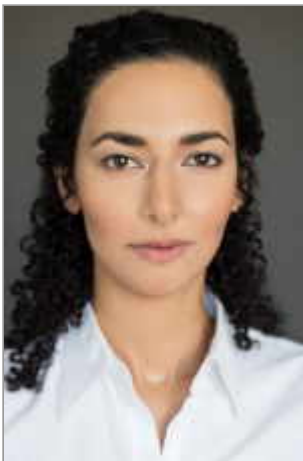


Civil Litigation**How criminal charges can also lead to civil lawsuit**By **Lorne Sabsay and Roselyn Kelada-Sedra**

Lorne Sabsay



Roselyn Kelada-Sedra

(June 29, 2021, 11:46 AM EDT) -- The law operates in different silos. Most lawyers practise in only one or two of those silos, three tops. When a criminal charge is laid, the accused gets a criminal defence lawyer. Criminal defence lawyers may fail to look outside of their silo. Where acquittal seems like a pipe dream, an excellent result might still be available on sentence, with or without a "plea bargain" with the Crown.

Until, that is, when the client who just escaped jail is served with a multimillion-dollar civil claim arising from the same facts the client just pleaded guilty to! Soon, the accused's plea bargain looks like the short end of the stick.

Here's the "Big Aha!" More and more, complainants turn to the civil court, after the criminal proceedings are over — and sometimes they don't even wait that long. So, your criminal law client may subsequently be served with a civil lawsuit. And liability in civil court can be established, no matter how a criminal trial ends. And there are real consequences to that, outside of money lost or won.

How criminal conviction also establishes liability for civil suit

Recently, we defended a client in civil court after his criminal trial was over. His family stuck by him, and he never wavered in stating his innocence. He was a professional, charged with sexual assault, sexual interference and more. His professional licence was suspended.

The defendant got a lawyer who did the best he could. However, that lawyer never called on the accused to tell his own story during the trial. It's possible that unconscious bias was at play; maybe the lawyer thought his client couldn't be understood or convincing through his thick accent. Maybe not. Who knows what led to this decision?

What we know for sure is that the trial ended, and this man's story was never put on the record. Even the worst testimony is better than nothing when it comes to that next, increasingly real, possibility: a civil suit.

For criminal defence lawyers, remember that even if you desperately want to avoid calling your client to testify, a client will not have a choice if they are sued civilly. Civil defendants must submit to questioning during examinations for discovery. There is no "right to silence" in civil litigation.

What happened next to our client made defending the civil action very difficult. Because he never got to tell his story in criminal court, there was no story on the record except the complainant's. The criminal court judge convicted. Once the criminal allegations were, thus, proved beyond a reasonable doubt, liability was established, on a balance of probabilities, in the civil action. That meant that when the civil case got rolling, there was nothing we could do except negotiate the best settlement we could (based on a consideration of the damages issue only) and hope that the client appealed, which he did.

Although ably represented by expert appellate criminal counsel, the client was hamstrung by the fact

that s/he did not testify in his/her own defence at their criminal trial. Though the trial judge cannot make mention of this tactic to a jury, an appellate tribunal can take into account the defendant's failure to testify. The appeal was not successful. And, as a result, liability was established for the purpose of the civil action.

What happened to our client was sad. He did not understand the consequences of not testifying at his criminal trial. It was his lawyer's job to understand that and explain it to him. For whatever reason, that did not happen, and the client did not testify. Because of this decision, he was never able to practise in his profession again. With that conviction, he could not get his licence back. And we didn't have a leg to stand on to argue the allegations in the civil case. All we could do was negotiate a settlement.

What criminal defence lawyers need to know about a potential civil lawsuit

So, criminal defence lawyers, here are some things to take into consideration when advising your client as to how to conduct a criminal trial, knowing that a civil action for the same allegations may follow.

If your client says that they are innocent, then you must consider letting them tell their story on the stand. You may think you can win the trial without it; you may think the client isn't going to do well in cross-examination. You may think that you can destroy the Crown's case in cross and win without putting your client through the ordeal of testifying. This decision can put your client in danger.

First point: you may not do enough damage to get the case dismissed without letting your client speak. Even the most fair judges have a difficult task constructing an alternate narrative if the defence does not give them one — and a person behind it. If the Crown told a coherent story, and the defence made no answer, then what is a judge to think?

Second point: if your client does not testify, then your chances of appealing the conviction and winning on appeal are significantly reduced.

What civil litigators need to know about criminal defence, including 'plea bargains' testimony

Civil litigators, here is what you must know. If your client has been charged with a criminal offence, you would be wise to send that client to a criminal defence lawyer who knows the impact of potential civil litigation. Look out for this any time there has been 1) serious injury, 2) significant financial loss, or 3) any sexual assault allegation. Especially at risk are high net worth clients.

Consequences can unfold long after a criminal charge is brought, long after the proceedings are over, if they are not handled properly. You do not want to be that lawyer who cost their client's livelihood — or worse.

Lorne Sabsay is the owner of Sabsay Lawyers and has been practising criminal and civil litigation for 35 years. He is a member of both Toronto BJJ and Northern Karate Schools. He holds a fifth-degree black belt in karate, Shihan-level teaching title in karate and a blue belt in Brazilian jiu-jitsu. A former journalist, Roselyn Kelada-Sedra is criminal and civil litigation lawyer at Sabsay Lawyers.

Photo credit / Azam Ishaq ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.