Protecting Your Client's Right to Sue Police and Public Authorities: Avoiding the Pitfalls

by Asha James

Criminal lawyers are on the front lines of representing clients who are the victims of misconduct by police, correctional or other public authorities. The criminal bar is often the first resource for clients who are considering what steps to take to vindicate their legal rights outside of the criminal justice system. Many of these clients are economically disadvantaged and marginalized, and do not have ready access to civil counsel. The early advice (or non-advice) given by criminal lawyers to clients with possible civil rights of redress can often be critical to success or failure of any claim.

Our firm practises civil, administrative and constitutional litigation, with a focus on state accountability. Many of our clients are referred to us by criminal lawyers, often after the criminal proceedings have concluded. In managing referrals from criminal lawyers, we have noticed that some of our clients come to us having received inaccurate information about their legal rights, or that there has been miscommunication between criminal counsel and client, sometimes on matters that are critical to the case. This is not to be critical of the criminal bar. Many of you will have had similar experiences when representing criminal clients referred to you by commercial or corporate lawyers.

The purpose of this article is to flag some of the most significant pitfalls for criminal lawyers who are consulted (even briefly) by their clients on civil matters. These are matters that are not just of academic interest. To the extent that you provide advice that turns out to be wrong, and that advice prejudices an otherwise meritorious claim, you are potentially liable in negligence. This is true even (as is most often the case) the advice is given gratuitously and outside of the scope of your crim-

inal retainer. Your client may just see you as her lawyer, and may not understand that you view civil litigation as outside of your retainer. Any misunderstanding about this may well, if push comes to shove, be resolved in favour of the client. While the scope of your retainer is relevant to an assessment of solicitors' negligence, it can never be relied on as a complete defence.[1]

1. Limitation Periods

Limitation periods are the most significant pitfall for criminal lawyers. Once a limitation period expires, no claim may be initiated. There are no excuses and no extensions.

... there is a standard two-year limitation period for a vast majority of claims, regardless of who the defendant is and what the claim is about.

(a) How long does the client have to start a claim?

The good news is that the law became much more straightforward 12 years ago with the coming into force of the *Limitations Act, 2002*.[2] Prior to the introduction of the Act, there was a myriad of different limitation periods, depending on the cause of action and who the defendant was. Most significantly, police officers and correctional officials used to enjoy the benefit of a six-month limitation period by virtue of the former *Public Authorities Protection Act*.

Under the current *Limitations Act*, there is a standard two-year limitation period for a vast majority of claims,[3] regardless of who the defendant is and what the claim is about.[4] The most significant departure from the two-year period, for our purposes, is in respect of libel claims where the libel is in a newspaper/broadcast. An action for libel in a newspaper/broadcast must be filed within three months of the libel coming to the attention of the plaintiff.[5] In addition, notice of the claim must be served on the defendant within six weeks of the libel coming to the attention of the plaintiff.[6] These rules apply even where the defendant is a non-media defendant.[7] This means that if your client wants to sue the police for defaming him in a newspaper or on TV, he must move fast.

That was the good news. Now for the bad news.

(b) When does the clock start ticking

There can be questions about when the two-year clock starts ticking. In other words: when does the cause of action arise?

This will depend on what the cause of action is, i.e. what is the misconduct that your client is suing over. If your client is suing the police for assault or false imprisonment in tort or under the *Charter*, the two-year clock starts ticking on the date of the assault/arrest. The clock *does not* start ticking when your client is acquitted of assault police at his criminal trial, or when his lawyer receives disclosure that is helpful to his case. As a result, your client may well be in the position of having to commence a lawsuit prior to the completion of his criminal proceedings.

If your client is suing the police for malicious prosecution or negligent investigation, the two-year clock starts ticking after the criminal proceedings are terminated against your client. Your client as a matter of law cannot commence a malicious prosecution action until the proceedings are resolved in her favour. This means that your client may be required to commence two different actions, at two different times (if there is also a viable assault/false imprisonment action).

(c) Claims against the Crown, its servants/agents

Here is another wrinkle. Where the Crown is sued for the conduct of its servants and agents, the plaintiff is required under the *Proceedings Against the Crown Act*[8] to serve a notice of claim on the Ministry of the Attorney General 60 days prior to the commencement of a claim. *PACA* applies to claims against Crown prosecutors, OPP officers, and provincial correctional officers or institutions.

The notice of claim must be served prior to the expiration of the two-year limitation period. Where the expiration of the limitation period falls within the 60-day notice period, the limitation period is extended by 67 days from the date of the notice of claim. For example, if the limitation period for a claim against the Crown expires on April 30, 2016, and your client files a notice of claim on April 20, 2016, your client must wait until June 20, 2016 to file the claim, and must issue the claim in court by June 27, 2016.

(d) Amending a claim after the expiration of a limitation period

Many of you will remember hearing in your first year civil procedure class about the liberal approach to amending a civil claim after it is filed, and take comfort that as long as the client files something before the limitation period has expired, things are fine.

Wrong. The *Rules of Civil Procedure* do take a liberal approach to amending a pleading. But there are limits. A plaintiff cannot add new defendants to a claim after the expiration of a limitation period. Even more importantly, a plaintiff cannot add a new cause of action after the expiration of a limitation period. This can be significant, because the kinds of damages your client may be able to claim depend on the cause of action.

Consider the following example. Your client is assaulted and seriously injured by the police during the course of his arrest on May 1, 2014. He is

charged with assault police. As a result of your brilliant cross-examination, your client is acquitted at trial on May 1, 2015. Your client files a malicious prosecution case against the police officer on May 1, 2016. Your client will be barred from amending his pleading to add a claim for the assault after May 1, 2016. This may be very significant, because the damages arising from physical injuries caused by the assault (which are now unavailable) could well have been far more significant than the damages arising from the malicious prosecution.

... plaintiff is presumed to have knowledge of the matters that give rise to a cause of action on the date of the wrongdoing ...

(e) Discoverability

You may also recall from civil procedure class that a limitation period only starts to run when "discovered" by the client. The Court of Appeal for Ontario recently described the principle of discoverability as follows:

> The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term 'cause of action' – the fact or facts which give a person a right to judicial redress or relief against another". . .[9]

Under s. 5(2) of the *Limitations Act* a plaintiff is presumed to have knowledge of the matters that give rise to a cause of action on the date of the wrongdoing that gives rise to the claim, unless the contrary is proven.

Discoverability will seldom intervene to rescue a late claim arising from the criminal context. In most cases, the wrongdoing (e.g. the police officer's use of excessive force) will be readily discoverable on the date of events. Your client is not entitled to "sit on her rights" to await a favourable ruling from a judge at her criminal trial, or an opinion from an expert or lawyer before filing a claim. For the purposes of giving summary advice, one should assume that two years really means two years.

2. The Impact of Resolutions on Civil Proceedings

Criminal counsel should be aware that resolving a client's criminal charges may have significant impact on the viability of any potential civil action. This is the case even where the resolution does not involve a guilty plea.

(a) Peace bonds or diversion

Where your client enters a peace bond or agrees to diversion (or a donation), she will likely be barred from bringing an action for malicious prosecution or negligent investigation. We have had a number of clients over the years who were surprised to hear this.

The tort of malicious prosecution has four elements, namely, that the proceedings must have been: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause to commence or continue the prosecution; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.[10]

It is not enough that your client avoids a guilty finding (and/or conviction) in order to meet the second element of the test. Where your client enters a peace bond or agrees to diversion, the proceedings will usually be deemed to have not been "terminated in favour of the plaintiff." An action will be barred even where a peace bond is imposed over the objection of the plaintiff.[11]

We used the words "likely" and "usually" deliberately. A civil court is entitled to enquire into the circumstances surrounding a peace bond resolution with a view to determining whether the prosecution and the police abused their position to extract a peace bond resolution in order to avoid civil liability.[12] For all intents and purposes, however, criminal counsel should advise a client considering a peace bond resolution or diversion, that no civil action

Where your client enters a peace bond or agrees to diversion (or a donation), she will likely be barred from bringing an action for malicious prosecution or negligent investigation ...

for malicious prosecution or negligent investigation will be possible. At a minimum, counsel should at least alert the client to the issue and direct them to get advice. This should be done in writing.

(b) Factual admissions or findings

Factual admissions or contested findings of fact made in criminal proceedings may significantly compromise a client's ability to seek civil redress. The doctrine of abuse of process will prevent your client from contesting factual determinations made in the criminal proceedings in subsequent civil proceedings arising from the same event. This is the case even where there is no mutuality of parties, i.e. the civil defendants are not parties to the criminal proceedings.[13] The doctrine is rooted in the court's inherent jurisdiction to preserve the integrity of the administration of justice, and principles of judicial economy, finality and consistency.

This means that clients should be made aware that factual admissions made as part of a guilty plea may have consequences in civil proceedings. This should be added to counsel's standard advice on the collateral consequences of a finding of guilt and/or a criminal conviction.

The bottom line

The purpose of this article is not to invite criminal counsel to dabble in civil litigation. However, the work of criminal counsel cannot be completely divorced from potential civil proceedings. Counsel should take care to alert their clients, in writing, that there may be broader legal implications arising from the criminal process and invite them to seek advice if they are at all concerned about civil litigation. Not only does this better serve your clients, it will protect you from a client unhappy that your advice (or lack thereof) had unforeseen consequences for her.

Asha James is the Managing Associate at Falconers LLP, a boutique litigation firm that focuses on state accountability.

NOTES:

[1] *Fellowes, McNeil v. Kansa General International Insurance Co.*, 2000 CarswellOnt 3093, 22 C.C.L.I. (3d) 1 (Ont. C.A.), additional reasons 2000 CarswellOnt 4117 (Ont. C.A.).

[2] S.O. 2002, c. 24, Sched. B.

[3] Note: there are special rules for claims for sexual assault (that are beyond the scope of this article).

[4] For a handy chart summarizing applicable limitation periods see: http://www.practicepro.ca/practice/pdf/MiniLimitationsChart.pdf.

[5] *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 6.

[6] *Ibid.*, s. 5.

[7] *Watson v. Southam Inc.*, 2000 CarswellOnt 2336, 189 D.L.R. (4th) 695 (Ont. C.A.).

[8] R.S.O. 1990, c. P.27.

[9] *Lawless v. Anderson*, 2011 CarswellOnt 626, 81 C.C.L.T. (3d) 220, 2011 ONCA 102 (Ont. C.A.) at para. 22.

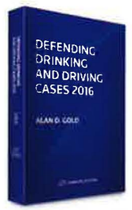
[10] *Biladeau v. Ontario (Attorney General)*, 2014 CarswellOnt 16600, 2014 ONCA 848 (Ont. C.A.).

[11] *Sheridan v. Ontario*, 2015 CarswellOnt 6475, 2015 ONCA 303 (Ont. C.A.).

[12] *Mammoliti v. Niagara Regional Police Service*, 2007 ONCA 79, (sub nom. *Ferri v. Root*) 2007 CarswellOnt 563, 45 C.C.L.T. (3d) 159, leave to appeal refused 2007 CarswellOnt 5619 (S.C.C.).

[13] *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77 (S.C.C.).

New Edition
Defending Drinking and Driving Cases 2016
Alan D. Gold



Where do you turn for guidance on how to defend drinking and driving cases? This publication explains how to prepare, develop and strategically present an effective defence, beginning with the client's initial telephone call from the police station. The constituent elements of the offences, and the issues to which they give rise, are systematically examined within the governing statutory, constitutional and jurisprudential framework.

Topics addressed include the validity of the approved screening device test, proof of impairment, admissibility of blood and breathalyzer results, *Charter* defences, the concept of "care and control," and sentencing. The technical aspects of demands, breathalyzer reports, certificates and alcohol influence reports are also covered.

New in this edition
This 2016 edition has been updated to reflect all the legislative developments since the last edition and incorporates all significant developments in the case law, including:

- *R. v. Albert* (Alta. P.C.) - sections 8 and 9 of the *Charter* were violated by the arrest of a suspected impaired driver where police officer failed to turn mind to whether offence committed within proceeding three hours.
- *R. v. Cartier* (O.C.J.) - no authority to require an accused to take part in Standardized Field Sobriety Test once they have already been arrested.
- *R. v. Schwab* (Alta. P.C.) - theoretical 'safety concerns' cannot justify any delay in either making the demand or administering the ASD test in order for a search of the accused to take place first.
- *R. v. Waisanen* (S.C.J.) - an ASD demand and the Intoxilyzer demand are separate and distinct and a charge of failing or refusing one must fail if the other demand is the demand proved.
- *R. v. An* (Sask. P.C.) - where evidence shows that accused made numerous unsuccessful attempts to blow into the ASD and claims he was trying to blow into the ASD, Crown needs to prove that ASD and mouthpiece were in good working order.

Order # 987120-65203
$96
Softcover June 2016
approx. 460 pages
978-0-7798-7120-5
Annual volumes supplied on standing order subscription
Multiple copy discounts available

00237ZJ-A70026

Shipping and handling are extra. Price(s) subject to change without notice and subject to applicable taxes.

Available risk-free for 30 days
Order online: www.carswell.com
Call Toll-Free: 1-800-387-5164
In Toronto: 416-609-3800

the answer company
THOMSON REUTERS