Concurrent criminal and civil CASES: Making the most of evidence

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A jury awarded almost $3 million to the family of a dentist who suffered a fatal head injury when he was pushed to the ground in the parking lot of the Atherly Arms Hotel in Orillia. After an investigation into the events surrounding the death of David Dumencu, the police charged the Tavern's Bouncer with manslaughter. Ultimately, a jury felt that there was reasonable doubt as to who pushed Dr. Dumencu and acquitted the defendant of the criminal charges. The extensive police investigation, including the multiple interviews of numerous witnesses, was very helpful to the prosecution of a concurrent civil action against the Bouncer and the Tavern.

Often in personal injury, and particularly in assault cases (including sexual assault), the defendant's conduct can attract both civil and criminal liability. Where there is a conviction, it is admissible as proof that the acts making up the charge were committed and can therefore be very helpful to the civil case.[2] The issue of concurrent proceedings presents certain considerations in pleadings, production, discovery and evidence for trial above and beyond those faced in other lawsuits.

Use of criminal conviction/ admission in civil actions

Section 22.1(1) of the *Evidence Act* states:

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

In *Toronto (City) v. C.U.P.E, Local 79*,[3] a case of sexual abuse where a criminal conviction was entered and then resulted in the firing of the complainant, the Supreme Court was tasked with determining whether a conviction admitted as evidence under s. 22.1 should be rebuttable or taken as conclusive, and in doing so, turned to the doctrine of abuse of process. The Court found that re-litigation of issues can enhance rather than impeach the integrity of the justice system, but only where:

1. the first proceeding was tainted by fraud or dishonesty;
2. fresh new evidence, previously unavailable, conclusively impeaches the original results;
3. the stakes in the criminal proceedings were too minor; and
4. fairness dictates that the original result should not be binding in the new context.

Where a conviction is a result of a guilty plea, the plea is admissible as an admission against interest. Because there has been no adjudication on the merits, the issue is the extent to which the defendant can lead evidence to explain away the guilty plea. In *English v. Richmond*,[4] the appellant had pled guilty to a *Highway Traffic Act* violation. In the subsequent civil trial, defence counsel tendered evidence before the jury with respect to the guilty plea of the plaintiff (appellant on appeal). The Supreme Court majority held that the evidence of the plea of guilty was relevant and admissible.

The majority decision in *English v. Richmond* was subsequently followed by the Ontario Court of Appeal in *Re Charlton*.[5] In that case, the Court held that an admission or confession in a criminal trial "is undoubtedly evidence of very great weight but a plea of guilty like any admission, and not withstanding its solemnity, is capable of an explanation". In *Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank*[6] it was held that a defendant's plea of guilty "constitutes his *prima facie* admission of what he pleaded to. Like any admission, his guilty plea is capable of explanation". In the end, the bearing of the guilty plea will be subject to a contextual analysis of the case.

Conversely, an acquittal presents a different set of issues. The effect of evidence of a criminal charge (albeit resulting in an acquittal) can be more prejudicial than probative and, therefore, likely inadmissible. In *Rizzo v. Hanover Insurance Co.*[7] the plaintiff made an insurance claim for loss resulting from a fire at his restaurant. The plaintiff was accused and acquitted of arson. It was found that Rizzo's acquittal should not have been admitted at the subsequent trial of the civil action against his insurance company. You may be permitted to make reference to police investigations and use the statements or other documents but you should tread lightly with the use to which it is made.

Pleadings considerations

While a conviction can be incredibly helpful to the civil case, you cannot risk the limitation period to wait for the

results in a criminal proceeding – such delay will not be accepted as a defence to expiry of the limitation period. As such, you often have to commence an action without the advantage of a conviction.

When pleading your client's civil case, you want to ensure that you do plead the criminal conviction. Without the pleading you may be limited in asking questions relating to the concurrent proceeding at the discoveries. If you know that the defendant has committed similar crimes, you may wish to plead the similar acts. You must be careful not to plead evidence, however the factual foundation surrounding other incidents can be plead. A comprehensive review of the law of similar fact evidence is beyond the scope of this article, but the pleading rule is that if the similar fact evidence is used only to prove the defendant committed the acts against the plaintiff, it violates the rule against pleading evidence. However if the similar acts are relevant for other purposes, such as to establish allegations of negligence against a party, they can be properly set out in a pleading.

The *Victim's Bill of Rights*[8] can be pleaded if there has been a conviction. It provides for, among other things, a presumption of emotional distress in the case of sexual and/or spousal abuse, and the opportunity for substantial indemnity costs.

There is ongoing debate in the area of punitive damages in a civil action where there is a conviction. Courts formerly took the position that because punitive damages are designed to punish the defendant, they should not be ordered where a defendant has already been punished in the criminal justice system. This has shifted in recent years, so pleading punitive damages may still be advantageous. The *Victim's Bill Of Rights* suggests that the fact of a conviction is a consideration in assessing punitive damages as opposed to a bar.

Productions

Standard police reports completed by the Investigating Officer are easily obtainable from the Police Department involved. If there has been no criminal prosecution, the more detailed information such as witness statements, police notes, photographs, forensic investigation, etc. may be obtainable through a *Freedom of Information* request.

Where there is a concurrent criminal proceeding, the police investigation will have been turned over to the Crown prosecutor. Additional investigations beyond those conducted initially may also be directed by the Crown. The Crown is required to disclose its investigation to the accused to ensure a fair criminal trial. The Crown will have created what is called a Crown brief, which will comprise the police file and other evidence amassed over the course of the criminal investigation. Not unexpectedly, the contents of the Crown brief can be very helpful in your investigation of the civil action. Usually, disclosure of the Crown brief is permitted only to the defendant and defence counsel, who they must undertake to return the brief upon completion of the criminal proceeding or agree not to disseminate it further.

Production of the Crown brief can be compelled by way of a motion to the court. Since 2004, this has been referred to as a "*Wagg* Motion". The motion does not differ significantly from any other motion for production, except that the Crown must be put on notice and certain terms may be required by the Crown.

The 2004 decision in *D.P. v. Wagg*[9] involved a civil sexual assault case wherein the plaintiff, D.P., brought a motion for production of the Crown brief once it was brought to her attention that the defendant had the Crown brief in his possession as part of the usual criminal proceeding disclosure process. The Court held that while a defendant is required to disclose the existence of the Crown brief, the productions of its content may be required only after a screening process has undertaken by the Attorney General and the relevant police service. Most times the Crown will work with counsel in the civil case on wording for an Order which provides for production of the document while protecting information such as the names of informants. Due to a backlog

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of *Wagg* Motions, the screening process usually takes a minimum of three months and counsel are advised to contact the motions clerk in advance of scheduling the motion to get an idea of the timing. The motion is usually worthwhile as it can result in full disclosure of the police records, providing access to statements, names of witnesses, photographs, investigation materials, etc.

With access to the police investigation, you may have access to better demonstrative aids for the trial, which are particularly helpful in the case of a jury trial.

Apart from the documents contained in the Crown brief, the police officer may have additional information or perspective to provide in relation to the investigations conducted. As such, it may be worthwhile to meet with the officer face-to-face about the investigation. Generally there is a procedure for seeking an interview of a police officer, usually done when the officer is off work and for a fee. You will have to communicate with the police department to arrange the interview (either by phone or in person). An in-person interview with the police officer is also helpful since he or she will likely have the investigation file handy at the time of your meeting. Additionally, developing a relationship with the police officer on the file can be very important. The officer may be amenable to providing updates in the event anything new progresses on the criminal file.

Discoveries

The choice of timing for discoveries is significant. It is necessary to weigh different concerns when determining whether to proceed with discovery while awaiting the conclusion of the criminal trial. In some cases, it may make sense to wait until after the criminal trial to get discovery evidence, particularly if there is no urgency in the civil action and there is a potential risk of tainting the criminal proceeding. Often the Crown will oppose a *Wagg* motion until after the criminal case is concluded, so it may make sense to wait for discoveries until the Crown brief has been obtained.

Obtaining the statements given to the police (particularly ones given by parties to the litigation) is crucial prior to going into discovery to enable you to prepare for any inconsistencies. Additionally, with concurrent proceedings the plaintiff may have to testify multiple times, widening the concern for potential inconsistencies. The implied undertaking rule applies to the evidence obtained (i.e. discovery evidence cannot be used in the criminal trial), but the effect of inconsistencies cannot be underestimated both on your clients emotional state and on your ability to try and resolve a civil matter prior to trial.

In the event of an acquittal, the discovery process may be the only opportunity for your client to hear from the person who the client believes wronged him or her. This is an opportunity for closure that should not be discounted; it can be a very important part of the civil process for your client, particularly if the accused/defendant exercised his or her right to not testify at the criminal trial.

Not unexpectedly, the contents of the Crown brief can be very helpful in your investigation of the civil action. Usually, disclosure of the Crown brief is permitted only to the defendant and defence counsel, who they must undertake to return the brief upon completion of the criminal proceeding or agree not to disseminate it further.

If you do choose to proceed with discovery during or prior to the criminal proceedings, however, the defendant has no right to postpone discovery despite his or her right not to testify in the criminal proceeding. In *Prudential Consulting Inc. v. Correia,*[10] in which the defendants sought a stay in the civil proceeding prior to examination for discovery, it was found that the mere fact that criminal proceedings were pending at the same time as the civil proceeding was not a sufficient basis to stay the proceedings. The moving party must show some specific or particular way in which his right to a fair trial in the criminal proceeding will be prejudiced. In another case, *Torchia v. Royal Insurance Co. of Canada,*[11] it was found that the defendant's discovery evidence could be sealed until the criminal charge was fully disposed of. An application to set aside the sealing order could be brought on notice by any party.

Trial considerations

If the civil case has been commenced before the criminal case has concluded, the plaintiff is vulnerable to being cross-examined during the criminal proceeding about a financial motive. This is of particular concern where credibility is an important feature of liability (e.g. credibility is so often at stake during sexual abuse proceedings). Counsel should prepare the client for this line of cross-examination.

At the civil trial, the conviction certificate should be entered as an exhibit. The police statements can be used to cross-examine and potentially impeach witnesses like any other prior inconsistent statement. The weight of these statements cannot be underestimated since they are made to persons of authority, and likely made closer in time to the subject event, thereby presumably being more reliable.

Photographs are also a very useful demonstrative aids, particularly since they are contemporaneous images and unlikely to be seen to have manipulated the scene. The police witnesses themselves or any forensic witness (e.g. pathologist or toxicologist) used by the police are usually very credible and likely viewed as more impartial than a hired expert.

Whether or not a criminal conviction has been entered, an application to the Criminal Injuries Compensation Board (CICB) can be made. The CICB can grant a lump sum award of $25,000 where there has been criminal conduct (conviction not required). However, under the *Compensation for Victims of Crime Act,* the CICB has both subrogation rights and the right to recover back from the applicant, out of the amount received as compensation by way of settlement from or judgment against the offender or any other party sued, the amount that the CIBC had awarded to the applicant.

Conclusion

Concurrent criminal proceedings can be very helpful to your civil case both in terms of the conviction that may result and the significant and useful evidence gathered through the investigation process. Ultimately the success of the civil suit may rest on strategic decisions made by counsel early in the process. Where the client's objectives, the limitations periods and evidentiary issues are carefully considered, there can be a very effective and also efficient outcome to both proceedings.

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NOTES

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[2] *Evidence Act,* RSO 1990, c E.23, s. 22.1.

[3] [2003] 3 S.C.R. 77

[4] [1956] S.C.R. 383

[5] [1968] O.J. No. 1347

[6] [1999] O.J. No. 1195

[7] [1993] O.J. No. 1352

[8] *Victims' Bill of Rights,* 1995, SO 1995, c 6.

[9] [2004] O.J. No. 2053

[10] [2008] O.J. No. 3187

[11] [1999] O.J. No. 5179

[12] [1956] S.C.R. 383

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