

**THE SURVIVOR'S GUIDE TO  
SEXUAL ABUSE CLAIMS**

# Breaking the **SILENCE**

A resource for survivors of sexual abuse



***John A. McKiggan***



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# Table of Contents

“Who Are You and Why Should I Listen to You?” .....	7
“Why Did You Write This Book?” .....	9
I Am Not Allowed to Give Legal Advice in this Book! .....	13
Some Frightening Statistics .....	15
“What Are My Legal Options?” .....	17
“Do I Have to Chose Between Criminal Charges or a Civil Claim for Compensation?” .....	21
You Have to Disclose Personal Information .....	23
Employers or Institutions May be Responsible .....	25
The Burden of Proof .....	27
Repressed Memory: What is it and Why is it Relevant to Sexual Abuse Claims? .....	29
“What is the Statute of Limitations and why should I be concerned about it?” .....	31

“What’s my claim worth?” (Canada’s Limit on Compensation for “Pain and Suffering”).....	35
The Psychological Assessment (The Key to Proving Harm).....	39
GAF Scale in a Nutshell .....	43
“Who do I Sue?” .....	45
Sexual Abuse by Catholic Priests. ....	49
The Secret Archives of the Catholic Church.....	51
“How Do I Find a Qualified Sexual Abuse Claims Lawyer?” .....	55
“How Do I Find Out Who Is Good In My Area?” .....	57
Other Things to Look For: .....	59
Understand How the Relationship Between You and Your Lawyer Will Work .....	63
The Legal Process in Abuse Compensation Cases .....	65
“How Long Will All of This Take?” .....	71
What Cases Do I Not Accept? .....	73
“What Can I Do From Here?” .....	75
Our Services .....	77



# “Who Are You and Why Should I Listen to You?”

My name is John McKiggan. I am one of the founding partners of Arnold Pizzo McKiggan, Trial Lawyers. I limit my work to serious personal injury claims, medical malpractice cases and representing survivors of childhood sexual abuse.

I represent people who have been injured by the negligence or intentional acts of others. While each case is different, and past results cannot be used to predict future success, I can tell you that I have been privileged to help my clients and their families recover millions of dollars in compensation in sexual abuse, wrongful death and medical malpractice claims.

I have been elected by my fellow trial lawyers as President of the Atlantic Provinces Trial Lawyers' Association. I have written papers and presented lectures in Nova Scotia, New Brunswick, Ontario and Singapore on various issues pertaining to sexual abuse litigation, personal injury law, and institutional liability to a variety of groups including the Nova Scotia Barristers Society Continuing Education Lecture Series, the Canadian Bar

Association, The Canadian Institute, and the Atlantic Provinces Trial Lawyers' Association. I was honoured to be invited to lecture in Singapore at the annual meeting of the International Bar Association.

You can find out more about me and my firm at *www.apmlawyers.com*. Our web site has a lot of useful information on a variety of subjects. Or you can visit one of my Blogs:

[www.halifaxpersonalinjurylawyerblog.com](http://www.halifaxpersonalinjurylawyerblog.com),

[www.sexualabuseclaimsblog.com](http://www.sexualabuseclaimsblog.com), or

[www.halifaxmedicalmalpracticelawyerblog.com](http://www.halifaxmedicalmalpracticelawyerblog.com).

# “Why Did You Write This Book?”

To answer that question, I have to tell you a story.

More than eighteen years ago, James (not his real name) made an appointment to see me. James was 42 years old. He told that he wanted to sue his doctor for medical malpractice. James told me that for more than a year he had been having horrible pains in his stomach. He had been going to his doctor week after week complaining about the pain. He had gone through dozens of medical tests and taken every type of medication that his doctor prescribed. Nothing seemed to help.

James was convinced that his doctor was negligent because his doctor had not been able to discover why he was having the pains or find any way to treat the pain.

I talked with James for a couple of hours. We talked about what he did for a living (to see if he was exposed to any hazardous materials at work that might be causing his pain). We talked about his family medical history (to see if these kinds of medical problems ran in his family).

Finally we started to talk about the town that he grew up in. I asked James if he had ever suffered any injury as a child that might account for the kind of pain that he was having. He said he had never been physically hurt ... and then he told me that “something” had happened to him when he was a boy. James disclosed to me that when he was nine years old his parish priest had sexually assaulted him.

I didn't know what to say. We talked for another hour. James told me that he never told his parents what had happened. The only person in the world he had ever talked to about the abuse was his wife. He had never sought treatment or counseling because he was too ashamed to talk about what had happened.

I asked James if he would be willing to talk to a professional for help and support.

I arranged for James to see a psychologist who specialized in treating survivors of childhood sexual abuse. Shortly after starting counseling James' pain went away.

We never sued the doctor. But I represented James in a civil claim for compensation against the priest that had sexually abused him.

During my investigation into James' claim I determined that the Bishop had received complaints about the priest but had refused to do anything about the complaints. Instead the same priest went on to sexually assault dozens of other children over three decades. So we sued the Diocese that had allowed the priest to

prey on children in the parishes rather than risk damaging the reputation of the church with a “scandal”.

Since then I have represented hundreds of survivors of childhood sexual abuse in claims against priests, ministers, doctors, teachers, guards, probation officers, family members, scout leaders, and foster parents. I have sued institutions like the Catholic Church, the Anglican Church, the United Church, the Baptist Church, the Boy Scouts, School Boards, and the Provincial and Federal Government.

I am class counsel for more than 100 sexual abuse survivors in the first successful sexual abuse class action against the Roman Catholic Church. A 15 million dollar class action against the Roman Catholic Diocese of Antigonish.

The sad fact is that childhood sexual abuse is an epidemic. But it is an epidemic whose victims usually suffer silently without any support or treatment or anyone who can truly understand what has happened to them.

That is why I wrote this book. To let you know that you have options.

I wrote this book so that survivors of abuse can get good, solid information about their legal options *privately* without having to disclose or discuss what may be very painful memories.

You could get some of this information by making an appointment with a lawyer, but I understand that for survivors, privacy and confidentiality is a primary concern.

I wanted to find a way to provide survivors with this valuable information in a way that protects their dignity and privacy without subjecting them to questioning that can be stressful and upsetting.

By writing this book, I can give you the information you need to educate you about your legal options before you talk to a lawyer, the police or other authorities. Frankly, this method of talking to you also saves me time. I've packed a ton of information into this book and it saves me the hours of time that it would take each day just to talk to all of the new clients who call me.

## **I CANNOT AND WILL NOT ACCEPT EVERY CASE.**

Rather than cut you short on the phone, writing this book gives me a chance to tell you what you need to know so that you can make an informed decision about what steps to take with your complaint.

Even if you decide not to pursue a compensation claim, or if I do not accept your case, I would like you to be educated about the process.

# I Am Not Allowed to Give Legal Advice in this Book!

I can offer you suggestions and help educate you about the issues involved in sexual abuse claims, but please do not construe anything in this book to be legal advice until you have agreed to hire me AND I have agreed, in writing, to accept your case.





# Some Frightening Statistics

- It is estimated that of every 100 incidents of sexual assault, only 6 are reported to the police;
- 1 in 4 women in North America will be sexually assaulted during their lifetime;
- 60% of sexual abuse victims are under the age of 17;
- More than 80% of victims of sexual crimes are women;
- 80% of sexual assaults occur in the home;
- 17% of girls under 16 have experienced some form of incest;
- 83% of disabled women will be sexual assaulted during their lifetime;
- 15% of sexual assault victims are boys under 16;
- More than half of all sexual offenders are married or in long term relationships;
- 57% of aboriginal women have been sexually abused;
- 20% of all sexual assaults involve a weapon of some sort;

- 80% of assailants are friends and family of the victim!

If you have been a victim of sexual abuse I have written this book to explain your options and identify some resources to help you on your road to recovery.

# “What Are My Legal Options?”

Essentially, a victim of sexual assault who wants to pursue the matter through the justice system has two options: the criminal justice system and the civil justice.

## **CRIMINAL CHARGES:**

Criminal proceedings are intended to punish an accused that is found guilty of criminal misconduct.

If you have been sexually assaulted and you want to pursue criminal charges, the first thing you will have to do is to swear out a criminal complaint. In other words, give a statement to the police about what happened to you.

The police will investigate to see if there is evidence that a criminal offence has occurred.

If the police determine that there is evidence that a crime has occurred, they pass on the evidence to the crown prosecutor's office.

Crown prosecutors are lawyers that represent the public interest. The crown prosecutor will determine if criminal charges should be laid and what the proper charges are.

The accused is then charged, and enters a plea of “guilty” or “not guilty”. If the accused pleads “not guilty” he or she is entitled to a trial where a judge, or a judge and jury, will determine if the accused is guilty of the criminal offence.

If the accused is found guilty, the court then imposes whatever punishment the court deems to be appropriate.

There are certain procedural rules in criminal trials that can be frustrating to victims who have been sexually abused.

Most people have heard the expression: “you have the right to remain silent”. What that means is that criminal courts **cannot force an accused to testify** at trial. There is also a limited amount of information to which the victims have access. The victim has little or no input into the criminal process and no control over whether charges proceed or how the prosecution is handled.

In a criminal proceeding all costs are paid by the government (the crown prosecutor’s office). In other words, you do not have to hire the crown prosecutor.

Therefore, if your primary goal is to **punish the person who sexually abused you**, then the criminal justice system may be the avenue that you want to pursue.

## **CIVIL CLAIMS FOR COMPENSATION:**

On the other hand, civil claims for compensation are designed to address the needs of the victim. The court attempts to **compensate** the victim for the harm caused by the intentional, abusive or negligent acts of the defendant. The plaintiff in a civil claim has control over the claim and can determine whether they wish to proceed or discontinue the action.

Furthermore, the amount of information that the defendant is required to disclose in a civil proceeding is extremely broad and includes information that would never come to light in a criminal proceeding.

Finally, a defendant in a civil lawsuit can be forced to testify during discovery or trial.

Another advantage of a civil claim is that you are able to control the process and move the matter forward as quickly or slowly as our rules of court allow.

On the other hand, you are responsible for hiring your own lawyer and paying that lawyer to proceed with your claim. This doesn't mean that you have to pay a legal bill each month. Most sexual abuse claims are done on what is called "contingency". What that means is that the lawyer is not paid unless you receive compensation.

A large part of my practice involves representing people who were victims of childhood sexual abuse. These types of claims

are difficult to pursue because the allegations are decades old and evidence that may have existed has often been destroyed or witnesses have passed away. Often these type of claims boil down to “he said, she said”.

# “Do I Have to Chose Between Criminal Charges or a Civil Claim for Compensation?”

Victims of sexual assault can pursue criminal charges, file a civil claim, or do both. There are certain advantages and disadvantages depending on which order you chose to proceed.

If you proceed with criminal charges first and the person that sexually assaulted you is convicted, then he (or his employer) cannot defend a civil claim on the basis that the abuse did not happen (because the court has already dealt with the issue of guilt).

On the other hand, if you sue the person that abused you first, you can expect him to deny that the abuse happened.

You can pursue both criminal charges and a civil claim at the same time. However, if you do that you can expect the defence lawyer in the criminal proceedings to suggest to the court that your credibility is suspect because you have a financial motive for pursuing the criminal charges. In other words, the lawyer will

argue that you are making up the criminal allegations in order to support your civil claim for compensation.

I have found that whenever a criminal investigation into these types of allegations starts the police generally find more victims. Overall, that tends to strengthen the criminal proceedings. It also strengthens the civil proceedings should they be filed at a later date.

I think it is important that sexual abusers be held accountable and punished for their actions. Therefore, I always recommend that my clients give serious consideration to filing criminal charges against the person that abused them.



# You Have to Disclose Personal Information

If you decide to pursue a civil claim the defendant is entitled to receive copies of your psychological and psychiatric history and any counseling records that may exist regarding the effect the assaults have had on your life. I go into this requirement for disclosure in more detail later in this book.

The defendant is entitled to receive information of any other traumatic events that may have happened in your life. The defendant's lawyer will argue that those other traumatic events (if there are any) caused your psychological injuries, not the sexual assaults.



# Employers or Institutions May be Responsible

In many cases, the sexual abuser has died, and the only hope of anyone being held accountable for the sexual assaults, and for the abuse survivor to receive compensation, is to sue the abuser's employer or the institution where they worked or volunteered, for negligence.

For example, I have successfully sued the Roman Catholic Diocese of Antigonish for the Diocese's responsibility in allowing sexually abusive priests to continue to abuse the children in the parishes where they were placed, after the Bishop became aware of the abuse.



# The Burden of Proof

The Plaintiff (you) bears the burden of proving your case.

Most people have heard the term: “*proof beyond a reasonable doubt*”. That is NOT the burden that applies in civil claims for compensation; it is the burden that applies to criminal prosecutions.

In a sexual abuse compensation claim you bear the burden of proof: “*on the balance of probabilities*”. In other words, is more likely than not that the defendant is responsible for the sexual abuse and your resulting injuries.

The easiest way to think about this is to consider a pair of scales. All the evidence FOR your claim is placed on one side of the scale. All the evidence AGAINST your claim is placed on the other side of the scale.

As long as the scales tip to the side FOR your claim, even a little bit, then you have met the burden of proof *on the balance of probabilities*.

Many of my clients ask me how they can prove they were sexually assaulted when the abuse happened decades ago. Sexual abuse, by its nature, is a crime of secrecy. It is not unusual for there to be no actual records of historic sexual abuse.

However, in many cases of historical sexual abuse where I have represented survivors, I have found after investigation that the institution that employed the abuser had received complaints about the abusers conduct. In some cases other victims or their parents had actually complained!

In most cases, the proof comes from the victims' own statements about what happened to them. If the victim is credible, and their evidence is consistent with all the other evidence, the claim may meet the burden of proof, on the balance of probabilities.

# Repressed Memory: What is it and Why is it Relevant to Sexual Abuse Claims?

It is common for us to consciously repress unpleasant memories. In other words, we know what happened, but we *consciously* chose not to think about it.

*Repressed memory* is the memory of a traumatic event that has been *unconsciously repressed*. In other words, the victim of a traumatic event has no conscious memory of the event because his or her subconscious has repressed the memory. Repressed memories can be recalled after being triggered, usually by another traumatic event.

## **DOES REPRESSED MEMORY REALLY EXIST?**

There is mixed scientific opinion about whether repressed memory really exists. Some professionals deny the existence of repressed memories. Some are skeptical. Many respected professionals recognize that peer-reviewed studies and clinical studies continue to document the phenomenon.

## **SO WHAT'S THE ANSWER?**

The reality is that the validity of repressed memories may have a great deal to do with the way in which the memories were recovered. I have been representing survivors of childhood sexual abuse for more than 18 years. I have no doubt traumatic memories of something as horrifying as childhood sexual abuse can be repressed by the unconscious mind as a protection mechanism.

That is not to say that I think all repressed memories are necessarily true. But in my experience a careful examination of all the facts surrounding each particular case usually provides evidence to corroborate the accuracy of most victims' repressed memories.

Repressed memory can play an important part in sexual abuse compensation claims because it affects when the *Statute of Limitations* starts to run.



# “What is the Statute of Limitations and why should I be concerned about it?”

A Statute of Limitations is a law that sets a time limit on how long a plaintiff, for example a sexual abuse survivor, has to file a civil claim for compensation with the court. It is the maximum period of time that a plaintiff can wait before filing a lawsuit. For example, in Nova Scotia, the time limit for filing a claim for injuries from a car accident is three years from the date of the accident.

Most claims for sexual abuse are based on a claim for compensation for assault. In Nova Scotia, the time limit for filing a claim for compensation for injuries suffered in an assault is **one year** from the date of the assault.

## **SPECIAL RULES FOR SEXUAL ABUSE SURVIVORS**

In many cases, victims of sexual assault are simply not capable of bringing a claim within a year of the assault, especially if they were a child at the time or if they suffered significant psychological

harm as a result of the assault. Strictly applying the one year time limit to survivors of sexual assaults could result in legitimate claimants being unfairly prevented from being able to file their claims.

The 1992 the landmark decision of the Supreme Court of Canada, *M (K) v M (H)*, removed a major barrier to lawsuits by ruling that provincial limitation periods do not begin to run until the abuse survivor is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the survivor's injuries.

Nova Scotia was the first province to change its Statute of Limitations so that the limitation period for sexual abuse cases does not start to run until **the victim is aware of the full extent of the abuse** and the injury suffered.

In 1994, British Columbia changed its *Limitation Act* to eliminate all limitations for causes of action 'based on misconduct of a sexual nature' or 'based on sexual assault'. The rest of the provinces enacted similar legislation shortly thereafter.

In Nova Scotia Section 2(5) of the Limitation of Actions Act says:

(5) In any action for assault, menace, battery or wounding based on sexual abuse of a person,

(a) ... the cause of action does not arise until the person becomes aware

of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period ...does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

As you can see, the rule is complicated. When the court will consider the Statute of Limitations to start to run depends on the facts of each case.

It is *very important* that you get advice immediately from an experienced sexual abuse claims lawyer, to determine when the deadline for filing your claim runs out.



# “What’s my claim worth?” (Canada’s Limit on Compensation for “Pain and Suffering”)

In 1978, in a case known as *Teno v. Arnold*, the Supreme Court of Canada created a barrier to recovery for innocent victims who have been injured as a result of someone else’s actions.

In that case, the court ruled that **no matter how seriously injured you are**, the *maximum* recovery you can obtain for what is commonly referred to as “pain and suffering” is one hundred thousand dollars (\$100,000.00).

Accounting for inflation, the limit on pain and suffering awards is currently considered to be slightly more than three hundred thousand dollars (\$300,000.00). However, that amount is only paid to the most catastrophically injured (quadriplegia, paraplegia, severe brain damage and similar injuries).

## **“ARE SEXUAL ABUSE CLAIMS IN CANADA DIFFICULT?”**

In a word, yes.

Lot's of people have read about large jury awards for sexual abuse claims in the United States. Sometimes the jury awards amount to millions of dollars.

In Canada, court awards are much lower than awards for similar injuries from courts in the United States. Cases that might be successful in the U.S. are simply not economically feasible to pursue in Canada.

Nova Scotia also has some of the most conservative (lowest) awards in Canada for compensation for personal injury claims.

In the last ten years there have been reported cases in Nova Scotia where victims of sexual abuse were awarded compensation for “pain and suffering” ranging between \$23,000.00 to \$80,000.00.

Recently, the courts in Nova Scotia have become more aware of the devastating effect that childhood sexual abuse can have and recent cases have reflected this awareness. In a case reported last year a victim of sexual abuse by a probation officer was awarded \$125,000.00 for pain and suffering and \$500,000.00 for past and future income loss.

Not all cases will receive the same kind of awards, but it does indicate that the courts are becoming more sophisticated in assessing personal injury damages for victims of sexual abuse.

Sometimes it is difficult to determine how much a survivor's sexual abuse claim will actually be worth. The value of your claim will depend on the extent of the harm you have suffered as a result of the abuse. This depends a great deal on the quality of expert reports we have to document the extent of your psychological injuries and how those injuries affected your ability to get an education or earn an income.

Your injuries and resulting harm must be proven by expert testimony. In other words, psychologists/psychiatrists or abuse counselors must be willing to testify about the nature and extent of your injuries and how your injuries impair or eliminate your ability to work.

In order to determine whether you have a case, we must first gather all of the relevant records involved in your care and treatment. Once the information is received, we review them to see if, based upon our experience, it looks as though the claim will result in a significant compensation award.

If I accept your case we will retain experts who are prepared to testify on your behalf, and obtain other important records, including employment records and tax returns. This information will help us prove the damages or financial losses that you have suffered due to the defendant's actions.





# The Psychological Assessment (The Key to Proving Harm)

One of the greatest difficulties abuse survivors have is expressing how the abuse has affected their life. It is difficult to see the harm caused by sexual abuse because the scars are invisible.

A proper psychological assessment is the key to being able to prove the harm that an abuse victim has suffered and how the abuse has affected their ability to work, raise a family and lead a normal, healthy life.

Psychological assessments use scientifically validated tests to identify the symptoms and effects of childhood abuse. The results of these tests are then compared with normative standards (people who have not suffered abuse).

## **COMMON PSYCHOLOGICAL TESTS**

There are a number of tests that psychologists can use to help establish the kind of symptoms you have as a result of trauma. The tests can also be used to prove what effect the symptoms have

on your ability to earn income and have healthy interpersonal relationships with your family, friends and other people.

### **DETAILED ASSESSMENT OF POSTTRAUMATIC STRESS (DAPS)**

The DAPS test has 104 questions that provide detailed information about an adult's history of various types of trauma exposure. The DAPS also helps uncover information about the survivors psychological reactions to the abuse at the time it happened, any long term post traumatic stress symptoms because of the abuse, and the current level of post traumatic impairment (in other words, how the trauma effects the survivors ability to function on a day to day basis).

The DAPS also allows a psychologist to make a tentative diagnoses of Post Traumatic Stress Disorder (PTSD). The DAPS also tests for event-related dissociation, substance abuse, and information about the individual's potential for suicide.

### **MINNESOTA MULTIPHASIC PERSONALITY INVENTORY: (MMPI-2)**

The MMPI-2 is the current form of the most frequently used test of personality in psychological assessment practice. The MMPI-2 is a standardized set of 338 true/false questions which are designed to uncover a wide range of self descriptions of emotional adjustment and attitude towards testing.

## **MALINGERING (ARE YOU TRYING TO FAKING IT?)**

The MMPI-2 test has questions that are designed to identify if a patient is exaggerating or trying to fake their symptoms. This is called “malingering”.

The DAPS also includes two validity scales that evaluate under- and over-reporting of symptoms. In other words, the test can show if you are trying to downplay or exaggerate the effects of the abuse.

## **SYMPTOM CHECKLIST—90—REVISED (SCL-90-R)**

The SCL-90-R is a checklist of 90 common medical and psychological symptoms.

The checklist was designed to reflect the psychological symptom patterns of psychiatric and medical patients. The Global Severity Index that is part of the SCL-90-R test is considered by many experts to be the most sensitive single indicator of a patient’s psychological distress since it combines information on the number of symptoms causing distress and the intensity of distress.

## **TRAUMA SYMPTOM INVENTORY (TSI)**

The TSI is a 100 item test of post traumatic stress. The inventory is designed to identify important effects following traumatic events. It is intended for use in the evaluation of both acute (recent or short term) and chronic (long term) effects stemming from exposure to trauma.

The TSI can be helpful because it not only measures symptoms typically associated with Post Traumatic Stress Disorder (PTSD) but it also measures symptoms associated with intra- and inter-personal difficulties that are often found in more chronic (long term) forms of psychological trauma.

### **WECHSLER ADULT INTELLIGENCE SCALE- FOURTH EDITION (WAIS-IV)**

The WAIS-IV is the most frequently used test to determine cognitive and intellectual functioning. It is the most frequently used test to determine intellectual functioning in current practice. The WAIS-IV also has the advantage of having Canadian norms (test data from Canadian test subjects).

### **GLOBAL ASSESSMENT OF FUNCTIONING (G.A.F.) RATINGS**

After the tests are administered, the psychologist may assign a GAF rating. The rating is used to show to what extent a person's injuries or illness impact on their ability function on a day to day basis.

# GAF Scale in a Nutshell

**100-91** Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.

**90-81** Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).

**80-71** If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).

**70-61** Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

**60-51** Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social,

occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).

**50-41** Serious symptoms (e.g., suicidal ideation, severe obsession rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

**40-31** Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed person avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

**30-21** Behavior is considerably influenced by delusions or hallucinations OR serious impairment, in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day, no job, home, or friends).

**20-11** Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g., smears feces) OR gross impairment in communication (e.g., largely incoherent or mute).

**10-1** Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

**0** Inadequate information.

## “Who do I Sue?”

There is an obvious answer, and a not-so-obvious answer to this question.

The obvious answer is that you should sue the person that sexually assaulted you.

However, an important consideration is whether the person that assaulted you actually has any assets that would enable him to pay a judgment. For example, if the court awards you \$500,000.00 in compensation you will get a court order requiring the abuser to pay you. But a judgment is simply a piece of paper suitable for framing unless you are able to collect your compensation.

In many cases that I have been asked to review, the abuser is elderly, unemployed and has no assets to pay a judgment. The abuser is what is referred to as “judgment proof” meaning a judgment against the abuser simply couldn’t be collected.

In cases like that, I have reluctantly had to tell the victim that there is no sense in pursuing a civil claim, because it is not likely

that the survivor will ever receive compensation, even if they win their claim in court.

The *not-so-obvious answer* is that in some cases the abuser's employer or the institution where they worked or volunteered can be sued for compensation.

Under the legal principle of *vicarious liability* an employer can be held liable (legally responsible) for negligent acts or omissions by an employee who is acting in the course of their employment. Traditionally employers were not liable for criminal acts, like sexual assault, by employees.

Almost ten years ago the Supreme Court of Canada changed the rules. In **P.A.B. v. Curry** and **G.T. v. Griffiths**, the Supreme Court ruled that an employer will be held vicariously liable for criminal sexual assaults by an employee in two circumstances:

- (1) Where the employee's actions were authorized by the employer; and
- (2) Where the employee's unauthorized acts are so connected with his or her authorized acts that they can be characterized as modes of conducting the employer's business.

Every claim of sexual abuse involving abuse by an employee in the course of his duties will require a careful examination of all of the facts surrounding the abuse and the details of the employee's terms of employment and whether the employee's employment facilitated the abuse.



Every case will be judged on its own facts, but in some circumstances a sexual assault claim may be paid out because the abuser's employer is found to be *vicariously liable* for the damages.

For example, I have sued the Catholic Church for abuse by priests, the provincial government for abuse by a probation officer, the Department of National Defence for abuse by a victim's commanding officer, a school board for abuse by a teacher and so on.



# Sexual Abuse by Catholic Priests

Sexual abuse by Catholic priests is a special situation.

In *John Doe v. Bennett* the Supreme Court of Canada considered whether the Catholic Church was *vicariously liable* for the sexual misconduct of one of its priest's. The case involved sexual abuse against a number of young boys by a parish priest, Bennett, in a Roman Catholic Diocese in Newfoundland. Bennett admitted to using various means; including money, alcohol and intimidation to sexually abuse his victims. All of the abuse occurred while Bennett was employed as a parish priest.

The Supreme Court of Canada overruled an earlier decision from the Nova Scotia Court of Appeal and held that the Church was vicariously liable for the priest's sexual abuse because:

- The Bishop provided Bennett with the opportunity to abuse his power, and Canon 528 of the Code of Canon Law of the Roman Catholic Church directs a parish priest "to have a special care for the catholic education of children and young people";

- Bennett's wrongful acts were strongly related to the "psychological intimacy" inherent in his role as priest;
- The Bishop conferred an enormous degree of power on Bennett relative to his victims.

The Supreme Court of Canada noted that the power imbalance between the priest and the children that he abused was intensified in the diocese involved, due to a number of factors, including its geographic isolation, the fact that the communities in the diocese were devoutly Roman Catholic, and that there were few authority figures other than Bennett, the parish priest.

# The Secret Archives of the Catholic Church

Proving sexual abuse against Catholic Priests is sometimes made more difficult because of the institutional secrecy of the Catholic Church.

The Code of Canon Law is the fundamental legal document of the Roman Catholic Church. It codifies the rules, procedures, duties and obligations of the Catholic Church and its members.

The Code of Canon Law requires each Diocese to maintain a “secret archive” documenting any criminal misconduct by priests. The Canon governing the secret archive requires that records be destroyed when the priest that committed the misconduct dies.

The relevant sections of the Code of Canon Law (1983) are as follows:

## **CANON 1717(1)**

Whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to inquire carefully,

either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this inquiry would appear to be entirely superfluous.

### **CANON 1719**

The acts of the investigation, the decrees of the Ordinary by which the investigation was opened and closed, and all those matters which preceded the investigation, are to be kept in the secret curial archive, unless they are necessary for the penal process.

### **CANON 489**

(1) In the diocesan curia there is also to be a secret archive, or at least in the ordinary archive there is to be a safe or cabinet, which is securely closed and bolted and which cannot be removed. In this archive documents which are to be kept under secrecy are to be most carefully guarded.

(2) Each year **documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died**, or ten years have elapsed since the condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.

### **CANON 490**

(1) Only the Bishop is to have the key of the secret archive.

What these rules mean is that a Catholic priest may be found guilty of sexual abuse by the church, but the church may deny the existence of any record of the abuse, because of the requirement for secrecy.

Furthermore, if the priest abuser has died, Canon law requires that the Bishop destroy the evidence that the abuse even occurred.





# “How Do I Find a Qualified Sexual Abuse Claims Lawyer?”

Choosing a lawyer to represent you is an important but daunting task. The decision should not be made on the basis of advertising alone. The Yellow Pages are filled with ads—all of which say basically the same thing. You should not hire based solely on advertising.

You shouldn't even hire me until you have met me and decided that you trust that I can do a good job for you.

## **“HOW DO I CHOOSE?”**

How do you find out what lawyer is the best for your case? I believe that there are certain questions to ask that will lead you to the best lawyer for your case--no matter what the type of claim. It may involve some time on your part, but that's OK because who you hire to represent you is one of the most important decisions you will make.

Sexual abuse litigation is complicated. The clients are particularly vulnerable. New court decisions are released by courts across the

country every day. I believe by narrowly focusing my efforts on specific types of claims; I am better able to serve my clients. I believe that a lawyer simply cannot develop expertise in all areas of the law. You cannot be all things to all people.

If you are represented by a lawyer who has never handled a sexual abuse case, you may not be in the best of hands. I believe it is so important that you get the correct advice that I have written this book to provide you with information you need to help educate you about your options. I will even give you the names and telephone numbers of other capable lawyers if I do not agree to accept your case.

Why do I give you the names of my competitors? Simple—I believe that we are all on the same side in representing innocent victims. These people are lawyers for whom I have a great deal of respect. It is my desire, above all else, that people with meritorious cases get into the hands of experienced trial lawyers.

# “How Do I Find Out Who Is Good In My Area?”

There are a number of ways you can find the lawyer that is right for you:

## **REFERRAL:**

Get a referral from a lawyer that you do know. He or she will probably know someone who practices in the area you need.

## **YELLOW PAGES:**

The Yellow Pages can be a good source of names. But remember two things:

- Placing an ad in the Yellow pages does not necessarily mean the lawyer has experience with sexual abuse compensation claims. Most of my cases come from referrals from other lawyers.

- Second, make sure that the lawyer you hire is selective enough with his or her cases that your important case does not become just one more file in the pile.

**BOOKS OR REPORTS:**

Ask each lawyer if they have information like this book so you can find out more about their qualifications and experience before you walk in the door.

## Other Things to Look For:

Here are a few factors to look for and question your lawyer about. Not every lawyer will meet all of these criteria, but the significant absence of any the following should be a big question mark.

### **EXPERIENCE:**

Obviously, the longer you have been practicing a particular area of the law, the more you will know. I believe that experience is a big factor in most cases. Ask the lawyer if he or she has achieved any significant verdicts or settlements. The larger the verdicts and settlements achieved, the more likely the defendants will respect your lawyer.

For example, I was co-counsel for the Atlantic Canadian plaintiff's in the largest class action settlement in Canadian history; a two billion dollar class action settlement for survivors of Indian Residential Schools. I am class counsel for more than 100 survivors in the largest sexual abuse class action in Nova Scotia; a 15 million dollar claim against the Diocese of Antigonish.

## **RESPECT IN THE LEGAL COMMUNITY:**

Does the lawyer teach other lawyers in Continuing Legal Education courses?

I have lectured internationally at conferences for the Nova Scotia Barristers Society, the Atlantic Provinces Trial Lawyers Association, the Canadian Institute and the International Bar Association's annual conference in Singapore.

Recently Canadian Lawyer magazine published a cover story about my clients' class action against the Roman Catholic Diocese of Antigonish.

## **MEMBERSHIP IN THE ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION:**

I have been a member of A.P.T.L.A. since its inception. I have the honour of being elected by my fellow trial lawyers as President of the Atlantic Provinces Trial Lawyers Association.

I am also a member of the American Association for Justice and I have been invited to lecture at their annual convention in New York.

## **PUBLICATIONS:**

Has the lawyer written anything that has been published in legal conferences or journals? This is another sign of respect that the legal community has for his or her skills and experience.

I have presented papers to a variety of groups including the Nova Scotia Barristers' Society Continuing Education Lecture Series, the Canadian Bar Association, The Canadian Institute, the Atlantic Provinces Trial Lawyers' Association and the prestigious International Bar Association.





## Understand How the Relationship Between You and Your Lawyer Will Work

How will your lawyer keep you informed about the progress of the case? In my practice, we generally send a copy of every piece of correspondence and pleadings in the case to our client. We take time to explain the “pace” of the case and in what time frames the client can expect activity to take place.

The client is invited to call or email at any time. I try to return every call within 24 hours. Sometimes that’s impossible, particularly if I am traveling or in trial. But if I can’t call you back, one of my associate lawyers or my assistants will help you set up a specific “telephone appointment.” You are also invited to make an appointment to come in at a time that is convenient to you.

Find out who will actually be working on your case. Some firms boast of their large “team”. But the senior lawyer that you hire hands your case off to a junior lawyer or even a non-lawyer “paralegal” to deal with your claim. Make sure that you and your law-

yer have a firm understanding as to who will actually be handling your case.

There are a lot of things that go on with a case that do not require the senior lawyer's attention. On the other hand, if you are hiring a lawyer because of his or her experience, you want to make sure that that person is going to be in charge of your case.

# The Legal Process in Abuse Compensation Cases

If I accept your case it is because I believe your claim has merit and you are entitled to recover compensation for your injuries.

## **TASKS IN A “TYPICAL” ABUSE COMPENSATION CLAIM**

Here is a more or less complete list of the tasks I may be called to do in your case.

Remember that each case is different, and that not all of these tasks will be required in every case.

- Interview you (the client);
- Educate you about abuse compensation claims;
- Gather documentary evidence including counseling, psychological, medical records and hospital documents;
- Find and interview known witnesses;

- Analyze the legal issues, such as vicarious liability or insurance coverage;
- Talk to your counselors or physicians or obtain written reports from them to fully understand your condition;
- Obtain relevant medical literature;
- Recommend whether an attempt should be made to negotiate the claim or whether a law suit should be filed;
- Obtain an expert review of your claim;
- If a law suit is filed, prepare the client, witnesses and experts for discovery examinations;
- Prepare written Interrogatories (questions) for the Defendants and their experts;
- Prepare answers to the Defendants written questions;
- Conduct discovery examinations of the defendant and other witnesses;
- Go to court to argue any pre-trial issues;
- Produce all relevant data for the claim, such as counseling or medical records;
- Go to court to set a trial date;
- Prepare for trial and/or settlement before trial;
- Prepare you and our witnesses for trial;

- Organize the preparation of medical exhibits for trial;
- Organize the preparation of demonstrative exhibits for trial;
- Prepare for mediation and/or arbitration;
- File briefs and motions with the court to eliminate surprises at trial;
- Take the case to trial with a jury or judge;
- Advise you on issues for appeal.

### **NOTIFY DEFENDANT OF THE CLAIM:**

We will notify the defendant that hurt you of your claim. We will provide them with basic information about the nature of your claim. Sometimes (rarely) the facts of the claim, and the extent of the resulting injuries are so clear that we will be able to negotiate a reasonable settlement without having to file a lawsuit.

### **FILE YOUR LAWSUIT WITH THE COURT:**

You have to file a document called a Notice and Statement of Claim with the court that explains all the relevant facts that you rely on to prove your claim. You have to provide facts to prove:

- That you were sexually assaulted;
- That you suffered injuries as a result;
- That the Defendant is responsible for your injuries;
- A description of your injuries;

- That you suffered financial losses as a result; and
- A description of the amount of the financial losses.

### **EXCHANGE OF DOCUMENTS:**

Both sides have to provide each other with any relevant information they have about the claim.

For example, you may have to provide the Defendant with copies of your counseling records and your work-history and income records to prove the extent of your income loss.

The Defendant will have to provide, for example, copies of any police records if they were charged as a result of the assault.

### **INTERROGATORIES:**

Each side is entitled to send written questions, called Interrogatories, to the other side to learn what they know about the claim and how it happened and what injuries or losses resulted from the assault(s).

### **DISCOVERY EXAMINATIONS:**

Each side is allowed to ask questions about what the other side is going to say at the trial. These questions are recorded and typed up into a transcript.

In an individual claim, the plaintiff is discovered (questioned) about their claim. In a class action, it is only the lead plaintiff that goes through the discovery examination.

### **DEFENCE MEDICAL EXAMINATION:**

The other side may request that you attend a medical exam (or exams) with a psychologist of their choosing. The purpose of the defence medical examination is to help the other side prepare to defend your claim. I have written a special report to help my clients prepare for defence medical exams.

### **REQUEST TRIAL DATE:**

Once discoveries are complete and we have collected all the reports and other information that you need for your claim, we file your request for a trial date.

This is a document that is filed with the court advising the court that you are ready to go to trial and including all the expert reports that you will rely on at trial.

Depending on how complicated your claim is, and how many days your trial is expected to take, it usually takes several months or even years before your trial will be scheduled.

### **TRIAL:**

If both sides are not able to negotiate a settlement that both sides agree to then a trial takes place to decide the claim. In Nova

Scotia you can elect (decide) to have your trial in front of a judge alone or in front of a judge and jury.



# “How Long Will All of This Take?”

You can expect the entire claims process to take two to four years to complete.

Some claims are resolved faster, where the injuries and financial losses are insignificant (in which case you may not need a lawyer to help you) or where the injuries and their effects are clear from the start. But that does not happen in the majority of claims.

**I do not represent people who are looking to “make a fast buck”!** I only accept clients whom I believe have a legitimate claim and who are prepared to commit to do what is necessary to help *me* help *you* get the most amount of compensation that you are entitled to receive.

## **WHY SHOULD YOU HIRE ME?**

There are many lawyers who advertise for sexual abuse claims. There are capable experienced lawyers in this field, but it is difficult for a client to separate the good from the bad. You need to ask your lawyer all of the questions I have outlined in this book.

My clients get personal attention because I am very selective in the cases that I take. I turn away hundreds of cases every year in order to devote personal, careful attention to those few that I accept. I do not make money by accepting many small cases hoping to get a small fee out of each.

# What Cases Do I Not Accept?

Due to the high volume of calls and referrals from other lawyers that I receive, the only way to provide the personal service I want to provide to my clients is to turn away those cases that do not meet my strict criteria.

Therefore, I generally **do not accept** the following types of cases:

- As I mentioned above, I do not represent people who are simply *looking for a quick settlement* in order to make a few bucks.
- I do not accept cases where there is no *evidence* of a significant injury caused by the sexual abuse. As strange as it may seem, not all sexual assaults result in serious or lasting harm. If you didn't suffer any harm as a result of the sexual abuse, I cannot accept your claim. These cases are expensive and time consuming. The last thing you want to do is to "win" your case only to have the lawyer fees and expenses be larger than your personal recovery. I would like to represent everyone who needs a good lawyer, but I cannot.

- I will not accept cases where the person that assaulted you is judgment proof (has no assets) and there is no other potential defendant (like an employer) that may be held responsible. Sexual abuse lawsuits are extremely stressful for the survivor. There is simply no point in going through litigation if you are not going to be able to recover fair compensation at the end of the day.
- Finally, I do not accept cases where the **statute of limitations** will run out soon. I like to have at least three to four months to adequately investigate and evaluate your claim.

*I concentrate my efforts on increasing the value of good cases—not filing and chasing frivolous ones.*

When I devote my time and resources to representing only legitimate claimants with good claims, I am able to do my best work. I have found that getting “bogged down” in lots of little cases, is not good for my clients with legitimate claims.

## “What Can I Do From Here?”

You should seek out the advice of an experienced sexual abuse lawyer to represent you.

As stated earlier, it is likely that the *statute of limitations* in your claim has already started to run. The legal process does take time—you should weigh your options for counsel carefully, but you should begin your search immediately.

Details are very important—cases may involve looking back over many years. Write down what happened to you and how you believe it affected your life. This information can help us prepare your claim.



# Our Services

I hope this book has been helpful. If you would like to discuss your claim with us, you can call me at 902-423-2050 or toll-free in Atlantic Canada at 1-877-423-2050.

If your case meets my criteria for acceptance, you can be assured that you will receive my personal attention. I will keep you advised as to the status of the case and give you my advice as to whether your case should be settled or whether we should go to trial. If we go to trial, I will be the lawyer trying your case.

My initial consultation is free. I will fully explain all fees and costs to you before proceeding.

Together, as a team, you and I will decide on the tactics best suited for your case. I look forward to hearing from you.







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# Breaking the Silence on **JOHN MCKIGGAN**



John McKiggan has dedicated the past 18 years to representing survivors of childhood sexual abuse. He has received national recognition for his work in helping sexual abuse survivors get closure, accountability and fair compensation for their injuries.

The sad fact is that childhood sexual abuse is an epidemic. But it is an epidemic whose victims usually suffer silently without support from anyone who can truly understand what has happened to them.

This book was written to encourage abuse survivors to break their silence and to help educate survivors about their options and legal rights.

For more information about sexual abuse claims you can visit John's website at [www.apmlawyers.com](http://www.apmlawyers.com) or take a look at one of his blogs at: [www.halifaxpersonalinjurylawyerblog.com](http://www.halifaxpersonalinjurylawyerblog.com), [www.sexualabuse-claimsblog.com](http://www.sexualabuse-claimsblog.com), [www.halifaxmedicalmalpracticelawyerblog.com](http://www.halifaxmedicalmalpracticelawyerblog.com).



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