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## Suing Rapist in Civil Court: An Alternative Justice to Rape Victims In Malaysia

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#### ABSTRACT:

While rape is a criminal act punishable by imprisonment and whipping in Malaysia, criminal prosecution of the rapist is not the only legal remedy available for the rape victim. In Malaysia, Section 426(1) of the Criminal Procedure Code (Act 593) provides for the court's discretion to order convicted person to compensate the victims of the crime. The effectiveness of this provision is yet to be tested especially when no such order has been made to compensate rape victims. In the United States and the United Kingdom, civil lawsuits have become additional avenue that rape victims can take on journey towards healing. Although a civil suit cannot undo the harm the rapist has caused towards the victim, award of damages may assist the victims to cope up with the aftermath of the event such as depression, unwanted pregnancy or sexually transmitted diseases. This paper seeks to highlight the advantages of suing the rapist in civil court. It also examines the legal and practical problems of taking such action by making a critical analysis of Malaysian legal system in bringing such action in court. This paper employs a doctrinal legal research and secondary data of which the Criminal Procedure Code (CPC) is the primary source. The secondary sources for this article include decided cases, articles in academic journals, books and online databases. This paper contends that the laws are inadequate to assist the victim to sue the rapist. It is recommended that the CPC should be amended to allow the court to award compensation for acquittal cases. Furthermore, the government should enhance the scope of the legal aid assistance system in Malaysia by including civil action on sexual assault cases.

**KEYWORDS:** *rape, civil action, compensation to rape victims*

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#### INTRODUCTION

Rape is an awful crime against women. Every day, an average of four women are raped in Malaysia.<sup>1</sup> However, not each case was reported in the local news. Only the sickeningly brutal ones involving child or ending with murder captured the attention of the media.<sup>2</sup> The authors acknowledge that the rapists may have been convicted, but quite a number of them were acquitted due to lack of evidence and the need to prove the offence lies on the standard of

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<sup>1</sup> Yoon, Chin Mooi. (2008). 'She Was Ripe for the Plucking', The Star. Retrieved from <http://www.thestar.com.my>.

<sup>2</sup> Ibid.

beyond reasonable doubt.<sup>3</sup> Rape can be both a crime against the state and the victim but the nature of interests between the two are not the same. The authors are of the opinion that the rape victim should receive pecuniary as well as non-pecuniary damages in order for them to cope with the aftermath of the incident such as depression, unwanted pregnancy or sexually transmitted diseases. This prompted the question of whether rape victim is adequately remedied and protected by our justice system.

## **THE CURRENT LAWS IN MALAYSIA**

In Malaysia, the offence of rape is defined in Section 375 of the Penal Code which states that a man is said to commit rape if he has sexual intercourse with a woman under any of the following circumstances:

(a) against her will;

(b) without her consent;

(c) with her consent when that consent has been obtained by putting her in fear of death or hurt to herself or any other person or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;

(d) with her consent when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married or to whom she would give consent;

(e) with her consent when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;

(f) with her consent, when that consent is obtained by using his position of authority over her or because of a professional relationship or other relationship of trust in relation to her;

(g) with or without her consent, when she is under 16 years of age.

Section 376 of the Penal Code provides for the punishment of rape. It states that a person who is found guilty under Section 375 shall be punished for a term which may extend to 20 years, and shall also be liable to whipping.

In 2013, 608 accused were charged for the offence of rape in Malaysia and surprisingly, out of that numbers, only 36 cases recorded conviction.<sup>4</sup> This is due to the fact that the prosecution has failed to prove the case beyond reasonable doubt and it was further compounded by the need of corroboration for the testimony of complainant.

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<sup>3</sup> For example, see *Ah Mee v PP* [1967]; *Aziz Bin Muhammad Din v PP* [1996]; *Balwant Singh v PP* [1960]; *Chiu Nang Hong V PP* [1965] and *Muniandy & Anor V PP* [1973]

<sup>4</sup> *Statistic of Court's Judgment in Rape Cases*, Crime Investigation Department, Police Headquarters, Bukit Aman as at 22 November 2013

Although the corroboration requirement is not a rule of law, the desirability of corroboration in a sexual offence has been consistently required by courts as a matter of both practice and prudence. Most of the time, the prosecution faced difficulties to prove rape especially when there was delay in the victim's part to make a complaint as soon as the offence was committed. Reliable evidence cannot be presented if there was delay in making the complaint to the authority.

If the prosecution is able to prove its case against the accused, Section 426(1) of the Criminal Procedure Code (Act 593) provides for the court's discretion to order convicted person to compensate the victims of the crime. Based on this provision, the judge has no discretionary power to order accused who is acquitted to pay any form of compensation to the victim of crime even though the acquittal may be on the ground of technicalities. Although this provision allows the judge to make an order of compensation to the victim of crime, the application of it is very minimal. The provision has been applied only in several cases; none of them were rape cases.<sup>5</sup> In *Raja Izzuddin Shah v Public Prosecutor*<sup>6</sup>, the accused was charged for assaulting a public officer. He was sentenced to imprisonment but the sentence was set aside upon appeal. However, the court judge exercised his discretion pursuant to Section 426(1)(b) of the Criminal Procedure Code by ordering the accused to pay nominal damages of RM200 to the victim.

Therefore, the authors are of the opinion that Section 426(1) of the Criminal Procedure Code does not adequately provide justice to victims of crime, especially rape victims. The provision also cannot be applied if the accused is acquitted.

## ADVANTAGES OF SUING RAPIST IN CIVIL COURTS

Civil action should be considered for rape victim who seek compensation from the rapist. The authors refer to various judicial decisions from the United Kingdom and the United States for this contention. The course of action may include assault, battery or in some cases, false imprisonment. For example, in the case of *W v Meah; D v Meah*,<sup>7</sup> the rape victim suffers depression ever since they were raped by the defendant.

The court awarded general damages for assault action taken by both plaintiffs. The dissimilarities of substantive and procedural law between tort action and criminal action allow the rape survivors to pursue justice via civil action, which clearly a criminal justice system cannot provide.<sup>8</sup> The following are the advantages of this civil action against the rapist.

Firstly, a civil action can be brought against a convicted rapist as well as to the one who is acquitted in their criminal prosecution. For example in the case of *J v Oyston*<sup>9</sup>, the plaintiff successfully brought a civil action against the defendant who had been convicted for raping her. The plaintiff relied on Section 11 of the United Kingdom Civil Evidence Act 1968 which allows

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<sup>5</sup> The provision has been utilised in *Yeo Siow Yee v PP* [1974] 1 MLJ 54 – (robbery), *Yap Eu Leong Sunny v PP* [1994] 3 MLJ 434 – (corruption), *Kok Kee Kwong v PP* [1972] 1 MLJ 124 – (criminal misappropriation), *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270 – (assault) and in *Mohamed Johan Mutalib v PP* [1978] 1 MLJ 213 – (forgery)

<sup>6</sup> [1979] 1 MLJ 270.

<sup>7</sup> [1986] 1 All ER 935

<sup>8</sup> Manley, Holly J. (1990). *Civil Compensation for The Victim of Rape*. *Cooley Law Review*, Volume 7, 193 at p. 196

<sup>9</sup> [1999] 1 WLR 694

for evidence of criminal conviction to be admissible in civil trial. Consequently, Mummery LJ in *Parrington v Marriott*<sup>10</sup> held that failure to report the rape incident did not bar the plaintiff to sue the defendant for trespass to person and sexual assault. In this case, the court acknowledged the financial and emotional reason of rape victims as rationale for delaying the making of the report to the police.

Secondly, the rape victim is also allowed to take action against a third party. A civil action filed against third party based on sexual assault is a negligence action where the plaintiff has to prove several elements as follows:

- i. There was a legal duty owed by the defendant;
- ii. The duty has been breached;
- iii. The plaintiff suffered damages; and
- iv. The defendant's breach was the proximate cause of the damages.

Employers, schools, nursing homes and other entities can be the possible defendant for this action. In the United States, the case of *Kodiak Island Borough v Roe*<sup>11</sup> illustrated this situation where the plaintiff successfully obtained damages against the Alaskan Borough for negligence hiring of employee who has a criminal history of sexual misconduct to care for developmentally disabled person.

Thirdly, civil proceedings offer better prospects for financial compensation than in criminal proceedings. Besides psychological trauma, rape survivors faced various kinds of monetary losses. This may include monetary expenses for counseling, therapy and consultation with doctors, medicine to prevent infection or sexually transmitted diseases, or expenses for unwanted pregnancy. Besides that, the rape victim can also claim for non-pecuniary damages such as physical pain, mental anguish, fright and shock, denial of social pleasure and enjoyments, embarrassment and humiliation. For example in *Mays v Pico Finance Ltd & Anor*<sup>12</sup>, the plaintiff alleged that the second defendant raped her during the job interview. The court held that the plaintiff is entitled to damages for mental injury, distress and humiliation.

Fourthly, the standard of proof in civil suit is not as high as the standard of beyond reasonable doubt in criminal cases. Thus, the victim and the defendant appear on equal footing and where the need to prove the case is on a standard of balance of probabilities. For example, if the course of action is battery, a plaintiff need to prove that she was harmed or offended by contact and that the defendant intended the contact to harm or offend the plaintiff. However, judicial decisions have consistently held that in a civil proceeding where the action is criminal in nature, the degree of probability must commensurate the occasion and a standard higher than balance of probabilities should be adopted.<sup>13</sup>

Lastly, the odds of success are better in civil proceedings than in criminal proceedings. In *Delia S v Torres*<sup>14</sup>, a Californian woman was raped by her dentist. She and her husband successfully sued the dentist for intentional infliction of emotional distress although the dentist was acquitted for rape in criminal court. In *Doe v Ewing*,<sup>15</sup> a fifteen years old rape victim successfully sued the rapist for damages even though he is serving a life sentence. The higher odds of success in civil

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<sup>10</sup> [1999] All ER (D) 168

<sup>11</sup> 63 P. 3d 1009 (Alaska 2003)

<sup>12</sup> 339 So.2d 382 (Nebraska 1976)

<sup>13</sup> Temkin, Jennifer. (2002). Rape and the Legal Process (2<sup>nd</sup> Edition): Oxford University Press, at p. 336

<sup>14</sup> 134 Cal. App. 3d471 (1982)

<sup>15</sup> 205 Mich. App. 605 (1994)

proceedings against the rapist are like 'the rainbow of hope' for the rape victim to be compensated rather than to be left empty handed.

## THE LEGAL AND PRACTICAL PROBLEMS

As much as there are advantages for it, there are certain problems that may hinder the success of civil claims brought by the rape victims against the rapist. Among the legal hindrance that can be highlighted are limitation period, corroboration issues and the standard of proof that should be considered for such claim. Practical problems include the financial standing of the plaintiff and the defendant and also time constraint.

The first legal problem is in relation to limitation period. Unlike criminal action which has no limitation period, a tort action in Malaysia must be taken before the end of six years after the cause of action accrues.<sup>16</sup> However, in cases of persons with disability which includes minor and persons of unsound mind, the limitation period starts when the disability ceases.<sup>17</sup> Failure to observe the limitation period would be fatal to the plaintiff's claim as limitation operates as a total procedural defect in favour of the defendant.<sup>18</sup>

For example, in the case of *Stubbings v Webb*,<sup>19</sup> the respondent had failed in her claim for trespass to person as a result of taking the action after the end of limitation period. In this case, the respondent alleged that she had been raped and sexually abused by her stepfather and stepbrother between the ages of 2 to 14 years old. She brought the action when she was 27 years old. The House of Lords held that the respondent was barred in her action because the six years limitation period is over after she had reached the age of majority. This ruling has received huge criticism until the case of *A v H*<sup>20</sup> was decided.

In that case, the plaintiff had been permitted to commence civil proceeding against the defendant for assault and battery even though the action was taken after the limitation period had lapsed. In this case, the defendant was convicted of attempted rape in 1988 and was sentenced to life imprisonment because he had six previous convictions for rape, attempted rape and sexual assault. In May 2004, the defendant was released on licence and whilst on release, he won £7 million on the National Lottery. As a result of his winning, the plaintiff commenced civil action against the defendant. Coulson J ruled that:

*"In this case, equity had required that the discretion under s 33 of the Limitation Act 1980 should be exercise in favour of the claimant. The nature and seriousness of the underlying tortious wrong, and the particular circumstances of the instant case, had made it an exceptional one. A very small proportion of tortuous claims would have revolved around intentional assaults like the instant one. An even tinier proportion of such cases would have arisen out of offences which were so serious that a term of life imprisonment would have been imposed thereby creating the very circumstances which the claimant had maintained had caused her not to pursue the claim originally. The subsequent events, in particular the lottery win, had only served to underline the exceptional nature of case. Moreover, the principal reason for the claimant's delay was as a result of the defendant's impecuniosity*

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<sup>16</sup> Section 6 of the Limitation Act 1953

<sup>17</sup> Section 24 of the Limitation Act 1953

<sup>18</sup> Talib, Nurcahaya. (2010). Law of Torts in Malaysia. Sweet & Maxwell Asia. at p 10

<sup>19</sup> [1993] 1 All ER 322

<sup>20</sup> [2008] EWHC 1573 (QB)

*prior to his lottery win, which meant that he was simply not worth pursuing in an action for damages. Accordingly, the limitation period would be disapplied and the claimant would be entitled to pursue the claim against the defendant."*<sup>21</sup>

Sadly, in Malaysia, no similar provision (which allows for equitable consideration) exists in the Limitation Act 1953. The insertion of new provision which gives the power to the court to extend the limitation period based on equity is desirable. Failure to consider the insertion of equitable consideration to extend limitation period may pose a problem to the rape victim to resort to civil action if she did not institute her action within limitation period.

The second legal problem is associated with the issue of whether there is a need of corroboration for the plaintiff's evidence. Should the plaintiff in civil action claiming damages against the rapist be subjected to the same rule of corroboration required from a sexual complainant in a criminal trial? In a criminal trial, corroboration is required to support the evidence of victims of sexual offences not because the victim is not reliable, but because the nature of the offence. This was decided in the case of *Din v PP*<sup>22</sup> where Thompson LP stated:

*"But the desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law which is still a rule of practice and of prudence) springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed, there can be no question of a conviction on such evidence being open to attack for want of corroboration. If, however, she complains of having been raped, then both prudence and practice demand that her evidence should be corroborated."*<sup>23</sup>

The authors submit that the rule requiring evidence of sexual complainant be corroborated (which is applied in criminal proceeding) should not be applied in a civil proceeding. The main reason why the rule of corroboration is demanded in a criminal proceeding is because such trial can result in the deprivation of the accused's liberty, especially if the accused faced death or life imprisonment sentence. The outcome is of course far more severe compared to a civil trial, in which monetary damages is the sought remedy. Thus, the rule of corroboration for evidence of rape victims should not apply in civil proceedings.

Thirdly, as stated above, judicial decisions have consistently required higher burden of proof if there is criminal allegation in civil proceeding. In Malaysia, one of the examples of criminal allegation in a civil trial is forgery. The court in *Adorna Properties v Bonsoom Boonyani*<sup>24</sup> held that the standard of proof maintained is the civil standard of proof which is on the balance of probabilities. However, the court also held that the degree of the standard may vary according to the seriousness of the allegation. In *Yong Tim v Hoo Kok Cheong*<sup>25</sup> and *Lee Way Fah v Lee Seng Ein*<sup>26</sup> on allegation of fraud in civil proceedings, the court held that the standard of proof is beyond reasonable doubt.

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21 [2008] EWHC 1573 at 1574

22 [1964] 1 MLJ 300

23 [1964] 1 MLJ 300 at 301

24 [2001] 1 MLJ 241, FC

25 [2005] 3 MLJ 553

26 [2005] 3 CLJ 397

Rape or sexual assault is a serious allegation which may require the rape victim to prove rape on a standard of beyond reasonable doubt in order to succeed in her claim. If the standard of beyond reasonable doubt is imposed in this claim, the justice to the rape victims cannot be served. As stated before, the outcome of a civil proceeding is not as severe as in criminal proceeding. Thus, the authors are of the opinion that the civil standard of proof should be maintained in an action of this kind.

Next, among the practical problems that may prevent civil action being taken against the rapist is financial standing of both parties. The costs for civil actions may be expensive, and as a plaintiff in a civil action, the rape victims would have to bear the costs of the action. This may also be a contributing factor to prevent rape victims from pursuing action against the rapist. The plaintiff is responsible for all out-of-pocket expenses, regardless of the outcome of the case, including the costs of legal representation. The costs may include paying expert witnesses whom they hire such as doctors or psychologists, the costs of transcribing depositions, incidental costs such as travel and phone calls) and court fees.<sup>27</sup> In the United States, legal aid may help the victims of rape in suing the rapist.<sup>28</sup> However in Malaysia, the Legal Aid Department which was established under the Prime Minister's Department cannot be utilised if the rape victim has no financial means to sue the rapist for damages because such civil action are not covered under the Third Schedule of the Legal Aid Act 1971 which basically provide a list of legal suit actionable under the Act. In fact, the newly established National Legal Aid Foundation (NLAF) only provides representation for the accused in criminal cases.

It can also be argued that taking civil action against the rapist is time consuming. Furthermore, it is argued that such action could be a waste of time if the rapist has no ability to satisfy the judgments. Frank Carrington in his article also stated that the reason behind the lack of civil action for rape was because very few judgments were collectible as most defendants are either too poor or incarcerated.<sup>29</sup> In Malaysia, it takes years for a civil action to be disposed and this may not serve justice to the victim.

However, not all rapists are poor. According to Krista Anderson, the idea that 'rapists rarely have any money' is a myth that fails to account the frequency with which the middle and upper class men commit rape.<sup>30</sup> Mary Lou Lowder also supported the idea that not every rapist is indigent. Her arguments were that many rapists may have some property which is not subject to attachment and execution, or wages which may be subjected to a wage deduction order.<sup>31</sup> Thus, before a rape victim decided to sue the rapist for damages, it is crucial that she be advised of the rapist's financial standing.

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<sup>27</sup> A Survivor's Guide to Filing a Civil Law Suit. (2004). Washington Coalition of Sexual Assault Programs. Retrieved at <http://www.wcsap.org>

<sup>28</sup> Godden, Nicola May. (2009). Rape and the Civil Law: An Alternative Route to Justice. Durham E-Thesis, Durham University at p79

<sup>29</sup> Currington, Frank. (1977). Victim's Rights of Litigation: A Wave of the Future? University of Richmond Law Review, Volume 11 at p 456

<sup>30</sup> Anderson, Krista M. (2013). Twelve Years Post Morrison: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors. Harvard Journal of Law & Gender, at p. 18

<sup>31</sup> Lowder, Mary Lou. (1978). The Civil Action for Rape: A Viable Alternative for the Rape Victim? Southern Illinois University Law Journal, 399 at p. 420

## RECOMMENDATIONS

After having discussed the above, the authors would like to recommend that the judiciary system in Malaysia to consider the punitive damages for rape cases in Malaysia. It appears that the judiciary has never awarded any compensation to rape victim to help them to get back their normal life.

Furthermore, the Islamic concept of 'diyat' or blood money can also be considered where the offender will compensate the victim for culpable homicide or personal injuries. It originates from pre-Islamic practices as an alternative to revenge. 'Diyat' gives a chance to victim's family to pardon the offender and accept a monetary form of compensation as a substitute for equal punishment.<sup>32</sup>

It is also recommended that the Third Schedule to the Legal Aid Act 1971 be amended to include any civil action pursuant to tortious acts arising from sexual assault or rape. By having this provision, victim who has no financial means to sue could seek justice and it is hoped that it can serve as deterrence to any potential sexual assault offenders.

The NLF also should widen its services by also providing legal representation for civil cases, especially for the poor. Where there is a right there must exist a right of access to court or tribunal, so that any person who feels that his rights or liberty has been infringed or violated by any organ of the state or by any person whomsoever, may bring the matter to court or tribunal for adjudication. If there is no such recourse open to the aggrieved person, then the right is devoid of any meaning or effect.

## CONCLUSION

It can be concluded that Malaysia should emulate the practice of compensating the rape victim like in the United States and United Kingdom. This is to ensure the victim receive adequate protection and reasonable relief as a result of the heinous crime. It is contended that pecuniary damages may not be sufficient to restore the lost dignity or reputation but it is hoped that such proposal to compensate the victim could provide a reasonable remedy to start a new life after the traumatic incident.

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<sup>32</sup> Siti Zubaidah Ismail, (2012), *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The case of Homicide and Personal Injuries*. Arab Law Quarterly. 26 at p 361-379.

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