



# CRIMINAL CONVICTION CAN HAVE BIG IMPACT ON A CIVIL CASE

Nature of offence considered in deciding liability

By GRANT CAMERON

**WHEN SOMEONE IS** accused of a criminal offence, whether due to a car accident or more heinous wrongdoing, they're often so consumed with planning for their day in court that they don't consider the effect of the charges on civil proceedings.

Many assume that a *Highway Traffic Act* or *Criminal Code* conviction is separate from a future civil law claim. However, according to a number of legal experts, a criminal charge, and even more so a conviction, can greatly affect a civil injury suit.

"Evidence and guilty verdicts in criminal proceedings will inevitably have an impact on a civil case," explains Wendy Moore Mandel, a partner and personal injury lawyer at Thomson, Rogers in Toronto. "The question remains, how much impact? The weight afforded will depend on the nature and circumstances of each case."

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arise when civil courts are asked to deal with matters that have previously proceeded through the criminal court system.

One issue the courts must deal with is whether the facts from a criminal conviction should stand up in civil court. The other is how much weight a judge in a civil trial should give to evidence that was presented during a criminal proceeding.

Moore Mandel says that the Canadian system recognizes that it's a waste of resources to relitigate the facts that have been determined by another court.

"Despite the differences between the criminal and civil forums, courts have increasingly recognized that the final decision of a competent, expert, criminal court should be an important, and in some cases, a decisive factor in subsequent civil proceedings."

While not binding, Moore Mandel says previous criminal convictions are generally admissible in subsequent civil proceedings



and are prima facie proof of the material facts underlying the conviction. However, the prima facie weight afforded to criminal convictions in a civil proceeding is still subject to a right of rebuttal.

“Prima facie means it will go in but then the defendant in the personal injury case still has a right to say, ‘Wait a second, they didn’t consider this, this and this, and so I’m not negligent for causing the personal injury.’”


Practically speaking, though, says Moore Mandel, when the issue in the civil case is the same as the issue that was determined in the criminal proceeding, and there’s no new evidence, the prima facie evidence of conviction is given conclusive weight.

Section 22.1 (1) of the *Evidence Act* codifies the admissibility of criminal convictions in civil matters, she says. The act indicates a person is considered convicted of a crime if an appeal or discharge was dismissed and no further appeal is available or no appeal or discharge was taken and time for an appeal has expired.

However, according to Moore Mandel, there is no legislation which specifies the

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weight that a prior criminal conviction is to be afforded in a civil proceeding.

In Canada, there is no strict adherence to a doctrine instructing how a party to a civil action may use a prior conviction, she says. Rather, the courts consider the circumstances of each case and are flexible regarding the weight they afford to the conviction.

“Once admitted as prima facie proof, the civil proceeding may then commence to test the evidence and create a ruling about the weight the evidence should be afforded.”

When deciding the weight to be afforded the criminal conviction, the civil court will look at circumstances such as whether there were investigative errors or judicial bias, or if there is new evidence not available during the criminal case, says Moore Mandel.

A criminal conviction based on a guilty plea could be afforded less weight than a conviction where there was full consideration of the merits, she notes, because an accused person might have pleaded guilty just to avoid the cost of a criminal trial.

“It really is on a case-by-case basis,” says Moore Mandel. “There aren’t any hard and fast

rules about how much weight it ought to be given.”

Loretta Merritt, a lawyer with Torkin Manes LLP in Toronto, says a conviction in a criminal case is generally admissible as proof in a civil proceeding, with certain exceptions.

Those exceptions include if it’s proven that the first case was tainted by fraud or dishonesty; if there’s fresh, new evidence, previously unavailable, that conclusively impeaches the original results; if the stakes in the criminal proceeding were too minor; or if fairness dictates that the original results should not be binding.

“It’s pretty much irrefutable unless the findings are in one of the categories which indicate

it’s clearly a wrong outcome.”

The *Evidence Act* and case law, says Merritt, have basically shut the door on relitigating the issue in civil proceedings, unless it can be proved the original conviction was flawed.

While lawyers have to be cognizant of the limitation periods in their provinces, Merritt says it’s better if a lawyer representing a plaintiff in a civil case can stall proceedings until the criminal prosecution of a defendant is completed. Limitation periods vary across Canada but generally range from one to two years for most actions.

Having the criminal conviction on the books is helpful in the civil case, she says, because it makes the plaintiff’s case much stronger.





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From a psychological point of view, a defendant in a civil matter will also know that the case against them is practically insurmountable if they’ve been convicted in a criminal court, says Merritt, and they’ll be more likely to enter into settlement negotiations.

If it’s a sexual abuse matter, meanwhile, and the defendant in the civil case is an employer or institution such as a government, school board, church or children’s aid society, a conviction of a perpetrator in criminal court will convince authorities that the claim is valid, which again will result in them entering into a settlement, says Merritt.

An institution can be in a difficult position if there’s no criminal case because authorities will have to choose sides, she says, whereas if a perpetrator has been tried and criminally convicted in court “it just takes one of the major issues off the table.”

Darryl Singer, principal of Singer Barristers Professional Corporation, says a finding of guilt in a criminal proceeding makes it much easier for a lawyer who’s representing a plaintiff in a civil case because the burden of proof has already been met.

“If you’re already convicted it’s unlikely that you’d be able to successfully argue that you weren’t liable and your lawyer’s strategy at that point in the civil case would be to shift to limiting the amount by saying, ‘Yes, he committed an assault and we admit the liability but we don’t think the damages are as high as the plaintiff says.’ ”

Typically, Singer acts for plaintiffs who are bringing a suit against a convicted drunk driver or a person who has been assaulted

and the perpetrator has been convicted.

“A conviction under the *Criminal Code* doesn’t automatically mean that I will win civilly,” he says, “but it certainly helps me get over the liability hurdle. The key is because the test to convict in criminal court is higher than the test to prove liability in the civil court.”

In a criminal matter, he says, the court has to be satisfied beyond a reasonable doubt that the person has committed an offence whereas in civil court it only has to be satisfied that on the balance of probabilities the defendant is responsible.

Singer says it doesn’t bother him if someone he’s suing in civil court is found not guilty at a criminal trial.

“The mere fact there is a charge is helpful to me. Obviously if there’s a conviction then proving liability is much easier in a civil case because I’ve already got a precedent.”

Singer says a suspect can escape conviction on a criminal charge for a number of reasons. The Crown may decide the case is not worth pursuing and drop the charge, or allow the accused to enter into a peace bond if the person is a first offender.

If a defendant is found not guilty in criminal court, it just means that the defendant’s lawyer can argue in civil court that the client is not responsible for an act, says Singer, “however it doesn’t mean that we’re down and out on the liability.”

Moore Mandel says an acquittal in a criminal proceeding should not affect a subsequent civil trial.

An accused who is acquitted in a criminal matter may be found guilty in a civil matter on exactly the same evidence because the burden of proof is lower, she says.

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