistake of fact is yet another area in which court decisions often favor victims by interpreting the facts so as to find for insurance coverage despite what appears to be the plain meaning of exclusionary clauses in perpetrators' insurance contracts. The courts have carved out ***exceptions to the exclusions*** in this area by saying that if perpetrators injured persons other than those whom they **thought** they were assaulting, then there would be no ***intent*** for purposes of ***expected/intended injury*** exclusions in their policies.

EXAMPLE # 99[139]

Mr. Cormier, believing that his daughter was a burglar, shot her as she attempted to enter his house. In the daughter's suit against his homeowner's carrier, the court held that since her father fired mistakenly, not intending to shoot his own daughter, the ***expected/intended injury*** exclusion did not relieve the carrier.

EXAMPLE # 100[140]

Homeowner's insured and his girlfriend were in bed at his home; she awoke and went to the bathroom. The insured heard the noise and shot her in the mistaken belief that she was a burglar. The court held that an ***expected/intended injury*** exclusion did not excuse the carrier; the insured intended to shoot the gun, but did not intend to shoot the person whom he actually injured.

EXAMPLE # 101[141]

Homeowner's insured shot a garbage man, apparently believing that the latter was a dog. The court held that the existence of a question of material fact question as to whether the injury to the plaintiff was

expected, required reversal of a judgment in favor of the carrier in its action invoking an ***expected/intended injury*** exclusion.

EXAMPLE # 102[142]

Homeowner's insured, while drunk, kicked plaintiff in the mistaken belief that plaintiff was his wife. The court held that the mistaken identity negated the ***expected/intended injury*** exclusion.

Mistakes happen to all of us. Unfortunately, they are also easy to falsely. If this happens, or even if it is only **suspected**, courts will take a harder look at the situation.

EXAMPLE # 103[143]

Aldrich hit Curtain with a crow bar, allegedly in the mistaken belief that Curtain (who Aldrich knew and liked) was a burglar. However, evidence was later developed that Aldrich may have struck Curtain intentionally, knowing his true identity. The appellate court held that the question of whether injury was ***expected or intended*** would have to be decided by a jury. A judgment for Curtain was reversed.

NOTES FOR SERVICE PROVIDERS

Cases such as those described above often arise from tragic circumstances, where the perpetrators and victims enjoy extremely close personal or familial relationships, and the injuries are those that the assailants would never dream of inflicting on loved ones, family members or even close friends. Service Providers, in these cases, may have a great deal on their hands, just coping with and assuaging grief; nonetheless, when matters get sorted out and the issue of litigation arises, it is most helpful to all concerned if a sound factual picture about the ***mistaken*** aspects of the case has been developed.

LIFE INSURANCE

Victim versus perpetrator cases involving life insurance arise when the actual victims have been murdered and there is some question about who will benefit from one or more policies on the victim's life.

The previous discussion of wrongful death pointed out that every jurisdiction in the country has ***slayer's statutes*** (legislatively enacted) or ***slayer's laws*** (devised by the courts) which prohibit those who murder others from **inheriting** from them, either by will or by intestacy.

The same is true of insurance policies on decedents' lives. Just as murderers cannot inherit, neither can they benefit from insurance policies.[144] Most of the remaining legal issues, then, involve questions about who will share in the proceeds of the policies, once the murderers have been removed as potential beneficiaries. Usually these issues are resolved in terms of contract law and do not concern Service Providers. However, two areas of potential interest do arise. First, are cases in which the **circumstances** of the victim's deaths become major issues in deciding who is entitled to collect under the policy. Second, are cases involving the potential liability of the insurance companies themselves for negligence in **issuing** life insurance policies to people who then murder the victims in order to collect on those policies.

Circumstances of Insureds' Deaths

Cases arise in which the police suspect beneficiaries of murder in the deaths of insured persons, but they do not have enough concrete evidence to make a formal charge. Courts take differing approaches regarding insurance coverage in these situations:

EXAMPLE # 104[145]

Eric Reist fell to his death from his hotel room balcony in Sarasota, Florida. He knew that his wife, Linda, was having an affair with a 16-year-old neighbor boy and he suspected that they were planning to kill him. Forensic evidence indicated that he may have been pushed from the balcony. The state authorities found insufficient evidence to prosecute Linda and she claimed her husband's $485,000 insurance estate to which she was the beneficiary.

Reist's daughters objected to the wife benefitting under the policies, and an appellate court upheld their objections, finding that material fact questions still existed as to whether she murdered her husband.

EXAMPLE # 105[146]

Plaintiff insured the lives of her three children with herself as beneficiary. Subsequently, two of them were murdered. The insurance carrier contacted the police who advised the carrier that the plaintiff was a suspect. She sued on the policies. The trial court held that, after three years, the company was obligated to pay the insurance proceeds to the plaintiff unless it could prove her complicity.

NOTES FOR SERVICE PROVIDERS

Life insurance cases will probably have been thoroughly investigated by the police, and there is generally little more that Service Providers can do. They **can**, however, advise survivors that if they harbor any doubts at all about the cause of death of their family members, loved ones, etc., they should consult an attorney as soon as possible.

Life insurance policies often provide benefits for accidental death, and offer options such as double indemnity for deaths caused by accident. There is no recovery under these policies either for

accidental death or double indemnity benefits if the decedents brought about their own deaths through negligent or reckless conduct.

EXAMPLE # 106[147]

A man who was insured under a life policy illegally entered his ex-wife's residence late at night and refused to leave. She ordered him at gun point to do so. He did not. She shot him to death. His estate could not collect double indemnity benefits. When one commits a criminal act, knowledge that he is putting his life in danger is imputed to him, and hence, his death is not ***accidental.***

EXAMPLE # 107[148]

Insured, under a life policy with a double indemnity provision, went to Nelson's house knowing that Nelson was armed, violent and had a grudge against him; Nelson fatally shot the insured. The trial court held that the insured (or any reasonable man) should have anticipated the gunplay; hence, the death was not ***accidental*** for purposes of the policy.

EXAMPLE # 108[149]

Defendant's insurers were not obligated to pay on an accidental death policy where the evidence indicated that the insured was shot by an off-duty policeman while committing the felonies of assault and robbery.

NOTES FOR SERVICE PROVIDERS

As in the previous example, the issues here are primarily legal; however, factual questions certainly may arise as to the degree of danger involved in the circumstance that caused the insureds'

deaths, **and** the extent to which the insureds actually **knew** of the dangers involved. When Service Providers sense that their survivor/clients harbor suspicions about how decedents really met their deaths, they should encourage them to consult a lawyer.

Negligence in Issuing Policies

When we consider how eager most salespersons are to sell insurance policies, and how massive and depersonalized the insurance industry has become, it is a wonder that there are not more decided cases in which suits have been filed for **negligent issuance** of life insurance policies.

It is longstanding insurance law that one seeking to purchase a life insurance policy on another's life must have an ***insurable interest***, that is, there must be some connection between the insured and the intended beneficiary: family, spouse, ***key man*** in a business concern, debtor/creditor relationship, etc. It appears, however, that often this requirement is not difficult to by-pass. A few cases have considered the issue of liability of insurance companies in issuing policies when they know, or have reason to suspect, that a plot is afoot to murder the insured. Most courts have found that the carriers may be held liable.

EXAMPLE # 109[150]

Life insurance salesmen sold life policies to the aunt of 2 1/2-year-old Shirley Weldon, knowing that the aunt had no insurable interest in the child. The aunt murdered the little girl to collect on the policies. The victim's father sued the insurance companies involved. The trial court held that a cause of action for wrongful death had been stated; judgment for the little girl's father was affirmed.

EXAMPLE # 110[151]

Wife took out an insurance policy on husband's life which was grossly disproportionate in coverage and premiums to the family's income. The husband was influenced to sign his consent by trickery. Husband overheard the wife and her brother plot to kill him, and notified the carrier, which did nothing. The wife and brother attempted to kill the husband, who was saved by the unexpected appearance of a police officer. The Florida Supreme Court held that the policy's disproportionate coverage and premiums, when compared to family income, coupled with the carrier's actual knowledge of intent to kill, created liability against the carrier.

EXAMPLE # 111[152]

Bodine's company had a $2,000,000 key man policy on his life. A plot to murder Bodine to obtain the policy proceeds was discovered by Bodine and others. Florida law allows a cause of action for failure to cancel a policy, and failure to notify the beneficiary, in such circumstances. Defendant carrier failed to cancel for about a month and Bodine was not advised of the cancellation for several months. A federal district court jury verdict for the **emotional distress** suffered by Bodine because of the carrier's failure to cancel was affirmed as to liability.

On the other hand, insurance carriers do not have to be clairvoyant when issuing policies, and if they have no reason to suspect that an application was fraudulent, they will not be liable:

EXAMPLE # 112[153]

Bacon purchased a $50,000 insurance policy on his life. Blackie, Bacon's business partner, forged Bacon's name to a change of beneficiary form, naming Blackie as beneficiary, and then allegedly murdered Bacon. In a suit by Bacon's widow charging that the carrier's

negligence in accepting the change caused Bacon's death, the court held that the carrier was not negligent when only an expert could tell that Bacon's signature was forged.

NOTES FOR SERVICE PROVIDERS

These crimes are usually of a highly secretive, well-concealed nature and it is unlikely that they will arise very often. Nonetheless, Service Providers who are counseling such vulnerable people as battered spouses or abused children might keep the idea in the back of their minds that such cases **can** happen. If, for example, a woman having trouble with her husband should mention a sudden increase in talk at home about insurance, a few well-phrased questions might save a lot of grief at a later date.

AUTOMOBILE INSURANCE

The area of automobile insurance-related victims' cases is complicated by the fact that there are many **kinds** of automobile insurance coverage. In addition, many automobile policies are **required by law**: personal injury protection, uninsured motorist, and so on. Consequently, compulsory insurance is treated somewhat differently from other purely optional insurance contracts.

For our purposes, however, we can concentrate on two principal areas of automobile insurance law that most often determine whether coverage for violent automobile-related crimes will be available. The first is whether the injury is ***accidental*** -- in which case there will probably be coverage, or ***intentional*** -- in which case there may not be. The second area of importance involves provisions in almost all automobile policies which require that the injury must ***arise out of***, or ***result from***, the ***use, ownership or maintenance*** of the vehicle.

Most of the cases to be discussed involve situations in which victims have been injured by the intentional, violent acts of others while in or around either their own, or other people's, automobiles. The perpetrators' crimes usually involve:

(1) Use of their automobiles as weapons (running people down);

(2) Shooting or throwing objects at victims' automobiles;

(3) Using automobiles to abduct or transport victims; and

(4) Assaulting victims while they are in their cars or at the scene of automobile-related altercations.

Despite these variations, the factual scenarios that confront Service Providers will have as their ***common denominators*** the presence of either ***Accident/Intentional*** or the ***Arising Out Of*** issues.

Accidental or *Intentional* Injuries

This area is similar to that which we encountered in homeowner's insurance ***expected/intended injury*** cases; however, the courts have generally taken more victim-oriented positions when deciding what is or is not an ***accident*** for purposes of automobile insurance coverage.

The rationale for victim-oriented court decisions lies in the fact that the carnage on our streets and highways, coupled with the fact that so many culpable drivers and vehicles are uninsured, has induced legislatures across the nation to **force** insurance coverage on everyone. This has led to legislation in the states mandating that all drivers not only purchase insurance to cover injuries that

they might cause to themselves and to others, but all drivers must purchase ***uninsured*** or ***underinsured*** motorist insurance.

- ***Uninsured motorist*** insurance means that the insured drivers have purchased policies that will pay for any injuries to themselves, or their passengers, that are caused by other drivers who have no insurance to cover the injuries that they have inflicted.

- ***Underinsured motorist*** protection applies where the drivers who caused the injuries have **some** insurance but not enough to cover all of the injuries that they have caused.

With regard to **compulsory** insurance issues, most courts felt that it would violate public policy -- and fundamental fairness -- to allow carriers in uninsured/underinsured motorist and other compulsory policies situations to ***contract away*** their liability by denying coverage for ***intentional*** automobile-related injuries. The compulsory nature of automobile insurance -- unlike homeowners policies, which are not mandatory -- led to the creation of a body of law that, generally, does not permit automobile insurance carriers to evade having to pay damages because of ***intentional act*** or ***expected/intended injury*** exclusions.

Automobile policies almost invariably require that the injury to the person suing must have been caused by an ***accident***, so a great deal depends on how an ***accident*** is defined. Recall how, in the homeowner's insurance cases discussed above, the major issue was whether the injury was ***expected or intended*** from the perpetrator's point of view.

In homeowners insurance cases, a body of law developed that was concerned with what went on in the **perpetrators'** minds. Obviously, if the perpetrators **intended** either to do the act, or to injure their victims, then, by definition, what happened to the victims could not have been an ***accident***. That is why so many courts hold that ***expected/intended injury*** exclusions in homeowner's policies relieve the carrier of the obligation to defend perpetrators and pay their damages.

What makes automobile policies so much more favorable to crime victims is that the great majority of courts have held that in **these** policies, an ***accident*** is defined from the victim's point of view.

This makes a tremendous difference. To illustrate:

(1) I am driving my car, have a heart attack and pass out. My car hits yours. This is an ***accident*** from my perspective **and** from yours; neither one of us expected it.

(2) I deliberately drive my car into yours in a suicide attempt or because I want to hurt you personally. This is not an ***accident*** from **my** perspective because I expected and intended to hit you. It is certainly an ***accident*** from **your** perspective as the victim. It is totally unexpected to **you** that another car should come crashing into yours.

The **victim's** point of view is the ***yardstick*** by which accidents are defined in automobile insurance cases. Thus, in the second hypothetical situation above you would probably recover from an automobile insurance carrier because, **to you**, it was an accident (In an analogous, but non-automobile situation, victims might **not** recover from a **homeowner's** carrier because those cases define accidents from the **insureds'** point of view, *i.e.*, **did I**, as the insured perpetrator, expect or intend to injure **my** victims?

Nor does it matter whether the perpetrator was insured or uninsured. For instance, in the second hypothetical situation described above, if I was insured and hit you, you could recover from **my** insurance carrier. If I was uninsured you could recover from **your** uninsured motorist insurance carrier. In both cases you would recover because my driving my car into yours was an ***accident*** from **your** point of view.

The following case examples will illustrate the importance of the ***whose-point-of-view?*** issue.

EXAMPLE # 113[154]

An automobile owner was assaulted by a man who then placed her in the trunk and drove around until she died. The victim's uninsured motorist carrier was liable to her estate. Her abduction and death, from **her** point of view, was an ***accident.***

EXAMPLE # 114[155]

Automobile insured intentionally rammed another with his car. The court held that, under Hawaii's compulsory insurance law, this was an ***accident*** from the standpoint of the victim and the victim was entitled to recover from the insured's carrier. Public policy favors letting victims recover for intentional acts under compulsory automobile insurance policies.

EXAMPLE # 115[156]

The insured kidnapped, raped and sodomized his victim, then led the police on a high-speed automobile chase in which he was killed. It was held that the insured's death was ***accidental*** for purposes of a policy

providing benefits for ***accidental*** death. Although the insured **did** intend to flee, he did not intend his own death, so it was ***accidental*** for the purposes of the policy. The courts also noted that the beneficiary (insured's mother) was a wholly innocent party.

EXAMPLE # 116[157]

Plaintiff who was injured when she was kidnapped and driven in a high speed chase filed an action for coverage under her uninsured motorist policy. The court held that she was covered; the injuries were ***accidental*** and the intentional act exclusion did not apply.

In these cases the courts' opinions spoke in terms of ***accidents*** holding that, **from the point of view of the victims involved**, their injuries were indeed accidental. Other courts have reached the same result by holding that ***expected/intended injury exclusions*** in automobile policies were void as being against **public policy**. An insurer in these cases should not be allowed to bargain away **statutorily imposed** liability. To hold otherwise would defeat the intent of legislatures to ***spread the risk*** for automobile accidents.

EXAMPLE # 117[158]

Mumford, attempting suicide, intentionally hit McLamb's truck. The court held that an intentional act exclusion did not relieve Mumford's carrier because the statute concerning automobile insurance mandated coverage for intentional acts and controlled over the policy exclusions; the court noted that different interpretation is given to the term ***accident*** with compulsory insurance coverage, which **protects the public**, as opposed to voluntary coverage which protects the insureds' personal financial interests.

EXAMPLE # 118[159]

Automobile insured quarrelled with plaintiffs; later she intentionally ran over them with her car. The court held that an ***intentionally caused injury*** provision purporting to excuse the automobile liability carrier from defending the insured in a civil action by the victims was invalid. Public policy underlying compulsory auto insurance negated the exclusion.

NOTES FOR SERVICE PROVIDERS

In automobile insurance cases where the ***accidental*** nature of the injury is critical for coverage, the kinds of information that might be helpful involve such things as:

- The manner in which the perpetrators drove and acted.
- What was said and done after collisions (or near misses).
- **Especially** any comments that perpetrators might have made about their intent (or lack of it):

  "I was going to kill myself but just couldn't go through with it";

  "I tried to swerve away at the last minute."; and so on.

Even though most courts view the term ***accident*** in automobile insurance cases favorably to victims, Service Providers should never take it for granted that **all** courts will do so. The more evidence that can be obtained that the injury really **was** accidental, the more chance the victim will have to collect.

The following examples illustrate how some courts, a minority, allow automobile insurers to escape liability by measuring intent from the perspectives of the **perpetrators.**

EXAMPLE # 119[160]

The wife of an uninsured with motorist coverage was killed when the killers, riding in an automobile, intentionally shot into her home and unintentionally killed her. The court held that, viewing the shooting from the **perspective of the perpetrator**, the shooting was ***intentional*** for purposes of the policy's intentional acts exclusions.

EXAMPLE # 120[161]

Williams, in an argument with Tobin, pulled a pistol, got out of his truck, and shot Tobin. The court held that William's act was ***substantially certain*** to cause injury and, thus, the ***expected or intended*** injury exclusion was applicable.

Arising Out of the *Use, Occupancy, etc.* of Vehicles

Unfortunately for plaintiff/victims in automobile insurance cases, establishing that the injury was caused by an ***accident*** (from the victim's point of view) is merely the first hurdle to be overcome in establishing carriers' liability under automobile insurance policies.

The next step involves proving that the injury ***arose out of*** or ***resulted from*** the ***use, maintenance or occupancy*** of vehicles (these words may differ slightly, but their sense is usually the same). The following case illustrates how plaintiff/victims can win on the first issue only to lose on the second:

EXAMPLE # 121[162]

Plaintiff's husband was murdered by the other driver during an argument that occurred when both left their cars after a collision. The plaintiff sued her husband's uninsured motorist carriers. The court held that:

(1) Uninsured motorist coverage is not to be denied because the injury was intentionally caused;

(2) When interpreting such policies, the term ***accident*** is to be considered from the point of view of the insured; thus, an intentional act could be accidental to the victim, **but**

(3) The policy's terms ***arising out of the use of*** the vehicle, and ***while occupying*** the vehicle, prevented recovery because the killing took place outside of the car and the car **itself** was not ***in use*** at the time.

NOTES FOR SERVICE PROVIDERS

Here we see the need to prove **both** elements: ***accident*** **and** ***arising out of***, or the case may be lost. ***Arising out of the use of*** a vehicle is often harder to prove than ***accident*** because a number of courts interpret the word ***use*** very narrowly. There must be some **causal connection** between the injuries and the vehicle. Generally, it is insufficient simply to establish that the victim was in the vehicle at the time of the crime or that the vehicle was used to transport the victim. Victim/plaintiffs' evidence must establish a **definite causal connection** among vehicles, drivers, passengers, and the resulting criminal injuries.

Factual situations in which injuries were held **not** to ***arise out of use*** or ***occupancy*** are illustrated by the following:

EXAMPLE # 122[163]

An automobile insured, after an altercation, shot from his vehicle into Bayless' vehicle, injuring him. Bayless sued the perpetrator's insurer. The court held that despite the fact that the insured shot ***negligently***, Bayless's injury did not ***arise out of*** the use of a motor vehicle. The carrier was excused.

EXAMPLE # 123[164]

Ms. Blue was in a minor automobile accident, hitting a car that had run out of gas, with the driver sitting in it. That driver got out and stabbed Blue with a ball point pen. She appealed a trial court decision holding that her uninsured motorists carrier was not liable. The court held that the altercation did not ***arise out of the use*** of an automobile and even if it had, the injury was not **caused by** such use.

EXAMPLE # 124[165]

Plaintiff/insured's daughter was murdered while in her automobile. In her father's lawsuit, the court held that the murder was an ***accident*** when viewed from the victim's perspective; however, the killing did not ***arise out of the use of*** the car so there was no duty to pay personal injury or uninsured motorist benefits.

EXAMPLE # 125[166]

Plaintiff/motorist was punched in the nose by an unknown motorist whom he had ***cut off*** and he sued his uninsured motorist carrier. The court held that the assault did not ***arise out of*** the uninsured's use of his vehicle so coverage under plaintiff's uninsured motorist policy was denied.

EXAMPLE # 126[167]

Plaintiff was shot on a school bus by another passenger who had left the bus to go into his house and then returned to the bus. The court held that this shooting was not covered by a liability policy because it did not ***arise out of the use*** of a vehicle.

Other courts, appearing to follow the lead of their own vicitm-oriented holdings in the ***accident*** phase of automobile insurance cases, take an equally flexible view of ***arising out of*** situations. The following cases are particularly helpful because they suggest various ingenious arguments that victims' counsel may use in their own cases to convince the courts that injuries really did ***arise out of use, etc*** of vehicles. For this reason, a larger than usual number of plaintiff-prevailed cases are discussed here.

Some courts have held that injuries ***arose out of*** use of the vehicle (or at least it was up to a jury to decide whether the injuries arose out of such use) because the **vehicles themselves** were the assailants' **targets.**

EXAMPLE # 128[168]

Automobile no-fault insureds were injured as a result of rocks thrown at their cars. The court held that coverage was afforded because the cars themselves were the targets, so the injuries were the ***normal risks*** of driving and ***arise out of*** the use of the vehicle.

EXAMPLE # 129[169]

Plaintiff was shot in his car. In his action against his automobile carrier, the court held that a jury question existed as to whether the assailant shot at the driver (no coverage) or at the car (coverage) for purposes of the ***arising out of*** provisions in the policy.

In the next three cases, the court found that the injuries ***arose out of*** use because the **vehicles themselves** could be considered as ***assailant cars***.

EXAMPLE # 130[170]

Plaintiff, motorist, was shot by a stranger in a passing car. He sued his insurance carrier. The court held that the insured was covered by no-fault and uninsured motorist policies, and the shooting was an ***accident*** **which arose out the use** and operation of a car. In addition, the insured was entitled to full attorney fees.

EXAMPLE # 131[171]

Spear's pickup had a ***brush-by*** collision with another truck whose driver (never identified) pursued Spear's truck, shooting at it until it ran off the road. In the process Spear's passengers, including the plaintiffs, were injured. In the plaintiffs' suit against their uninsured motorist carriers, the court upheld the claim that the injury ***arose out of the use*** of a vehicle.

EXAMPLE # 132[172]

Plaintiff was driving her truck when high school students in an oncoming truck threw a pumpkin through her windshield, injuring her seriously. She sued under her uninsured motorist policy. A judgment for $75,000 compensatory damages, $5,595 for medical expenses, and $1,200 for loss of work was sustained. The court held that her injuries arose out of the "use or operation" of the **assailant** truck and the driver was equally liable with the thrower.

Note that in the next set of cases the courts found some kind of **special circumstances** sufficient to connect the victims' injuries with the use of the car so as to prove that those injuries ***arose out of*** that use.

EXAMPLE # 133[173]

Automobile insured was shot to death in her car by a pedestrian who had asked for a ride and been refused. The court held that the shooting was an ***accident*** from the perspective of the victim, and ***arose out of*** the use of her car; hence, the carrier was liable for personal injury protection benefits.

EXAMPLE # 134[174]

Insured, under a personal injury protection plan, was assaulted when he stopped his car to ask directions, and was covered under a policy providing coverage for an ***accident involving the use of*** an automobile.

EXAMPLE # 135[175]

Using his personal car, the insured, an armed deputy sheriff, picked up one "*Lightning*", a criminal suspect, for the purpose of taking him to the police station. "*Lightning*" pulled a gun and in the ensuing shoot-out, killed the insured and wounded the plaintiff, a passenger. In an action to avoid coverage by the insured's automobile insurance carrier, the court held that the insurer was obligated to pay because the shooting was caused by the insured's ***use*** of the car in transporting the suspect to the police station.

EXAMPLE # 136[176]

Automobile insured dropped her son off at a shopping center and remained in her car. An assailant got in and told her to ***drive***. She resisted; the assailant beat her and then said "*Okay . . . if that's the way you want it.*" He got in another car and drove off. Because he told her to ***drive***, the court reasoned that he wanted to use her car, and so her automobile insurer was liable for injuries ***arising out of*** use of the car.

On occasion, courts consider the question of ***contact*** between vehicles to be the deciding factor in ***arising out of*** cases. The two examples below illustrate divergent views. The second example illustrates a narrow analysis by the court. The court held that because a bullet fired from a gun travels through the air **for just a few feet**, the element of ***contact*** is lacking.

EXAMPLE # 137[177]

A group of picnickers, who were chased from a park by hoodlums, fled the scene in the back of a truck. One of the group was struck with a baseball bat wielded by one of the hoodlums who was riding a motorcycle alongside the truck. The hoodlum then proceeded to run the truck off the road. One of the truck's passengers, injured in the crash, sued his uninsured motorist carrier. The court held that the carrier was liable because the blow with the ball bat was enough ***contact*** to trigger uninsured motorist coverage, and the happening was an ***accident*** when viewed from the perspective of the insured.

EXAMPLE # 138[178]

Plaintiff, his wife and sister were in his car when the sister was shot and killed by someone in another car. In a suit against plaintiff's uninsured motorist insurer, the court held that there was no coverage since there was no **direct** contact between plaintiff's car and the uninsured vehicle.

Finally, it should be noted that, when both the ***accident*** and the ***arising out of*** tests are met, passengers -- as well as drivers -- are covered.

EXAMPLE # 138[179]

Plaintiff was a passenger in an automobile insured's car. When he got out to get the license number of a third-party who had run into the car, the third-party intentionally ran into him. The court held that the plaintiff was ***using*** insured's car, and that his injuries were ***accidental*** for uninsured motorist coverage.

NOTES FOR SERVICE PROVIDERS

Arising out of **cases, particularly those won by victims, are extremely dependent on factual variations and interpretation.** For instance, in Example #135, the court noted that one of the assailants hit the victims' car with a ball bat; this fact alone established sufficient ***contact*** with the victim's car that later, when the assailants ran the victims off the road, presumably **without** making contact, the accident ***arose out of*** the use of the vehicles. Insurance coverage was available for serious injuries to the passenger. These are the kinds of ***little things*** that make a significant difference as far as collectability is concerned, but which a victim, upset by the accident, might overlook were it not for Service Providers' questions about the facts of the incident. Service Providers should think in terms of eliciting any information, over and above the mere fact that one car was being used as a means of transportation that might lead to insurance coverage. Information should be elicted that will connect the vehicle, its driver, and passengers with the crime and the resultant injuries.

INSURED PERPETRATORS: CONCLUSION

This chapter's overview of insurance-related *victim versus perpetrator* litigation illustrates three major points that are essential to the success of the mission of the *Manual*: training Service Providers to assist victims in enforcing their legal rights and remedies **and** collecting judgments.

FIRST: Insurance coverage for perpetrators' acts is perhaps the most effective method of ensuring collectability.

SECOND: Far more perpetrators are insured and there are far greater chances of collecting on their policies than most people -- victims, Service Providers and attorneys included -- realize.

THIRD: The facts of insurance related cases, probably more than those in other areas covered by the *Manual*, can be used to develop the pivotal bases of courts' narrowly- drawn distinctions between coverage and non-coverage. This, as noted earlier, is the reason for the exceptionally large numbers of case examples provided in this insurance chapter.

These factual situations involve a kind of contest, or ***battle-of-wits*** between insurers and insureds. The carriers are eager to hide behind the **exclusions** of coverage that they have built into their policies; the victims' crafty attorneys come sneaking up on them, claiming that ***exceptions*** to such exclusions require coverage. This creates a milieu wherein the ***factual one upmanship*** provided by Service Providers can win the prize: **coverage designed to make the plaintiff/victims whole.**

ENDNOTES SECTION IV

1. *Steinbarth v. Johannes*, 423 N.W. 2d 540 (WI. 1988).

2. *Korman v. Carpenter*, 216 S.E. 2d 195 (Va. 1975). **See also**: *Lee v. Lee*, 535 So. 2d 145 (Ala. 1988); ***Quinn v. Quinn***, 772 P. 2d 979 (Ut. 1989).

3. For a list of all of the states that have enacted Slayer's statutes see: *Ford v. Ford*, 512 A. 2d 389 (Md. 1988), Appendix A, p.).

4. Id.

5. And see: *Walsh, Homicide As Precluding Taking Under a Will or By Intestacy*, 25 A.L.R. 4th 787 (1983); Supp. (1988).

6. *Estates of Pinnock*, 371 N.Y.S. 2d 797 (N.Y. Surr. 1975).

7. *Bryan v. Blue*, 724 S.W. 2d 400 (Tex. App. 1986); **and see**: *Morrisey v. Ferguson*, 753 P. 2d 1192 (Ariz. App. 1988).

8. *Polmatier v. Russ*, 537 A. 2d 468 (Conn. 1988). The opinion cites a number of cases from other jurisdictions holding that acquittal does not bar a Wrongful Death action.

9. *Ford v. Ford*, 512 A. 2d 389 (Md 1986).

10. *Holliday v. McMullen*, 756 P. 2d 1179 (Nev. 1988).

11. *Drumheller v. Marcello*, 505 A. 2d 305 (Pa. Super. 1986).

12. *Schneider v. Middleswart*, 457 N.W. 2d 33 (Iowa App. 1990).

13. *Id.*, at 35.

14. *Christensen v. Christensen*, 472 N.W. 2d 279 (Iowa, 1991).

15. *Hough v. Mooningham*, 487 N.E. 2d 1281 (Ill. App. 1986).

16. See: ***Trott v. Merit Department Store***, 484 N.Y.S. 2d 827 (App. Div. 1985)

17. *Id.*, at 1285; **see also**: ***Butler v. Paciera***, 483 So. 2d 1190 (La. App. 1986).

18. *Id.*

19. *Id.*, at 1286.

20. *Sills v. Mid-South Sports, Inc.*, 550 So. 2d 909 (La. App. 1989).

21. *Id.*, at 911.

22. *Id.*, at 910/ In another case that may be of interest to sports fans, one professional hockey player sued another for intentionally hitting him with his stick during a game. The court held that the allegation that the deliberate hitting of the plaintiff violated a National Hockey League rule against unnecessary and retaliatory hitting with sticks, stated a cause of action in negligence. ***Babych v. McRae***, 567 A. 2d. 1269 (Conn. 1989).

23. *Donohue v. Losito*, 529 N.Y.S. 2d 813 (App. Div. 1988).

24. *Burks v. Weiss*, 524 N.Y.S. 2d 737 (App. Div. 1988).

25. *Sills v. Mid-South Sports, Inc.*, 550 So. 2d 909 (La. App. 1989).

26. *Brown v. Conway*, 781 S.W. 2d 12 (Ark. 1989).

27. *Hensley v. Harbin*, 782 S.W. 2d 480 (Tenn. App. 1989).

28. *Chamberlin v. Storch*, 739 S.W. 2d 122 (Tx. App. 1987).

29. *O'Neal v. Church's Fried Chicken*, 580 So. 2d 706 (La. App. 1991).

30. *Caron v. Caron*, 577 A. 2d 1178 (Maine 1990).

31. *Szafranski v. Priebe*, 543 N.Y.S. 2d 598 (App. Div. 1989).

32. *Crochet v. Eaglin*, 532 So. 2d 313 (La. App. 1988).

33. *Grayes v. DiStasio*, 560 N.Y.S. 2d 636 (App. Div. 1990). **See also**, applying the doctrine of Collateral Estoppel: ***Kramer v. Griffin***, 549 N.Y.S. 2d 264 (App. Div. 1989), (Assault and Battery); ***Ross v. Lawson***, 395 A. 2d 54 (D.C. App. 1978); (Assault with a dangerous weapon). **But see:** ***Fahlen v. Mounsey***, 728 P. 2d 1097 (Wash. App. 1986), (defendant's conviction which was vacated on a federal **habeas corpus** petition could not be used for Collateral Estoppel purposes: rape.)

34. *Floyd v. Baxter*, 508 So. 2d 549 (Fla. App. 1987).

35. *Jines v. Seiber*, 549 N.E. 2d 964 (Ill. App. 1990).

36. *Fontenot v. Bolfa*, 549 So. 2d 924 (La. App. 1989)

37. *Moorhead v. J.C. Penney Co, Inc.* 555 S.W. 2d 713 (Tenn. 1977).

38. *Thayer v. Herdt*, ___A. 2d ____, #89-243, May Term, 1990 (Vt. Supreme Ct. Dec. 14, 1990).

39. *Gann, Sr. v. Key*, 758 S.W. 2d 538 (Tenn. App. 1988)

40. Restatement (2d) of Torts, #46

41.

42. *Id.*

43. *Delia S. v.Torres*, 184 Cal. Reporter. 787 (Cal. App. 1982)

44. *Mindt v. Shavers*, 337 N.W. 2d 97 (Neb. 1983).

45. *Id.*, at 101.

46. See also, re: statutes of limitations: ***Mounts v. Vyeda***, 272 Cal. Reporter. 876 (Cal. App. 1990), (defendant/motorist brandished a pistol at plaintiff/motorist; **held**: the longer statute of limitations for Intentional Infliction of Emotional Distress controlled over a shorter one for torts "arising out of the operation of" a motor vehicle.

47. *Pursley v. Price*, 670 S.W. 2d 448 (Ark. 1984).

48. *Id.* at 449.

49. *Hanks v. General Motors Corp.*, 906 F. 2d 341 (8th Cir. 1990).

50. *Erickson v. Christienson*, 781 P. 2d 390 (Ore. App. 1989).

51. *Brown v. Manning*, 764 F. Supp. 183 (M.D. Ga. 1991).

52. Other Emotional Distress cases in which plaintiff prevailed against third parties include: *Mayer v. Town of Hampton*, 497 A. 2d 1206 (N.H. 1985); (police brutality led to suicide); ***Akers v. Irvine Marriott, Corp.***, 235 Cal. Reporter. 92 (Cal. App. 1987); (motel security guard ordered a drunk guest to drive away, then called the police on him); ***DiMarco v. Supermarkets General Corp.***, 524 N.Y.S. 2d 743 (App. Div. 1988); (child witnesses his father being beaten during an armed robbery.)

53. *Doe v. American Broadcasting Co.*, 543 N.Y.S. 2d 455 (App. Div.1989).

54. *Garland v. Herrin*, 724 F. 2d 16 (2d Cir., 1983).

55. See: J.R. Zephin, *The Independent Tort of Negligently Inflicted Emotional Distress--Its Time Has Come,* Vol. X, No. 4 Fall 1984, P. 4 VA Bar Assoc.

56. *Halberstam v. Welch*, 705 F. 2d 472 (D.C. Cir. 1983).

57. *Id.*, at 474.

58. *Id.*, at 478.

59. *Id.*, at 459.

60. 354 S.E. 2d 393 (S.C App. 1987)

61. *Id.*, at 394.

62. ***Burton v. DePew***, 547 N.E. 2d 995 (Oh. App. 1988).

63. *Bergman v. Anderson*, 411 N.W. 2d 336 (1987).

65. *Riggs v. Colis*, 695 P. 2d 413 (Idaho App. 1985).

65. Other Civil Conspiracy (Aiding and Abetting cases in which victims prevaile, or partially prevailed, include: *Michaels v. Nemethvargo,* 571 A. 2d 850 (Md. App. 1990), (defendant hired plaintiff's son to murder her husband; the son was convicted of attempted murder; the parents stated a cause of action against defendant for loss of their son's services, but not for loss of campanionship); *Stover v. Atchley*, 374 S.E. 2d 775 (Ga. App. 1988), (grandchildren conspired to assault and defraud grandfather, $57,000 compensatory, and $100,000 punitive damages against grandson and his wife were not excessive); *Fahrenberg v. Tengel*, ___ N.W. ___, 96 Wis. 2d 211 (Wis. 1980) (punitive damages were properly awarded against defendant who directed two others to steal plaintiff's coin collection).

66. ***Bell v. McManus***, 742 S.W. 2d 559 (Ark. 1988).

67. ***Peterson v. Heflin***, 413 N.W. 2d 810 (Mich. App. 1987).

68. ***Curtin v. Lataille***, 527 A. 2d 1130 (R.I. 1987).

69. ***Bryan v. Kitamura***, 529 F. Supp. 394 (D. Haw. 1982).

70. *Id.* at 396.

71. Cases in which recovery under **Parental Liability** statutes have been upheld by appellate courts include the following: an asterisk indicates that the court's opinions present extended discussions of the law of **Parental Liability** and cites applicable law from courts across the country:
Assault and Battery: ***Anello v. Savignac***, 342 N.W. 2d 440 (Wis. App. 1983); ***Gordineer v. Gallagher***, 553 N.Y.S. 2d 449 (App. Div. 1990);
Property crimes: Burglary, Arson, Vandalism, etc.: ****Distinctive Printing and Packaging Co. v. Cox***, 443 N.W. 2d 566 (Neb. 1989); ***Hayward v. Ramich***, 285 S.E. 2d 697 (Ga. 1982); ***Stang v. Waller***, 415 So. 2d 123 (Fla. App. 1982); ****Piscataway Twp. Board of Education v. Caffiero***, 431 A. 2d 799 (N.J. 1981); ***Buie v. Longspaugh***, 598 S.W. 2d 673 (Tex. Cir. App. 1980);
Auto Theft and Damage: Cabral v. White, 354 S.E. 2d 162 (Ga. App. 1987); ***Carter v. West American Ins. Co.***, 553 N.E. 2d 1099 (Licking Co., Ohio, 1989); ***Citizens Ins. Co. of America v. Lowery***, 407 N.W. 2d 55 (Mich. App. 1987); ****Vanthournout v. Burge***, 387 N.E. 2d 341 (Ill. App. 1979);
Theft: ***First Bank of Southeast, NA v. Bentkowski***, 405 N.W. 2d 764 (Wis. App. 1987). **See also:** Randall Sandborn, "Should Mom, Dad Pay for Kids' Sins," *National Law Journal*, Feb. 26, 1990, p.1, col, 2; *Debra J. Fish; "Constitutional Law/Parental Responsibility", 1980 Fla. Bar J. 474 (Mar. 1980).

72. ***Crowley v. Spivey***, 329 S.E. 2d 774 (S.C. App. 1985).

73. ***Rausch v. McVeigh***, 431 N.Y.S. 2d 887 (N.Y. Sup. Ct. 1980).

74. ***Schultze v. Perry***, 427 So. 2d 467 (La. App. 1983).

75. ***Mitchell v. Wiltfong***, 604 P. 2d 79 (Kans. App. 1979). **See also:** ***Blache v. Jones***, 521 So. 2d 530 (La. App. 1988), (burglary; mental anguish); ***Duncan v. Rzonka***, 478 N.E. 2d 603 (Ill. App. 1985), (False fire alarms, injuries to responding policeman); ***Huyler v. Rose***, 451 N.Y.S. 2d 478 (N.Y. Supreme Court, 1982), (defendant's son pushed plaintiff into a bonfire.)

76. **In re *James D.,*** 455 A. 2d 966 (Md. 1983). It is also worth noting that when juvenile prisoners injure someone else, the state, which has physical custody of them, cannot be held liable under **Parental Liability** statutes; see: ***Hahn v. Brown***, *Attorney General*, 367 N.E. 2d 884 (Ohio App. 1978).

77. ***Johnson v. Toth***, 516 N.E. 2d 85 (Ind. App. 1987). **See also:** ***LeBlanc v. Phillips***, 546 So. 2d 1339 (La. App. 1989), ("legal custodian", not a parent, not liable under the statute.); ***Pfaff v. Ilstrup***, 746 P. 2d 1303 (Ariz. App. 1987), (no liability of non-custodial father living 120 miles away); ***Bennett v. Ames***, 434 N.Y.S. 2d 766 (App. Div. 1980), (no statutory liability because assault was unforeseeable.)

78. ***Geliner v. Abrams***, 390 S.E. 2d 666 (Ga. App. 1990).

79. ***Pesek v. Discepolo***, 475 N.E. 2d 3 (Ill. App. 1985).

80. ***Clark v. McKerley***, 497 A. 2d 846 (N.H. 1985). **See also:** ***Saenz v. Andrus***, 393 S.E. 2d 724 (Ga. App. 1990), (thrown butcher knife not foreseeable); ***Borelli v. Board of Education, Highland School District***, 550 N.Y.S. 2d 120 (App. Div. 1989), (fight at school); ***Zapalski v. Benton***, 444 N.W. 2d 171 (Mich. App. 1989), (sexual assault); ***Campbell v. Haiges***, 504 N.W. 2d 200 (Ill. App. 1987); ***Pardo v. Carhart***, 546 So. 2d 1142 (Fla. App. 1989).

81. ***Williams v. Bumpass***, 568 So. 2d 979 (Fla. App. 1990).

82. ***Foster v. Arthur***, 519 So. 2d 1092 (Fla. App. 1988). **See also:** ***Dickens v. Auvil***, 508 So. 2d 638 (La. App. 1987); (leaving a gun where defendant's "excitable" daughter could get to it and shot plaintiff instituted negligent entrustment). **But see:** ***Wise v. Superior Court (Meyers)***, 272 Cal. Rptr. 222 (Cal. App. 1990), (no Negligent Entrustment on the part of a wife when her deranged husband murdered strangers; no "special relationship" between the wife and the victims.)

83. ***Johnson v. Patterson***, 570 N.E. 2d 93 (Indiana App. 1991).

84. ***Barth v. Massa***, 558 N.E. 2d 528 (Ill. App. 1990). **See also:** ***Jordan v. Lamar***, 510 So. 2d 648 (Fla. App. 1987), (no liability for lending a pistol to a man who killed his wife with it; no knowledge of the couple's marital difficulties); ***Reeves v. King***, 534 So. 2d 1107 (Ala. 1988) and ***Dunaway v. King***, 510 So. 2d 543 (Ala. 1987), (no liability for **Negligent Entrustment** of a handgun to defendants son who killed another with it; the crime was not foreseeable); ***Blackwell v. Cantrell***, 315 S.E. 2d 29 (Ga. App. 1984), (no liability for **Negligent Entrustment** where one grandchild shot another with a pistol in the grandparents' house.)

85. *Id.* at 533.

86. **See:** e.g., ***Berry v. Kipf***, 407 N.W. 2d 648 (Mich. App. 1987), (no liability when a son used his mother's car to ram the plaintiff because the plaintiff did not allege a cause of action in **Negligent Entrustment** against the mother.).

87. ***Hough v. Mooningham***, 487 N.E. 2d 1281 (Ill. App. 1986).

88. ***Thigpen v. Stern***, 503 So. 2d 1056 (La. App. 1987).

89. ***Barras v. Touchet***, 467 So. 2d 172 (La. App. 1985).

90. ***Thigpen***, *supra*, n. 91, at 1052

91. See: Note: Oklahoma's "Make My Day" Law 23 Tulsa L.J. 533 (1988), at 534.

92. ***Siglow v. Smart***, 539 N.E. 2d 636 (Ohio App. 1987).

93. ***Lassiter v. Warriner***, 368 S.E. 2d 258 (VA. 1988).

94. *Id.* at 260.

95. ***Richard v. Mangion***, 535 So. 2d 414 (La. App. 1988).

96. ***Terrell v. Hester***, 355 S.E. 2d 97 (Ga. App. 1987).

97. **Godbersen v. Miller**, 439 N.W. 2d 206 (Iowa, 1989). See also: **Graves v. Graves**, 531 So. 2d 817 (Miss. 1988), (contributory and comparative negligence are not defenses to assault and battery); ***Whitlock v. Smith***, 762 S.W. 2d 782 (Ark. 1989); (same).

98. Kristin Wilcox, "Intentional Injury Exclusion Clauses - What Is Insurance Intent?" 32 Wayne L. Rev. 1523 (1986).

99. See, e.g.: ***U.S. Fidelity and Guaranty Co. v. American Employers Ins. Co.***, 205 Cal. Rptr. 460 (Cal. App. 1984), for construction of a statute, where it was held that there was no coverage for fire damage caused by a 16 year-old boy.

100. ***Alabama Farm Bureau Mutual Insurance Co. v. Dyer***, 454 So. 2d 921 (Ala. 1984).

101. *Id.*, at 922.

102. *Id.*, at 924.

103. *Id.*, at 922.

104. ***Smorch v. Auto Club Group Ins. Co.***, 445 N.W. 2d 192 (Mich. App. 1989).

105. ***Eastern Shore Financial Resources Ltd. v. Donegal Mutual Insurance Co.***, 481 A. 2d 452 (Maryland Spec. App. 1990); **see also:** ***Wieachowski, Fremont Mutual Insurance Co. v.*** , 451 N.W. 2d 523 (Mich App. 1989); ***Terrio v. McDonough***, 450 N.E. 2d 190 (Massachusetts App. 1983); ***Saba v. Darling***, 531 A. 2d 696 (Maryland Spec. App. 1987).

106. ***Allstate Ins. Co. v. Atwood***, 523 A. 2d 1066 (Md. Spc. App. 1987).

107. ***Melito v. Romano***, 553 N.Y.S. 2d 893 (New York App. 1990); see also: ***Rullo v. Rullo***, 428 A. 2d 1245 (N.H. 4/17/81); ***Irene S., State Farm Fire & Cas. Co. v.***, 526 N.Y.S. 2d 171 (A.D. 1988); ***Morris v. Farmers Ins. Exchange***, 771 P. 2d 1206 (Wyoming 1989); ***Calvo, Prudential Prop. & Casualty Ins. Co. v.***, 700 F. Supp. 1104 (S.D. Fla. 1988); ***Heidelmark, N.Y. Central Mut. Fire Ins. Co. v.***, 485 N.Y.S. 2d 661 (New York App. Div. 1985); ***Burke, Nationwide Mut. Fire Ins. Co., v.***, 456 N.Y.S. 2d 223 (App. 1982); ***Burns v. Middlesex Ins. Co.***, 558 A. 2d 701 (Maine 1989); ***Brennan, Merrimack Mut. Fire Ins. Co. v.***, 534 A. 2d 353 (Maine 1987).

108. ***Raby v. Moe***, 450 N.W. 2d 452 (Wis. 1990).

109. ***Continental Western Ins. Co. v. Toal***, 244 N.W. 2d 121 (Minn. 1976).

110. ***State Farm Fire & Cas. Co. v. Jenkins***, 382 N.W. 2d 796 (Mich. App. 1985).

111. ***Barton v. Allstate Ins. Co.***, 527 So. 2d 524 (Louisiana App. 1988); see also: cases in which intent to injure was established with clear-cut or inferred from the facts. ***State Farm Fire & Cas. Co. v. Williams***, 355 N.W. 2d 421 (Minnesota 1984); ***Shelter Mutual Insurance Co. v. Haller***, 793 S.W. 2d 391 (Missouri App. 1990); ***State Farm Fire & Cas. Co. v. Superior Ct. (Pahl)***, 236 Cal. Rptr. 216 (California App. 1987); ***Barrass v. Benoit***, 509 So. 2d 668 (Louisiana App. 1987); ***Draffen v. Allstate Insurance Co.***, 407 So. 2d 1063 (Florida App. 1981); ***Allstate Ins. Co. v. Maloney***, 435 N.W. 2d 448 (Michigan App. 1989); ***Travelers Ins. Co. v. Cole***, 631 S.W. 2d 661 (Missouri App. 1982); ***Bay State Insurance Co. v. Wilson***, 451 N.E. 2d 880 (Illinois 1983); ***Western National Assurance Co. v. Hecker***, 719 P. 2d 954 (Washington App. 1986); ***State Farm Fire & Cas. Co. v. King***, 851 F. 2d 1369 (11th Cir. 1988); ***State Farm Fire and Cas. Co. v. Miles***, 730 F. Supp. 1462 (S.D. Ind. 1990); ***City of Newton v. Krasnigor***, 536 N.E. 2d 1078 rev'g. ***C. Newton v. N'folk D'ham Mut. Fin. Ins.***, 525 N.E. 2d 685 (Mass. App. 1988) (Massachusetts 1989); ***Allstate Ins. Co. v. Herman***, 551 N.E. 2d 844 Rev'g. id. 542 N.E. 2d 576 (Indiana 1990).

112. ***Shelter Mut. Ins. Co. v. Parrish***, 659 S.W. 2d 315 (Mo. App. 1983).

113. ***Aetna Cas. and Sur. Co. v. Brathwaite***, 751 P. 2d 237 (Oregon App. 1988).

114. ***Pique v. Saia***, 450 So. 2d 654 (La., 1984).

115. ***Quincy Mut. Fire Ins. Co. v. Abernathy***, 469 N.E. 2d 797 (Mass. 1984).

116. ***Tally v. MFA Mutual Insurance Co.***, 620 S.W. 2d 260 (Arkansas 1981); see also: ***Bolin v. State Farm F & C Co.***, 557 N.E. 2d 1084 (Indiana App. 1990); *Northland*

Insurance Company v. Mautino, 433 So. 2d 1225 (Florida App. 1983); ***Kling v. Collins***, 407 So. 2d 478 (Louisiana App. 1981); ***Farmers & Merchants Mut. Fire Ins. Co. v. Lemire***, 434 N.W. 2d 253 (Michigan App. 1988); ***Lavoie v. Dorchester Mut. Fire Ins. Co.***, 560 A. 2d 570 (Maine 1989); ***State Farm Ins. Co. v. Trezza***, 469 N.Y.S. 2d 1008 (New York Sup. Ct. 1983); ***Home Mut. Ins. Co. v. Steelman***, 765 S.W. 2d 372 (Missouri App. 1989); ***Breland v. Schilling***, 550 So. 2d 609 (Louisiana 1989); ***Baugh v. Redmond***, 565 So. 2d 953 (Louisiana App. 1990); ***Schexnider v. McGuill***, 526 So. 2d 513 (Louisiana App. 1988); **Patrons- Oxford Mutual Ins. Co. v. Dodge**, 426 A. 2d 888 (Maine 1981).

117. ***Colonial Penn Ins. Co. v. Hart***, 291 S.E. 2d 410 (Georgia App. 1982).

118. ***Allstate Ins. v. Lewis***, 732 F. Supp. 1112 (D. Colo. 1990); see also: ***Allstate Insurance Company v. Steinemer***, 723 F. 2d 873 (11th Cir. 1984); ***U.S. Fidel. & Guarant. Co. v. Perez***, 384 So. 2d 904 (Florida App. 1980)

119. ***Rausch v. McVeigh***, 431 N.Y.S. 2d 887 (Sup. Ct. 1980). **But see:** ***Anicet v. Gant***, 580 So. 2d 273 (Fla. App., 1991); (No liability of mental patient to an attendant whom he attacked while in the mental institution.)

120. *Id.* at _____.

121. ***Arkwright-Boston Mfrs. Mut. Ins. Co. v. Dunkel***, 363 So. 2d 190 (Fla. App. 1978).

122. ***State Farm Fire & Cas. Co. v. Wicka***, 461 N.W. 2d 236 (Minn. App. 1990).

123. ***von Dameck v. St. Paul Fire and Marine Ins. Co.***, 361 So. 2d 283 (La. App. 1978).

124. ***Rosa v. Liberty Mutual Ins. Co.***, 243 F. Supp. 407 (D. Conn. 1965).

125. ***Congregation of Rodef Sholom v. American Motorists Ins. Co.***, 154 Cal. Rptr. 348 (Cal. App. 1979); **See also:** ***Auto-Owners Insurance Co. v. Churchman***, 459 N.W. 2d 24 (Michigan App. 1990); ***Nationwide Mut. Fire Ins. Co. v. Turner***, 503 N.E. 2d 212 (Ohio App. 1986); ***Nationwide Mut. Ins. Co. v. Rajspic***, 718 P. 2d 1167 (Idaho 1986); ***Mangus v. Western Cas. & Sur. Co.***, 585 P. 2d 304 (Colorado App. 1978); ***Allstate v. Miller***, 460 N.W. 2d 612 (Michigan App.1990); on remand, Aff'g, id. 438 N.W. 2d 638 (Michigan App. 1989); ***State Farm Fire & Cas. Co. v. Christopher***, 729 F. Supp. 446 (W.D. Pa. 1988); ***Aetna Cas. & Surety Co. v. Dicthl***, 398 N.E. 2d 582 (Illinois App. 1980); ***Clemmer v. Hartford Ins. Co.***, 587 P. 2d 1098 (California 1978).

126. ***Eymann v. St. Paul Property and Liability Ins. Co.***, 802 P. 2d 1043 (Ariz. App. 1990).

127. ***Preston v. Granger***, 517 So. 2d 1125 (La. App. 1987); see also: ***New York Underwriters Ins. Co. v. Doty***, 794 P. 2d 521 (Wash. App. 1990).

128. ***Eubanks v. Nationwide Mutual Fire Ins. Co.***, 393 S.E. 2d 452 (Ga. App. 1990).

129. ***Johnson v. Ins. Co. of North America***, 350 S.E. 2d 616 (Va. 1986); see also: new case: ***Shelter Mutual Ins. Co. v. Williams***, 804 P.2d 1374 (Kansas, 1991). ***Transamerica Ins. Corp. Of America v. Boughton***, 440 N.W. 2d 922 (Michigan App. 1989); ***Rockford Mut. Ins. Co. v. Shattuck***, 544 N.E. 2d 843 (Illinois App. 1989); ***Continental Cas. Co. v. Parker***, 307 S.E. 2d 744 (Georgia App. 1983); ***State Automobile Mut. Ins. Co. v. Gross***, 373 S.E. 2d 789 (Georgia App. 1988); ***Aetna Cas. & Sur. Co. v. Sprague***, 415 N.W. 2d 230 (Michigan App. 1987); ***Allstate Ins. v. Cruse***, 734 F. Supp. 1574 (M.D. Fla. 1989).

130. ***American Mut. Ins. Co. v. Peterson***, 405 N.W. 2d 418 (Minnesota 1987); see also: ***Allstate Ins. Co. v. Carioto***, 551 N.E. 2d 382 (Illinois App. 1990); ***Economy Fire and Cas. Ins. Co. v. Meyer***, 427 N.W. 2d 742 (Minnesota App. 1988); ***Allstate Ins. Company v. Sherrill***, 566 F. Supp. 1286 (E.D. Michigan 1983).

131. ***Saba v. Darling***, 575 A. 2d 1240 (Md. 1990).

132. ***State Farm Fire & Cas. Co. v. Morgan***, 368 S.E. 2d 509 (Ga. 1988).

133. ***Safeco Ins. Co. of America v. House***, 721 P. 2d 862 (Ore. App. 1986).

134. ***Farmers and Merchants Ins. Co. v. Cologna***, 736 S.W. 2d 559 (Mo. App. 1987).

135. ***Berg v. Fall***, 405 N.W. 2d 701 (Wis. App. 1987).

136. ***Marshall v. State Farm Fire & Cas. Co.***, 534 So. 2d 776 (Fla. App. 1988); see also: ***Preferred Mutual Ins. Co. v. Thompson***, 491 N.E. 2d 688 (Ohio 1986); ***Transamerica Ins. v. Meere***, 694 P. 2d 181 (Arizona 1984); ***Blosser v. Sentry Indem. Co.***, 541 So. 2d 1370 (Florida App. 1989); ***Fire Insurance Exchange v. Berray***, 694 P. 2d 191 (Arizona 1984); ***Johnson v. Hitchens***, 518 So. 2d 1154 (Louisiana App. 1987); ***Western Fire Ins. Co. v. Persons***, 393 N.W. 2d 234 (Minnesota App. 1986); ***Allstate Ins. Co. v. Novak***, 313 N.W. 2d 636 (Nebraska 1981); ***Brown v. St. Paul Fire and Marine Insurance Co.***, 338 S.E. 2d 721 (Georgia App. 1985); ***Allstate Insurance v. Portis***, 472 So. 2d 997 (Alabama 1985); ***Economy Fire & Cas. Co. v. Iverson***, 426 N.W. 2d 195 (Minnesota App. 1988); ***State Farm Fire and Cas. v. Poomaihealani***, 667 F. Supp. 705 (D. Haw. 1987).

137. ***Grange Ins. Co. v. Brosseau***, 776 P. 2d 123 (Washington, 1989)

138. ***McAndrews v. Farm Bur. Mut. Ins. Co.***, 349 N.W. 2d 117 (Iowa 1984); see also: ***Stahl v. Northern Assur. Co. of Amer.***, 716 F. Supp. 626 (M.D. GA 1989); ***State Farm Fire and Casualty Co. v. Marshall***, 554 So. 2d 504 (Fla. 1989) vacating: ***Marshall v. S.F.F. & C.***, 534 So. 2d 776 (Fl. App. 1988); ***Century Mut. Ins. Co. v. Paddock***, 425 N.W. 2d 214 (Michigan App. 1988); ***Stein v. Massachusetts Bay Ins. Co.***, 324 S.E. 2d 510 (Georgia App. 1984); ***Nationwide Mutual Fire Ins. Co. v. Dunkin***, 850 F. 2d 441 (8th Cir. 1988); ***American States Ins. Co. v. Clemmons***, 412 So. 2d 906 (Florida App. 1982); ***Frankenmuth Mut. Ins. jCo. v. Beyer***, 395 N.W. 2d 36 (Michigan App. 1986).

139. ***State Farm Fire & Cas. Co. v Sabri***, 488 So.2d 1293 (Fla. App. 1990).

140. ***Spengler v. State Farm Fire & Cas. Co.***, 568 So. 2d 1293 (Fla. App. 1990).

141. ***Allstate Ins. Co. v. Merritt***, 772 S.W. 2d 911 (Tenn. App. 1989).

142. ***American Family Mutual Ins. Co. v. Johnson***, 796 P.2d 43 (Colo. App. 1990).

143. ***Curtain v. Aldrich***, 589 S.W. 61 2d (Mo. App. 1979).

144. See, e.g.: ***Continental Casualty Co. v. Young***, 354 S.E. 2d 1 (Georgia App. 1987); ***Seidlitz v. Eames***, 753 P. 2d 775 (Colorado App. 1987); ***National Home Life Ins. v. Patterson***, 746 P. 2d 696 (Oklahoma App. 1987); ***Crawford v. Coleman***, 726 S.W. 2d 9 (Texas 1987); ***Lee v. Aylward***, 790 S.W. 2d 462 (Missouri 1990); ***Lynn v. Philadelphia American Life Ins. Co.***, 543 So. 2d 807 (Florida App. 1989).

145. ***Metropolitan Life Ins. Co. v. Reist***, 421 N.W. 2d 592 (Mich. App. 1988).

146. ***Doe v. Amer. Gen. Life Ins. Co. of N.Y.***, 526 N.Y.S. 2d 904 (Sup. Ct., Bronx 1988).

147. ***Aliff v. Travelers Ins. Co.***, 734 F. Supp. 232 (W.D. Va. 1990).

148. ***Byrd v. Life Ins. Co. of Va.***, 252 S.E. 2d 307 (Va. 1979).

149. ***Prater v. J.C. Penney Life Ins. Co.***, 508 N.E. 2d 305 (Ill. App. 1987); see also: ***Pierre v. Conn. General Life Ins. Co./Life Ins. Co. of North America***, 866 F. 2d 141 (5th Cir. 1989); ***Mitchell v. State National Life Ins. Co.***, 406 So. 2d 777 (La. App. 1981); ***Ellington v. Metrop. Life Ins. Co.***, 696 F. Supp. 1237 (S.D. Ind. 1988).

150. ***Liberty National Life Ins. Co. v. Weldon***, 100 So. 2d 696 (Alabama 1957).

151. ***Life Ins. Co. of Georgia v. Lopez***, 443 So. 2d 947 (Fla. 1983).

152. ***Bodine v. Federal Kemper Life Assurance Co.***, 912 F. 2d 1373 (11th Cir. 1990).

153. ***Bacon v. Federal Kemper Life Assurance Co.***, 512 N.E. 2d 941 (Mass. 1987); see also: ***Overstreet v. Kentucky Central Life Ins. Co.***, 747 F. Supp. 1195 (W.D. Va. 1990).

154. ***Alabama Farm Bur. Mut. Cas. Ins. Co. v. Mitchell***, 373 So. 2d 1129 (Alabama App. 1979).

155. ***State Farm Fire & Casualty Co. v. Tringali***, 686 F. 2d 821 (9th Cir. 1982).

156. ***Harrington v. New England Mut. Life Ins. Co.***, 873 F. 2d 166 (7th Cir. 1989).

157. ***Dyer v. American Family Ins. Co.***, 512 N.E. 2d 1071 (Ill. App. 1987); see also: ***Martin v. Chicago Insurance Co.***, 361 S.E. 2d 835 (Georgia App. 1987); ***American Protection Ins. Co. v. Parker***, 258 S.E. 2d 540 (Georgia App. 1979); ***Leatherby Insurance Co. v. Willoughby***, 315 So. 2d 553 (Florida App. 1975); ***Hulsey v. Mid-America Pref'd Ins. Co.***, 777 P. 2d 932 (Oklahoma 1989); ***Keeler v. Farmers and Merchants Ins. Co.***, 724 S.W. 2d 307 (Missouri App. 1987).

158. ***South Carolina Farm Bur. Mut. Ins. Co. v. Mumford***, 382 S.E. 2d 11 (S.C. App. 1989).

159. ***Martin v. Chicago Ins. Co.***, 361 S. E. 2d 835 (Ga. App. 1987); see also: ***Globe American Cas. Co. v. Lyons***, 641 P. 2d 251 (Arizona App. 1981); ***Mosley v. West American Insurance Co.***, 743 S.W. 2d 854 (Kentucky App. 1988); ***Hudson v. State Farm Mutual Insurance Co.***, 569 A. 2d 1168 (Delaware 1990).

160. ***Petersen v. Croft***, 447 N.W. 2d 903 (Minn. App. 1989).

161. ***Tobin v. Williams***, 396 So. 2d 562 (La. App. 1981); see also: ***Sciascia v. American Insurance Co.***, 443 A. 2d 1118 (N.J. Super. App. Div. 1983); ***Bosson v. Uderlitz***, 426 So. 2d 1301 (Florida App. 1983); ***Utica Mutual Ins. Co. v. Travelers Indemnity Co.***, 286 S.E. 2d 225 (Virginia 1982).

162. ***Kish v. Cent. Nat'l. Ins. Co. of Omaha***, 424 N.E. 2d 288 (Ohio 1981).

163. ***Howell v. Richardson***, 544 N.E. 2d 878 (Ohio 1989).

164. ***Blue v. State Farm Mut. Auto. Ins. Co.***, 493 So. 2d 701 (La. App. 1986).

165. ***State Automobile Mutual Ins. Co. v. Nichols***, 710 F. Supp. 1359 (N.D. Ga. 1989).

166. ***Cerullo v. Allstate Ins. Co.***, 565 A. 2d 1125 (N.J. Super. 1989).

167. *Washington v. Hartford Accident and Indemnity Co.*, 288 S.E. 2d 343 (Georgia App. 1982).

168. ***Saunders v. Detroit Auto. Inter-Ins. Exch.***, 332 N.W. 2d 613 (Mich. App. 1983).

169. ***Jones v. Allstate Ins. Co.***, 411 N.W. 2d 457 (Mich. App. 1987).

170. ***Ganiron v. Hawaii Ins. Guaranty Assn.***, 744 P. 2d 1210 (Hawaii 1987).

171. ***Ins. Co. of North America v. Dorris***, 288 S.E. 2d 856 (Ga. App. 1982).

172. ***Foster v. Lafayette Insurance Co.***, 504 So. 2d 82 (La. App. 1987).

173. ***GEICO Insurance Co. v. Novak***, 453 So. 2d 1116 (Florida 1984).

174. ***Smaul v. Irvington Gen. Hosp.***, 530 A. 2d 1251 (N.J. 1987).

175. ***State Farm Mut. Auto. Ins. Co. v. Whitehead***, 711 S.W. 2d 198 (Missouri App. 1986.)

176. ***State Farm Mutual Auto Ins. Co. v. Barth***, 579 So. 2d 154 (Fla. App. 1991).

177. ***Country Companies v. Bourbon***, 462 N.E. 2d 526 (Illinois App. 1984).

178. ***Curtis v. Birch***, 448 N.E. 2d 591 (Illinois App. 1983).

179. ***Roller v. Stonewall Insurance Co.***, 780 P. 2d 278 (Washington App. 1989).

SECTION V: SPECIAL CASES

Chapter 1. Overview

The preceding section, *MAKING THE CIVIL LAW WORK FOR VICTIMS*, presented a broad spectrum of tort actions available to victims against perpetrators. That presentation dealt **generally** with the various kinds of first-party remedies that victims can enforce.

This section discusses **particular** classes of cases that have been selected based on the fact that each classification combines some, or all, of the following unique factors that make them stand out from the more traditional areas of *victim versus perpetrator* litigation:

1) The situations, with respect to the crimes and the victims are highly sensitive and emotionally-charged;

2) Cases in the selected classifications are encountered with increasing frequency as the area of crime victims' legal rights and remedies develops;

3) The cases typically involve instances in which the perpetrators seek out the most vulnerable kinds of victims; and

4) The special cases present the viable possibility of collecting judgments from perpetrators.

THREE C's CRIMES: CONCEALED, CONCEALABLE, AND, COVERED-UP

These kinds of victimizations were introduced in Section III which emphasized the **collectability** aspects of suing perpetrators who are, to all outward appearances, persons of exemplary character,

stature and means who conceal ***dark sides*** of their natures, from all but the victims of their violent and covert criminal conduct. This section focuses specifically on the crimes committed by these ***dark side*** perpetrators, the effects of their crimes on their victims, and the civil remedies available to these victims.

The collective reference to crimes committed by the ***dark side*** perpetrators as the ***Three C's*** is more a shorthand classification for convenience sake rather than any kind of sociological definition of criminal behavior. It just happens that major manifestations of victimization constituting the special cases covered here began with the letter *c*. The common denominator of all of them is the element of secretiveness involved.

- **Concealed Crimes** refers to criminal victimizations in which the veil of secrecy is most often impenetrable. Child sexual abuse is the classic example of a concealed crime. The combination of the youth and vulnerability of child victims with the dominant positions of abusers -- family members, teachers, ministers, youth group leaders and other authority figures -- almost guarantees the secrecy of the violations. Crimes such as these are the focus of the next chapter.

- **Concealable Crimes** primarily involve cases in which women are victimized **because they are women**, particularly in cases involving domestic violence. The victims, as adults, **can** report physical and sexual assaults against themselves; however, they may be reluctant to do so because of countervailing considerations:

  - keeping the family together,
  - loss of financial support,
  - protection of children,

- fear of retaliation,
- or simply because victims consider the offenses against them as **private matters.**

All of these disincentives to reporting work in favor of the perpetrators: from their perspective the crimes are **concealable** because they can be, but probably will not be, brought to the attention of the authorities.

- **Covered-up Crimes** are unlike **concealed** crimes, in which victims -- children -- usually **can't** report the violations, and they differ from **concealable** crimes in which victims -- battered women -- may **want** to report, but are often prevented by circumstances from doing so. Covered-up crimes involve cases in which campus victims may wish to report crimes against them (usually sexual assaults) but are frequently **dissuaded** from doing so by college officials who are more concerned with the ***image*** of their institutions than with the welfare of their students/victims. Thus a crime that is covered-up becomes, by definition, a **secret** crime simply because the cover-up has accomplished its purpose.

  The extent and seriousness of violent crimes at colleges and universities has suddenly emerged into the public consciousness during the past few years. This newly-emergent recognition of college students as a separate class of victims has uncovered a relatively new area of secretive crimes.

Abused children, battered women, and campus sexual assault victims are by no means the only people who fall prey to ***Three C's*** crimes. **Hate Crimes**, in which victims are singled out because of their race, religion, or sexual preference provide additional examples of victimization in which concealment, concealability and cover-ups are often encountered.

This section focuses on the legal aspects of crimes which combine the unique factors that single them out for special treatment. These factors include:

- Sensitivity and emotional impact;
- Measurable increases in the commission (or at least reporting) of the criminal activity involved;
- Vulnerability of victims; and
- Potential collectability of perpetrators.

Chapter 2: Children as Victims: *Concealed* Crimes

This chapter focuses primarily on child **sexual** abuse and the available legal remedies; however, the principles involved are generally applicable to other crimes and torts against children.

The emphasis on child sexual abuse is based on the fact that the success of *victim versus perpetrator* litigation in this secretive area of criminal activity has resulted not only in lifting the veil of secrecy from such crimes but, in addition, has resulted in legal initiatives that have been instrumental in greatly expanding the rights of ***Concealed Crimes*** victims.

One example of how child abuse litigation has brought about positive change for victims involves recent court decisions and legislation extending statutes of limitations in cases where victims were abused as small children but repressed the traumatic experiences, or their effects, until long after the legal time period for filing suit had expired. In some states, by case decision (or statute), survivors may now bring actions against incest and child abuse perpetrators despite the lapses of time that would previously

have barred their suits. These legal principles, referred to generically as ***delayed discovery rules*** will be discussed in detail later.

Instruction in this chapter tracks the same approach the previous sections and chapters: technical legal theory is subordinated to discussion of current real-life situations that will train Service Providers to assist victims. Emphasis is on the kinds of practical law-related issues that Service Providers can recognize and develop from information provided by their victim/clients, and then transmit, acting as the victims' ***intermediaries,*** to attorneys.

Specific legal issues peculiar to particular types of crimes involving children as victims are stressed in this chapter. Actions on behalf of molested children against insurance carriers for day care centers; cases against third-parties whose negligence facilitated the molestation; and causes of action for emotional distress caused to molested children are all examples of the kinds of ***fine tuning*** of issues that will characterize this section. Remember, however, that the more particularized legal principles presented here in the context of child abuse are still premised on the more traditional torts described in the preceding section.

Almost every case of child molestation that is litigated in the civil courts will, by definition, involve a battery: an intentional, offensive, non-consensual touching and, of course, in instances in which child/victims die at the hands of perpetrators, actions for wrongful death can be brought. Civil courts have held, almost without exception, that child sexual abuse is, by its very nature, so heinous that the **intent to injure** will be inferred from the acts constituting molestation.

Thus, it is hardly surprising that appellate courts, in addition to inferring intent to injure, also routinely hold that the same acts of

child molestation that constitute assault and battery (or wrongful death) **also** give rise to causes of action against perpetrators for intentional reckless or negligent infliction of emotional distress. These actions may be brought not only by the child/victims themselves, but by the victims' parents and by other loved ones.

EMOTIONAL DISTRESS IN CHILD ABUSE CASES

Victims as Plaintiffs

The cliche *"judges are human, too"* takes on significance when those particular humans sit in judgment on child molestation case situations. The courts repugnance frequently filters through judicial efforts to maintain a proper sense of judicial objectivity. A recent case from Maryland's intermediate appellate court illustrates this repugnance. It deals eloquently with aspects of victims' civil remedies in child molestation situations, and will help to set the tone for much of the case law to follow:

EXAMPLE #1[1]

Plaintiff alleged that while she was between the ages of 10 and 17, she was sexually molested by her stepfather, with whom she and her mother lived. The stepfather's activities included every sort of sexual molestation short of actual intercourse. As she approached graduation from high school, she began refusing his advances. Her stepfather then ordered her to submit to him or leave the home.

She chose the latter course; however, when her mother urged her to return home, she told the whole story and was then persuaded by her mother to report it to the police. Her stepfather was tried for criminal sexual molestation, but was acquitted. The victim sued her stepfather for intentional infliction of emotional distress, and received a jury award of $18,845 for compensatory and $10,000 for punitive damages against him.

The stepfather appealed on two grounds:

(1) whether the evidence presented at trial was legally sufficient to allow the question, whether or not the defendant actually caused the plaintiff's injuries, to be submitted to the jury; and

(2) whether the evidence presented at trial, on the issue of the severity of the emotional distress,[2] was legally sufficient to allow submission of the case to the jury.

The Maryland Court of Special Appeals held that Maryland recognized that the tort of intentional infliction of emotional distress, is composed of four essential elements:

(1) the conduct be intentional or reckless;

(2) the conduct must be extreme and outrageous;

(3) there must be a causal connection between the wrongful conduct and the emotional distress; and

(4) the emotional distress must be severe.

The court had no difficulty in upholding damages for emotional distress under the facts of this child molestation case.

In its analysis, the court considered the ongoing nature of the defendant's sexual molestation and its impact on the plaintiff:

> Appellee (victim) testified that these experiences caused her to suffer extreme embarrassment, humiliation, mortification and depression, and caused her to gain weight to the point of obesity. The pattern of sexual abuse prevented her from forming normal personal relationships and caused her to engage in what she felt were improper and unusual sexual activities, including homosexual and group sex and masturbation.[3]

The court then proceeded to examine defendant's argument that since the victim's emotional distress did not arise **immediately** after the act of sexual molestation, there was no causal connection between the defendant's acts and the plaintiff's consequent emotional damage. This argument was rejected based on the testimony of plaintiff's expert

witness that the trauma of incestuous sexual molestation was certainly the **principal** cause of her emotional problems, and that compared with the sexual activities of her stepfather, any of plaintiff's other psychological trauma was ***incidental***.

Defendant's second argument, that the damage caused to plaintiff's emotions was not **severe**, was also emphatically rejected. The court's reasoning consisted of a recapitulation of prior cases and authorities holding that when defendants' actions are sufficiently atrocious, ***serious*** injury to their victims will be presumed:

> The very nature of the conduct involved can provide a guarantee that the claim for emotional distress is genuine and serious. When the acts of the defendant are so horrible, so atrocious and so barbaric that no civilized person could be expected to endure them without suffering mental distress, the jury may find as a matter of fact that ***severe*** emotional distress resulted. In appropriate cases, ***severe*** emotional distress may be inferred from the extreme and outrageous nature of the defendant's conduct alone. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.[4]

Applying these principles to the facts of the plaintiff's case, this particular court summarized its findings about the defendant's conduct and his liability:

> Appellant has conceded, as indeed he must, that the evidence was sufficient for the jury to find his conduct intentional or reckless. He intended his specific conduct and knew or should have known that emotional distress would likely result. He concedes, as indeed he must, that the jury could find his conduct extreme and outrageous in that it offends against the generally accepted standards of decency and morality. The testimony of appellee and Dr. Sodak was sufficient to establish causation. From the very nature of the outrageous conduct -- sexual molestation of a child by a person in a position of authority and trust during six of her more critical formative years; and from the intensity and duration of the emotional distress -- a severe depression deteriorating over a three year period and

requiring an additional two years of therapy, the jury could properly find that the emotional distress was severe. Judge Fader did not err in denying appellant's motions for judgment.[5]

EXAMPLE #2[6]

C.T.W. was a pedophile and the step-grandfather of two preteen boys B.G. and D.G. He engaged in sexual acts with both boys including exhibitionism, photography, touching and oral sex. The boys' parents sued C.T.W. for **negligence** and **gross negligence** in that, knowing he was a pedophile, he:

1) Allowed himself to come into contact with the boys while they were alone; and

2) Failed to seek professional help.

Evidence indicated that he **could have** kept out of one-on-one contact with the victims and **could have** sought help. It indicated that the boys sustained grave emotional damage. (Texas law holds that insane persons can be held liable for their torts. **Ross v. York**, 233 S.W. 2d 347 (Tex. Civ. App. 1950).

The evidence supported the parents' allegation of **gross negligence**, thus justifying an award of **punitive** damages because the pedophile did not consider the possible harm to the victims while committing his acts.

The court sustained an award of $1.3 million actual damages and $1 million punitive damages, including $200,000 each for lack of future earning capacity because of the trauma of the molestation.

The court, in an unusual move, added a special section to its opinion called ***Special Issues and Contentions Revisited*** which contains an extraordinarily well-reasoned and sympathetic review of legal issues in this case and child molestation cases generally.

NOTES FOR SERVICE PROVIDERS

These cases are typical of the attitudes taken by courts when the litigation involves child molesters. The theme running through court's opinions on this subject is that the crimes themselves, and their effects on their victims, are so heinous that very little sympathy should be accorded to defendants who try to justify their actions with the kinds of issues that were advanced by these particular defendants. Legalistic arguments about how **immediate** the trauma must have been, after the continuing sexual misconduct, or how **severely** the violations must have affected the emotions of the victims do not, as a rule, impress judges. According to the courts, in child sexual abuse cases, the evils of the acts are such that their consequences to the victim are inferred as a matter of law.

Note that the defendant in the first example was acquitted in the criminal phase. This demonstrates once again that lack of a criminal conviction (or even a failure to file criminal charges) will not, in and of itself, defeat a civil action arising out of the same facts.

EXAMPLE #3[7]

A New York court sustained a jury award of compensatory and punitive damages for battery and for intentional infliction of emotional distress to a young woman who had been sexually touched (without penetration) by her stepfather. The court, however, reduced the compensatory damage award from $200,000 to $100,000 and the punitive damage award from $275,000 to $100,000. Despite these reductions, the court had harsh words about child molesting, its effects on its victims, and the appropriateness of punitive damages:

> There is no doubt that the wrong the jury and court found that the defendant committed is egregious. The betrayal of a child's trust by a close family member is

> no less reprehensible than the betrayal of a public trust by a psychiatrist, teacher or dentist. In fact, the devastating effect upon the child might well be even greater. The rising tide of cases involving sexual abuse against children by adults in the family context causes incalculable injury to society as well as private interests. Tragically, abused children often themselves become child abusers, perpetuating continuing hideous damage to society from generation to generation. The deterrent value of punitive damages in such cases becomes important. We therefore find that the conduct in the case at bar warrants the drastic sanction of punitive damages in such cases becomes important. While the jury was not required to award punitive damages as a matter of law in the circumstances here, which exhibited the requisite element of wanton disregard of the child's rights and well-being, we cannot say that the court improperly submitted the issue of punitive damages to the jury or that the jury, having found the defendant liable, improperly awarded punitive damages.[8]

NOTES FOR SERVICE PROVIDERS

While clearly recognizing the harm to the victim as justifying punitive damages, the court was willing to give the defendant **some** credit for ***doing the right thing*** after he was confronted. In reducing the punitive damages award, the court may have been motivated by the fact that there was no penetration, that the stepfather stopped molesting his victim voluntarily because he ***knew it was wrong***, and that he left the marital home without any further trouble once Laurie Marie told her mother about his acts. The court concluded that the defendant " . . . lacked the malicious, evil motives frequently cited as a requirement for very large punitive damage awards."[9]

The court's conclusion may or may not have been warranted in this case, but the fact remains that the award **was**, indeed, reduced **based on the appellate court's perception of the facts of the**

case. This yet again underscores the necessity for Service Providers to gather all of the factual information available to them in any given case, because such information may be the key to countering the defendant's appeals to the courts to reduce damage awards against them.

An emotional distress case, ***Mindt v. Shavers,***[10] presented in the previous section, involved the rape of a female soldier by a male soldier. Her claim against the assailant for assault and battery was barred by the statute of limitations. However, she was allowed to recover from the perpetrator for intentional infliction of emotional distress because of the longer statutory period for filing suit for that tort. In affirming her award, the court noted that actions for intentional infliction of emotional distress were *uniquely appropriate* to sexual assault cases.

The same is true of actions for intentional infliction of emotional distress in child molestation situations.

EXAMPLE #4[11]

The plaintiff sued her father for sexual abuse committed when she was a minor. She alleged causes of action for battery, assault, intentional infliction of emotional distress and several other torts. Her actions for assault and battery were barred by the state's two-year statute of limitations; however, she was allowed to proceed under her intentional infliction claim because that tort was governed by a three-year "catch-all" statute of limitations for ". . . any other injury to the person."

The defendant/father had argued that the intentional infliction claims were so ***closely related*** to assault and battery that the two-year statute should apply. The appeals court disagreed. It held that the essence of an assault claim was the victim being put in fear of an imminent battery, whereas the gist of a claim for intentional infliction of emotional distress is: " . . . the victim's severe emotional distress caused by the perpetrator's egregious conduct."[12]

The court held that there was enough difference between the facts that the longer statute for intentional infliction was properly applied.

NOTES FOR SERVICE PROVIDERS

Questions and issues involving statutes of limitations loom large in the area of legal remedies for child molestation victims. The fact that a large number of sexual assaults take place when child/victims are so young, coupled with many victims' tendencies to deny or repress memories of the abuse until later, creates problems not often found in other areas of first-party litigation.[13] Consequently, limitations problems should **automatically** be considered by Service Providers when interviewing child victims, and Service Providers should be constantly alert for evidence of emotional distress, because statutes of limitations may be longer for those torts, than for more traditional actions in battery and assault.

Family, Loved Ones, etc. as Plaintiffs

The preceding examples involve situations in which the ***direct objects*** of molestation, (i.e. the actual victims) were also the plaintiffs, and the actions were primarily for **intentional** infliction of emotional distress. We turn now to child molestation situations in which the plaintiffs are the **parents** of the actual victims who allege causes of action against their children's molesters.

In most instances, third parties -- even parents -- have no cause of action for infliction of emotional distress unless they were **present and actually witnessed** the actions that gave rise to the claimed emotional injury.

Recent child molestation cases illustrate this principle:

EXAMPLE #5[14]

A next-door neighbor befriended the ***Oscar*** and ***Smith*** (pseudonyms) children, gaining their trust. He sexually molested them and distributed pictures of his activities. The children sued the perpetrator and settled their cases. The victims' parents sued him for infliction of emotional distress; their case was dismissed. The Iowa Supreme Court affirmed the dismissal, adhering to the rule that third parties must be **present and witness** the injuries before a cause of action arises **for them.**

EXAMPLE #6[15]

The defendant sexually molested plaintiff/parents' children, ages 5 and 7. The trial court refused to dismiss the children's suit against the defendant, but dismissed the parents' action for infliction of emotional distress. The appellate court affirmed; since the parents were not **present** and did not **witness** the molestation, they had no cause of action.

EXAMPLE #7[16]

Plaintiffs/parents were told by defendants, man and wife, that the man had sexually molested their daughter, and the wife had furnished her with drugs. The appellate court held that the parents had no cause of action for infliction of emotional distress because they did not witness the assault or the narcotics transactions.

The rule of **non-liability-without-physical-presence** is firmly established in the law of personal injury. However, some courts have on occasion found causes of action to exist, usually when the facts of the case indicate some action on the part of defendants that establishes **special duty** to the third-party plaintiffs (parents), or when the molestation takes place in close proximity to the plaintiffs in time and space.

EXAMPLE #8[17]

Plaintiff/mothers enrolled themselves and their minor sons at a psychiatric clinic in order to obtain counseling for family problems. The psychologist assigned to the boys sexually molested them. Two of the mothers sued for **negligent** infliction of emotional distress. The California Supreme Court held that the mothers had stated a cause of action based on the psychologist's **breach of a professional duty** owed to the mothers **as well as to the sons**, since both sons and mothers had sought counseling together, as family units. One Justice concurring with the majority, suggested that the conduct of the psychologist was so outrageous that a cause of action might also have been stated for intentional infliction of emotional distress.

EXAMPLE #9[18]

Wicker was visiting at the home of his employer Croft. He sexually molested the Croft's daughter ***in close proximity*** to Mr. and Mrs. Croft. The court held that the Crofts had stated a cause of action for both negligent and intentional infliction of emotional distress.

NOTES FOR SERVICE PROVIDERS

These two examples again illustrate the impact that the **factual settings** of cases may have on the outcome of the litigation. In both instances, the usual requirements of presence and witnessing the acts complained of, were missing. However, the courts, apparently outraged by the defendant's behavior, found additional factors -- breach of professional duty, and ***close proximity*** to the unlawful activity -- upon which to base liability. New, or at least novel, rules of law were developed because of the particular **factual** variations involved in each case.

If the facts involved in child molestation (or other) cases appear to be particularly outrageous to Service Providers, they may be equally outrageous to the courts. This kind of information should be brought to the attention of attorneys and should serve as incentives to Service Providers to ascertain further helpful information that might be forthcoming from victims.

PARENTAL LIABILITY ISSUES IN CHILD ABUSE CASES

Liability of parents for the crimes and torts of their children was discussed in the preceding section. The same liability exists when children molest other children. Parental liability has been recognized under general principles of law for failure to control children. Additionally, many states have enacted statutes imposing liability on parents, in various circumstances, for their children's actions. Parental liability laws often require that the defendant/parents have custody and control of the children, and that the children's acts giving rise to liability must have been reasonably foreseeable.

EXAMPLE #10[19]

Sherry, a 16-year-old, was raped by three 17-year-old boys at a recreational camp. Her mother settled with the camp and its owners, but sued the boys and their custodial parents. A jury awarded $60,000 special damages to cover the costs of psychological treatment, and $180,000 general damages against the parents collectively (reduced by 12% for negligence on Sherry's part.) This award was upheld on appeal. Parental liability was apparently imposed based on a common law theory, as no statute is mentioned in the opinion. On another issue, the court held that an untimely request by the defendants for a psychological examination of Sherry, and her mother, was properly denied.

NOTES FOR SERVICE PROVIDERS

Since common law parental liability usually involves elements of the foreseeability of the possible acts of one's children, the backgrounds and reputations of children who molest others are important with regard to both liability and damages issues. Service Providers are well-placed to develop this information through questioning victims and their families. It is important to remember that liability may be based not only on what the parents actually **knew** about their children's violent tendencies, but also on what they **should have known about them.** Consequently, general knowledge in the community about defendants/children's prior acts is extremely important in developing the overall picture of foreseeability.

In cases where plaintiff/children have been molested by defendant/children, the victims and their parents generally do not have much success in recovering from the defendant/parents' insurance carriers. ***Expected/intended injury*** exclusions in insurance policies are especially difficult to defeat in child molestation cases, because the great majority of courts consider child sexual abuse to be such a heinous crime that the intent to injure will be **inferred** from the act. (This is discussed in more detail below.)

EXAMPLE #11[20]

Plaintiff's minor son was sexually penetrated by an eighteen-year-old who was ***mentally slow***. The court held that his parents' homeowners' carrier had no obligation to defend; intent was inferred from the criminal act despite the assailant's mental condition.

EXAMPLE #12[21]

The Roelf's minor son sexually molested two minor girls. The court held that an ***intentionally caused injuries*** exclusion in the parents' policies excused the carrier from liability for the actual molestation and for parental negligence.

NOTES FOR SERVICE PROVIDERS

The fact that chances of collection from perpetrators' insurance policies are remote in child molestation cases does not mean that there is no chance at all of collecting. Occasionally, carriers will settle insurance claims to avoid publicity, or possibly because it is cheaper to settle than to litigate the defense of perpetrators. Service Providers should attempt to acquire any information that might be pertinent to a civil action even though the realities of child sexual abuse situations make the chances of collection from insurance carriers unlikely.

DAMAGES IN CHILD SEXUAL ABUSE CASES

It is difficult to imagine cases of child sexual molestation that would not involve extensive damages. Computation of the amounts of damages is critically important in light of the fact that the effects of the crime may be felt by the young victims for years and years, and possibly for life. For example, recall the damage award cited in EXAMPLE #2 above, when two young boys, sexually molested by their step-grandfather, won $200,000 each for **future** loss of earning capacity. The court, in affirming these awards, noted the testimony of the plaintiffs' expert about the future trauma issue:

> Dr. Gripon testified that child victims of pedophiles have many of the problems common to others, but they are magnified for these victims and are more likely to occur. They are more likely to be divorced, have drinking problems, and have difficulty maintaining jobs consistently. Such victims have problems establishing basic human trust. Gripon stated that where the abuse is repeated over a long period of time, the potential for damage is increased. Also, the more significant the abuser is to the child, the more damaging the incidents are. Dr. Gripon stated that, though he could not identify precisely which long term problems each child would suffer, the children would, more likely than not, be adversely affected by this experience. He testified that the abuse would likely have an impact on the boys' earning capacity. Mr. Velardo stated that these boys have a handicap for the future and will have permanent effects of this abuse for life, including psychological, emotional, and mental injuries.[22]

Generally speaking, assessment of injury and quantification of damages is beyond the scope of this *Manual*, which is concerned primarily with substantive liability issues. Nonetheless, it is useful to look at a few cases that illustrate some of the issues raised by molestation defendants who have challenged awards on the basis of the **reasonableness** of the amounts of damages awarded, or the means of computation of those damages.

EXAMPLE #13[23]

Defendant sexually molested plaintiff's 4-year-old daughter. With regard to damages, it was held that proof of bills rendered and paid were ***prima facie*** evidence of the necessity and reasonableness of medical expenses. Also, evidence of the defendant's financial condition was not a prerequisite to an award of punitive damages ($100,000 in this case).

EXAMPLE #14[24]

A stepfather had sexual relations with his stepdaughter from the age of 9 through 16. She sued him; on the damages issue it was held that compensatory damages of $12,000 and punitive damages of $30,000 were not excessive. The ***disparity*** between compensatory and punitive damages was not grounds for reversal of the punitive amount. With regard to the defendant's contention that punitive damages should be reduced, the court said:

> To be considered in relation to the defendant's contention are the innate evil of his conduct as found by the jury, together with how extensive and far reaching its effects are on the lives of plaintiffs and others.[25]

NOTES FOR SERVICE PROVIDERS

Service Providers' empathy with the victims, combined with their experience and expertise in dealing with child abuse situations, will be of valuable assistance to attorneys in quantifying the harm inflicted for purposes of damages calculations.

SPECIAL DEFENDANTS: AUTHORITY FIGURES

Almost **every** adult is an ***authority figure*** to young children: parents, relatives, neighbors, clerks in stores, mail carriers, and so on. There are however, groups of people who, because of their professions, stature in the community, or positions of trust and control, symbolize greater-than-usual ***authority*** to children. Unfortunately, some of these people take advantage of their status to victimize children who submit to their indicia of ***authority***.

From a strict *victim versus perpetrator* perspective, first-party litigation cases against authority-figure molesters have a better-than-usual potential for settlement because the perpetrators,

almost by definition, have reputations which they wish to protect. Hence, they may wish to avoid the kind of publicity and exposure that litigation generates (See the discussion of ***Three C's*** Crimes in section III, above, and at the beginning of this section).

If the perpetrators of these crimes have assets, and many of them do, the collection of judgments, awards and settlements may not be a major problem. The opposite is true, however, when the principal sources of collection appear to be from perpetrators' insurance policies. This is so because in insured child molester cases the **intent to injure**, for purposes of **expected/intended injuries** exclusions in their policies, is **inferred** from the nature of the crime.

Nonetheless, Service Providers should pay close attention to authority figures/child molestation cases because of the possibility of **third-party** actions against the molesters' employers. For example, in the case of *Erickson v. Christianson*[26], discussed in Section IV above, under the topic intentional infliction of emotional distress, a Sunday school pupil was seduced by the minister of her church. The court held that she had stated a cause of action not only against the minister but also against his employer, the church, for failing to supervise its employee, the minister. This presents an example of how first-party suits against authority-figure perpetrators (who may not be collectable) and third-party suits against their employers (who may be quite collectable) are, legally speaking, related to each other.

The following brief discussion of some classifications of ***authority figures***, who appear frequently as defendants in child molestation cases, cover both first-party and third-party aspects of this kind of litigation.

Teachers

Teachers are *authority figures* in every sense of the word. Cases arise with disturbing frequency involving attempts by teachers to take advantage of their positions by molesting and seducing their charges.

Both victims and their parents have attempted to recover damages from these errant teachers' personal (homeowner's) and professional (teacher's) insurance policies, usually with little success.

EXAMPLE #15[27]

Defendant-teacher had non-consensual sexual relations with a minor student who sued the teacher for the assault and the school district for negligent employment and supervision. On the question of insurance it was held that:

(1) The insurer for the Minnesota Educational Association of which the defendant was a member, had no duty to defend or indemnify him;

(2) The teacher's homeowner's insurer had no duty to defend or indemnify the teacher;

(3) The school district's insurer had no duty to defend or indemnify the teacher; and

(4) The school district had a duty to defend the teacher but not to indemnify him.

NOTES FOR SERVICE PROVIDERS

This case is typical of the spectrum of cases involving child molestation by insured authority figures such as teachers. With the exception of cases that carriers may decide to settle out of court for reasons unrelated to their legal obligations (e.g., publicity, expense and trouble to litigate, questions of liability, etc.), the possibility of collecting from teachers' insurance carriers is usually remote. The teachers themselves may be sued personally, but **collection** of any judgments awarded depends on whether the defendant/teachers have assets other than insurance.

Service Providers should also consider the possibility of third-party liability by the teachers' employers, such as schools and school districts. Prospective victims attorneys will be extremely interested in this aspect of litigation, because third-party litigation is usually aimed at those with **deeper pockets** than first-party cases can provide. The following example describes a successful third-party action brought against a high school principal by a student who had been sexually abused by a band teacher:

EXAMPLE #16[28]

Karen Stoneking was a high school student and member of the band. She and several other girls in the band were molested by the band teacher. Karen reported him. The principal not only took no action, but made Karen apologize to the band teacher in front of the other band members. She sued school officials under the *Federal Civil Rights Act*. The U.S. Court of Appeals held that she had stated a civil rights cause of action against the **principal** for ***covering up*** the teacher's conduct.

NOTES FOR SERVICE PROVIDERS

In many molestation cases in which employees are the culprits, their supervisors will attempt to ***cover-up*** for the molesters and dissuade victims from reporting the crimes or pursuing their civil remedies. There is currently a trend among courts to recognize causes of action against employers for covering-up and ***stonewalling*** against victims (See the discussion of ***Three C's*** Crimes: *Covered-Up* Crimes, above, and below in the chapter on campus violence). In addition to ***cover-up*** cases, causes of action for negligent employment and negligent retention of unfit employees are recognized as valid third-party actions. This is illustrated in some of the following authority figure molesting cases.

Clergy

One of the best-kept secrets in the entire area of crime victims' litigation consists of child molestation by clergy persons and other church officials. Cover-ups and quick, secret settlements have become the rule rather than the exception. Some cases, however, have managed to reach the appellate courts:

EXAMPLE #17[29]

A priest in an Archdiocese in Portland, Oregon molested children/ parishioners over a number of years. Suit was brought against the Archdiocese for negligence in failing to control the priest. The defendant Archdiocese settled the lawsuit and apparently the insurance carrier was required to pay for the victim's damages.

NOTES FOR SERVICE PROVIDERS

This case typifies those noted earlier, where it was suggested that settlements are eagerly sought to avoid the awful publicity that such cases generate. These settlements are very beneficial to victims because, when a settlement is reached, there is no trial, and defenses that could have been asserted against victims will not be raised.

The following example illustrates how a defense based on the statute of limitations can be used to defeat a claim against a clergyman/molester.

EXAMPLE #18[30]

Plaintiff was homosexually molested by his minister while he was a minor; after the statute of limitations had run out, he sued the minister alleging that the minister's dominant conduct prevented him from perceiving the defendant's wrongful conduct. The court rejected this contention because the plaintiff knew of the conduct and its illegality and could have reported it.

NOTES FOR SERVICE PROVIDERS

Despite this particular holding, Service Providers should keep in mind that short statutes of limitations for substantive torts such as assault and battery may not bar **all** recovery if actions are brought for such torts as intentional infliction of emotional distress which may have longer statutes of limitations. This possibility should **always** be explored.

As in other child molestation situations, perpetrators' insurance carriers often invoke ***expected/intended injury*** exclusions in clergy molestation cases, and, because of the rule that intent to injure is inferred from the act of child molestation, insurance coverage is usually denied. This is another reason why out-of-court settlements are so beneficial for the victims in these cases.

EXAMPLE #19[31]

A Homeowner's insured, a church's ***minister of music,*** sexually molested a young male parishioner. The court held that the ***expected/intended injury*** exclusion relieved the carrier despite psychiatric testimony that the molester, as a pedophile, did not ***intend*** to injure his victim.

Youth Groups

The same legal principles apply here as in other ***Authority Figure*** cases. Two of the cases discussed below involve perpetrators who molested children under the cover of Big Brother/Big Sister activities. There was little question of the liability of the molesters. Rather, the legal issues involved damages and collectability.

EXAMPLE #20[32]

A nine-year-old boy was sexually molested by a man who was in Big Brothers/Big Sisters of Anchorage. The molester subsequently committed suicide. The court appeared to assume that **compensatory** damages would be available while holding that **punitive** damages could not be awarded against the estate of the molester.

EXAMPLE #21[33]

Defendant (male) pled guilty to sexually assaulting a male under his supervision (Big Brothers); the court held that a writ of attachment against the defendant's real property would be granted to ensure collectability.

NOTES FOR SERVICE PROVIDERS

Both of these cases turned on first-party issues, *i.e.*, the actions were directly against the perpetrators. Both examples suggest **at least** the possibility of third-party actions by the victims (or their parents) against Big Brothers/Big Sisters for:

- **Negligent employment** - failing to check the backgrounds of persons entering the program;
- **Negligent retention** - retaining persons in programs after suspicion of child molestation had been aroused; and
- **Failure to supervise or control** those who had charge of children in the programs.

When these programs, no matter how laudable their aims, place young children into positions of trust and control by adults, there is a duty on the part of the operators of the programs to choose carefully and to supervise and monitor program members and employees. A recent first-party **and** third-party action against the Boy Scouts of America resulted in liability:

EXAMPLE #23[34]

A Boy Scout leader molested plaintiff, a Boy Scout. A jury exonerated the National Boy Scouts and the trial court dismissed the counts against the accused molester. The Virginia Supreme Court held that the latter ruling was in error. The plaintiff had alleged willful and wanton misconduct against the molester, rather than ordinary negligence, and the plaintiff's proofs had supported that allegation.

NOTES FOR SERVICE PROVIDERS

The jury in this case rejected the third-party claim against the National Boy Scouts because the plaintiff was unable to prove that the organization **should have known** of the molester's tendencies. It did, however, find liability on the part of the local Boy Scout Council, and, indeed, it is significant that the case even **reached** a jury in the first place.

Cases such as these can also have a **deterrent** effect on future activities of organizations that involve young children. **The mere fact** that the suits were filed may make agencies such as Big Brothers and Boy Scouts aware of the **potential** for first and third-party liability (not to mention the terrible publicity attendant in such cases). If, as a consequence, potential defendants are forced to enhance their screening and supervisory procedures (in their own enlightened self-interest, if for no other reason), then a great service of a positive nature will have been performed on behalf of future child molestation victims.

Until now, the notes and suggestions for Service Providers have concerned the kinds of information to be elicited from victims (and survivors) about the **perpetrators themselves**: their activities, characteristics, potential collectability, statements, or sanity/

insanity. These first-party issues are still the **principal** focus of the *Manual*; however, with the advent of third-party liability considerations, a new dimension is added to this instruction which goes beyond the prior emphasis on *victim versus perpetrator* issues.

As we progress, especially in the area of ***Three C's*** crimes, broader issues of third-party liability will emerge. The *Manual*'s fairly detailed instructions about ***asking the right questions*** of victims about what happened to them, will be supplemented with some key references about third-party liability so that Service Providers will recognize such issues in order to provide complete and useful information to attorneys.

CHILD SEXUAL ABUSE: INSURED PERPETRATORS

Inferred Intent

It is ironic that, in the area of child sexual abuse, where the victims have the greatest need of long-range psychological therapy and counseling to overcome their trauma, the courts have, in most cases, effectively foreclosed one of the principal sources of collection of judgments to pay for such therapy: insurance from perpetrators' policies. The courts reason that child molestation is so inherently harmful that the intent to injure is **inferred** in almost every case and, hence, *expected/intended injury* exclusions in defendants' policies relieve the carrier of any obligation to pay damages.

A recent case, ***J.C. Penney Casualty Insurance Co. v. M.K. et al.***, decided by the California Supreme Court, illustrates the

rationale of the majority of courts confronted with the child molestation/insurance issue. (An eloquent dissent in the case sets forth legal and policy arguments in favor of allowing recovery from insured child molesters' insurance carriers.)

EXAMPLE #24[35]

In September of 1984, five-year-old M.K. told her mother that she had been sexually molested by R.H., an adult male neighbor and friend of her mother's, who often babysat M.K.

R.H. admitted to fondling the victim's genitals with his hands, holding the girl over his head with his thumb inserted into her vagina, and orally copulating her. Medical evidence was consistent with these admission. R.H., in deposition, admitted that he intended to do the acts, and that he knew they were wrong. He testified that he did not intend to harm M.K. (He was sentenced to six years upon his conviction for the criminal offense.)

M.K. and her mother sued R.H. for negligence, and negligent infliction of emotional distress. A jury awarded the child $400,000 and the mother $100,000 on the negligence counts. R.H. had an insurance policy with the J.C. Penney Casualty Insurance Company. It contained the standard exclusion for ". . . bodily injury or property damage which is either expected or intended from the standpoint of the insured." Reviewing the case a majority of the California Supreme Court stated:

> We turn now to the primary issue addressed by the parties and numerous *amici curiae* : Is liability coverage for R.H.'s molestations of a child excluded by the terms of the insurance policy and Insurance Code section 533?
>
> J.C. Penney contends coverage is excluded from coverage unless the insured acted with a ***preconceived design to inflict injury***." They contend psychiatric testimony shows that molesters, including R.H., often intend no harm, despite the depravity of their acts, and that the molestation is often a misguided attempt to display love and affection for the child.

> We conclude there is no coverage as a matter of law. No rational person can reasonably believe that sexual fondling, penetration, and oral copulation of a five-year-old are nothing more than acts of tender mercy.
>
> Except in the present case, every court to decide this issue under California law has held that a homeowner's insurance policy does not provide liability coverage for child molestation. The courts of many other states also have considered the issue and, almost without exception, have held there is no coverage.[36]

The court first pointed out that section 533 of the California Insurance Code provides that an insurer is not liable for the ***willful act of an insured***. After a lengthy discussion, it held that the section excluded insurance coverage for child molestation:

> We find nothing in the statute, however, to support defendants' view that a child molester can disclaim an intent to harm his victim. There is no such thing as negligent or even reckless sexual molestation. The very essence of child molestation is the gratification of sexual desire. The act is the harm. There cannot be one without the other. Thus, the intent to molest is, by itself, the same as the intent to harm.[37]

If the court had limited its holding **only** to the words of the state's statute excluding liability for ***willful*** acts, then the decision might be dismissed as being no more than a single state's interpretation of its own statute, and of no real value as a precedent for other states. The court stated:

> Some acts are so inherently harmful that the intent to commit the act and the intent to harm are one and the same. The act is the harm. Child molestation is not the kind of act that results in emotional and psychological harm only occasionally. The contrary view would be absurd.[38]

The court held that -- with or without California's statutory language -- intent to harm will be inferred from any proven act of child molestation. Bolstering its conclusion, the court pointed out that almost every other court that had also ruled on the issue had ruled that there could be no insurance coverage for child molesting.

> Although we are not bound by decisions of other states' courts, particularly in a case of statutory construction, they do reflect that our decision is in the mainstream on this issue . . . To allow coverage for child molestation would be contrary to the almost unanimous rule in other states. . . We are not aware of any decisions by a state's high court that allows coverage for child molestation.[39]

Justice Broussard dissented, making an eloquent plea for compensating molestation victims through perpetrators' insurance policies, and for consideration of the " . . . *interests and rights of victims of child abuse and other crimes.*"[40] The language of this dissent is worth noting in the hope that at some time in the future courts and legislators might heed what this Justice had to say:

> Liability insurance serves two functions in our society. It not only provides a fund that the wrongdoer may resort to in order to meet his just obligation, but also provides compensation for the victims of wrongful and criminal conduct. Often, the wrongdoer's insurance is the only way the innocent victims of crime, including child molestation, may recover compensation for medical expenses, their disabilities and their injuries. Particularly as to child molesters, the wrongdoers are likely to be incarcerated for lengthy periods of time, and there is little likelihood that a judgment recovered against the wrongdoer can be collected out of the wrongdoer's earnings. The wrongdoer will ordinarily be faced with substantial legal expenses depleting whatever assets he may have had. Liability insurers ordinarily pay to the innocent victim rather than the insured, so there is little danger that the wrongdoer insured will fatten his pocket from the insurance.
>
> Concern for the innocent victims of crime outweighs the policy of deterrence or penalizing the wrongdoer and strongly militates against an interpretation expanding Section 533's prohibition of insurance coverage.[41]

As the California Supreme Court's majority correctly pointed out, courts across the nation are in agreement that the doctrine of inferred intent will deny insurance coverage to child molesters. Nonetheless, **within months** of the decision in the ***J.C. Penney*** case just described, the United States Court of Appeals for the Ninth Circuit, **applying California law,**

including the ***J.C. Penney*** case, found a *loophole* in the inferred intent doctrine. Based on the court's analysis, the child molester's insurance carrier was liable for the victim's damages.

EXAMPLE #25[42]

The defendant was sued by the parents of a three-year-old girl for touching her private parts while she was at the defendant's day care center. A jury returned a verdict for the plaintiffs based on allegations of intentional acts (assault and battery) and negligent acts (infliction of emotional distress).

The defendant had never been charged with or convicted of any criminal offense involving the alleged molestation, nor had he ever admitted to any such acts.

The court in this case interpreted the California Supreme Court's ***J.C. Penney*** decision to mean that *intent to injure* would be inferred from child molestation only to the extent that it involved acts of child molestation which have been proven or admitted.

Since the jury in the civil case found the defendant liable for **negligent** acts, as well as intentional acts, the Federal Appeals Court held that the intent to injure could not be inferred, and that the insurance company had to pay.

NOTES FOR SERVICE PROVIDERS

This case is somewhat unusual in that the defendant had not been charged with or convicted of molesting the child, nor had he ever admitted touching her private parts. Most child molestation cases will involve some proof of the unlawful acts charged. The case does illustrate that it is possible to bring civil cases alleging **both** negligent and intentional acts. Especially in cases involving insured perpetrators, this kind of alternative pleading may work to the benefit of the plaintiffs.

A few other courts have held that insurers may have a duty to defend their insured and to pay their damages in such cases.

EXAMPLE #26[43]

Homeowner's insured/grandfather sexually molested his granddaughter, without physical violence. A United States District Court applying Alabama law held that the ***expected/intended injury*** exclusion did not excuse the carrier and the injuries were covered by the policy.

EXAMPLE #27[44]

A bus driver for a transit authority sexually molested children. In a suit against the authority, the court held that:

1) The expected/intended exclusion in the authority's motor vehicle policy precluded **full** coverage;

2) The state's Motor Vehicle Safety Responsibility law overrode the expected/intended exclusion up to the limits of the state's policy; and

3) The injury did ***arise out of*** use or operation of the vehicle.

Hence, recovery was allowed from the carrier to the extent that the state's mandatory safety law required coverage.

EXAMPLE #28[45]

Metz sexually molested N.N. while in a drunken stupor. He then pleaded guilty to sexual assault. The court held that the victim should be allowed to litigate the issue of whether his intoxication negated the expected/intended exclusion in Metz's homeowner's policy.

EXAMPLE #29[46]

Homeowner's insured was sued for intentional acts and negligent acts arising out of child molestation. The court held that, since negligent acts had been alleged, an intentional harm exclusion did not excuse the insurance carrier from its policy obligations.

NOTES FOR SERVICE PROVIDERS

Despite these examples, generally speaking, the rule for non-liability of proven or admitted child molesters' insurance carriers is firmly rooted in the law. Often, the most that Service Providers can do in such situations is to remain alert for any possible factors which might lead to settlements by insurance carriers (for example, desire to avoid publicity), and to pay special attention to other sources of collection, including third-party actions.

Child-Care Entities: Insurance

Businesses

The victims' movement has, in recent years, witnessed a dramatic increase of litigation on behalf of children who have been negligently placed in the care of others such as foster parents, ***day care*** centers and schools, and babysitters. Such placement may be made by social service agencies established and run by the government, by private child care agencies (who may nevertheless operate under some sort of governmental approval) or by parents and guardians themselves.

Horror stories about the treatment of negligently-placed children include claims of sexual abuse, torture, and even murders of the child victims. Those who negligently place child victims in (or

fail to remove them from) situations of abuse and danger, often become defendants in third party actions which are referred to collectively as **Negligent Oversight of Children** cases. Such cases are beyond the scope of the *Manual*, although Service Providers should be aware of the potential for actions based on negligent placement, failure to remove, etc., by the third parties involved.

First party *victim versus perpetrator* actions are filed directly against those who actually committed the crimes against the victims. These actions involve assault and battery, intentional infliction of emotional distress, parental liability, civil conspiracy, and any of the other direct actions discussed above, including, tragically, wrongful death. Collection from child abuse perpetrators in these cases will depend primarily on whether they have assets other than insurance because, in cases against insured molesters purporting to care for children, the doctrine of ***inferred intent to injure*** will almost invariably relieve insurance carriers of any obligation to pay.

Despite the fact that the ***inferred intent to injure*** doctrine generally bars insurance coverage of **individuals** who are guilty of molestation in child care situations, some courts have taken a more flexible view of coverage when it comes to insurance policies covering the **business** of caring for children. Insurance policies of this nature are often issued to child-care businesses and, on occasion, coverage has been afforded to molestation victims. The following cases illustrate this:

EXAMPLE #30[47]

Husband, James and wife, Isabel, ran a nursery school and were covered by a comprehensive insurance policy. Husband sexually molested a number of the children. The wife did not molest the children nor did she conspire with, aid or abet her husband in his molestations. The trial

court found that " . . . at most, she may have been a knowing bystander. More likely, she closed her eyes to certain facts to deliberately avoid learning the whole truth.[48]

The appeals court held that the wife could be liable for the acts of her husband/ partner; but if **she** herself, was innocent, she would be entitled to insurance coverage under the policy.

The court discussed the effect of California Insurance Code #533 prohibiting coverage for ***willful*** acts and found that it did not apply to the innocent co-partner situation:

> The public policy underlying section 533 is to prevent encouragement of willful torts. Section 533 is a codification of the jurisprudential maxim that no man shall profit from his own wrong . . . To conclude that Isabel may be indemnified under the American states policy does no violence to this public policy. She did not encourage, aid, or abet her husband's willful, tortious activities. She did not ratify his acts. Isabel may be liable for what the district suggested might have been "negligent . . . supervision" or for a negligent failure to investigate facts which existed but to which the district court stated she may "have closed her eyes . . . to deliberately avoid learning the truth." But neither Isabel's negligence, if any, nor her vicarious liabilities for James' willful acts precludes insurance coverage under California Insurance Code Section 533.[49]

In finding that coverage existed, the appellate court went even farther to refute the argument that public policy required that the insurer not be required to pay for the victim's damages. It noted that:

> The public policy against insurance for losses resulting from (child molestation) is usually justified by the assumption that such acts would be encouraged, or at least not dissuaded, if insurance were available to shift the burden of the loss from the wrongdoer to the insurer.[50]

However, the court pointed out that insurance coverage would not protect James, the wrongdoer, because only the **innocent** insured, Isabel, would be protected from liability. To the proposition that insurance would indirectly benefit James' interest in the partnership, the court replied that

> " . . . this is the kind of circumstance which tends to exist in every case in which an insurance company is called upon to provide indemnification for an innocent insured when an act is caused by the willful, intentional act of another."[51]

NOTES FOR SERVICE PROVIDERS

Despite the rigidity of the ***inferred intent to injure*** doctrine, when it is applied to **individual** perpetrators, once business law concepts became involved, a different legal situation may be presented. Indeed the law of business associations such as partnerships, corporations, etc., has largely been structured to **avoid** personal liability in favor of liability of the various business entities. This application of business principles may be used for the benefit of victims. Service Providers should be alert to elicit information about the legal structure and business arrangements in joint ventures that involve persons who are guilty of criminal and tortious acts. Service Providers need not hold Masters degrees in Business Administration to be alert for the **existence** of such business arrangements, and to convey such information to attorneys. Doing so may favorably affect the collectability of damages from insurers and enhance attorneys' willingness to accept such cases in the first place.

The opinion in this case reads like a little ***treatise*** on the insurance law-related aspects of child molestation in a business setting:

EXAMPLE #31[52]

A large number of children were outrageously violated, sexually and otherwise, at a day care center/not-for-profit corporation run by Violet Amerault, her children and her son-in-law. The corporation and the individuals were insured by homeowner's and multi-peril policies. In suits by the molested children and their parents, it was held that:

(1) The ***inferred intent to injure*** doctrine would be applied for intentional acts;

(2) Further evidence would be needed to determine whether the corporation should be liable for the acts of the employees/officers;

(3) Negligent and reckless acts of the employees, such as failure to prevent others from injuring the children, were covered -- the negligent acts were not the same acts as constituted assault and battery; and

(4) Suits by the parents of the victims alleging that the injuries **to the children** deprived the parents of the ***consortium*** companionship, love, etc., of their children were covered by the policies.

NOTES FOR SERVICE PROVIDERS

The attorneys for the plaintiffs really did their homework in this case which provides a classic example of how multi-party, multi-injury insurance-related situations can be divided up into coverage and non/coverage issues. The example also illustrates the importance of gathering as much information as possible.

Consider one aspect of the case: insurance coverage for **parents** of the victims' loss of the consortium of their children. Not only is this an inspired piece of legal pleading, but it illustrates a novel, but fertile, field in which Service Providers' have special expertise. In cases like this, Service Providers will be in contact

with the abused children, necessitating contact with the parents, who are also victims. Psychologically trained Service Providers, who are experienced in dealing with such ***indirect victims***, may be extremely helpful in developing information from these situations.

EXAMPLE #32[53]

Robert Knighton was accused of molesting children at *Tots and Toddlers*, the day care center that he ran with his wife. The victims' parents sued the center and the couple. The court held that the expected/intended injury exclusion in the center's business policy relieved the carrier of coverage for Knighton's acts. However, a jury question existed as to coverage for the center, and the wife, for **negligence** in failure to supervise Robert.

NOTES FOR SERVICE PROVIDERS

A good rule in analyzing these cases is to see how many people are involved and then start gathering information about the relative guilt of each. Remember, the ***inferred intent to injure*** doctrine, which results in denying insurance coverage, is applied primarily to **individual molesters.** Other parties who are innocent of intentional wrongdoing may **not** themselves be barred from coverage by that doctrine. These individuals' acts in failing to control the guilty perpetrators may create liability on their part for **negligence** to which ***expected/intended injury*** exclusions do not apply; consequently, insurance coverage may be available.

EXAMPLE #33[54]

Plaintiff's daughter was molested by an employee of a day care center; the mother and daughter sued the center's insurer and were granted a judgement. The court held that the child's injuries were not covered by

insurance because of a specific policy exclusion; however, the mother had received judgment for emotional distress and, since there was no policy exclusion as to this tort, the judgment was affirmed.

NOTES FOR SERVICE PROVIDERS

Here, again, we run into our old friend ***emotional distress***. In this case, the appellate court found that, legally, the mother should not have been awarded judgment for emotional distress because she did not actually witness her daughter being molested. **However**, the appellate court held that the judgment, whether erroneous or not, had in fact been awarded, and since there was no exclusion pertaining to emotional distress, the carrier was required to pay. This is an example of how strictly courts interpret insurance policies, resolving all disputes over ambiguities in favor of the insured. Time and again, allegations of emotional distress may ***come to the rescue*** of plaintiffs'/victims' cases in areas such as statutes of limitations. Since, in the kinds of cases described in this *Manual*, **some** emotional distress is almost always present, Service Providers' quests for information about this aspect of cases should become second nature to them.

The foregoing cases illustrate some relaxation of the rigorous application of the ***inferred intent to injure*** rule when the insurance coverage in question involves child care **businesses**. This relaxation is by no means unanimous; other cases have inferred intent to injure and excluded coverage:

EXAMPLE #34[55]

Day care operators sexually molested children. Intent to injure was inferred from the nature of the acts, and the ***expected/intended injury*** exclusion was held to deny coverage.

Babysitters

Babysitters, usually paid on a regular or hourly basis, but not belonging to business associations such as day care centers, appear as violators in a disturbing number of child molestation cases in which homeowner's or other insurance policies are involved.

The disturbing aspects of these cases arise from the fact that, while parents may make some efforts to check out business entities such as day care centers, they often take less care to make any kind of check at all on, say, sitters who are the children of friends, sitters who are friends of friends, or sitters who live in the neighborhood.

Usually, cases arise when the parents of child molestation victims sue babysitters and/or their parents. The molesters' parents turn to their homeowner's insurance for coverage, which is usually denied, and these denials are often upheld on appeal. Some denials of coverage are based on ***expected/intended injury*** exclusions:

EXAMPLE #35[56]

The Watts' children were sexually molested by the Hembrees' three minor sons who were babysitting the Watts' children. A Suit was filed against the minor molesters and the Hembrees for negligence. The court held that the Hembrees' homeowner's insurance carrier was excused. The intentional acts exclusion negated any coverage if ***an insured*** committed the act. Since the minors were also ***insureds***, the exclusion controlled.

EXAMPLE #36[57]

Minor females were molested sexually by their minor male babysitter. The victims' parents sued the molester's parents. Regarding the defendants' homeowner's insurance coverage the court held that an intent to injure must be inferred even though the assailant was also a minor; thus, an ***intentional act*** exclusion relieved the carrier of its obligation.

NOTES FOR SERVICE PROVIDERS

Both of these cases illustrate the point that some courts will presume an intent to injure even though those committing the tortious acts are minors. At least one court, however, took a more flexible view of how much children can be expected to intend, at least for purposes of interpretation of insurance contract provisions.

EXAMPLE #37[58]

A 14-year-old female babysitter fellated a 3-year-old boy in her charge. The court found that the policy exclusion for ***bodily injury...intentionally caused*** was ambiguous. The court would not infer intent to harm; this had to be proven to a jury or judge. Whether the policy covered the babysitter's parents for negligence in failure to supervise her would depend upon how the ***intent to harm*** question was resolved.

The three cases just discussed dealt with language in policies involving the ***expected/intended injury*** exclusions. Homeowner's policies usually contain another type of exclusion that has often been used by insurance carriers to avoid coverage in babysitting-type cases. These exclusions are called ***Business Pursuits*** exclusions and apply when homeowner's insureds engage in activities that would usually be equated with pursuing some kind of business enterprise. If the carrier can convince a court that the baby-sitting activity in question was in furtherance of a ***business***,

then this fact will be held to deny coverage. On occasion, both ***expected/intended injury*** exclusions **and** ***business pursuits*** exclusions will combine to relieve the carrier of any obligation under the policies.

EXAMPLE #38[59]

A 17-year-old boy babysat as a part of his mother's babysitting business. While babysitting with the plaintiff's minor children, for a flat weekly fee, he sexually molested them. The court held that the policy's ***business pursuits*** exclusion relieved the carrier of obligation.

However, in another case, skillful pleading on the part of the plaintiff's attorney alleging **negligence** against the babysitter, resulted in a decision that held the insurance carrier liable.

EXAMPLE #39[60]

Homeowner's insured babysat plaintiffs' minor son for a fee. The insured son sexually molested the plaintiffs' son. Plaintiffs sued the babysitter and her homeowner's insurance carrier. The court held that the insurance company could be liable because the plaintiff had alleged that the babysitter was **negligent** in failing to supervise her son. Thus, neither the expected/intended injuries exclusion nor a ***business pursuits*** exclusion relieved the carrier of its obligations.

NOTES FOR SERVICE PROVIDERS

When interviewing victims in cases involving babysitters, Service Providers should obtain all possible information about other persons on the premises, their relationship to the babysitter and whether the children/ victims ever made any references to them: for example, ***Bobby played with me.***

Foster Parent Policies

Persons who are, or are contemplating, becoming foster parents may be able to purchase ***foster parent*** insurance policies. A recent California Court of Appeals case construed a foster parent policy in a case involving molestation of a foster child. It found an exclusion for ***licentious, immoral, or sexual behavior*** to be sufficiently ambiguous that the carrier was liable to pay the foster parent's/molester's damages of $1.25 million to the foster child he had sexually molested.

EXAMPLE #40[61]

Lynette C. was placed into the Lopes' foster care. Debra Lopes was the insured under a foster parents policy. Her husband, Duane Lopes, was also covered. He molested Lynette C. for three years until she reported him. He pled guilty to the criminal offenses involved.

Lynette sued Duane for assault and battery, and sued Debra for failing to warn her of Duane's tendencies to molest. She also sued Debra for failing to protect her from Duane.

The policy provision in question was an exclusion for molestation by **the** insured, Debra, but which provided coverage if **an** insured, such as Duane, molested a foster child.

The court said that the provision in the policy was ambiguous and, since basic insurance law requires that all ambiguities must be resolved in favor of coverage for the insureds, the carrier had to pay Lynette's judgment.[62]

NOTES FOR SERVICE PROVIDER

Jokes and stories abound about the ***fine print*** in insurance contracts. Here it would seem that the carriers' draftsmen failed to read their own fine print very carefully. As a result, the court

refused to apply an ***intentional act*** exclusion to the conduct of co-insureds who were at worst negligent. The courts are aided in these holdings by the iron-clad rule that insurance contracts are interpreted most strictly against insurers.

In drawn-out, complicated cases like these, Service Providers will probably have numerous opportunities to discover what **really** went on at day care centers or in foster homes, particularly where one party is doubtlessly guilty of reprehensible intentional acts and the other party claims to have been an ***innocent bystander.*** Information to support the claim that one or more parties were merely negligent will be **vitally important to attorneys.**

Information about one party's total domination of the other, active concealment of one party's activities, one party cautioning the child-victim not to tell the other -- in short, whatever will tend to isolate the acts of the guilty parties from the knowledge of the innocent parties -- may make the difference as to whether coverage is available.

CHILD ABUSE AND INCEST: STATUTE OF LIMITATIONS AND THE *DELAYED DISCOVERY* RULE.

The trauma of child abuse and incest is sufficiently horrible for the victims that their minds may simply be unable to deal with it. They may totally repress the memory of the events themselves or, recalling the molester's assaults, be unable to connect, in their own minds, what happened to them **then**, and as a cause of what is **currently** ruining their emotional stability, perhaps their lives. This kind of trauma is well-recognized in mental health circles. For our purposes, the issue is whether the law will allow incest and child abuse cases to be brought in civil courts long after the civil statutes of limitations for the crimes have barred the lawsuits.

To put the matter into perspective from the legal point of view, consider a recent case decided by the United States District Court for the Northern District of Illinois.

EXAMPLE # 41[63]

Deborah Johnson sued her parents, William and Josephine Johnson, alleging that she was sexually molested by her father from the time that she was three years old until she was twelve or thirteen. She also alleged that her mother knew of this, but failed to protect her.

The molestation took place between 1958 and 1968; the suit was brought some 20 years later, long after the two-year Illinois statute of limitations had run.

Deborah sued in the Federal District Court based on ***diversity of citizenship***; that is, she was a citizen of one state, California, and her parents were citizens of another, Illinois. The **Federal** courts apply the law of the **state** in which the suit is brought. If the **state** court has not ruled on the precise issue presented, the federal court makes what might be called an ***educated guess*** as to how the state court **would** rule. (For our purposes, the Federal court's legal analysis can be roughly equated with a state court's analysis).

Obviously, Deborah was going to have to explain to the court why she waited almost 20 years to bring the lawsuit against her parents. In order to do so, she alleged that her situation was covered by a newly-emergent legal doctrine called the ***discovery rule*** or the ***delayed discovery rule***. Under this rule, the statute of limitations for certain civil actions begins to run **only** from the time that the plaintiff **knew or should have known** that she was injured. Thus, according to the court:

> Plaintiff also alleges that she ***suppressed all memories of the alleged sexual abuse and was blamelessly ignorant of the causal connection between Defendant's acts and injuries she suffered until on or about March 16, 1987, when, in the course of psychotherapy, Plaintiff was able to begin to remember, perceive and understand the nature and scope of her injuries and their causal***

> ***connection to Defendant's earlier acts.*** Plaintiff alleges that the suppression of these memories was a self-protecting measure which ***prevented Plaintiff from knowing, recognizing and understanding the nature of her injuries and the fact of their causal relationship to Defendant's ... sexual abuse.***[64]

Deborah introduced evidence from her therapist, Ms. Raymer, to support her claims:

> Raymer further states that because of Plaintiff's ***psychiatric disturbance . . .*** **[Plaintiff]** ***was unable to remember the sexual abuse by her father until on or about March 16, 1987, when in the course of therapy . . . she was able to trust another individual enough to allow suppressed memories and personalities or personality fragments to surface.***[65]

The court began its analysis of the delayed discovery rule issue by looking at what the Illinois statute of limitations would ordinarily have provided. That statute allowed child abuse actions to be brought two years after the victims' 18th birthdays; that is, up until they were 20 years-old. Deborah, however, was over 36-years-old when she filed her suit. Thus, the situation, according to the court was as follows:

> Defendants assert, however, that Plaintiff's cause of action is clearly time barred since it was brought in 1988 when Plaintiff was over 30 years of age. Plaintiff argues that the discovery rule should be applied in this case to toll the beginning of the statute of limitation period until Plaintiff knew she was injured. The discovery rule is a judicially created device under which the statute of limitations commences ***when the Plaintiff knew or should have known that he was injured.***[66]

The court defined the current status of the discovery rule, in general, and in the state of Illinois:

> Illinois Courts have not as yet addressed the issue of whether the discovery rule should apply to toll the statute of limitations beyond the two-year statutory toll period for minors so as to allow adults to bring claims of incest against their abusers. In fact, this is a relatively new phenomenon and few courts have

addressed the issue directly. The cases which have been brought to date have fallen into two categories:

(1) Those where the Plaintiff claimed she knew about the sexual assaults at or before majority, but that she was unaware that other physical and psychological problems were caused by the prior sexual abuse; and

(2) Cases such as this one, where the Plaintiff claims due to the trauma of the experience she had no recollection or knowledge of the sexual abuse until shortly before she filed suit.[67]

The court analyzed the state of the law on the discovery rule questions with regard to each type of case:

- **Type 1** - Plaintiff knew of the sexual assaults but did **not** know that her current psychological problems had been caused by the assaults; and

- **Type 2** - Plaintiff had repressed the assaults to the extent that she had no memory of them at all until some later event triggered her recollection.

The court then cited the holding and specific language from a Washington case, *Tyson v. Tyson*,[68] in which the discovery rule was rejected for **both** Type 1 and Type 2 cases. The court (after noting that the *Tyson* decision had been superseded by a state statute) discussed the **rationale** of the *Tyson* court:

> In *Tyson*, the court stated that ***[t]he discovery rule should be adopted only when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action***. The *Tyson* court refused to apply the discovery rule in the incest context because there was ***no empirical, verifiable evidence ... of the occurrences and resulting harm which plaintiff alleges. Her claim rests on a subjective assertion that wrongful acts occurred and that injuries resulted.... [T]hese allegations ... are based on plaintiff's alleged recollection of a memory***

> ***long buried in the unconscious which she asserts was triggered by psychological therapy.*** The court seemed particularly concerned over the staleness of the claim and the fact that ***psychology and psychiatry are imprecise disciplines.***[69]

In sharp contrast, the court noted a Wisconsin case, *Hammer v. Hammer*,[70] which allowed use of the discovery rule in **both** Type 1 and Type 2 cases. It summarized the holding in *Hammer*:

> In *Hammer*, the court held ***as a matter of law, that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury.*** In reaching this result, the court balanced plaintiff's and defendant's interests and decided that ***the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.***

In *Hammer*, the plaintiff had reported the sexual abuse to her mother when she was fifteen. Despite this fact, the court declined to *decide the factual question of when [the plaintiff] discovered or should have discovered her injuries and their cause*. By including both the discovery of injury and the discovery of cause component in their holding, this court appears to have determined that the discovery rule applies in both Type 1 and Type 2 cases.[71]

All of this was brought to bear on Deborah's case. The Federal court noted that Illinois courts had not ruled on the specific issue; but, in view of its finding that other courts that had considered Type 2 cases, like Deborah's, to be covered by the discovery rule, the court held that Illinois would probably do so too. In support of its ruling the court went into a rather lengthy analysis of the prevalence and extent of the problem:

> Incest is a crime in Illinois. *Ill. Rev. Stat. ch. 38, Section 12-16(b)(1988).* It is also a major social problem. ***It has been estimated that as much as one third of the population has experienced some form of child sexual abuse.*** National Legal Resource Center for Child Advocacy and Protection, Child Sexual Abuse: Legal Issues and Approaches (rev. ed. 1981).... ***Much***

> ***of the sexual abuse of children occurs within the family***. Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 Harv. Women's L.J. 189 (1984).... ***[When incest occurs] among family members, it has been estimated that 75 percent [of the cases] involve incest between father and daughter.*** Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 Mo.L.Rev. 251, 251 n. 1 (1984). Given the extent of the problem and dearth of cases on this subject, we doubt that Illinois would find that these suits have been wrongfully used in the past and are disfavored as they did with respect to (other doctrines.) Furthermore, . . . applying the discovery rule in this context will give the substantive law room to develop.[72]

The court held that Deborah's parents' motion to dismiss her case should be denied.

NOTES FOR SERVICE PROVIDERS

Ironically, subsequent events were to deny Deborah Johnson, herself, the benefits of this highly sympathetic ruling. She was 36-years-old when she brought suit. Under the court's ruling, the fact that she had repressed the memory of the molestation until she was 35-years-old allowed her to make her late claim because she did not ***discover*** her cause of action until she was 35.

However, on January 1, 1991, the Illinois legislature amended its statute of limitations law to cut off the application of the delayed discovery rule 12 years after the victim's 18th birthday.[73] Thus, under the new statute, no case could be filed after the victim's 30th birthday.

Deborah's parents filed a second motion to dismiss the suit, arguing that the new law controlled, and that because of the new law, Deborah had filed her suit too late. The court agreed and dismissed her case.[74]

The irony of this is that the Illinois legislature, in passing its law extending the filing time by 12 years, undoubtedly believed that it was taking a major step **in favor of** child molestation victims. And so it was, except for Deborah Johnson.

Nonetheless, Judge Plunkett's opinion set forth above in Example #40, is still worth consideration on the part of Service Providers and attorneys for child molestation victims. The fact that the new Illinois law banned **Deborah's** lawsuit does not mean that Judge Plunkett's **legal analysis** was misplaced or in error.

The opinion presents a lucid discussion of the distinction between Type 1 and Type 2 discovery rule situations, and it offers an analytical basis for the application of the discovery rule to Type 2 situations in other cases, despite the intervention of the Illinois law in Deborah's particular case.

In any event, Service Providers who are interviewing and counseling incest/abuse victims, and others concerned, should orient their thinking into Type 1 and Type 2 discovery rule channels from the outset because of the important legal consequences attached to each.

Discovery Rule Limitations: Defendants Prevailed

The following cases involve **Type 1** situations in which victims/plaintiff knew that they had been molested, but did not realize that this was the cause of their current psychological problems.

EXAMPLE # 42[75]

Plaintiff was allegedly sexually abused by her step-uncle while she was a minor. In a suit filed after the statute of limitations had run, plaintiff could not claim that the statute was inapplicable as a result of her delayed discovery that the molestation was causing current psychological problems.

EXAMPLE # 43[76]

Foster father allegedly sexually molested plaintiff/female foster child while she was a minor; plaintiff sued foster mother for negligent infliction of emotional distress. The court refused to apply the discovery rule to that cause of action because her allegations were not sufficient to excuse her failure to discover her injuries when they occurred.

EXAMPLE # 44[77]

Plaintiff alleged that her step-grandfather sexually molested her between the ages of 4 and 11. The court held that a suit brought 4 years after plaintiff's majority was barred by the statute of limitations; the ***delayed discovery*** rule would not be applied because she alleged that she was aware of the acts of molestation, but not of their causal connection to her current psychological injuries.

NOTES FOR SERVICE PROVIDERS

The last case described demonstrates the critical nature of the factual settings of these cases. There was evidence in the plaintiff's case that she really **had** repressed any memory of the actual molestations. However, because her complaint did not **allege** repression of the acts, the delayed discovery rule was not applied.

If plaintiff could and did allege that she repressed her memories of the sexual assaults until one year before filing her complaint, she might be able to invoke the delayed discovery rule. While the assaults that DeRose has alleged caused serious harm as a matter of law, DeRose could not logically be charged with awareness of the harm if she had not been aware of the assaults. In fact, there are allegations in the complaint that might be read to suggest that this was the case. DeRose, however, both in the superior court and on appeal, disclaimed that interpretation of the complaint. While we must construe the complaint to state a cause of action, if possible, there is no rule that compels us to interpret the complaint to allege particular facts which the pleader disavows.[78]

Situations like this underscore the importance of training Service Providers in the **legal consequences** of the information to be gathered from victims. In this case, the **degree** and **extent** of the plaintiff's repression of her memories probably made the difference between winning and losing the case. This is where Service Providers' unique expertise can make all of the difference in the world.[79]

The next case is a **Type 2** case in which a majority of the judges rejected the application of the discovery rule even though the plaintiff had alleged complete repression of the memory of any molestation. The dissent takes a more flexible view.

EXAMPLE # 45[80]

Daughter sued father alleging sexual abuse twenty years in the past; she alleged that she had repressed all memory of the abuse and only discovered it during recent psychotherapy. The court held that the

discovery rule would not be allowed to toll the statute, and the case was properly dismissed. (Judge Jorgenson filed a dissent arguing that scientific testimony about sexual abuse trauma syndromes should have been admitted to determine repression.)

> In my view, psychiatry ***represents the penultimate grey area***, particularly with regard to issues of foreseeability and predictability of future dangerousness. However, it does not necessarily follow that this area of medicine cannot serve the courts and litigants by providing useful testimony with respect to past events. Expert testimony regarding past acts and their consequences can readily be evaluated by a fact finder and considered with other evidence in the case to determine whether the alleged repression in fact occurred and, accordingly, whether the plaintiff ever had an opportunity to bring an earlier action. Repression, moreover, can hardly be deemed a novel concept; it appears in the literature as early as the late 19th century and is integral to any number of psychoanalytic theories.
>
> It is not clear whether the particular theory of repression alleged in this case or the syndrome of which it is a characteristic is a sufficiently developed and recognized phenomenon to allow application of the delayed discovery rule. However, because incest is such an odious crime which causes deep-rooted injuries more subtle and complex than those caused by other tortious acts, plaintiff should have the opportunity to present to the trial court expert testimony on the issue of post traumatic stress syndrome and, if the court finds the expert opinion evidence relevant and therefore admissible, allow the fact finder to determine whether plaintiff could have brought the action earlier but for repression.
>
> The views I express in this dissent regarding admissibility of expert testimony on the question of repression relate only to the application of the delayed discovery rule for limitations purposes in civil actions seeking damages for injuries caused by incest.

Discovery Rule Cases: Plaintiff Prevailed

All of the cases herein are, of course, horror stories. The facts plumb the depths of human depravity. Nonetheless, the **facts** are so critical to understanding these cases that they must be given emphasis.

Discovery rule case law is divided basically into:

- **Type 2 situations**: complete repression -- in which the discovery rule will usually be applied; and,
- **Type 1 situations** -- knowledge of the act but unaware of consequences, in which the rule may not be applied.

The law governing the outcome of the cases is usually determined from the facts of the crimes, the victims' subsequent mental states, and expert testimony.

The cases presented here are those in which plaintiffs prevailed, or at least in which discovery rules were applied to save causes of action from dismissal.

EXAMPLE # 46[81]

This case is of interest because the court reached its conclusion, favorable to the plaintiff, on a theory that goes even farther than most discovery rule cases. Indeed, the court held as it did almost **in spite of** the discovery rule.

The case involved a Type 2 situation under the following factual allegations:

> Petersen was sexually abused by respondent, Ned Bruen, during the period from 1975 to 1983 when, through the Big Brothers program, Bruen was assigned as a ***big***

> ***brother*** to Petersen. The record reflects that Petersen, the ***little brother***, was approximately seven-years-old when the abuse commenced. Bruen exploited his relationship of trust with Petersen by seducing him and committing various acts of sexual battery upon his young victim. Bruen also memorialized his depravity by taking photographs of Petersen before, during and after Bruen's sexual trysts with his victim.[82]

Petersen further alleged that he had ***blocked out*** the eight years of sexual molestation by Bruen until he entered therapy for mental problems, whereupon he remembered the molestation vividly and reported Bruen to the police. Bruen was convicted of sexual assault and other crimes. Petersen eventually sued Bruen for battery and emotional distress after the statute of limitations had expired.

The Nevada Supreme Court ruled that Petersen's suit was timely, holding that because Bruen had been convicted of child molesting, the conviction itself provided ***clear and convincing*** evidence of the crime and, as a consequence, there should be no statute of limitations whatever:

> In those instances where the fact of abuse is clearly and convincingly corroborated, we perceive no compelling need or policy which justifies the intervention of a period of limitations to eliminate the right of CSA (Child Sexual Abuse) victims to seek recovery against their abusers, irrespective of delay or the time of discovery of the causal connection between the abuse and the injury.[83]

Interestingly, the court found that the ***no limitations*** rule was **preferable** to the ***discovery rule*** because it freed victims from guilt caused by delay in reporting sexual abuse, and it avoided putting victims in positions where they might have to ***lie, falsify their lack of recollection, or feign ignorance***, in order to take advantage of the discovery rule. In a pronouncement of extraordinary sensitivity towards the plight of child abuse victims, the Court gave the following as the bedrock reason for its decision:

> Unfortunately, however, child sexual abuse survivors are hostage to their own thought processes, implanted by their abusers, and from which they may never be totally released. Indeed, the mental and emotional dysfunction suffered by such victims may virtually prevent them from seeking relief against their tormentors until the period of limitations has long since expired. To place the passage of time in a position of priority and importance over the plight of CSA victims would seem to be the ultimate exaltation of form over substance, convenience over principle.[84]

NOTES FOR SERVICE PROVIDERS

The Court's empathetic statements serve almost as a ***guideline*** for Service Providers who are attempting to ascertain the extent of injury from this kind of child abuse. The decision is well worth reading.

Additionally, although the opinion is silent, it would certainly appear that Petersen might have had a third-party cause of action against the Big Brothers corporation for failure to supervise him. Certainly, the mere fact of ***authority figure*** involvement should trigger Service Provider's thoughts about third-party liability.

EXAMPLE # 47[85]

This case is similar to Example #46 in that, while the court refused to apply the traditional ***discovery rule*** to the facts of a child sexual abuse case, it nonetheless held that the statute of limitations was not a bar to the cause of action.

Dr. Hildebrand allegedly mistreated his minor daughter by beating her, inflicting emotional distress and sexually abusing her when she was a child. Susan suffered from near-crippling depression; and, after her therapist discovered that her depression was caused by the abuse inflicted on her by her father, she sued her father in Federal court for infliction

of emotional distress. Her father defended on the grounds that Indiana's two-year statute of limitations barred her action.

The federal district court held that the discovery rule, as such, was not available to Susan, a Type 1 victim. However, the court also held, that it was a question for a jury as to whether Susan knew the cause of her injuries before or after the statute of limitations had run:

> Statutes of Limitation cannot be abrogated every time a patient gets a new diagnosis. Nevertheless, a reasonable jury could find that Susan filed suit within two years of her damage becoming ascertainable, given the nature and circumstances of the alleged injury. When dealing with subtle issues of psychological injuries, a court should hesitate to intrude on the factfinding prerogative of the jury. It may well be that a jury will find Susan's claims to be barred, but such a finding is not a foregone conclusion. Because the ascertainability of Susan's injuries is a disputed factual issue, summary judgment must be denied.[86]

Additionally, the court noted that Susan's father, an M.D., had diagnosed her depression as a ***chemical imbalance*** and had medicated her for it. From this, the court concluded that a jury might determine that the father **fraudulently concealed** from her the fact that his mistreatment caused her injuries.

> Susan Hildebrand has alleged facts with respect to these requirements sufficient to avoid summary judgment. Dr. Hildebrand's diagnosis and medication of Susan can reasonably be interpreted as designed to prevent her from understanding or disclosing his alleged abuse of her, or its emotional impact upon her. Susan asserts that she believed her father's diagnosis, and her repeated attempts to deal with her depression through psychological therapy can be seen as a diligent attempt to discover the cause of her woes. Remembering that the discovery rule applies to fraudulent concealment of a cause of action, a reasonable jury could conclude that Susan did not discover her cause of action until March of 1987, and that consequently her suit was not barred by the statute of limitations. Thus the fraudulent concealment statute provides an independent basis for denying summary judgment.[87]

NOTES FOR SERVICE PROVIDERS

In some instances such matters as the application of the discovery rule in child abuse cases will be decided by the courts **as a matter of law.** In other situations, as in the *Hildebrand* case, **fact questions,** such as when Susan became aware that her injuries were caused by her father, must be decided by the **jury.** Jurors tend to be highly sympathetic to victims like Susan. Since it is the function of civil juries to rule on the **facts** of the cases, it is obviously to the advantage of victims/plaintiffs to present as many of the issues as possible in these **factual** contexts. As cases like this one demonstrate, factual issues such as whether the doctor, by ***diagnosing*** and ***medicating*** his daughter, concealed the source of her injuries from her, can make the difference between winning or losing cases.

EXAMPLE # 48[88]

A daughter sued her father for sexual abuse during her minority. In this case, the court applied the discovery rule to extend the statute of limitations, upholding the trial court's finding that the plaintiff had suffered severe emotional trauma from the sexual abuse so that she could not fully understand or discover her cause of action against her father during the statute of limitations period.

EXAMPLE # 49[89]

Plaintiff alleged that her father had sexually molested her from birth to the age of five-years and that she had repressed all memory of this until after the statute of limitations had run. The court held that plaintiff was entitled to application of the delayed discovery doctrine if she could prove that she had no recollection until therapy brought it forth.

NOTES FOR SERVICE PROVIDERS

The appellate court in the last example summarized the factual allegations made by plaintiff's complaint. The court's summary of these allegations presents a textbook example for Service Providers of the kinds of information that they should elicit in child abuse/discovery rule cases in order to prove a Type 2 -- repression of knowledge of injuries -- case.

The factual recitation appears to cover every possible nuance of secrecy, concealment, and dissociation that might be involved in a child sexual abuse case. It is worth reprinting verbatim, and will be of valuable assistance to Service Providers when interviewing such victims.

> Plaintiff was born on March 15, 1962. On May 29, 1986, when she was 24 years old, she filed a complaint alleging that defendant is her natural father and that he sexually molested her from her infancy until she was approximately five years old. The complaint further alleges that the acts of abuse were committed against her will and without her consent; that they were accomplished by dominance and duress on defendant's part; that defendant committed the acts in secret and accompanied by implicit and explicit directions never to tell others about the acts; that the very nature of the acts and the secrecy and duress by which they were accomplished, coupled with the relationship of dependency and trust between plaintiff and defendant, caused plaintiff to develop various psychological mechanisms including but not limited to denial, repression, and dissociation from the experiences. It is further alleged that at the time of the acts, plaintiff was unable to know the existence or nature of the injuries which the conduct caused, and the psychological mechanisms of denial and repression caused by these acts caused plaintiff to

> be unable to become aware of the existence or nature of the injuries. These mechanisms, the allegations continue, operated to preclude plaintiff from becoming aware of her injuries and their probable causal connection to defendant's acts until on or after approximately June 1, 1985, (approximately one year before the filing of the complaint).[90]

EXAMPLE # 50[91]

The discovery rule might be applied to extend the statute of limitations where young boys were molested by their foster father but repressed all memory of it.

NOTES FOR SERVICE PROVIDERS

Example #50, a Type 2 case, illustrates the basis of the factual issues that may strengthen the various rationales for the application of the delayed discovery rule. In this case, the court discussed the manner in which parents or parent-figures manipulate children to conceal their actions, and how application of the rule might prevent such manipulation:

> As a practical matter a young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship. As in the professional negligence cases, application of the delayed

discovery rule would serve to prevent the molester from using the child's ignorance and trust to conceal the primary tort.[92]

EXAMPLE # 51[93]

Defendant/stepfather sexually molested his ***severely retarded*** stepdaughter. Her suit against him was filed by a guardian after the statute of limitations had run. The court held that a jury should decide whether her retardation was sufficient to be considered ***insanity*** for purposes of Oregon's statute tolling limitations periods while plaintiffs are ***insane***.

EXAMPLE # 52[94]

Plaintiff's father subjected her to incestuous, sexual abuse, and fathered her child. The court held that a jury question existed as to whether plaintiff had been ***insane*** and repressed the incestuous events and whether the father's and mother's threats were sufficient to toll the statute of limitations for duress.

NOTES FOR SERVICES PROVIDERS

Example 52 -- a **real** horror story -- describes two of the factual situations that can extend statutes of limitations in discovery rule cases. First, the court held specifically that the trauma of child sexual abuse (and in this case the pregnancy) could indeed lead to the kind of insanity that would support a claim of Type 2 repression.

Second, the threats and duress by the mother and father in this case are like the fraudulent concealment that was held to toll the statute of limitations in the above *Hildebrand* case. In that case the father/molester, who was also an M.D., had ***diagnosed*** and ***medicated*** his daughter so as to conceal the source of her injuries

from her. Service Providers should be alert for any evidence of misconduct by molesters, or those aiding and abetting molesters, that would tend to prevent their impressionable victims from reporting the crimes. Such behavior on the part of the violators or their confederates may be of material benefit to victims when discovery and statute of limitation issues arise.

EXAMPLE # 53[95]

Three teenage female students were sexually molested by a male teacher. They reported this to other teachers who instructed them to say nothing about it. All of the victims filed suit under Type 1 delayed discovery theories years after the events. They alleged that while they remembered the acts, they didn't recognize the harm until they went into therapy. The court held that Type 1 delayed discovery allowed actions for *sexual molestation*:

(1) Against the ***molesting*** teacher for the assault and battery **plus** abuse of trust; and,

(2) Against the ***cover up*** teachers on the theory that they greatly exacerbated the harmful effects of molestation when the children did report the crimes but were told not to divulge what had happened.

Other cases involving school teachers include:

EXAMPLE # 54[96]

Plaintiff, while a minor, was seduced by her high school teacher (male). The court held that a three-year statute of limitations would be extended if she could demonstrate that she had repressed the memory and that the sexual assault had in fact occurred.

EXAMPLE #55[97]

Plaintiff was molested by a fifth grade teacher. He repressed this until many years later. In his negligence suit against the school board, the court held that a Minnesota statute extending the limitations period in such cases was to be applied retroactively and was constitutional.

NOTES FOR SERVICE PROVIDERS

These cases, dealing with school teachers as molesters, illustrate the fact that statutes favoring extensions of statutes of limitations are often interpreted most favorably for child victims. As usual, when authority figures are involved -- here, teachers -- all third-party aspects should be considered.

Delayed discovery rules in child sexual abuse cases are premised on concepts of fairness to the most defenseless victims of the most heinous crimes. There appears to be a marked trend in the courts to expand child abuse victims' rights in this area, and a number of state legislatures have reached the same result through statutory enactments.

The factual issues involved are complex and varied and, as we have seen, provide unlimited opportunities for the exercise of Service Providers expertise and ingenuity in eliciting information to help their victims/clients.

Chapter 3 Women as Victims: "Concealable" Crimes

Crimes against women committed on the basis of their gender, specifically sexual assaults and domestic violence, have become epidemic in this country. The numbers of **reported** rapes in 1990 exceeded 100,000 for the first time ever.[98] Domestic violence has reached crisis proportions[99] and ***date*** or ***acquaintance*** rape has recently become the focus of national attention.[100] Women, always vulnerable to ***street*** criminals, are now being singled out as targets by assailants who may not even consider themselves to be engaged in criminal activity.

The classification of ***Three C's*** crimes -- concealed, concealable and covered-up -- has been discussed in the previous sections. These are ***special*** classifications in that many of the perpetrators appear to lead normal, even exemplary lives while, at the same time, concealing ***dark sides*** of their natures which manifest themselves in serious crimes against special classes of victims, predominantly women and children.

This chapter is primarily concerned with the classification of **concealable** crimes. This class differs from such **concealed** crimes against children as were discussed in the preceding chapter. In child molestation situations, for example, concealment is in effect the **essence** of the victimization. People who prey on children -- family members, authority figures, etc. -- are not only in positions to enforce concealment on the part of their young, vulnerable victims, but the perpetrators' facades are often such that others find it difficult to believe that they are engaged in child sexual abuse or other perversions.

On the other hand, ***concealable*** crimes are committed against adult women who are, generally speaking, **able** to report crimes committed against them to authorities, but for various reasons elect not to do so. This reluctance to report is what makes the crimes ***concealable***. Failure to report may occur for reasons that are psychologically more complex than the direct compulsions that prevent child victims from coming forward. For example, a 1986 report, *Preventing Domestic Violence Against Women*, published by the Bureau of Justice Statistics of the United States Justice Department noted that:

> The most common reason given by women for not reporting domestic violence to police was that the women considered the crime a private or personal matter (49%). Fear of reprisal from the assailant was the reason in 12% of unreported crimes.[101]

Other reasons for not reporting include mistrust of a system that is perceived as unwilling or unable to assist; the stature of the assailants (e.g. doctors or dentists); fear of losing a source of financial support; guilt feelings; or even pure inertia, *i.e.*, ***making the best of a bad situation***. In situations such as ***date*** or ***acquaintance*** rape, victims may believe that they ***brought it on themselves*** or were contributorily negligent because they were drinking, went to the assailant's place, etc.

In short, reasons usually psychological and not directly related to the actual criminal violence involved, often result in the concealment of large numbers of crimes against women. The legal and physical **ability** to report is not necessarily synonymous with the **will** to report.

This situation, of course, works to the benefit of perpetrators, even encouraging further crimes. The prospect of successful civil litigation against perpetrators, as described in this *Manual*, will

hopefully encourage not only enhanced reporting of these crimes, but also enhanced enforcement of these legal remedies.

PHYSICAL ASSAULTS: EVIDENTIARY AND PROCEDURAL ISSUES

The foregoing section described the general kinds of legal/factual issues involved in physical assault cases that will be most helpful to attorneys in establishing liability. Here we discuss some evidentiary and procedural issues that often arise in cases of crimes against women. Service Providers should pay particular attention to these cases when counseling victims.

EXAMPLE # 56[102]

John Chandler Ewing owned a successful sporting goods store in Ann Arbor, Michigan. Exemplifying the ***dark side*** perpetrators, discussed above, whose legitimate activities conceal their violent natures, Ewing was also a serial rapist.

His **modus operandi** involved stalking female joggers or bicyclists, abducting them, and then raping them. In 1984, his luck ran out; a female jogger evaded his assault and gave his license number to the police. Ewing was arrested, convicted of three sexual assaults, and sentenced to life in prison.

Jane Doe was 15 when he raped her. She sued him, and a jury awarded her damages totalling nearly $200,000 Ewing appealed this civil judgment.

The defendant argued that the judge should not have allowed testimony about other sexual assaults that he had committed. The appellate court held that these were properly admitted on the basis of ***identification evidence***, that is, they could be used to prove, through evidence of the prior crimes, that he was the same man who raped ***Jane Doe***.

Similarly, the court ruled that the trial judge and the plaintiff's attorney were permitted to comment on the fact that Ewing did not testify or offer evidence in his own defense. While it is true that it violates defendants' rights to comment on their silence in **criminal** cases, there was no such bar with regard to **civil** actions. The court held that it was proper for the plaintiff's attorney to point out that anything that the defendant might have offered would probably have worked **against** his case.

Jane Doe's lawyer opinioned that she would collect her judgment because of Ewing's ownership of his sporting goods store. (The court's decision was not published in the official legal reporters but it received front-page treatment in the *Detroit News*.)[103]

NOTES FOR SERVICE PROVIDERS

This case underscores again the important fact that rules of evidence in civil cases are far more flexible and favorable to victims/plaintiffs than are those in criminal cases. Civil trials are conducted on the theory that the entire process is a search for the truth, and that almost anything that sheds light on what really happened to the parties should be heard. This flexibility is enormously helpful to plaintiffs' attorneys, but it is only as useful as the quantity and quality of factual information that those attorneys know about.

This, in turn, underscores the importance of Service Providers obtaining **all** of the facts about the crimes from victims **as soon as possible** after the commission of those crimes. This is especially true in cases involving emotionally-charged violations such as sexual assaults and domestic violence, because there may be very strong psychological tendencies on the part of victims to repress, or mentally deny, crucial elements of the crime and the events surrounding them. Contemporaneous elicitation of information from victims, together with careful recording of this information by Service Providers, will allow attorneys to refresh victims' memories long after the crime took place.

The overview section above touched on the effect of prior criminal proceedings in civil cases. This is of special importance in the kinds of cases discussed here. Sexual assault and domestic violence cases are frequently dismissed, or defendants are acquitted, because the burden of proof in criminal cases is so high, and often the only witnesses to the crimes are the victims themselves. It is thus important for these victims to know that acquittals and dismissals do **not** rule out subsequent civil suits.

EXAMPLE # 57[104]

A wife was beaten by her husband and sustained serious injuries. She filed a criminal complaint against him which was thereafter dismissed. This dismissal, however, did not prevent her from suing him civilly for assault and battery. The court cited the lesser burden of proof in civil cases -- a preponderance of the evidence -- as the basis for its decision.

Of equal importance is the fact that, in many instances, **convictions or guilty pleas** in criminal cases are conclusive as to the civil liability of defendants. The doctrine of ***collateral estoppel***, if applicable, holds that the defendant may not re-litigate the question of his guilt for purposes of establishing civil liability. Given the sensitive nature of sexual assault and domestic violence cases, victims/plaintiffs may be extremely reluctant to confront the perpetrators of violent crimes against them in civil litigation situations.

In those instances where convictions or guilty pleas prevent re-litigation of civil liability, there may be no necessity for such confrontations because, with the liability of perpetrators thus established, the only remaining issue is damages, which are usually worked out among the attorneys involved.

For obvious reasons, the possibility of eliminating victim/ perpetrator confrontations is an incentive for the victims to file lawsuits, one which Service Providers should certainly bring to their clients' attention.

There are still other areas in which procedural issues may make the difference between the success or failure of sex crime victims' cases.

EXAMPLE # 58[105]

Defendant was convicted of felony sexual battery against the plaintiff. She filed a civil suit against him within one year of his felony conviction, the time allowed for filing by California's statute of limitations. She was awarded $10,000 damages. Later, the defendant's felony conviction was reduced to a misdemeanor. On appeal, the defendant argued that this reduction should be interpreted to deny the plaintiff the benefit of the ***one-year-after criminal conviction*** statute of limitations.

The appellate court ruled in the plaintiff's favor. The reduction in the **criminal** charge did not affect the **civil** statute of limitations. The court noted that:

> Hickey was a convicted felon when Jamieson filed her civil action, and he remained a convicted felon for 17 months thereafter. Jamieson was entitled to rely on the extended statute of limitations provided by Code of Civil Procedure section 340.3. To bar a cause of action in this situation would force felony crime victims to file personal injury suits within one year of their injuries in order to protect themselves against the possibility that the defendant's felony conviction might later be reduced to a misdemeanor. It would allow for the setting aside of some judgments already collected. *Code of Civil Procedure* Section 340.3 is designed to facilitate recovery of damages in civil suits by victims of felonious crimes. We would undermine the purpose of the section if we were to put victims in a quandary about when to file actions against their assailants.[106]

EMOTIONAL TRAUMA

The law has long recognized that the emotional suffering caused by sexual assaults and domestic violence can be at least as traumatic, even more so in some cases, than the actual physical injury to the victim. This is often translated into substantial compensatory and punitive damages by judges and juries in civil suits.

Causes of action in these situations generally involve allegations of assault and battery (or wrongful death), and intentional infliction of emotional distress. In addition, attorneys often include allegations of negligence in their complaints in order to avoid or sidestep ***expected/intended injury*** exclusions in perpetrators' insurance policies.

These torts have been discussed in general terms in the preceding section. The instruction here will focus on more specific legal issues involved in emotional disorders that have been recognized by the courts. It is assumed that Service Providers have a solid working knowledge, or expertise, in the **psychological** components of such disorders as **Post Traumatic Stress Disorder (PTSD)**, its sexual assault manifestation, **Rape Trauma Syndrome (RTS)**, and the newly-emergent **Battered Women's Syndrome (BWS)**. The discussion here deals primarily with how the law views these disorders in the context of civil litigation.

Post Traumatic Stress Disorder/Rape Trauma Syndrome

PTSD and RTS are ***recognized*** in the psychological and medical fields as cognizable, well-established disorders. For our purposes, the principle issue is whether, and to what extent, the **courts** will

recognize them. There are wide variations in the legal acceptance of PTSD and RTS evidence. The following examples illustrate these divergent attitudes:

EXAMPLE #59[107]

Plaintiff alleged that she had been sexually harassed, then raped by a co-employee at her job. He denied this charge. The question of law confronting the court was whether the fact that the victim suffered from PTSD/RTS should be admitted in evidence to prove the fact of the rape itself. The court summarized her position:

> (Plaintiff's) argument is a simple syllogism:
>
> (1) Dr. Simon says she has PTSD;
>
> (2) Only a major psychological stressor such as rape triggers PTSD, and the only such stressor plaintiff experienced in the relevant time frame was the alleged rape; and
>
> (3) *Ergo* the rape occurred.[108]

The court then described the current ambivalent status of the law:

> Neither the Virginia courts nor the Fourth Circuit has addressed whether evidence of PTSD or ***rape trauma syndrome*** (RTS) is admissible to prove that a rape actually occurred. Other courts, however, have addressed this issue with sharply divided results. Some states have held such evidence admissible. Others have held such testimony inadmissible. Yet other states, while excluding RTS or PTSD evidence to prove that a rape occurred, have indicated that some evidence regarding an alleged rape victim's emotional state may be admissible to support the victim's claim.[109]

This particular court followed the line of cases holding PTSD/RTS inadmissible for any purpose. It described the conditions as ***therapeutic tools*** which had not been developed for the purpose of ***ferreting out the truth in cases where it is hotly disputed whether the rape occurred.***"[110]

The court acknowledged that Virginia would admit testimony from physicians about the **mental conditions** of rape victims[111], but it felt that Virginia courts would not admit such evidence **to establish the fact of the rape.** It also acknowledged that courts in other jurisdictions had taken a more flexible view of the use of PTSD and RTS as evidence in rape cases.[112]

NOTES FOR SERVICE PROVIDERS

Despite the ambivalence of courts about the use of PTSD/RTS evidence, any factual data gathered by Service Providers from their victims/clients about their post-trauma emotional conditions may be of assistance to attorneys in their appraisals of potential litigation. And again, the fact that Service Providers often see victims closely following the commission of the crime allows them to elicit information regarding their emotional reactions while it is fresh in their minds and before it might be ***blocked*** by some sort of denial manifestation.

Even if PTSD/RTS evidence is held to be inadmissible to establish **liability**, the existence of the disorders can be of significant assistance to victims' cases when procedural barriers to liability are raised by defendants.

For example, most government entities require that persons alleging that government employees injured them must file a ***notice of claim*** with the employing government entity within a certain time or any civil actions will be barred. It has been held,

however, that if plaintiffs can prove that such emotional disorders as PTSD prevented them from being able to file charges, then ***notice of claim*** provisions will not automatically foreclose victims' lawsuits.

EXAMPLE # 61[113]

Plaintiff, a teenager, was raped and impregnated by an on-duty city employee. She sued the city on third-party theories of negligent employment and retention of the employee because the city knew or should have known of his assaultive tendencies. The city alleged that the suit was barred because the victim's notice of claim was not filed on time. The appellate court held that evidence that the plaintiff suffered from PTSD, which caused emotional disorientation and denial to the extent that she was impaired from filing, excused her lateness in filing her notice of claim.

NOTES FOR SERVICE PROVIDERS

This example serves as yet another reminder that Service Providers should gather information from victims that could lead to third-party, as well as *victim versus perpetrator* lawsuits. In this case, the plaintiff clearly had a cause of action against the rapist himself; but, in addition, she may have been able to collect from the city's ***deeper pockets***.

With regard to the overall area of PTSD and RTS evidence, the expertise of Service Providers (especially those trained in psychiatry, psychology and related disciplines) will often enable them to know, instinctively, the right questions to ask in order to elicit information that will assist attorneys in matters pertaining to emotional distress manifestations.

Battered Women's Syndrome

On May 18, 1990, a victim of Battered Women's Syndrome prevailed in the District Court of Blaine County, Idaho in a suit for battery and emotional distress against a man with whom she had lived with for 10 years. Her case was hailed by the *National Law Journal* as possibly the first such victory in the nation.

The jury awarded Sandra Firth $1 million against Carl Curtis: $50,000 for battery; $225,000 for emotional distress; and $725,000 in punitive damages.

The case was described in detail in the *Law Reporter* of the Association of Trial Lawyers of America.[114] It began as a suit for divorce from an alleged common law marriage, and for personal injury issues. Ms. Firth's attorneys, Paul Buser, Eleanore Baxendale and Robert Huntley, all of Boise, suspected that she suffered from **Battered Women's Syndrome** and referred her to Lenore Walker, a Denver psychologist, and renowned expert on that condition.

According to the *Law Reporter* article, Battered Women's Syndrome is defined as:

> A recently identified post-traumatic stress disorder caused by a cycle of physical and mental abuse and domination. The syndrome gradually conditions the victim to please the aggressor and lose self-esteem. Victims come to believe that they are responsible for and deserving of the abuse and are powerless to leave the relationship.

After the syndrome was identified, Ms. Firth's complaint was amended to allege that the defendant's sexual and psychological abuse caused her to develop the syndrome. Dr. Walker testified that Ms. Firth suffered from Battered Woman's Syndrome caused

by Curtis. Ms. Firth testified at length about cruelty and sexual domination by the defendant, and the precedent-setting jury verdict followed.

Perhaps more than any other example in the *Manual*, this case illustrates the tremendous importance of Service Providers' expertise in the area of crime victims' litigation against perpetrators. Dr. Walker is, of course, a ***Service Provider***, and the combination of her treatment of the plaintiff, and her testimony on behalf of the plaintiff, may have created an important new weapon in the arsenal of victims' litigators.

This case also demonstrates the dynamic nature of victims' rights litigation. A Service Provider, trained in psychology, together with a team of victims' attorneys, prevailed upon a court and jury to accept BWS as the critical element of the plaintiff's case. The original victim and uncounted others to follow will benefit from this successful, multi-disciplinary effort.

WOMEN VICTIMS VERSUS PROFESSIONAL PERPETRATORS

A *Worst Case* Perspective

Women are quite often victimized by physicians, dentists and other ***professionals***. The defendants in these cases are generally alleged to have committed sexual assaults, up to and including forcible rape, when their patients are involved in some aspect of treatment, office visits, in-hospital situations, and so on.

A recent case involving a dentist/assailant illustrates a number of aspects of victims versus professional perpetrators litigation. It also illustrates the lengths to which a few judicial officers go in

demonstrating their insensitivity, even outright hostility, to women who have been victimized. The case illustrates why we have appellate courts to oversee trial courts who deviate from basic legal, perhaps even ethical, parameters.

EXAMPLE # 59[115]

Mary Lou Sciola had been a dental patient of Dr. Robert Shernow for 10 years. On April 19, 1984, she visited his office to have a tooth filled. He administered nitrous oxide to her as he had done, without incident, on past occasions.

The opinion of the appellate Court of Connecticut describes what happened next:

> When the nitrous oxide had been administered to the plaintiff in the past, she felt mildly dazed, but completely aware of her surroundings. When the nitrous oxide was administered on this occasion she heard a loud ringing noise, felt as if her head was flying up to the ceiling and then lost consciousness. During the course of the one hour and fifteen minutes she was under the effects of the gas, she regained consciousness three times. On the first occasion, she felt the defendant's tongue in her mouth and experienced pain in her breasts. When she attempted to resist the defendant, she observed him turning up the concentration of nitrous oxide and again lost consciousness.
>
> She awoke a second time to find the defendant on top of her. She was having difficulty breathing, the defendant's tongue was in her mouth and she was experiencing pain in her breasts. Once again she attempted to resist the defendant and saw him turn up the gas. The painful ringing returned to her ears and she once again slipped into an unconscious state.
>
> The third time the plaintiff regained consciousness, she kept her eyes closed so the defendant would not turn up the gas again. At this time, the defendant was still on top of her, and his tongue was in her mouth. She was

> frightened and felt violently ill. Once the defendant realized that she was awake, he assisted her out of the chair. He then approached her from behind, grabbed her breasts and kissed her neck. She was aware that he had an erection at this time. She did not recall any dental work being performed during the entire course of this visit.[116]

The plaintiff suffered acute respiratory symptoms, headaches and sore breasts. A pulmonary specialist concluded that the excessive nitrous oxide caused her to aspirate stomach acid into her lungs, leaving her with permanent asthma and a permanent loss of 35 to 40 percent of her lung capacity.

The appellate court described her emotional injuries and financial loss:

> The plaintiff also was seen by a psychiatrist who determined that she suffered from Post-Traumatic Stress Disorder. He further concluded that as a result of the events of April 19, 1984, she has a phobia of medical and dental personnel, and suffers from periodic sleeplessness, depression, fearfulness, and heightened anxiety. In addition, her sense of self-reliance, her self-image and her ability to interact effectively with males has been impaired.
>
> Before this incident, the plaintiff was the lead singer in her own six piece band. Since the incident, her income has been significantly reduced due to her diminished lung capacity and endurance.[117]

She sued Shernow for medical malpractice and intentional assault, and was awarded $300,000 compensatory and $100,000 punitive damages by a jury.

The defendant asked for a ***remittitur***. That term means that the court was requested by the defendant to reduce the jury's damage award. Judges have the power to do this in the exercise of their sound discretion. Here is how trial judge, James T. Healy, exercised his discretion.

The court held a hearing on these motions. It granted the motion to set aside the verdict and ordered a remittitur of $323,833.34, thus reducing the plaintiff's award to $76,166.66. The plaintiff's motion for sanctions was denied and costs of $15,074.67 were allowed. In its memorandum of decision, the trial court stated that the jury's award was ***so large as to be ridiculous and must have resulted from either prejudice or mistake. Its amount offends the sense of justice and shocks the conscience***. The court went on to explain that the verdict was ***some sixteen times*** its own estimate of the value of the case and concluded that the jury had ***gone astray*** because ***(i)t is completely irrational to think that a kiss and touching of the breast could produce asthma and there was not a scintilla of evidence to support such a conclusion.***"

The court further concluded that the plaintiff's claim of diminished earning capacity was unjustified, first, because ***there was no evidence whatsoever that her income had decreased***, and, second, because after the incident, she was able to earn a living by operating a travel agency and managing her own income producing property.[118]

> The appellate court began its opinion by noting that the trial courts had ***broad legal discretion*** to make their decisions; however, it said, the plaintiff had a constitutional right to have her claims decided by a jury. It then reviewed the exercise of Judge Healy's ***sound discretion***:
>
> > Although the court in the present case arbitrarily declared that the jury must have been directed by prejudice or mistake, this conclusion is not supported by the record before us. First, the trial court clearly invaded the province of the jury when it declared that the jury's award was sixteen times greater than its own estimate of the case and then reduced the award accordingly.
> >
> > Second, the court ignored a substantial portion, if not all, of the medical evidence placed before the court by the plaintiff when it declared that a kiss and

> touch on the breast could not produce asthma. Clearly the court had overlooked the testimony of both the plaintiff and her family physician as to the bruises on her breasts which indicated that the defendant had more than merely touched her. The court also overlooked the testimony of the pulmonary specialist who attributed the plaintiff's permanent asthma condition and loss of lung function to the defendant's excessive use of nitrous oxide rather than to a kiss and a touch.
>
> In addition, the court overlooked, or chose to ignore, the evidence submitted by the plaintiff indicating her annual income from singing dropped from $18,000 before the incident to $2,400 at the time of trial.
>
> Finally, the court attempted to negate the permanent lung damage the plaintiff suffered by indicating that she had access to other income. It is possible, however, that the jury believed that she was nonetheless entitled to compensation for lost wages and impairment of her future earning capacity as a singer.[119]

The trial judge's orders were reversed with directions to reinstate the jury verdict.

While the case just described was being appealed, Shernow's insurance carrier had filed an action asking a different trial court to declare that it was not liable for the injuries caused to Ms. Sciola by Shernow. The second trial court held that it was premature to decide the coverage issue. On the same day that Mrs. Sciola's case against Shernow was decided, a different panel of judges of the Appellate Court of Connecticut ruled that the suit by the insurance carrier was not premature and it ordered the trial court to decide the coverage issue in Ms. Sciola's favor.[120]

NOTES FOR SERVICE PROVIDERS

This case presents an enlightening example of appellate courts' analyses of the exercise of ***sound discretion*** by trial courts, and of the use and occasional abuse of those courts' considerable power over litigants.

The case may have another, more practical use. As the concepts of victims' legal rights and remedies continue to expand, victims/plaintiffs may encounter losses at the trial level that shake their faith in the judicial system. One can only imagine the feelings that Ms. Sciola experienced while awaiting the appellate court's decision.

A predictable result of cases such as this one is that victims will adopt a ***why bother?*** attitude caused by their disappointment over trial court rulings. This attitude may, in turn, have a negative impact on their decisions whether or not to appeal. If there is at least a reasonable possibility that plaintiffs might prevail on appeal, but their lack of confidence in the appeals process motivates them not to appeal, Service Providers might explain the *Sciola* decision to wavering plaintiffs as evidence that glaring errors by trial courts can and will be rectified by the appellate process when the trial courts run roughshod over victims' rights. This case may put matters in a different perspective for disillusioned trial court litigants.

Procedural Issues

Various procedural issues have arisen in cases involving sexual assaults by professionals that are worth mentioning here. One case is particularly relevant to this manual's discussion because it contains a well-reasoned and well-documented analysis of when

social worker Service Providers who are Social Workers are qualified to give expert opinion evidence regarding sexual assault victims.

EXAMPLE # 63[121]

Patti Honea accused her physician of sexually assaulting her during a visit to his office to obtain a prescription for birth control pills. A jury awarded her $15,000 compensatory and $80,000 punitive damages.

On appeal, the defendant challenged the trial court's allowing two social workers (non-medical personnel) to testify as experts about Ms. Honea's suffering from post-traumatic stress.

The appellate court affirmed the trial court's qualification of the social workers as experts:

> The qualification of a witness as an expert is, as a general rule, a matter committed to the sound discretion of the trial judge . . . The trial judge's determination regarding a witness' qualifications to testify as an expert will not be disturbed on appeal, absent a showing of an abuse of discretion . . .
>
> To qualify as an expert, a person must have acquired by study or practical experience such special knowledge of the subject matter of his or her testimony as would enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate . . .There is no exact requirement concerning how knowledge or skill must be acquired . . . A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience and not by scientific study, training, or research . . . Even where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter . . .

With respect to the qualifications of an observing witness to give an expert opinion concerning a person's mental condition, it is not necessary that the witness be specially skilled in the subject of mental disorders or that the witness be a psychiatrist . . . An observing witness as to mental condition, however, must have had ***adequate opportunities for observation***.

. . . considering each social worker's education, her post-graduate training, her clinical experience with victims of sexual assault, and her opportunities to observe Honea, we hold the trial judge committed no abuse of discretion in determining that each social worker was qualified as an expert to give opinion evidence regarding Honea's mental condition. See *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986) (the trial court did not abuse its discretion in admitting expert testimony by a social worker knowledgeable in the field of child sexual abuse where the expert offered no opinion as to whether the children involved had been abused); *Onwan v. Commonwealth*, 728 S.W. 2d 536 (Ky. App. 1987) (wherein the court held a social worker qualified either as an expert or lay witness to give her opinion regarding whether a sexual abuse victim's upset behavior during her questioning of the victim was consistent with that of a sexually abused child and the social worker's testimony did not go to the ultimate issue of guilt or innocence); *Matter of Kimberly K.*, 123 A.D. 2d 865, 507 N.Y.S. 2d 654 (1986) (where the expert conclusion of a social worker that a child had been abused was used to corroborate out-of-court statements by the child that she had been sexually assaulted); *People v. Scala*, 128 Misc. 2d 831, 836, 491 N.Y.S. 2d 555, 560 (1985) (Properly trained clinical social workers are manifestly competent to diagnose mental disorders."). **NOTE:** In a later case involving the same cause of action, the South Carolina Court of Appeals held that the defendant/doctor's medical malpractice insurer was not liable for the plaintiff's injuries. A sexual assault did not ***arise from the performance of professional services***."[122]

NOTES FOR SERVICE PROVIDERS

Requirements for witnesses qualifying as experts vary among differing jurisdictions; however, the foregoing legal analysis indicates, in general terms, what the courts may be seeking. This opinion underscores once again the unique placement of Service Providers in the system with regard to their ability to assist their victims/clients.

Many states have special procedural requirements for causes of actions against medical personnel. A number of these involve statutes of limitations.

EXAMPLE # 65[123]

Plaintiff alleged that she was fondled and forcibly kissed by her physician in his office. She sued him. The trial court dismissed her claim because the two year statute for ***medical malpractice*** had expired. The appellate court reversed. It held that the doctor's assault against the plaintiff did not involve ***diagnosis, treatment, or care*** and, hence, the longer limitation period for assault and battery applied.

A Virginia victim of a sexual assault by a doctor was not so fortunate:

EXAMPLE # 66[124]

Plaintiff alleged that a doctor sexually assaulted her during a pre-employment physical examination. The case was dismissed because the plaintiff had not given the defendant/doctor notice as required by the state's *Medical Malpractice Act*.

The Virginia Supreme Court affirmed, holding that the doctor's tortious conduct was ***based on health care or professional services rendered*** under the Act, and since the plaintiff did not comply with the Act's

requirements, the dismissal was proper. (**Note**: Three Justices dissented on the grounds that the *Medical Malpractice Act* did not apply to sexual assault.)

NOTES FOR SERVICE PROVIDERS

The latter case should signal Service Providers to be especially alert in cases involving doctors, dentists, etc. They should elicit any information about lapses of time since the assault and urge potential plaintiffs to consult attorneys **as soon as possible**, so as not to be ***snared*** by procedural enactments such as Virginia's *Medical Malpractice Act*.

Insurance Issues

Almost all ***hands-on*** professionals, doctors, dentists, etc. are covered by professional insurance policies. These policies are designed primarily to cover *medical malpractice* where the insureds are negligent in diagnosis or treatment of patients. Specific legal issues about coverage arise when one professional person is accused of some kind of sexual assault during treatment. A case decided by New York's highest court gives insight into this question.

EXAMPLE # 66[125]

Mrs. Schwartz alleged that her dentist, Dr. Goldfarb sexually assaulted her during treatment. The insurer sued for a legal declaration that it had no obligation either to defend the insured or to pay any damages that might be awarded against him.

The New York Court of Appeals analyzed the insurance contract which specifically covered ***assault*** and ***undue familiarity during the course of treatment.*** Based on this, the insurance carrier had to **defend** Dr. Goldfarb in Mrs. Schwartz's suit against him. Whether the carrier must pay his damages was a different question entirely, and it could only be resolved by the jury in the civil suit, which would have to make a special finding whether or not the acts complained of occurred ***during the course of treatment.***

The victim's suit had asked for compensatory and punitive damages. With regard to the latter, the court stated that to allow insurance coverage would totally defeat the purpose of punitive damages.

The court also held that if the jury found that the defendant intended to **injure** the plaintiff then the carrier would not even be liable for **compensatory** damages. However, if the dentist only intended to do the **act**, which caused **unintended** injury, then the insurance carrier would be liable.

NOTES FOR SERVICE PROVIDERS

This case gives some idea of the intricacies of professional insurance policy litigation in sexual assault cases. Service Providers can be especially helpful in the development of facts bearing on the perpetrator's **intent.** For example, even such things as a question, ***Doesn't that feel good?***, asked by the assailant during the touching, could lead a jury to conclude that there was no intent to **injure** the plaintiff and hence the defendant's carrier would be liable.

The decision in the last example was based in part on whether the sexual assault took place **during the course of dental treatment.** In other cases, even the assault itself is so completely related to ***treatment*** that courts find that the insurance carriers are liable.

EXAMPLE # 66[126]

Defendant, a gynecologist, improperly manipulated the vaginal areas of patients while making gynecological examinations. In an action by the doctor's professional insurance carrier attempting to avoid insurance coverage for these acts, the court held that the acts complained of were covered because they took place in the performance of professional services.

As is true with most cases involving insurance coverage for criminal acts, the manner in which the original complaint is phrased may make the difference between coverage and non-coverage. Thus, if plaintiffs allege only intentional torts or criminal acts against defendants, the insurance carriers may prevail based on ***expected/intended injury*** exclusions or their equivalents. On the other hand, if plaintiffs allege acts that **might** be covered, then in many instances the question of coverage becomes one for a jury, who might be quite sympathetic to the patients'/victims' plight.

The following is an example of some ***creative pleading*** in a physician-sexual-assault/insurance coverage case:

EXAMPLE # 66[127]

The plaintiff alleged that she was sedated by a plastic surgeon who was treating her and that she was then sexually assaulted and raped by the doctor. He was convicted of first degree sexual assault. She sued the doctor and his insurance carrier in order to establish that her injuries were covered by her assailant's policy. The court noted:

(Plaintiff's) complaint in the underlying action against (the doctor) asserts nine causes of action. The causes of action asserted are as follows:

1) medical malpractice;

2) assault and battery;

3) negligence;

4) rape;

5) sexual assault;

6) reckless endangerment;

7) wrongful drug injection;

8) failure to obtain informed consent; and

9) intentional infliction of emotional distress.

The plaintiff had asked the court to rule as a matter of law that the carrier was obligated to indemnify (that is, pay any damages on behalf of) its insured. This the court refused to do. In effect, it held that it was up to a jury to sort out all of the above allegations and charges and to decide what was or wasn't covered.

NOTES FOR SERVICE PROVIDERS

It is easy to see just how **much** factual information would be needed to sustain the ***laundry list*** of charges that the plaintiff alleged against the doctor, particularly those involving negligent, non-intentional conduct necessary to ensure insurance coverage. Cases, such as this one, should remind Service Providers that, in civil actions involving insurance, proof of **non-intentional** actions by perpetrators may be of more benefit to the victims than proof of **intentional** actions.

Chapter 4 Campus Victims

The factual basis of a civil case, *Clery v. Lehigh University*[128], catapulted the issue of criminal violence on college and university campuses into national prominence.

During the early morning hours of April 5, 1986, 19-year old Jeanne Ann Clery was raped, sodomized, tortured and murdered in her dormitory room at Lehigh University in Bethlehem, Pennsylvania. Her killer, Josoph Henry, was also a Lehigh student, although he and Jeanne had never met.

Henry entered his victim's dormitory, Stoughton Hall, through an outer door, proceeded through another open door into a stairwell, and emerged through yet another door onto the third-floor, the female residence hall. Each of these doors was required to be kept locked at night; each was propped open by students, a practice which was well known to the university authorities. There were no security guards in or around the building as the killer moved about, unchallenged, from place to place.

Soon after the crime, Henry bragged to his friends about committing the murder. He showed them the items he had removed from Jeanne's room. They, very commendably, informed the police, who arrested the assailant in possession of the stolen items. He was tried, convicted, and sentenced to death; the Pennsylvania Supreme Court affirmed Josoph Henry's conviction and death sentence.

This tragedy set in motion a chain of events that was to:

1) Uncover the previously well-kept secret of the prevalence of campus violence in America;

2) Revolutionize the concept of security on college campuses; and

3) Create what is rapidly becoming a new sub-specialty in the field of crime victims law: **campus violence litigation.**

The Clerys sued Lehigh for negligence and gross negligence in the death of their daughter. They alleged that there had been a number of felony crimes on the campus in the two years preceding Jeanne's death, but that the college authorities failed to notify the students about them. The couple also alleged that Lehigh officials were well aware that students routinely propped open the doors to their dormitories but, again, took no action to remedy the situation. Lehigh settled with the Clerys for an undisclosed amount in 1988.

Jeanne's parents did not sue Lehigh for their personal gain. Utilizing the proceeds of the settlement (and some of their own money) they established a not-for-profit organization, Security on Campus, Inc. ("SOC") in Gulph Mills, Pennsylvania.[129] Founded as a living memorial to Jeanne's life and death, the purpose of the organization was the enhancement of security on college campuses nationwide, so that Jeanne's fate might not befall others.[130]

The first major initiative of the newly-formed advocacy organization was to spearhead a grass-roots legislative effort to require colleges and universities to report to students and to government authorities about the number of crimes on campuses and the current state of security procedures being taken by college and university authorities on those campuses.

National, print and electronic media, rallied to the Clery's cause. On talk shows, network news programs and in every major

magazine and newspaper in the country, the couple made the point that, although campus crime and violence were epidemic throughout the country, fewer than ten percent of colleges reported their crime statistics to students, or anyone else; as a consequence, uncounted numbers of students (such as Jeanne) were victimized by campus violence **simply because they were unaware of its prevalence.**

Pennsylvania, in 1988, became the first state to require reporting of crime statistics. By October of 1990, ten other states had followed suit with some kind of crime reporting legislation.

In late 1989, *Crime Awareness and Campus Security Acts* were introduced in the United States Senate by Senator Arlen Specter (R-PA) and in the House of Representatives by Congressman William F. Goodling (R-PA). In April of 1990, President Bush honored the Clerys in a special ceremony for crime victim advocates which was held in the White House's Rose Garden. In October of 1990, the House and Senate unanimously passed what had by then become known as the *Clery Bill,* and on November 8, 1990, it was signed into law by President Bush.

CRIME ON CAMPUS: A MATTER OF NATIONAL CONCERN

The Clery's legislative initiatives served to focus national attention on the scope of the problem of campus crime. In October of 1988, *USA Today*, after meeting with the couple, published a comprehensive three-day series about the issue. *Crime on Campus*[131] compiled and analyzed statistics which demonstrated the current escalation of violent offenses being committed against what is rapidly becoming a new subclass of crime victims: students and others on college campuses.

Data for this series -- ***never before available even to the FBI***[132] -- was collected through an exhaustive program of nationwide interviews with students, security officers, campus administrators, faculty and others knowledgeable about the problem. The series documents a dramatic rise in campus violence which puts to rest the long-cherished notion that colleges and universities are somehow cloistered enclaves -- sanctuaries far removed from the threat of crime that haunts the rest of us.

The *USA Today* statistics were appalling. Violent crimes on campus during 1987 increased by five percent over the previous years. There were:

- At least 31 homicides;
- More than 1,800 armed robberies;
- 13,000-plus physical assaults; and
- 600 *reported* rapes. (The general consensus among criminal justice statisticians is that only one rape in ten is reported to authorities, which would bring the true figure for that crime into the neighborhood of 6,000.)[133]

In addition, *USA Today* reported that there were 22,170 burglaries and 144,717 thefts.[134] (The burglary numbers had their own significance for Connie and Howard Clery; their daughter was murdered in her dormitory room by a burglar who killed her because she might, later, be able to recognize him and testify against him.)

Adding to the statistical picture, in January of 1990, the Campus Violence Prevention Center at Towson State University in Towson, Maryland, reported the results of a recent comprehensive study, just completed, on the relationship between campus crime and alcohol/drug abuse. Two thousand college students nationwide

were interviewed. Regarding campus crime, generally 36 percent of the respondents (over one in three) reported that they had been victims sometime during their university experience.[135] The *Report* notes that, for the three-year period of 1986 to 1988, 80 percent of all campus violence was perpetrated by students.[136]

Focusing on sexual assault alone, a study published in April of 1987 in the *Journal of Consulting and Clinical Psychology* reported that of 3,187 college women surveyed, 28 percent had been victims of rape or attempted rape since age 14, and many of the crimes involved the use of drugs or alcohol by the perpetrator to lower the victim's resistance.[137] The statistics about sexual assaults take on greater and more troublesome significance when they are considered in light of a November, 1988 report by the Center for Disease Control which stated that one in 300 students on college campuses is infected with the AIDS virus.[138]

CAMPUS VICTIMIZATION: *COVERED UP CRIMES*

This section, *Special Classes of Crimes*, began by describing a sub-class of crimes denoted informally as ***Three C's Crimes***. In review, the *C's* stand for ***concealed***, ***concealable*** and ***covered up*** victimizations.

Concealed crimes are typified by child molestation where the perpetrators wield the power to force their victims not to reveal what was being, or had been done to them.

Concealable crimes involve such victims as battered spouses who **could** report the crimes against them, but often did not because of fear of retaliation, distrust of the system or simply because they considered such abuse to be a ***private matter***.

Covered-up crimes on campuses involve the failure of colleges and universities to make current and prospective students (and their parents) aware of the numbers and seriousness of crimes occurring on campuses. The Clerys sued Lehigh because of their belief that Jeanne died as a result of what she did not know: crimes on campus, the dangers of propped open doors, and so on.

Prior to the enactment of the Clery bills, campus officials were not **required** to report crime and security matters to **anyone**. Consequently, most of them did not inform students and others of the prevalence of criminal violence at their schools. There seemed to be a consensus among college administrators that the protection of college ***images*** took precedence over the protection of students from criminal harm. The prevalence of campus crime and violence remained, however, this kind of cover-up mentality eventually resulted in the enactment of the Clery bills.

Another ***covered-up*** crime situation arises when female students who have been victimized -- usually by fellow students turned rapists -- are coerced or otherwise induced by campus officials not to report the crime to the authorities. The reasoning of campus officials in attempting to prevent crime-reporting was logical from **their** perspective: if crimes themselves are not reported there will be no official statistics, thereby protecting colleges' ***images***.

The Clerys' ***crusade*** focused sufficient national attention on campus crime and cover-ups that campus victims -- especially rape victims -- began coming forward with their stories of being ***stonewalled***. This, in turn, led to yet another Congressional initiative, the *Campus Sexual Assault Victim's Bill of Rights*.[139] This legislation was introduced at a press conference on the grounds of the United States Capitol on May 14, 1991, by Representative Jim Ramstad, a freshman Republican Congress-member from Minnesota. His interest in the issue of campus

rapes, and the cover-ups associated with them, was sparked by a lawsuit filed by four student rape victims against Carleton College, a small, private institution in Northfield, Minnesota.[140]

The allegations of the plaintiffs against the college were described in a cover story about date rape appearing in *Time Magazine* on June 3, 1991.[141] The article cited a statement by an attorney for campus crime victims to the effect that ". . . *date and acquaintance rape is the rule rather than the exception on campuses today. And the way the universities treat it is to cover up and protect their image while a great outrage is building.*"[142]

Time's writer seized on this observation to launch into a description of the Carleton case:

> Nowhere is (outrage) building faster than at Carleton College, Minnesota's prestigious private liberal-arts school and, in 1983, one of the first in the nation to establish a sexual-harassment policy. In the language of the university's judicial code, ***rape*** doesn't officially exist. School administrators call it ***sexual harassment*** or ***advances without sanction***. But those phrases don't seem very useful when Julie, Amy, Kristene and Karen try to describe what happened to them.
>
> In October 1987, Amy had been on campus just five weeks when she joined some friends to watch a video in the room of a senior. One by one the students went away, leaving her alone with a student whose full name she didn't even know. "It ended up with his hands around my throat," she recalls. In a lawsuit she has filed against the college, she charges that he locked the door and raped her again and again for the next four hours. "I didn't want him to kill me. I just kept trying not to cry." Only afterward did he tell her, almost

defiantly, his name. It was near the top of the ***castration list*** posted on women's bathroom walls around campus to warn other students about college rapists.

Amy went to the dean of students, whom she had been told she could trust. "He told me it was my word against my attacker's, and that if I went for a criminal prosecution, the victim was basically put on trial." So instead she picked the gentler alternative -- an internal review, at which she ended up being grilled about her sexual habits and experiences. Her attacker was found guilty of sexual assault but was only suspended, because of a dean's assurance that he had no ***priors*** other than ***advances without sanction.***

Julie started dating a fellow cast member in a Carleton play. They had never slept together, she charges in a civil suit, until he came to her dorm room one night, uninvited, and raped her. Weeks later, she says, he ripped her dress at a play rehearsal and grabbed her exposed breast. Still she told no one. "If I had been raped by a stranger, I would have told someone. But to be raped by a friend -- I began to wonder, "Whom do you trust?". She struggled to hold her life and education together, but finally could manage no longer and left school. Only later did Julie learn that her assailant was the same man who had attacked Amy.

Two other students, Kristene and Karen, claim to have suffered similar experiences at the hands of another student; all four of the Carleton women have filed suit against the college. They claim the school knew these men had a history of sexual abuse and did nothing to prevent their attacking again. Even after the men were found guilty of sexual harassment, they were allowed to remain on campus, and the victims were barred from warning their dorm mates under the college's privacy policy.

> The local police chief says that in the past six years, no Carleton official has brought an assault victim to the department.[143*]

The Campus Sexual Assault Victims' Bill of Rights, known now as the ***Ramstad Bill***, was introduced at midday on May 14, 1991 and, by the end of that day, had 52 co-sponsors about equally divided among Republicans and Democrats.

Mr. Ramstad cited the following statistics as evidence of the need for the legislation:

- A woman is raped on a college campus every 21 hours;
- One in four female students are victims of rape or attempted rape;
- 90% of rapes go unreported; and
- One of every 100 campus rapists is prosecuted.[144]

As originally introduced, the bill prohibited campus authorities from coercing rape victims not to report the crimes against them or from ***suggesting*** that reporting those crimes might not be to their advantage, or that they might have been contributorily negligent, or assumed the risk: ("It's your word against his"; "You were drinking, no one will believe you"; "You don't want all that awful publicity.") The bill also required that medical evidence be obtained and kept, and that victims be advised of their rights to

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* The plaintiffs in this case settled with the college on October 31, 1991. The terms of the settlement were not disclosed by the parties.

discover the HIV status of the accused perpetrators. The ***Ramstad Bill*** has undergone a good deal of ***fine-tuning*** since it was introduced, but the concept of establishing certain rights for campus victims remains intact.

CAMPUS VIOLENCE AND THE LAW

The existence of the two kinds of cover ups described above -- failure to make students aware of the dangers of campus violence, and preventing or dissuading students from reporting crimes -- has led to a situation in which little or no actual case law involving campus violence litigation has been developed. Campus crime, in the past, was rarely reported **to** the students by the campus authorities, or **by** the students to the police. As a result, very few cases were filed against the colleges for failure to provide security, nor were suits filed against the perpetrators, because of the pressure exerted on victims not to report the crimes committed against them. There has, however, been some litigation in the campus violence area, and a few legal ***ground rules*** for Service Providers can be set forth.

Failure of Security Actions

Failure of Security actions are almost invariably third-party actions and, as such, are generally beyond the scope of the *Manual.* Nonetheless, because there are so few reported cases involving campus victimization, it may be useful to present one security-related case so that readers can appreciate how some courts view campus situations involving failure to protect ***foreseeable*** victims from criminal activity.

Perhaps the most far-reaching case involving legal obligations of colleges and universities to their students is *Peterson v. San Francisco Community College District.*[145] The court stated the facts of the case:

> On April 25, 1978, plaintiff, a student at City College of San Francisco, was assaulted while ascending a stairway in the school's parking lot. An unidentified male jumped from behind ***unreasonably thick and untrimmed foliage and trees,*** which adjoined the stairway, and attempted to rape her. The assailant used a **modus operandi** which was similar to that used in previous attacks on the same stairway.
>
> The defendants were aware that other assaults of a similar nature had occurred in that area and had taken steps to protect students who used the parking lot and stairway. Plaintiff relied upon this increased protection. Plaintiff had been issued a parking permit by the college in return for a fee. Defendants did not publicize the prior incidents or in any way warn the plaintiff that she was in danger of being attacked in that area of campus. Plaintiff sustained physical and emotional injuries and economic loss as a result of the assault.[146]

The court, in a unanimous decision, held that the Community College District could be held liable for failure to warn of dangerous conditions. The language is instructive for all involved: potential campus crime victims and their attorneys, college administrators and security personnel and **their** attorneys, and others concerned with the issue of campus victimization. The essence of the court's holding was that:

> In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from

> physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.
>
> Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailant might be. Further, the warnings sought here would not result in preventing the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution.[147]

The court held that, in these circumstances, harm to the plaintiff was clearly foreseeable and that the colleges could be held liable for failure to warn the students.

NOTES FOR SERVICE PROVIDERS

The court, in its opinion, emphasized the ***closed environment*** of college campuses and the fact that students paid tuition and fees to use the campus; hence, the college had a duty to protect its students. It should also be noted that the victim in this case was assaulted by a person who was a stranger to her, rather than by a fellow-student or other person whom she knew on campus, thus, clearly differentiating the case from those involving ***date rapes*** or ***acquaintance rapes***.

In any event, this is a good case for Service Providers to bear in mind when counseling victims of campus assaults such as this one. Because there are so few reported third-party campus violence cases (as opposed to the large numbers of cases involving non-campus premises owners such as landlords or innkeepers) the *Peterson* case will be useful to prove to victims and attorneys that third-party liability **can** be established in the context of campus violence.

Date and *Acquaintance* Rape on Campus

Of all of the crimes discussed in the *Manual*, ***date rapes*** and ***acquaintance rapes*** are among the most emotionally disturbing and frustrating, not only to their victims, but to Service Providers and attorneys who are assisting those victims. Most such victims report that the treatment they suffered from campus and other authorities, even from fellow students, was as traumatic, or more so, than the actual assault.

In their book, *Sexual Assault on Campus: What Colleges Can Do*,[148] Aileen Adams, Counsel, and Gail Abarbanel, Director, of the Rape Treatment Center in Santa Monica, California have summed up the situations confronted by campus rape victims:

> One of the most tragic outcomes of sexual assaults on campus is that most victims do not seek the help they need from family, friends, or authorities. A national survey of college students found that 90 percent of the victims never reported their assaults to the police. Silent victims suffer profound and long-lasting changes in their lives -- they are affected psychologically, socially, academically, and developmentally. Moreover, because most colleges are not really prepared to help the victims who do not have the courage to come forward, these people are often re-victimized by the system to which they turned for aid and understanding.[149]

From the perspective of victims and their attorneys, this victimization is far too often exacerbated by public misconceptions about what constitutes the crime of rape and to what extent the victim is to blame. The *Time Magazine* cover story surveyed 500 Americans for its article on Date Rape. The results are startling. They underscore the problems victims and their lawyers may face in convincing jurors (particularly older ones) that date and acquaintance rape really is rape.

Would you classify the following as Rape or not?			
		Rape	**Not Rape**
A man who has sex with a woman who has passed out after drinking too much.	**FEMALE**	88%	9%
	MALE	77%	17%
A married man has sex with his wife even though she does not want him to	**FEMALE**	61%	30%
	MALE	56%	38%
A man argues with a woman who does not want to have sex until she agrees to have sex	**FEMALE**	42%	53%
	MALE	33%	59%
A man uses emotional pressure but no physical force to get a woman to have sex	**FEMALE**	39%	55%
	MALE	33%	59%

		YES	**NO**
Do you believe that some women like to be talked into having sex?	**FEMALE**	**54%**	**33%**
	MALE	**69%**	**20%**

Do you believe a woman who is raped is partly to blame if:

	AGE	YES	NO
She is under the influence of drugs or alcohol	18 - 34	31%	66%
	35 - 49	35%	58%
	50+	57%	36%
She initially says yes and then changes her mind.	18 - 34	34%	66%
	35 - 49	43%	53%
	50+	43%	46%
She dresses provocatively	18 - 34	28%	70%
	35 - 49	31%	67%
	50+	53%	42%
She agrees to go to the man's room or home	18 - 34	20%	76%
	35 - 49	29%	70%
	50+	53%	41%

		YES	NO
Have you ever been in a situation with a man in which you said no but ended up having sex anyway?	**ASKED OF FEMALES**	18%	80%

The attitudes reflected in this survey illustrate the problems inherent in victims' litigation in the context of date rape cases. In theory the plaintiffs' burden of proof remains the same as in any other civil case: a ***preponderance,*** or 51%, of the evidence. In reality, however, victims/ plaintiffs may have to prove far more than that 51% in order to convince civil jurors that what happened to them constituted an assault and battery -- defined as an "**non-consensual** offensive touching" -- which is the civil law tort that encompasses the crime of rape. Consequently, Service Providers may have a far more difficult time convincing attorneys to take campus rape victims' cases than they would have in cases involving stranger/ perpetrators. The collective skills of Service Providers, as an integral part of the victims' movement, will be put to the test in these situations, because the date rape issue has appeared on the scene only so recently that it may take a long time to resolve the special problems created by the public attitudes noted in the *Time Magazine* survey.

Since there are almost no reported cases involving rape on campus, the following NOTES FOR SERVICE PROVIDERS are based more on general principles of tort law rather than on the specific issue of campus rape. The advice of local attorneys who are familiar with applicable state laws and procedures, and with current attitudes of local juries, should be obtained once a campus rape victim has come forward.

The two principal torts that will be involved are:

1) Assault and battery; and

2) Intentional (or reckless) infliction of emotional distress.

Civil conspiracy and aiding and abetting may also be alleged where the facts substantiate these torts.

Insurance questions may arise. A large number of college students live with their parents when they are not at school and will likely be covered under homeowner's policies. We saw in the previous chapter on *Insured Perpetrators* that most such policies exclude coverage for injuries that are expected or intended by the insured; however, we also saw that many courts have found ways to get around those exclusions in order to afford coverage for victims.

One of the legal doctrines that courts often use in order to find ***exceptions*** to ***expected/intended injury*** exclusions is that the insured was unable to form the intent to injure that is necessary to ***trigger*** the exclusion. Because many, if not most, date rape cases involve excessive consumption of drugs and/or alcohol (by victims and perpetrators), courts may hold that the assailant was too drunk to form an intent. Likewise, negligent acts are covered by homeowner's policy, and it may be possible to show that an assailant's refusal to take ***no*** for an answer was due to a ***negligent misunderstanding*** about his victim's real feelings. These may be ***long shots*** in terms of insurance coverage; nonetheless, any information that may tend to negate perpetrators' intent to injure will be of value to attorneys.

Campus rape cases often involve perpetrators who are looking forward to their graduations, careers, and to becoming future community leaders. Consequently, the desire of the accused or his parents to settle may be greater in campus rape situations than in other actions. This will certainly make a difference to attorneys who are considering rape victims' cases.

Additionally, Service Providers should bear in mind the **defenses** that may be raised by perpetrators in date rape actions. **Contributory Negligence** is usually not a valid defense in cases involving intentional torts. However, the doctrine of **Assumption of Risk** has successfully been raised by such perpetrators.

In a purely legal sense, the defense of assumption of risk arises when the plaintiffs/victims have **knowingly** exposed themselves to a **foreseeable** danger or peril. Technically, defendants would have to allege that **they, themselves, created** the peril of the victim being assaulted **and** that the victim knew about it, in order for the assumption of defense to succeed. They are not likely to allege things like this about themselves. In the real world, however, this defense has been perverted into a ***she asked for it*** defense, alleging that the victims went to certain places, or did certain things, in the knowledge that a sexual encounter **might** ensue.

Unfortunately, this ploy has often succeeded. Thus, every conceivable item of information that can be used to rebut it is critical to victims' cases. For example, if the defense raises the issue that the victim went to the assailant's room, information should be elicited about whether this was a common practice on the campus, whether the living quarters in question were coed, and any other information that would demonstrate that casual visiting among the sexes was accepted in the campus social milieu. If drinking by the victim becomes an issue, evidence should be elicited to indicate that the victim's drinking habits were moderate, and that even if she had too much, this should not be equated with an invitation to have sex with her companion, or anyone else.

Jurors may have certain preconceptions as to what the "typical" rape victim should do: resist fiercely; run screaming to the police **immediately** after the rape; become terrified of the perpetrator; and so on. Experienced Service Providers, however, know that every victim responds differently to the physical and mental trauma of sexual assault. For example, sexual assault victims often believe fierce resistance will only escalate the violence. Moreover, the

victim's psychological denial concerning the assault may well cause delay in reporting. Such information is very persuasive in countering defenses, and should be obtained as soon as possible, while fresh in victims' minds.

Finally, even though much of the information about campus rapes is initially gathered from victims by Service Providers to address the potential liability of perpetrators, Service Providers should also remain on the alert for additional information about how the campus authorities treated the victims. If, as in the allegations of the Carleton College case, described above, cover-ups and stonewalling by campus officials added materially to the mental anguish of the victims, then third-party actions against those officials for emotional distress or other torts should be considered.

Chapter 5 Hate Crimes

Hate crimes have only recently gained national recognition. The definition of these crimes encompasses a broad range of victims: persons who are attacked because their race, religion, national origin, sexual preference, or other personal characteristics that threaten or offend their attackers.

A recent study conducted by the consulting firm, Abt Associates Inc., for the U.S. Justice Department and National Institute of Justice found that blacks and Jews were the principal targets of hate, or bias, crimes. The National Gay and Lesbian Task Force, however, contends that homosexuals are most often hate crime victims; however, they are also more afraid to report the crimes because of their fear of retaliation, alienation from the public, or harassment by the police.[150]

Some states have enacted statutes creating civil causes of action for hate crimes and the *Federal Civil Rights Acts* have been utilized not only to bring criminal charges against those who deprive hate crime victims of their civil rights, but in addition, as a basis for suits for civil damages against perpetrators and third parties.

There have been a number of cases in which state and federal civil rights laws have been used effectively to recover large amounts of damages from racist defendants and organizations. Perhaps the most celebrated involved a lawsuit by the Southern Poverty Law Center of Alabama against the United Klan of America. The action was filed on behalf of the mother of a black man who had been lynched by Ku Klux Klansmen. A jury awarded her $7 million which bankrupted the Klan.[151]

More recently, a state jury in Oregon awarded punitive damages in the amount of $10,000,000 to the estate of a black man who had been beaten to death by ***skinheads***. The suit was filed against the actual murderers and against one Thomas Metzger, the president of the White Aryan Resistance Organization (WAR). The jury found that WAR had assisted and encouraged the killers.[152]

The *Federal Civil Rights Acts* provide for damages against **government officers** for doing acts that violate citizens' civil rights and against **private citizens who conspire** to commit acts which injure persons **for the purpose of** depriving them of the **equal protection of laws.**

Federal courts have affirmed civil damages under the latter provision. The Supreme Court of the United States upheld a civil cause of action under the *Federal Civil Rights Act* where individuals walking along a public highway were murdered simply because they were black.[153] Lower federal courts have followed suit, upholding liability where a racially inspired attack took place outside a public

restaurant,[154] and where a gang of whites beat black people in a public place.[155] On the other hand, a federal court in New York found no civil rights violation where a group of white perpetrators beat a young black man to death.[156] The court was not convinced that the intent to deprive the victim of his federal civil rights had been established.

Interestingly, when a person's **house or habitation** is the target of a racially-motivated act such as a fire bombing, it may be easier to establish a federal civil rights violation than in cases where a murder or assault has been committed. A section of *The Civil Rights Act* prohibits interference with a person's right to hold property, and courts have held racially-motivated arsonists liable under the *Act*.[157]

In another case, a white youth burned a cross in the yard of a black couple. The victims sued the boy, his parents, and their homeowner's insurer. The court held that a cause of action had been stated under the *Federal Civil Rights Act*, but that an intent to injure the feelings of the black victims would be inferred from the nature of the crime and hence, the perpetrator's insurance carrier was relieved of its obligation under the contract.[158]

NOTES FOR SERVICE PROVIDERS

In the years since hate crimes have become sufficiently numerous and outrageous to capture the attention of our courts and legislatures, the focus has been primarily on criminal prosecutions. Nonetheless, as the cases presented above demonstrate, civil actions may also be pursued.

The law is enormously complicated in such cases, and civil rights litigation on behalf of crime victims requires considerable experience and expertise on the part of attorneys. Service Providers should be alert for overtly biased or racially-motivated acts, or even **nuances** that could indicate that there was more to the victimization than merely criminally-motivated acts against the victims.

Words and actions of perpetrators, both before and after the crimes, may be evidence of actionable bias, as would the assailants' appearance, for example: *skinheads*, Klan regalia, and other obvious indicators of bias. If there is any evidence at all that the victims suffered at the hands of perpetrators because of race, origin, religion, sexual orientation, etc., all possible information should be elicited while fresh in victims' minds. Jurors may be more willing to award substantial damages if plaintiffs suffered because of **who they were**, rather than as random crime victims.

ENDNOTES: SECTION V.

1. ***Reagan v. Rider,*** 521 A. 2d. 1246 (Md. Ct. Spec. App. 1987).

2. **Id.**, at 1247.

3. **Id.**, at 1247.

4. **Id.**, at 1251.

5. **Id.**

6. ***C.T.W. v. B.C.G. and D.T.G. by S.G.***, 809 S.W. 2d 788 (Tex. App. 1991).

7. ***Laurie Marie M. v. Jeffrey T.M.***, 559 N.Y.S. 2d 336 (N.Y. App. Div. 1990).

8. *Id.*, at 341.

9. **Id.**, at 342. **See also:** "Trends in the Law, The Stepfather", *ABA Journal*, November, 1990, p. 94, col. 2.

10. ***Mindt v. Shavers***, 337 N.W. 2d 97 (Neb. 1983).

11. ***St. Michelle v. Robinson***, 759 P. 2d 467 (Wash. App. 1988).

12. **Id.**, at 469.

13. See: "Discussion on the Discovery Rule in Child Molestation Cases," below at p.___.

14. ***H.L.O. v. Hossle***, 381 N.W. 2d 641 (Iowa 1986).

15. ***Lauver v. Cornelius***, 446 N.Y.S. 2d 456 (N.Y. App. Div. 1981).

16. ***M.M. and M.M. v. M.P.S. and B.S.***, 556 So. 2d 1140 (Fla. App. 1989).

17. ***Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.***, 770 P. 2d 278 (Calif. 1989).

18. ***Croft v. Wicker***, 737 P. 2d 789 (Alaska, 1987).

19. ***Morris v. Yogi Bear's Jellystone Park Camp Resort***, 539 So. 2d 70 (La. App. 1989). **But see, *contra*:** ***Adolph E. v. Lisa M.***, 566 N.Y.S. 2d 165 (App. Div. 1991). ***K.C. v. A.P.***, 577 So. 2d 669 (Fla. App. 1991), no parental liability in child molestation cases because the parents did not know of, or even on insufficient notices of, their children's tendencies to molest.

20. ***Auto-Owners Insurance Co. v. Gardipey***, 434 N.W. 2d 220 (Mich. App. 1988).

21. ***Allstate Ins. Co. v. Roelfs***, 698 F. Supp. 815 (D. Alaska, 1987).

22. ***C.T.W. v. B.C.G. et. al.***, 809 S.W. 2d 788, at 794.

23. ***Wagner v. McDaniels***, 459 N.E. 2d 561 (Ohio, 1984).

24. ***Elkington v. Foust***, 618 P. 2d 37 (Utah, 1980).

25. *Id.*, at 41.

26. ***Erickson v. Christenson***, 781 P. 2d 390 (Ore. App. 1989).

27. ***Horace Mann Ins. Co. v. Independent School District #656***, 355 N.W. 2d 413 (Minn. 1984); **See Also:** similar holdings; Teachers: ***Whitt v. DeLeu***, 707 F. Supp. 2d 1011 (W.D. Wis. 1989); ***Matta v. Board of Education of Prince Georges Co.***, 552 A. 2d 1340 (Md. Spec. App. 1989); ***Allstate Ins. Co. v. Calkins***, 793 P. 2d 452 (Wash. App. 1990); ***Horace Mann Ins. Co. v. Leeber***, 376 S.E. 2d 581 (W. Va. 1988); School Bus Drivers: ***Allstate Ins. v. Thomas***, 684 F. Supp. 1056 (W. D. Okla. 1988).

28. ***Stoneking v. Bradford Area School District***, 882 F. 2d 720 (3d Cir. 1989); See also: *Id.*, 856 F. 2d 594 (1988).

29. ***Interstate Fire & Cas. Co. v. Archdiocese of Portland***, 747 F. Supp. 618 (D. Ore. 1990).

30. ***Doe v. Ainsworth***, 540 So. 2d 425 (La. App. 1989).

31. ***Allstate Insurance Co. v. Jarvis***, 393 SE. 2d 489 (Ga. App. 1990).

32. ***Doe v. Colligan***, 753 P. 2d 144 (Alaska, 1988).

33. ***Doe v. Uhler***, 532 A. 2d 1133 (N.J. Super. 1987).

34. ***Infant C. v. B.S.A. et. al.***, 391 S.E. 2d 322 (Va. 1990).

35. ***J.C. Penney Casualty Insurance Company v. M.K., S.K., et. al.***, 804 P. 2d 689 (Cal. 1991).

36. *Id.*, at 693.

37. *Id.*, at 695.

38. *Id.*, at 698.

39. *Id.*, at 699.

40. *Id.*, at 703.

41. *Id.*

42. ***State Farm Fire and Casualty Co. v. Nycum***, F. 2d (#90-15706, U.S. Court of App. for the Ninth Circuit, 1991).

43. ***State Auto Mutual Ins. Co. v. McIntyre***, 652 F. Supp. 1177 (N.D. Ala. 1987).

44. ***Dotts v. Taressa J.A.***, 390 S.E. 2d 568 (W. Va. 1990).

45. ***N.N. v. Moraine Mutual Ins. Co.***, 450 N.W. 2d 445 (WI. 1990).

46. ***Allstate Ins. Co. v. Mugavero***, 537 N.Y.S. 2d 961 (Supreme Court 1989); *aff*d., 561 N.Y.S. 2d 35 (App. Div. 1990).

47. ***American State Ins. Co. v. Borbor***, 826 F. 2d 888 (9th Cir. 1987).

48. *Id.*, at 891.

49. *Id.*, at 894.

50. *Id.*, at 895.

51. *Id.*

52. ***Warcester Insurance Co. v. Fells Acres Day School***, 558 N.E. 2d 958 (Mass. 1990).

53. ***Atlantic Employers Ins. Co. v. Tots & Toddlers***, 571 A. 2d 300 (N.J. Super. A.D. 1990).

54. ***Gilbreath v. St. Paul Fire & Marine Ins. Co.***, 685 P. 2d 729 (Ariz. 1984).

55. ***Landis v. Allstate Ins. Co.***, 546 So. 2d 1051 (Fla. 1989); **See Also**, in accord: Casualty Indemnity Exchange Co. v. Small Fry Inc., 709 F. Supp. 1144 (S.D. Fla. 1989); ***Doe v. City of Mount Vernon***, 548 N.Y.S. 2d 282 (App. Div. 1989); (municipal liability).

56. ***Farmers Ins. Co. of Washington v. Hembree***, 773 P. 2d 105 (Wash. App. 1989).

57. ***Illinois Farmers Ins. Co. v. Judith G.***, 379 N.W. 2d 638 (Minn App. 1986).

58. ***Allstate Insurance Co. v. Jack S,*** 709 F. Supp. 963 (D. Nev. 1989).

59. ***Safeco Ins. Co. v. Howard***, 782 S.W. 2d 658 (Mo. App. 1989); **See Also**, in accord: ***Burt v. Aetna Cas. & Surety Co.***, 720 F. Supp. 82 (N.D. Tex. 1989).

60. ***Gallo v. Grosvenor***, 572 N.Y.S. 2d 506 (App. Div. 1991).

61. ***National Union Fire Ins. Co. of Pittsburgh v. Lynette C.***, 279 Cal. Rptr. 394 (Cal. App. 1991).

62. *Id.* at ___.

63. ***Johnson v. Johnson***, 701 F. Supp. 2d 1363 (N.D. Ill. 1988).

64. *Id.*, at 1364.

65. *Id.*, at 1366.

66. *Id.*, at 1367.

67. *Id.*

68. ***Tyson v. Tyson***, 727 P. 2d 226 (Wash. 1986). This case was superseded by statute in 1988. **See:** Wash. Rev. Code ib. 144, S.S. B. No. 6305, amending RCW 4.16.350 and addressing a new section to RCW 4.16. RCW 1988.

69. *Id.*

70. ***Hammer v. Hammer,*** 418 N.W. 2d 23 (WI. App. 1987), *rev.* denied 428 N.W. 2d 552 (WI. 1988).

71. *Id.*, at 1368.

72. *Id.*. at 1370.

73. Ill. Code Civil Procedure #13-202, 2 (1991).

74. ***Johnson v. Johnson***, 766 F. Supp. 662 (N.D. Ill. 1991).

75. ***E.W. and D.W. v. D.C.H.***, 754 P. 2d 817 (Mont. 1988).

76. ***Bowser v. Guttendorf***, 541 A. 2d 377 (Pa. Super. 1988).

77. ***DeRose v. Carswell***, 242 Cal. Rptr. 368 (Cal. App. 1987).

78. *Id.*, at 371.

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See also: other cases, resembling Type 1 situations, in which plaintiffs failed in their attempts to have discovery rules applied, include: ***Bock v. Harmon***, 526 So. 2d 292 (La. App. 1988), (fear of father/mother was insufficient to invoke discovery rule); ***Whatcott v. Whatcott***, 790 P. 2d 578 (Utah App. 1990); (molestation did not cause "mental incompetence" sufficient to invoke the discovery rule).

80. ***Lindabury v. Lindabury***, 552 So. 2d 1117 (Fla. App. 3 1989).

81. ***Petersen v. Bruen***, 792 P. 2d 18 (Nev. 1990).

82. *Id.*, at 19.

83. *Id.*, at 23.

84. *Id.*, at 24.

85. ***Hildebrand v. Hildebrand***, 736 F. Supp. 1512 (S.D. Ind. 1990).

86. *Id.*, at 1523.

87. *Id.*, at 1524.

88. ***Osland v. Osland***, 442 N.W. 2d 907 (N.Dak. 1989).

89. ***Doe v. Doe***, 264 Cal. Rptr. 633 (Cal. App. 1989).

90. *Id.*, at 634.

91. ***Evans v. Eckelman***, 265 Cal. Rptr. 605 (Cal. App. 1990).

92. *Id.*, at 609.

93. ***Roberts v. Drew***, 804 P. 2d 503 (Or. App. 1991).

94. ***Jones v. Jones***, 576 A. 2d 316 (N.J. Super., A.D. 1990).

95. ***Daly v. Derrick***, 287 Cal. Rptr. 709 (Cal. App. 1991) (Non Pub. Op.).

96. ***Meiers-Post v. Schafer***, 427 N.W. 2d 606 (Mich. 1988).

97. ***K.E. v. Hoffman***, 452 N.W. 2d 509 (Minn. App. 1990).

98. "Reported Rapes Hit Record High Nationwide in 1990, New Senate Report Finds", *Crime Control Digest*, April 15, 1991, p.2, col. 1.

99. **See, e.g.**: Nancy Blodgett, "Violence in the Home," *ABA Journal*, May 1, 1987, p. 66, col. 1.

100. **See e.g.:Nancy Gibbs**, "When is it Rape?", *Time*, June 3, 1991, p. 48, col. 1 (cover story).

101. Patrick A. Langan Ph.D., and Christopher A. Innes Ph.D., "Preventing Domestic Violence Against Women", *Special Report*, Bureau of Justice Statistics, U.S. Department of Justice, Washington, D.C. 20531, August, 1986 p. 1, col. 1.

102. ***Doe v. Ewing***, No. 98751, Michigan Court of Appeals, (January 10, 1990); non-published opinion, reported in the *Detroit News*: Eric Freedman, "Rapist Must Pay Victim $200,000", January 11, 1990, p, 1, col. 6.

103. *Id.*

104. ***Kalra v. Kalra***, 539 N.Y.S. 2d 761 (App. Div. 1989).

105. ***Jamieson v. Hickey***, 244 Cal. Rptr. 859 (Cal. App. 1988).

106. *Id.* , at 860.

107. ***Spencer v. General Electric Co.***, 688 F. Supp. 1072 (E.D. Va. 1988).

108. *Id.*, at 1074,

109. *Id,*, at 1075

110. *Id.*, at 1076.

111. ***Loving v. Comm.***, 182 S.E. 224 (1935).

112. See, 688 F. Supp. 1072, at 1075, notes 9 and 11.

113. ***Howe v. Village of Trumansburg***, 565 N.Y.S. 2d 298 (New York App. Div. 1991).

114. "Victim of Battered Woman's Syndrome Recovers in a Civil Case for Battery and Emotional Distress.", ***Curtis v. Curtis***, Idaho, Blaine County District Court, No. 14574, May 18, 1990. 33 *ATLA Law Reporter* 314, September, 1990. **But** see: ***Laughlin v. Breaux***, 515 So. 2d 480 (La. App. 1987), in which the court held that a domestic violence victim who was assaulted during periods for which the statute of limitations had run could not go back and "reopen" those periods based on the fact that she had suffered from Battered Woman's Syndrome.

115. ***Sciola v. Shernow***, 577 A. 2d. 1081 (Conn. App. 1990)/

116. *Id.* , at 1083.

117. *Id.*

118. *Id.*, at 1084.

119. *Id.*, at 1085.

120. ***St.Paul Fire and Marine Ins. Co, v. Shernow***, 577 A. 2d 1093 (Conn. App. 1990)

121. ***Honea v. Prior***, 369 S.E. 2d 846 (S. C. App. 1988).

122. ***Prior v. S.C. Medical Malpractice Liability Ins. Joint Underwriting Assoc.***, 407 S.E. 2d 655 (S.C. App. 1991).

123. ***Buchanan v. Lieberman***, 526 So. 2d 969 (Fla. App. 1988).

124. ***Hagan v. Antonio***, 397 S.E. 2d 810 (Va. 1990).

125. ***Public Service Mutual Insurance v. Goldfarb***, 425 N.E. 2d 810 (New York, 1981).

126. ***St. Paul Fire and Marine Ins. Co. v. Asbury***, 720 P. 2d 540 (Ariz. App. 1986). **But** see, cases in which carriers prevailed because the sexual assaults were not, as a matter of law, considered part of the plaintiffs' "treatment": *Standard Fire Ins. Co. v. Blaheslee*, 771 P. 2d 1172 (Wash. App. 1989); ***S.C. Medical Malpractice Liab. Ins. Joint Underwriting Assn. v. Ferry***, 354 S.E. 2d 378 (S.C. 1987); *Washington Ins. Guarantee Assn. v. Hicks,* 744 P. 2d 625 (Wash. App. 1987).

127. ***Snyder v. National Union Fire Ins. Co.***, 688 F. Supp. 932 (S.D.N.Y. 1988).

128. ***Howard K. Clery, Jr., et. al v. Lehigh University***, et. al, #87-05845, Court of Common Pleas of Montgomery County, PA, Civil Action - Law.

129. Security on Campus, Inc., 618 Shoemaker Road, Gulph Mills, PA 19406 (215) 768-9330. In late 1990 the majority of the substantive activity that Security on Campus had engaged in was assumed by another not-for-profit corporation, the Victims Assistance Legal Organization, Inc. (VALOR), 4530 Oceanfront, Virginia Beach, VA 23451, (804) 422-2692, Frank Carrington, Esq., Executive Director. Howard and Connie Clery still participate in national campus safety initiatives and maintain Security on Campus in their daughter's memory.

130. This description of the ***Clery*** case and it's aftermath is taken from: Carrington, *Campus Violence: A New Trend in Crime Victim Litigation*, XVII Va. Bar Assn. J. 4 (1991), ff.

131. Pat Ordovensky, "Crime on Campus: Schools Fail Safety Test; USA Today Surveys 698 Schools," *USA Today*, October 4-6, 1988, p. 1, ff. each day.

132. *Id.*

133. "Crime on Campus", October 5, 1988, P. 7A.

134. "Crime on Campus", October 4, 1988, p. 1A.

135. *Summary, The Links Among Drugs, Alcohol and Campus Crime: A Research Project*, January 10, 1990, p.2, Published by the Campus Violence Prevention Center, Towson State University, Towson, MD 21204, (301) 830-2178. Dorothy G. Siegel, Executive Director.

136. *Id.*, at 9.

137. Malcolm Ritter, "28% of college women said to face rape attempt," *Norfolk Virginian Pilot*, April 23, 1987, p. A12.

138. Ellen Hale, "AIDS on Campus Shocking," *Gannet News Service*, November 2, 1988.

139. H.R. 2363, May 14, 1991.

140. ***Bauman, et. al. v. Carleton College***, et. al., #, District Court, Rice County, State of Minnesota, March 28, 1991. **See:** "Carleton, Lawsuit Charges Mishandling of Rape Cases", Campus Life, *New York Times*, April 7, 1991.

141. Cover Story: Nancy Gibbs, "When Is It RAPE?", *Time*, June 3, 1991, p. 48, col. 1. Story: Cathy Booth, "The Clamor on Campus", p. 54, col. 2.

142. *Id.*, at 55.

143. *Id.*, at 54; **see also:** Judy Keen, Cover Story, "Colleges 'Degrade' Rape Victims", *USA Today*, June 11, 1991, p. 1, col. 3.

144. Editorial, "Campus Rape Cases Should Go to Court", *USA Today*, June 12, 1991, p. 10A, col. 1.

145. 685 P.2d 1193 (Cal. 1984). A number of citations to other campus security cases will be found in the text and notes to Carrington, *op. cit. supra*, note 125.

146. *Id.*, at 1195.

147. *Id.*, at 1201.

148. Adams and Abarbanel, *Sexual Assault on Campus: What Colleges Can Do*. Rape Treatment Center, Santa Monica Hospital, 1225 Fifteenth St., Santa Monica, CA 90404, (1988).

149. *Id.*, at p. v.

150. See: Rosemary Kaholokula, "Hate Crimes", *Attorney General's Criminal Law Update*, Texas Attorney General's Office, October, 1989, p. 5, col. 2.

151. See: "Dees Wins Again", *National Law Journal*, November 15, 1990, p. 6. col. 2.

152. ***Berhanu v. Metzger***, Or. Multnomah Co. Circuit Ct., #A8911-07007, Oct. 22, 1990. See: *op. cit. supra*, note 148; Carlyle E. Douglas, "Speaking of Violence and Law", *New York Times*, October 14, 1990, Section E, p. 7, col. 1; "Youth Gang Members Beats Black Man", 34 *ATLA Law Reporter*, 100 (1991).

153. ***Griffin v. Breckenridge***, 403 U.S. 88 (1971).

154. ***Hawk v. Perillo***, 642 F. Supp. 380 (N.D. Ill. 1985).

155. ***Stirgus v. Benoit***, 720 F. Supp. 119 (N.D. Ill. 1989); **and see**, *Mody v. Hoboken*, 758 F. Supp. 1027 (D. N.J. 1991), (survivors of an East Indian who was murdered by hoodlums stated a Federal Civil Rights Act cause of action against a city and its police department for failing to protect East Indians in the face of threats against them; as a class of persons to whom equal protection of the law was due and owing).

156. ***Spencer v. Casavilla***, 717 F. Supp. 1057 (S.D. N.Y. 1989).

157. ***Emanuel v. Barry***, 724 F. Supp. 1096 (E.D. N.Y. 1989).

158. ***Allstate Ins. Co. v. Browning***, 598 F. Supp. 421 (D. Ore. 1983).

SECTION VI: OTHER LAW-RELATED MEANS OF RECOMPENSE FOR VICTIMS: COMPENSATION AND RESTITUTION

Chapter 1 Compensation

All states, the District of Colombia, and the Federal government have enacted crime victim compensation laws. These laws generally provide that crime victims, their survivors, and persons who are responsible for the maintenance and support of victims, or those who have suffered economic loss due to the victims' injuries or death, are eligible for compensation if certain conditions are met.

The kinds of losses and expenses for which compensation may be paid include:

- Funeral and burial expenses;
- Medical and other crime-related professional expenses (including counseling);
- Victims' financial support;
- Services provided to victim; and
- Disability and rehabilitation.

Crime compensation statutes vary among jurisdictions with regard to such matters as eligibility, amounts, and reduction in awards due to other sources of income (called ***collateral sources***).

Compensation mechanisms, in theory, have been established to assist victims as rapidly as possible, with a minimum of ***red tape***.

The sheer volume of applications, however, and the diversity of issues created by this volume, have resulted in an ever-growing network of administrative regulations and decisions, followed by court interpretations of the administrative law generated. As a result, compensation issues are becoming more and more complex; the need for assistance from attorneys who are knowledgeable about state and local administrative law and procedure may become necessary in all but the most straightforward cases.

Issues such as eligibility, proof of loss, ***economic necessity***, and collateral sources, etc., will usually be decided based on administrative rulings and court interpretations of those rulings. There are, however, some compensation issues in which the expertise of Service Providers may make the difference as to whether or not compensation awards are granted.

These areas involve **factual** information that generally arises in the context of certain statutory bases for **denying** applications for compensation.

STATUTES OF LIMITATIONS

All compensation statutes have fixed periods of limitations which bar claims after those periods have elapsed. These statutes are applied unless the claimants can convince the compensation boards or the courts that the delay was not their fault; the delay was caused by government misconduct or negligence, or simply that, under the circumstances, it would be unfair to deny the claim.

Fortunately, many courts take a rather liberal attitude towards claims that might otherwise be barred if the claimants can convince them that the delay was **not** their fault.

EXAMPLE # 1[1]

Claimant was raped and brutally beaten causing loss of teeth, a wired-together jaw and Post Traumatic Stress Disorder. She sought advice from government agencies about compensation, but received no assistance until after the statute of limitations had run. The Supreme Court of New Jersey held that, in cases where the late claim was caused by the crime-induced incapacity of the victim, and the delay did not prejudice the Compensation Board's ability to verify the victim's eligibility, the claimant would be allowed to go forward with her claim.

EXAMPLE # 2[2]

Claimant's aunt was murdered, but the authorities bungled the investigation and no one knew that she had been feloniously killed for almost a year. The court held that where the claimant filed for compensation after the one-year statute of limitations, but within a year of the discovery that her aunt was murdered, the claim was valid. The court further held that it would be unfair to penalize the claimant for the government's inept investigation.

Not all courts are as favorable to victims in their interpretations. Courts which are unfavorably disposed follow the legal doctrine that when a right, i.e. compensation, is created by statute, (as opposed to arising from the common law) it is to be construed very narrowly by the courts.

EXAMPLE # 3[3]

A minor was stabbed, and her unborn fetus was killed as a result. She filed for compensation, after the two year statutory period but within two years of attaining her majority. The court held that her claim had been filed too late, and her youth did not extend the statutory period.

NOTES FOR SERVICE PROVIDERS

When telling victims about the availability of compensation, Service Providers should be sure to advise them about the compensation statutes' limitation periods. It would also be useful to follow up with victim/clients from time to time to see if they had filed their compensation claims.

In situations where the limitations periods have elapsed, or are about to elapse, Service Providers should find out any information that might mitigate the claimant's delay, such as: physical or psychological reasons for inability to file; failure of government officials to adequately inform victims about the availability of compensation **or** about the time limitations for filing; language problems; bureaucratic bungling, and so on. A useful rule is to ask oneself if any information that developed regarding a victim's failure to file would convince a reasonable person that to bar the claim would be **unfair.**

COOPERATION REQUIREMENTS

Most compensation statutes require that claimants cooperate with law enforcement and prosecutorial authorities by reporting the crimes (usually within a certain period), signing complaints, testifying at trials and hearings, etc. Failure to do so may result in denial of claims:

EXAMPLE # 4[4]

A crime victim's compensation award was rightfully withheld from a claimant who refused to sign a complaint or cooperate with the police.

NOTES FOR SERVICE PROVIDERS

The requirements of prompt reporting and cooperation with the authorities are reasonable prerequisites for compensation. Part of the rationale for crime victim compensation is to encourage such cooperation. If victim/claimants willfully refuse to cooperate, for no valid reason, then they forfeit their claims.

Service Providers may often be confronted with situations in which victims believe that they have good reasons such as fear of retaliation against themselves or their families for refusing to cooperate. In those cases Service Providers may be able to serve as ***go betweens*** among victims and the authorities, helping to work out some means of cooperation so that the victims can be afforded reasonable protection. In any event, Service Providers serve a very useful function by explaining to victims the reasons for denial of compensation due to non-cooperation, and by attempting to convince them to cooperate with the authorities.

CONTRIBUTORY MISCONDUCT

Almost all compensation statutes require that the victims did not cause their own injuries by starting, or willingly participating in, fights; by engaging in criminal confrontations themselves; or by generally being more than an unwilling victim. This reason for denial of compensation is often referred to as ***contributory misconduct.***

Questions of contributory misconduct, that is, *who was to blame*, are decided almost exclusively on the facts of the cases. They provide a fertile field for Service Providers to elicit information that might make a difference. Consider these examples:

EXAMPLE # 5[5]

Plaintiff was stabbed by another woman and sought statutory victim compensation. Compensation was denied based on the victim's disruptive conduct when the prosecutor refused to prosecute her assailant. The court held that this was not a proper basis to deny compensation for which the plaintiff was otherwise eligible.

EXAMPLE # 6[6]

Claimant got into a fist fight in a bar, which continued in the street where claimant's adversary's girlfriend shot the claimant. Claimant's claim for compensation was denied and he appealed from the Compensation Board's decision. The court held that even though the claimant may have been ***foolhardy*** in starting the bar fight, the shooting was a superseding event, and might not have been provoked by the claimant. The court remanded the case to the Board. The Board's appeal was denied on procedural grounds.

EXAMPLE # 7[7]

Claimant alleged that he was beaten and robbed by two women. He was also drunk (.23% blood alcohol) at the time. The Administrative Law judge found claimant to be more credible than the women. The Compensation Board, however, relying on the medical and traffic treatises, found that he was too drunk to remember the incident and denied his claim. The court held that it was proper for the Board to disregard the A.L.J.'s findings, but the use of treatises, without notice to claimant, violated due process. The case was sent back for reconsideration.

Compare these cases with the following in which compensation was denied based on contributory misconduct:

EXAMPLE # 8[8]

Claimant's decedent got into an altercation with Oliver. Oliver went off and got a gun with which he murdered the deceased. The court held that a three member panel of commissioners' decision that the deceased engaged in ***contributory misconduct***, and that compensation was barred, was upheld as not being against the manifest weight of the evidence.

EXAMPLE # 9[9]

Claimant who was injured while participating in a knife fight between rival youth gangs was ineligible for crime victims' compensation.

EXAMPLE # 10[10]

Claimant of victim compensation had argued with her assailant by telephone and then went out to confront him. The assailant allegedly pushed claimant down, injuring her. The court held that the Compensation Board's ruling denying compensation, because claimant had violated a regulation requiring victims to avoid confrontation, should be upheld.

NOTES FOR SERVICE PROVIDERS:

These remarkably similar cases are evenly split as to whether contributory misconduct should bar compensation. It may be that the courts involved ruled as they did because the "winning" victims were more persuasive in articulating their stories to their counsel or to the various hearing boards.

Service Providers are aware that victims, especially violent crime victims, may be unable to articulate what really happened to them during a given affray, and that the granting or denial of compensation is extremely important to victims, being perhaps the **only** recompense they may have hopes of receiving. Consequently, Service Providers should make special efforts to gather facts favorable to their victim/clients' side of the story if it appears that the issue of contributory misconduct will result in denial of compensation. For example, victims who might **appear** to be aggressors, may have actually been acting in defense of themselves or others. The first three examples, #5, #6, and #7, in which claimants prevailed, indicate that courts **do** listen to victims in this class of cases, and that Service Providers can be extremely helpful in getting their clients' stories sorted out favorably.

EMOTIONAL DISTRESS OF SURVIVORS

Courts, on occasion, will make compensation rewards to survivors of homicide victims, or other horrible crimes, as the following sympathetic holding of the Ohio Court of Claims demonstrates:

EXAMPLE # 11[11]

Father found the body of his 12-year-old son, brutalized, sodomized and burned and left to die (and who did die two days later). He filed a compensation claim. The court held that, under Ohio law, the father suffered ***personal injury*** -- *i.e.*, emotional distress, ***as a result of*** the crime. Compensation should be awarded for time lost from work because of the father's emotional distress.

Finally, it should be mentioned that most states providing for victim compensation require that, if victims have received state compensation, and then receive other funds as a result of the same crime or crimes, the original claimant must reimburse the compensation fund to the extent of the other source of funding. (Of course, if the second source of recovery is greater, the victim/claimant gets to keep the difference).

EXAMPLE # 11[12]

Dillon was criminally assaulted and received $11,493 from the state. He then sued his assailant and recovered $15,000. The state, pursuant to the state's subrogation statute demanded that the $11,493 be returned. The court held that Dillon must repay that amount, otherwise, he would have duplicate recoveries.

The reason for the states' prohibition of ***double recovery***, and for the rationale behind the requirement of repayment to the state compensation funds, is based on the principle that there is never enough money in the fund to compensate all victims, and by requiring repayment from a ***collateral source*** recipient, more money is available for other deserving victims. Even if victims who have won civil suits against perpetrators are required to repay any state compensation that they have received, they are not ***out-of-pocket*** because they have already been compensated once. Of greater importance is the fact that if this *Manual* leads to an increase in civil suits, **and collection of judgments**, from perpetrators or their insurers, these civil recoveries will help to ease some of the financial pressures currently confronting state compensation funds.

It is also important to remember that state victim compensation programs are almost invariably limited in their awards to **out of pocket** losses. Such things as pain and suffering, future earnings, and punitive damages -- which are routinely recoverable in civil suits -- are rarely if ever compensated by the states.

Compensation provides fundamental assistance to many violent crime victims, and its adoption nationwide has been a major victory for the victims movement. Civil litigation, if successful, takes matters one step farther, in that it places the burden of compensating victims on the perpetrators, where it belongs.

Chapter 2. Restitution

Restitution is a means of recompense to victims through the use of court's coercive powers. During the sentencing phase of criminal cases, convicted defendants are ordered to pay sums of money to their victims.

Restitution differs significantly from compensation. Compensation is payable directly from the state to the victims. Once claimants have established that they were indeed victims of compensable crimes and that they meet the eligibility requirements established by statutes and regulations, payments are usually made without further judicial action.

On the other hand, restitution involves taking something from criminal defendants. As a result, all of the statutory rights of defendants must be scrupulously observed. This concern for defendants' rights creates a situation whereby the **factual** issues

which might affect restitution are usually confined to purely legal questions, and there is little room for Service Providers to utilize their talents in eliciting factual information that may make a difference in the availability or amount of restitution.

Consequently, Service Providers who are counseling victims will find themselves confined almost exclusively to one single area in which elicitation of the facts may materially assist victims. This area involves perpetrators' ability to pay their restitution obligations.

Almost every court that has ever addressed the matter has held that restitution orders are invalid if they do not take into consideration convicted defendants' ability to pay.[13] The United States Supreme Court has ruled that defendants who can't (reasonably) pay restitution cannot have their probation revoked by the courts.[14] Consequently, if defendants can convince sentencing courts that they won't be able to pay restitution, it can't be ordered.

Usually, defendants' ability to pay is determined by reports submitted to the sentencing judge by probation officers or other court officers charged with making pre-sentence reports. Judicial determinations of amounts of restitution are made based on these reports and other evidence submitted. Unfortunately, most such court officers are tremendously overworked, and may not have the time or resources to make thoroughgoing investigations of defendants' assets. Furthermore, defendants' testimony about their financial situation may be self-serving or even completely false.

In stranger-type crimes, victims know little more about defendants' assets than the inquiring probation officers and, if these perpetrators are attempting to conceal their assets, they may succeed. However, when victims know the perpetrators of violent crimes against them personally, or even come from the same community as the

criminals, those victims may be able to furnish valuable information to the courts about defendants' assets or sources of assets.

This is particularly true in the area of ***Three C's*** crimes -- *concealed, concealable, and covered-up* -- which are committed by individuals whose outward appearances are exemplary and whose ***dark sides*** are made known only to their victims. Victims of domestic violence and child abuse, in particular, may know a great deal about the financial condition of their perpetrators, because they have lived with them, or have been exposed to them, for long periods of time.

Service Providers have particular expertise in interviewing victims and in eliciting information that is not only useful in winning civil cases but in collecting judgments. The same applies if there is a possibility that the perpetrators will be required to pay restitution, for example, for services such as counseling for battered spouses or child molestation victims. Service Providers should attempt to gather all available financial information so that restitution orders are based on a **realistic** appraisal of defendants' assets rather than relying on the investigations of overworked probation officers, or the perpetrators' own self-serving declarations.

In those cases in which restitution may be a condition of the perpetrators' sentences, victims should be advised of the ***ability to pay*** restrictions on restitution orders, and encouraged to furnish any information that may help their attorneys or the appropriate court officers, in assessing ability to pay.

ENDNOTES SECTION VI

1. ***White v. Violent Crime Compensation Board***, 388 A. 2d 206 (N.J. 1978).

2. *In re Irwin*, 515 N.E. 2d 38 (Ohio App. 1987).

3. ***Cook v. Violent Crime Compensation Fund***, 557 N.E. 2d 1093 (Ind. App. 1990).

4. *In re Ferrell*, 553 N.E. 2d 1096 (Ohio Ct. Claims, Victims of Crime Div. 1988).

5. ***Randall v. District of Columbia Department of Employment Services***, 551 A. 2d 90 (D.C. App. 1988).

6. ***Violent Crimes Compensation Board v. Linton***, 545 A. 2d 624 (Del. 1988).

7. ***Robles v. Department of Labor & Industries***, 739 P. 2d 727 (Wash. App. 1987).

8. *In re Jones*, 546 N.E. 2d 978 (Ohio Ct. Claims, 1988).

9. ***Venable v. Soloman***, 580 A. 2d 483 (R.I. 1990).

10. ***Ortell v. Commonwealth of Pennsylvania Crime Victim's Compensation Board***, 552 A. 2d 766 (Pa. Comm. 1989).

11. *In re Fife*, 569 N.E. 2d 1078 (Ohio Ct. Claims, Crime Victims Div. 1989).

12. ***Department of Labor and Industries v. Dillon***, 626 P.2d 1004 (Wash. App. 1981).

13. **See, e.g.:** ***U.S. v. Clark***, 901 F. 2d 855 (10th Cir. 1990).

14. ***Bearden v. Georgia***, 461 U.S. 660 (1983).