CRIMINAL ACTS IN A TORTIOUS CONTEXT

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INTRODUCTION

When acting for plaintiffs, there will be occasions when criminal conduct (or allegations of criminal conduct) become key issues in the civil action. The alleged criminal conduct may be directed at the plaintiff or defendant, with differing consequences. Examples of the interaction of criminal law and civil law include:

- an allegation of arson in a civil fire loss case
- allegations of fraud
- impaired driving in a motor vehicle claim
- sexual assault

This article reviews some recent pronouncements by the Ontario Court of Appeal in *Plester v. Wawanesa*[1], along with some other recent and older though useful authorities that should be considered when criminal conduct intersects with a civil claim.

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1 unreported decision of the Ontario Court of Appeal released May 31, 2006

CHARACTER EVIDENCE

In civil cases, character evidence is generally excluded on grounds of relevance.[2] There are exceptions to this general rule, in defamation cases, where the character of a plaintiff may be put in issue by the defendant, or in a fire loss claim, where the defendant insurer has made an allegation of arson against the homeowner. Presumably, the same principle could apply to other cases where fraud is alleged against the plaintiff. In *Plester v. Wawanesa*, the Court of Appeal reviewed the trial decision of Jenkins, J. who allowed the plaintiffs to call character evidence in order to rebut allegations of arson. Justice Jenkins had ruled:

> Evidence of good character is routinely admitted in criminal cases, and, since the defendant is alleging that the plaintiffs in these actions committed criminal acts, I see no reason why they should not be permitted to call evidence of their general reputation in the community. I, therefore, order that the plaintiffs be permitted to call such evidence at the trial of these actions.

The Ontario Court of Appeal held that the trial judge did not err in admitting character evidence. Once there was an allegation of arson, character evidence was permissible in order to respond to that allegation, with the same kind of evidence that would be available in a criminal court when facing an allegation of arson.

Extrapolating from this recent appellate decision, it would seem reasonable that the calling of character evidence should be permitted not only in a fire loss case where arson has been alleged, but other types of property claims where fraudulent acts have been alleged.

Expanding the concept further, in a personal injury lawsuit, where the defence alleges that the plaintiff is malingering or exaggerating, or otherwise fraudulently claiming certain incapacities, query whether the door has now been opened to include, as part of the plaintiff's case, a roster of witnesses whose sole purpose is to proffer character evidence on behalf of the injured plaintiff. The application may be restricted to cases where there is a specific allegation pleaded in the Statement of Defence; although it is a rare defence pleading that does not at least allege that the claims are exaggerated.

ONTARIO *EVIDENCE ACT*

There will be times when a criminal conviction has already been registered against one party in a civil action.

Where an individual has been convicted of an offence, that conviction may be proved by tendering a certificate which contains "the substance and effect only, omitting the formal part of the charge and of the conviction, that is signed by the officer having the custody of the records of the court of which the offender was convicted, or by the deputy of the officer".[3]

The *Evidence Act* goes on to provide that such a certificate, once tendered, is proof, in the absence of evidence to the contrary, that the crime was actually committed by the person, if:

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2 *Deep v. Wood* (1983), 143 D.L.R. (3d) 246 (Ont.C.A.) at 250

3 The *Ontario Evidence Act*, R.S.O. 1990, c.A.23, as amended, s.22

> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
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> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.[4]

This provision applies whether or not the convicted or discharged person is a party to the civil proceeding itself.[5]

It will be helpful in any file where a conviction has been registered against the opposing party, to obtain as part of the routine work-up in the file the necessary certificate of conviction. In this way, the appropriate evidence will be available at trial to contradict the witness, should he or she deny the fact of a conviction or refuse to answer a question relating to it.

ENHANCED COSTS AWARD

In *Plester*, the trial judge awarded the plaintiffs partial indemnity costs up to the date of service of a Rule 49 offer, and substantial indemnity costs thereafter. In declining to award substantial indemnity costs throughout, the trial judge indicated that, although the actions of Wawanesa in denying the claim were unjustified, it should not be penalized a second time with respect to the costs of the action, having regard to the fact that punitive damages were awarded by the jury.

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4 The *Ontario Evidence Act*, supra, s.22.1

5 The *Ontario Evidence Act*, supra, s.22.1(2)

The Court of Appeal was asked to address whether the Plesters were indeed entitled to substantial indemnity costs *throughout*, since they had been wrongly accused of being arsonists.

The Court of Appeal noted with approval the commentary on the subject by Mark Orkin in the *Law of Costs*[6]. Orkin has observed that, while some courts have declined to award both punitive damages and solicitor and client costs, the better view appears to be that the two issues are legally distinct. The issue of indemnifying a plaintiff for legal costs is sufficiently distinct from punishing a defendant for misconduct that an award of punitive damages should not automatically preclude the awarding of solicitor and client costs. Orkin does further note, however, that the awarding of costs itself is a discretionary matter which, by definition, is not governed by a set of rigid rules.

While acknowledging Orkin's suggestion about the "better view", the Court of Appeal nonetheless declined to interfere with the trial judge's cost order. Rather, it noted that there are cases where the fact of an award of punitive damages will militate against an award of substantial indemnity costs, and that an award of substantial indemnity costs is not automatic, even where there are allegations of serious wrongdoing such as arson. The Court of Appeal was not persuaded that the trial judge erred in principle or that he exercised his discretion on an improper basis.

Given that the Ontario Court of Appeal has stated that substantial indemnity costs are not a given even where an allegation of serious criminal conduct has not been borne out, you are well advised to prepare and serve a formal offer to settle at the earliest

possible date, in order to maximize your cost recovery. Many property loss claims are for liquidated damages, or at least have a major liquidated damage component, which can be quantified when, or soon after, the claim is issued.

ISSUE ESTOPPEL AND *RES JUDICATA*

When a criminal or quasi-criminal act has been committed, it may have ramifications in a civil context by creating a situation where the principles of *res judicata* or issue estoppel will apply. Issue estoppel can apply more broadly so that it might also have application to administrative tribunals dealing with the same issue.

The leading case dealing with the issue of *res judicata* following a criminal conviction and a subsequent civil action is *Demeter v. British Pacific Life Insurance Company*[7]. Demeter commenced an action against his own insurer, claiming the proceeds of his wife's life insurance policies. He had previously been convicted of murdering his wife. He made it clear that he intended to use his action against his insurers to demonstrate that he had been wrongly convicted. His motive for instituting the action played a significant role in the ultimate finding that the action constituted an abuse of process.

The Court of Appeal determined that the use of a civil action to initiate a collateral attack on a criminal conviction, in the absence of fresh evidence or evidence of fraud or collusion, amounted to an abuse of process. In fact, the court said that it was not

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6 Loose-leaf (Aurora: Canada Law Book, 205) at paragraph 219.1.2

7 (1983), 43 O.R. (2nd) 33 (H.C.J.) affirmed (1984) 48 O.R. (2nd) 266 (C.A.)

persuaded that there was “the slightest merit in the appeal”. It would be an affront to one’s sense of justice to let the action go forward.

Consequently, the test for establishing whether issue estoppel applies is whether:

1. The same question has been decided in the earlier proceedings;
2. The earlier decision was a final judicial decision;
3. The parties to the decision, or their privies, are the same in both proceedings.

A conviction has a greater likelihood of triggering issue estoppel than does the discharge from a criminal or quasi-criminal offence. In *Schweneke v. Ontario*[8], the Ontario Court of Appeal reviewed the effect of a discharge following a preliminary inquiry on criminal charges.[9] The plaintiff had been terminated from a position of employment that he held with the Government of Ontario, after it was alleged that he defrauded the government by obtaining reimbursement for expenses from both Ontario and from a German company by whom it was alleged he was secretly and simultaneously employed. He was discharged at the preliminary hearing on all counts because insufficient evidence was presented to take the matter to a jury (which is the necessary test on a preliminary inquiry in order to have the matter proceed on to trial).

In the civil context, the plaintiff argued that his discharge from the criminal courts created an issue estoppel argument in his favour with respect to the wrongdoing that had been alleged against him as the cause for his dismissal. The Ontario Court of Appeal had this to say about the effect of his discharge:

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8 (2000), 47 O.R. (3rd) 97

9 See paragraph 64 of the decision

> The outcome of the preliminary inquiry has no relevance in the exercise of the discretion to refuse to apply the doctrine of issue estoppel. The discharge at the preliminary inquiry says no more than that the Crown had failed to put forward a *prima facie* case of criminal fraud. It does not, in our view, say anything about whether the appellant was in fact working for both the Ontario government and a German entity at the same time. The discharge at the preliminary inquiry does not detract from the findings of fact made by the Umpire. The outcome of the preliminary inquiry should have no effect on the applicability of issue estoppel arising out of the findings made by the Board and the Umpire.

In *Toronto v. Canadian Union of Public Employees*[10], a litigant sought to re-try an issue where there had already been a criminal conviction.

Glenn Oliver worked for the City of Toronto as a Recreation Instructor. He was charged with sexually assaulting a young boy over a two-year period of time. Oliver pleaded not guilty. The complainant testified at trial and was cross-examined. Oliver was convicted and a sentence of 15 months was imposed. His appeal from conviction and sentence to the Ontario Court of Appeal was dismissed.

A few days after Oliver's conviction, the City of Toronto fired him. His union, CUPE, grieved the matter on his behalf, with the matter ultimately proceeding to a grievance arbitration.

The Arbitrator who heard the matter ultimately rejected the findings reached in the criminal trial and made a credibility finding in favour of Oliver, even though the complainant did not testify during the arbitration.

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10 (2001), 55 O.R. (3rd) 541 (C.A.)

The Ontario Court of Appeal directed itself to Section 22.1 of the *Evidence Act*, which was discussed earlier in this article. The Court of Appeal noted that the doctrine of issue estoppel only applied where the parties to the second proceeding were parties, or privies of parties, to the first proceeding. Even if it could be accepted that CUPE was Oliver's privy, the City of Toronto played no role in the criminal proceedings and had no relationship to the Crown. Consequently, the doctrine of issue estoppel itself was found not to apply. The court, nonetheless, looked at the rationale behind *res judicata*, and indicated a willingness to preclude re-litigation in circumstances which do not quite come within the *res judicata* criteria, but on which the policy considerations barring re-litigation still operate as strongly as they would in cases captured by the *res judicata* doctrine.

It was held that the Arbitrator erred in law in permitting CUPE to re-litigate Oliver's culpability. The Arbitrator should have held that Oliver's conviction established that he had sexually assaulted the complainant for the purposes of the arbitration. Based on that finding, any conclusion other than that the City of Toronto had established just cause for Oliver's dismissal would be patently unreasonable.

The Ontario Court of Appeal has just released a decision dealing with the extent to which a defendant in a civil action is entitled to attack the basis of his prior criminal conviction founded on the same circumstances as those alleged in the civil case.[11] In 1995, H.C.A. was convicted of sexually assaulting his young daughter.[12] He unsuccessfully appealed the conviction in 1998, notwithstanding an attempt to file "fresh

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11 *W.H. v. H.C.A. Jr.* unreported decision of Gillese, Blair and LaForme JJ.A. released August 15, 2006

evidence" with the Court of Appeal. A civil action was later commenced in relation to the repeated sexual assaults perpetrated by him on his daughter. During the course of the civil trial, H.C.A. elicited evidence from his two sons, who each testified it was they, not their father, who had assaulted the plaintiff. The trial judge found the plaintiff was not a credible witness and dismissed the action. This was the same evidence which was rejected as fresh evidence in the earlier criminal appeal. The Court of Appeal determined that the circumstances of the case were such that the doctrine of abuse of process ought to have precluded H.C.A. from contesting the facts underlying his conviction. It was an error for the trial judge to have proceeded in a fashion so as to essentially re-litigate the criminal trial, bringing about a different result and undermining the credibility of the judicial process.

As it relates to criminal or quasi-criminal decisions, re-litigation of the facts underlying a conviction can be avoided if the civil court is satisfied that the same question has already been decided in the earlier proceedings, and that the same parties are before the court. For this reason, it likely is helpful to have the "complainant" participate in the criminal or quasi-criminal trial proceeding, giving much greater force to the argument that the same parties were involved.

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12 No defence evidence was called at the criminal trial from Mr. H.C.A. Jr. or any other witness.

***VICTIMS' BILL OF RIGHTS*, 1995**

When representing a plaintiff who is the victim of a criminal act, do not overlook the *Victims' Bill of Rights*, 1995[13]. This *Act* applies to a victim of crime (i.e. "a person who, as a result of the commission of a crime by another, suffers…physical harm…or economic harm…").

In a civil proceeding, a person convicted of a prescribed crime is liable in damages to every victim of the crime for emotional distress and bodily harm resulting from the distress arising from the commission of the crime. Moreover, victims of sexual assault or attempted sexual assault, or the victim of a common assault if the victim is a spouse, are all victims who shall be presumed to have suffered emotional distress.[14]

Section 4 of the *Act* has an interesting provision that many people may not be aware of with respect to costs when advancing a civil claim on behalf of a victim of crime. The *Act* provides:

> A judge who makes an order for costs in favour of a victim shall make the order on a solicitor and client basis, unless the judge considers that to do so would not be in the interests of justice.

Section 4 also provides for guidelines that favour the victim with respect to security for costs orders and prejudgment interest.

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13 S.O. 1995, Chapter 6

14 *Victims' Bill* of Rights*, supra, s.3*

CONCLUSION

Allegations of wrongdoing in property claims or insurance claims can have a significant impact when made before a jury. It may also weaken the resolve of a risk-adverse plaintiff who is unfairly tarred with the brush of suspicion. At least insofar as one's ability to call character evidence is concerned, the playing field has been levelled somewhat by allowing a plaintiff, in a civil forum, to defend himself or herself by calling witnesses to testify as to good character.

There are, of course, opportunities to refer to the criminal acts committed by a defendant. This article has also suggested some of the ways in which a defendant's criminal conviction can be introduced and used to good effect in the subsequent civil matter. As with all aspects of your practice, being creative and continuing to think outside the box when dealing with issues involving criminal conduct, whether allegations or convictions, will increase the opportunities for a better outcome.