CHAPTER 43

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Civil Consequences of Criminal Cases

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§ 43.1 INTRODUCTION

The disposition of a criminal case may affect the criminal defendant in later civil litigation. This chapter discusses (1) collateral estoppel, which may prevent the defendant from contesting issues in a later civil case; (2) the effect of the criminal case on the common types of civil claims brought by former criminal defendants; (3) releases that may resolve both the civil and criminal cases including accord and satisfaction; (4) investigation of a case that may later result in a civil suit; and (5) civil statutes of limitation.

§ 43.1A. LEGAL FRAMEWORK

Any defense strategy should consider the potential collateral consequences of the criminal case. The disposition of the criminal case may affect a later civil suit regarding the same incident when the criminal defendant (1) is sued civilly for money damages by the victim or (2) sues the arresting police officers for constitutional violations and the related state torts, typically: assault and battery, false arrest, false imprisonment, and malicious prosecution. Evidentiary hearings that may not affect the ultimate disposition of the criminal case, such as a probable-cause hearing or a suppression hearing, may also have effects on a later civil suit. A criminal defense client should be advised of potential collateral consequences of the criminal action so he or she may make knowing decisions regarding the disposition of the criminal case.

A not guilty finding at trial puts the defendant in the best position for later civil cases. Dismissals after an admission to sufficient facts or nolle prosequi may also be relatively favorable; while a guilty plea may make potential civil claims more difficult. Obviously, a guilty finding after a trial is the least favorable disposition.

§ 43.1B. COLLATERAL ESTOPPEL OR ISSUE PRECLUSION

Collateral estoppel, now often referred to as issue preclusion, prevents a party from relitigating the same issue in a second lawsuit. Issue preclusion applies:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[1]

To apply issue preclusion five factors must exist:

1. The same issue is involved in both actions;
2. The issue was "actually litigated" in the first action;
3. The issue was decided in the first action;
4. It was necessary to decide the issue in the first action; and
5. The judgment in the first action is valid and final on the merits.

Collateral estoppel in Massachusetts no longer requires mutuality of parties. The Supreme Judicial Court has held that

> a party to a civil action against a former criminal defendant may invoke the doctrine of collateral estoppel to preclude the criminal defendant from relitigating an issue decided in the criminal prosecution.[2]

Previously, collateral estoppel did not apply to the guilty findings in criminal cases because of the mutuality rule. Massachusetts courts now apply collateral estoppel in accordance with the *Restatement (Second) on Judgments.* In determining the collateral estoppel effects of a Massachusetts state court criminal conviction, a federal court will generally apply Massachusetts law.[3]

Specific limitations include the following:

1. Collateral estoppel cannot be used against a party who had no opportunity to appeal an adverse ruling because the judgment is not final.[4] A ruling in a case that is

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[1] RESTATEMENT (SECOND) OF JUDGMENTS § 27. Res judicata does not apply in this situation since that doctrine prevents relitigation of the same claim by the same parties. The double-jeopardy doctrine is the analogous principle in criminal law.

[2] Aetna Casualty & Surety Co. v. Niziolek, 395 Mass. 737 (1985*), relied on in* Baron v. Estate of Conway, 27 Mass. L. Rptr 259 (2010). However, while the former criminal defendant may be precluded from relitigating an unfavorable criminal case ruling, the same is not true of an opposing party in the civil case who had no opportunity to participate in the first litigation. Thus, a civil plaintiff may relitigate the legality of a seizure ruled unlawful in the defendant's former criminal case, unless the Commonwealth acted as the plaintiff's "virtual representative." Boston Hous. Auth. v. Guirola, 410 Mass. 820, 827 n. 9 (1991) (dictum).

[3] Kyricopoulos v. Town of Orleans, 967 F.2d 14, 16 (1st Cir. 1992); Cinelli v. City of Revere, 820 F.2d 474, 479 (1st Cir. 1987); Migra v. Warren City School Dist., 465 U.S. 75 (1984).

[4] *See* Jarosz v. Palmer, 436 Mass. 526 (2002) (issue preclusion requires that a decision be "subject to review" and where the likelihood of obtaining interlocutory review of a motion to disqualify was "so remote," it was not appropriate for issue preclusion); *but see*, Commonwealth v. Williams, 431 Mass. 71(2000) (Commonwealth was bound by a ruling on a motion to suppress where it could have pursued discretionary interlocutory review of the suppression order before a single justice of the SJC, as the discretion to review the suppression order is usually exercised when the Commonwealth's case depends on the suppressed evidence). *See also* City of Salem v. Massachusetts Comm'n Against Discrimination, 44 Mass. App. Ct. 627 (1998) (citing RESTATEMENT (SECOND) OF JUDGMENT § 28); Sena v. Commonwealth, 417 Mass. 250, 260 (1994) (where criminal court's denial of plaintiff's motion

reversed on appeal will have no collateral estoppel effect, even if the reversal was on other grounds, because the judgment was not final.[5]

2. Federal courts will not apply issue preclusion to 42 U.S.C. § 1983 cases if it would interfere with the plaintiff's rights under federal law.

3. Issue preclusion will not be applied if it would be unfair to the criminal defendant. The following factors can be considered in determining whether it would be unfair to apply issue preclusion:

a. Could the party in whose favor estoppel is to be applied have joined in the original action? [6]

b. Did the party against whom estoppel is to be applied have an adequate incentive to defend the original action? [7]

c. Are there other inconsistent judgments?

d. Are there procedural differences between the two actions that could cause a difference? [8]

4. The plaintiff is barred from bringing a claim only if it was actually litigated in the earlier case.[9] For example, although a defendant charged with assaulting a police officer may defend on grounds that the officer used excessive force,[10] if he does not

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to dismiss for lack of probable cause to arrest could not, after plaintiff's acquittal, be reviewed, collateral estoppel does not bar relitigation of issue).

[5] Dodrill v. Ludt, 764 F.2d 442 (6th Cir. 1985).

[6] The rape conviction of the chief jailer in Macon County could not be given collateral estoppel effect in a § 1983 action against the sheriff and the county by an inmate who was raped because the sheriff and the county could not be parties to the criminal action. Parker v. Williams, 682 F.2d 1471 (11th Cir. 1989).

[7] *See* United States v. Levasseur, 699 F. Supp. 965, 980–82 (1988) (in criminal proceeding, rejecting preclusive effect of prior suppression hearing; "courts should hesitate to estop a defendant who lost a suppression hearing in a previous matter involving charges relatively minor compared to the present charges"), *relied on in* Commonwealth v. DeJesus, 8 Mass. L. Rep. 355 (1998). Nos. 104104 et seq. (April 14, 1998) (because criminal defendants facing more serious charges compared to charges faced in court where suppression had been denied, fairness requires allowing them to bring motion again; "before doctrine of collateral estoppel can be used offensively, fact finder should be afforded wide discretion in determining whether to do so would be fair to the defendant") (citing Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 9 (1995)).

[8] *See generally* In the Matter of Cohen, 435 Mass. 7 (2001) (restating test for fairness in use of offensive collateral estoppel in the context of bar disciplinary proceedings); Haran v. Board of Registration, 398 Mass. 571, 577–578 (1986); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[9] *See, e.g.*, Kyricopoulos v. Town of Orleans, 967 F.2d 14, 16 (1st Cir. 1992) (collateral estoppel applies to a plaintiff previously convicted of larceny because he either actually litigated issue of whether officer had probable cause to search and arrest him, or had "full and fair opportunity" to do so in the criminal trial) (citing Brunson v. Wall, 405 Mass. 446, 451 (1989)). *Compare* Commonwealth v. DeCillis, 41 Mass. App. Ct. 312 (1996) (defendant's acquittal on conspiracy charges did not present collateral estoppel bar to prosecution of defendant, even on joint venture theory, for substantive offenses; conspiracy and joint venture offenses require different mens rea and conduct).

[10] Commonwealth v. Moreira, 388 Mass. 596 (1983), *relied on in* Com v. Graham, 62 Mass App Ct 642 (2004).

raise the issue, preclusion would not apply to a later civil suit.[11] (However, the fact of his conviction will weigh against bringing such an action.[12]) When it cannot be determined what issues were actually litigated the defendant will not be subject to issue preclusion. If there is uncertainty about what issues were litigated the party asserting collateral estoppel has the burden of proving what facts were determined by introducing the records from the criminal case.[13]

§ 43.2 THE EFFECT OF DISPOSITION WITHOUT TRIAL

Issue preclusion does not apply when the criminal case is resolved without a trial on the merits. This is because collateral estoppel applies only "to prevent relitigation of issues actually litigated in a prior lawsuit."[14] However, when a case is resolved by a plea, counsel must be concerned about an admission made by the defendant, which could be admissible in a civil suit.

§ 43.2A. GUILTY PLEAS

Issue preclusion does not apply to a conviction based on a guilty plea. However, the guilty plea, as an admission that the facts necessary to support the complaint or indictment are true, may under certain circumstances, be introduced in the later civil trial.[15] Thus, for practical purposes, when entering a guilty plea, a defendant should not plan to bring a civil suit regarding issues that were necessary to the

[11] Buranen v. Hanna, 623 F. Supp. 445 (D. Minn. 1985).

[12] Any time a defendant is found guilty there is a risk that the conviction may be used to impeach him should he testify in a later civil or criminal case. G.L. c. 233, § 21.

[13] US v. Carrozza, 59 F.Supp.2d 172 (D. Mass 1999); Bell v. Stephens, 403 Mass. 465 (1988) (summary judgment based on criminal conviction reversed because defendant did not meet burden of establishing what was actually litigated and necessarily determined). *But see* Jarosz v. Palmer, 436 Mass. 526, 530, n.2 (2002): ([In Bell v. Stephens] "we merely noted that the trial judge treated a rule 12 (c) motion as a motion for summary judgment when dismissing the case on the basis of issue preclusion, but we never stated that the judge had to do so… The judge did examine the record here, and determined that issue preclusion was appropriate."); Pinshaw v. Metropolitan Dist. Comm'n, 402 Mass. 687, 699 (1988).

[14] Aetna Casualty & Surety Co. v. Niziolek, 395 Mass. 737 (1985). In order to encourage resolution of cases without trial, a party is not subjected to collateral estoppel when the issues are not litigated, *relied on in* Johnson v Mahoney, 424 F.3d 83 (1st, 2005), *cited in* Com v. Bartos, 57 Mass. App. Ct. 751 (2003). *See also* Krochta v. Commonwealth, 429 Mass. 711 (1999) (collateral estoppel does not bar criminal prosecution of a defendant for offenses following a finding in his favor at a probation revocation hearing triggered by the alleged commission of the same offenses), *cited in* Labovitz v. Feinberg, 47 Mass. App. Ct. 306 (1999).

[15] Flood v. Southland Corp., 416 Mass. 62 (1993) (guilty plea was admissible under Proposed Mass. R. Evid. 803(22), which covers admissions of final judgments); Aetna Casualty & Surety Co. v. Niziolek, *supra* (guilty plea admissible as admission of party opponent) *cited in* Commonwealth v. Bartos, 57 Mass. App. Ct. 751 (2003). *See also* United States v. One Parcel of Real Property, 900 F.2d 470, 473 (1st Cir. 1990). *But see* Manzoli v. Commissioner, 904 F.2d 101 (1st Cir. 1990) (taxpayer who pled guilty to attempted tax evasion was collaterally estopped from denying fraud for purposes of civil fraud penalty) *cited in* Labovitz v. Feinberg, 47 Mass. App. Ct. 306 (1999).

determination of the criminal case. However, issues that are not necessary to the guilty plea, including a fourth amendment claim for an unlawful search, may still be raised.[16]

§ 43.2B. *ALFORD* PLEAS, NOLLE PROSEQUI, AND NOLO CONTENDERE

A defendant who enters an *Alford* plea has not made an admission of guilt.[17] The defendant has only acknowledged the Commonwealth's ability to prove the offense beyond a reasonable doubt but not his or her actual participation in the crime.[18] This is a more favorable course of action for a defendant concerned about potential collateral consequences because no issues are actually litigated. Therefore, issue preclusion will not apply.[19]

Similarly, a case that is resolved by a nolle prosequi or a plea of nolo contendere is not actually litigated and should not subject the defendant to either issue preclusion or use as an admission in the subsequent civil case.[20]

§ 43.2C. ADMISSION TO SUFFICIENT FACTS

An admission to sufficient facts was originally used in district court to waive trial while maintaining de novo appeal rights from the first tier.[21] When the de novo appeal was abolished, the legislation provided that a district court admission is the equivalent of a guilty plea.[22] Therefore (1) a defendant in district court may tender an admission contingent on the judge's acceptance of the defense dispositional proposal, and (2) all the warning and colloquy safeguards of a guilty plea must be provided even if the defendant is tendering an admission.[23]

With regard to subsequent civil cases, an admission to sufficient facts is also the equivalent of a guilty plea.[24]

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[16] Haring v. Prosise, 462 U.S. 306 (1983).

[17] Commonwealth v. Desrosier, 56 Mass. App. Ct. 348 (2002); U.S. v. Pulido, 566 F.3d 52 (Mass. 2009) *citing* North Carolina v. Alford, 400 U.S. 25 (1970).

[18] Commonwealth v. Giberti, 51 Mass. App. Ct. 907 (2001; Commonwealth v. Nikas, 431 Mass. 453, 455 (2000) *citing* North Carolina v. Alford, 400 U.S. 25 (1970).

[19] *See* Cortese v. Black, 838 F.Supp 485 (D. Col. 1993)(Under Colorado law Alford plea did nto bar 1983 4th Amendment claims).

[20] *See* Mass. R. Crim. P. 12 (prohibiting use of a plea of nolo contendere in civil proceedings); Wynne v. Rosen, 391 Mass 797 (1984) (nolle prosse or dismissal at Commonwealth's request is judgment in favor of defendant, provided reasons are consistent with innocence and not technical defect), *cited in* Britton v. Maloney, 196 F.3d 24 (Mass 1999). *But see* Olsen v. Correiro, 189 F.3d 52 (1st Cir. 1999) (evidence of manslaughter conviction and sentence that resulted from *nolo* plea should have been admitted into evidence and manslaughter conviction and sentence for time served barred claim for incarceration based damages under 42 U.S.C. § 1983), *cited in* Limone v. US, 497 F.Supp. 2d 143 (D. Mass 2007).

[21] See supra ch. 37, Plea Bargaining and Guilty Pleas.

[22] *Id. citing* G.L. c. 278 § 18.

[23] *Id. citing* Commonwealth v. Duquette, 286 Mass. 834 (1982). For more on district court admissions, *see* Wendy J. Kaplan, Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Court, 92 Mass. L. Rev. 73 (2009).

[24] Wholan v. Eastern Lumber Co. Inc., 61 Mass. App. Ct. 1116 (2004) *citing* Davis v. Allard, 37 Mass. App. Ct. 508, 511 (1994).

Therefore, because the issues in the prosecution were not actually litigated there is no preclusive effect in subsequent civil proceedings.[25]

§ 43.3 THE EFFECT OF EVIDENTIARY HEARINGS OR TRIAL

A criminal defendant's rights may be determined by evidentiary hearings, including, but not limited to, the criminal trial itself. A defendant will not be able to relitigate issues that are actually litigated to a final judgment in the criminal case.

§ 43.3A. PROBABLE-CAUSE HEARING

In Massachusetts, a defendant accused of an offense that falls within superior court jurisdiction is technically entitled to a full evidentiary hearing in district court on the issue of probable cause to bind the defendant over to the grand jury.[26] If a probable cause hearing is held, a judicial finding of probable cause may prevent the defendant from arguing malicious prosecution based on a lack of probable cause in a subsequent civil case.[27] Lack of probable cause to bring a criminal prosecution is an element of the state tort of malicious prosecution. It is likely that a judicial finding of probable cause after a full probable-cause hearing would preclude a defendant from bringing such a claim.[28] As discussed below, this result is somewhat anomalous since a judgment at a probable-cause hearing is not a final judgment.[29]

Meanwhile, a judicial finding of no probable cause to bind the defendant over to a grand jury has been held generally inadmissible in a subsequent civil action. For example, such a finding cannot be used for collateral estoppel purposes in the tort of false arrest, because the existence of probable cause to arrest, at the time of arrest, was not decided, and the party against whom the finding is offered had no opportunity to contest the issue.[30] Other reasons include the stricter standard of proof in criminal cases.[31]

§ 43.3B. MOTIONS TO SUPPRESS

1. Issues Actually Litigated

[25] Commonwealth v. Bartos, 57 Mass. App. Ct. 751, 785 (2003).

[26] Mass. R. Crim. P. 3(f).

[27] *See* Guenther v. Holmgreen, 738 F.2d 879, 885–88 (7th Cir. 1984).

[28] *See* Broussard v. Great Atl. & Pac. Tea Co., 324 Mass. 323 (1949).

[29] Town of Lee v. Touponie, 72 Mass. App. Ct. 1117 (2008); Commonwealth v. DiRenzo, 44 Mass. App. Ct. 95, 101 (1997).

[30] Williams v. Kobel, 789 F.2d 463 (7th Cir. 1986).

[31] Billy's Serv. v. American Ins. Co., 37 Mass. App. Ct. 584 (1994) (inadmissible because (1) finding of no probable cause does not necessarily indicate that the evidence does not meet the preponderance standard, (2) prosecution might have chosen not to present all available evidence, and (3) there was no opportunity to appeal erroneous finding).

Ordinarily, a decision on a motion to suppress will be binding for collateral estoppel purposes.[32] The U.S. Supreme Court has ruled that federal courts will apply collateral estoppel to state court rulings on suppression motions in determining federal civil rights actions under 42 U.S.C. § 1983.[33] If a defendant is found guilty, he will be unable to relitigate any fourth amendment issues raised and rejected in the criminal case. However, if a defendant is acquitted , collateral estoppel should not apply since a ruling on a motion to suppress is neither final nor appealable following an acquittal.

When a motion to suppress is allowed, the criminal defendant cannot obtain an estoppel effect in a later civil case because estoppel cannot be applied against a party who had no ability to participate in the first litigation.[34] *See infra* § 43.3E regarding the effects of a not guilty verdict.

2. Failure to File a Motion to Suppress

Collateral estoppel applies only to issues that are actually litigated. Therefore, a defendant who is found guilty but did not file a motion to suppress evidence can challenge the constitutionally of actions that might have been subject to a motion to suppress.[35] And a defendant who pleads guilty to drug charges does not waive his right to file a civil rights action based on a Fourth Amendment search and seizure violation.[36]

§ 43.3C. GUILTY FINDING AFTER TRIAL

[32] *But see* United States v. Levasseur, 699 F. Supp. 965, 980–82 (1988) (in criminal proceeding, rejecting preclusive effect of prior suppression hearing; "courts should hesitate to estop a defendant who lost a suppression hearing in a previous matter involving charges relatively minor compared to the present charges"), *relied on in* Commonwealth v. DeJesus, 8 Mass. L. Rptr. 355 (1998) Nos. 104104 et seq. (April 14, 1998) (fairness requires allowing criminal defendants, facing more serious charges compared to charges faced in court where lost suppression hearing, to bring motion again), *cited by* Cabrera v. Clarke, 2010 WL 1529474 (D. Mass 2010).

[33] Allen v. McCurry, 449 U.S. 90 (1980), *cited by* Johnson v. Mahoney, 424 F.3d 83 (Mass. 2005). *See also* Bilida v. McLeod, 211 F.3d 166(1st Cir. 2000) (state law determines whether suppression ruling in criminal case is to be given preclusive effect in subsequent federal action brought by criminal defendant where the issue--the legality of the search and seizure--is the same in both cases, and it is no bar to preclusion that the rulings were made in different courts and that the prior case was criminal while the latter was civil.)

[34] Thus, a civil plaintiff may relitigate the legality of a seizure ruled unlawful in the defendant's former criminal case, unless the Commonwealth acted as the plaintiff's "virtual representative." Boston Hous. Auth. v. Guirola, 410 Mass. 820, 827 n.9 (1991) (dictum). *See also* United States v. Land at 5 Bell Rock Road, Freetown, Mass., 896 F.2d 605, 609–10 (1st Cir. 1990) (state court suppression will bind prosecution in federal court "only if federal authorities 'substantially control[led]' the state action or were 'virtually represent[ed]' by the state prosecutor") (quoting United States v. Bonilla Romero, 836 F.2d 39, 43 (1st Cir. 1987), *cert. denied,* 109 S. Ct. 55 (1988)); Heath v. Cast, 813 F.2d 254 (9th Cir. 1987); Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); Duncan v. Clements, 744 F.2d 48 (8th Cir. 1984).

[35] Tyree v. Keane, 400 Mass. 1 (1987). The case further holds that the failure to file a motion to suppress may not be introduced in evidence as an admission of the defendant.

[36] Haring v. Prosise, 462 U.S. 306 (1983). In reaching this decision, the Supreme Court, applying Virginia law, used traditional collateral estoppel analysis. The fourth amendment issue was not actually litigated, and legality of the search was not an issue at the plea hearing, so determination of a fourth amendment violation was irrelevant to acceptance of the guilty plea.

A defendant who has been found guilty after trial and has had a final judgment entered against him will be precluded from relitigating any issues actually litigated at trial. The critical issue is determination of the facts that were essential to the conviction.[37] For example, a defendant who has been found guilty of "operating to endanger" has been found guilty beyond a reasonable doubt of at least simple negligence in operation of his motor vehicle. As a result, issue preclusion applies in a later civil case brought against the criminal defendant by an injured party. The criminal conviction conclusively establishes that the defendant was operating the motor vehicle and that he did so negligently.

As another example, a defendant who has been found guilty of assault and battery on a police officer cannot raise the issue of whether he committed an assault on the police officer. Should the police officer bring a cross-claim or a separate civil suit against the defendant, the issue of whether an assault took place is established and the trial of that claim will be on damages.[38] However, if the propriety of the police use of force was not litigated in the criminal proceeding a criminal defendant can bring a claim against the police officers for use of excessive force in making the arrest, even if the defendant was found guilty.

In most cases a criminal conviction will not bar a defendant from bringing a civil suit because the issues in the civil suit will be completely different from those involved in the criminal case. For instance, a defendant found guilty of 'operating under the influence" and "being a disorderly person" would not be barred from litigating claims of excessive force during or after his arrest and failure to provide medical care while he was in police custody. However, a criminal conviction will establish the defendant's civil liability for injuries caused by the criminal conduct.

§ 43.3D. GUILTY FINDING LATER REVERSED

Because issue preclusion applies only to final judgments, it will not apply to a guilty verdict that was later reversed. However, the Supreme Judicial Court has made an important exception to this rule with regard to the tort of malicious prosecution, as discussed *infra* at § 43.4A.

§ 43.3E. NOT GUILTY FINDING

Collateral estoppel based on an acquittal does not apply to subsequent civil proceedings. However, it may bar relitigation of some issues in a subsequent criminal case, as discussed *supra* § 21.5B.[39] Although it may seem unfair that a defendant having fully litigated issues in criminal court cannot use that acquittal offensively, the fact that the government has a heavier burden of proof in a criminal case prevents issue preclusion based on such a verdict in a civil suit where the standard of proof is "proof

[37] *See* McCurry, 449 U.S. 90 (1980).

[38] *See also* Kowalski v. Gagne, 914 F.2d 299, 302–05 (1990) (defendant's second-degree murder conviction collaterally estopped him from contesting both liability under wrongful death statute, and the intentional nature of his conduct for purposes of insurance exclusion provision).

[39] Chief of Fire Dep't of Boston v. Sutherland Dep't, 346 Mass. 685, 690 (1964); Fitzgerald v. Lewis, 164 Mass. 495, 501 (1895); Fowle v. Child, 164 Mass. 210, 214 (1895); Kunzelman v. Thompson, 799 F.2d 1172, 1177 (7th Cir. 1986); Smith v. Wickline, 396 F. Supp. 555 (W.D. Okla. 1975).

by a reasonable preponderance of the evidence."[40] Issue preclusion is further inappropriate in a civil case against a party other than the Commonwealth (such as a police officer), since the party against whom the finding is offered would not have been a part of the original criminal proceeding.

The fact that a defendant was found not guilty is admissible in a malicious prosecution case to establish the element of favorable termination. In other cases, the fact that the defendant was found not guilty of the criminal charges may not be admitted in evidence.

An appellate court's failure to reverse a conviction on a ground raised by appellate counsel does not preclude the former defendant from raising the issues in a subsequent civil action, if the appellate court reversed his conviction on other grounds.[41]

§ 43.4 THE CRIMINAL DEFENDANT AS A CIVIL PLAINTIFF

Police misconduct litigation is the area in which criminal defendants most often become civil plaintiffs. There are five claims[42] most likely to be brought based on state tort law and federal civil rights violations under 42 U.S.C. § 1983.[43] The following areas are referred to as torts:

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[40] 3 MAPOC Evidence § 70:5.

[41] *See* Glenn v. Aiken, 409 Mass. 699, 702 (1991) (former criminal defendant whose conviction was reversed on another ground is not precluded, as malpractice plaintiff, from presenting the issue of his defense attorney's negligence).

[42] In Gutierrez v. Massachusetts Bay Transit Authority, 437 Mass. 396 (2002), judgment affirmed 442 Mass. 1041 (2004), the SJC distinguished abuse of process claims from malicious prosecution claims, noting that the tort of malicious abuse of process involves the "use of lawful process primarily for a purpose for which it is not designed." (citing J.R. Nolan & L.J. Sartorio, Tort Law § 82, at 108 (2d ed. 1989). The elements of an abuse of process claim are that: (1) 'process' was used;(2) for an ulterior or illegitimate purpose; (3) resulting in damage. *Id., See also*, Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 775-776, (1986), quoting Jones v. Brockton Pub. Mkts., Inc., 369 Mass. 387, 389, (1975). A most crucial distinction between malicious prosecution and abuse of process is that probable cause is irrelevant to an abuse of process claim. "It is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them." Quaranto v. Silverman, 345 Mass. 423, 426, (1963), quoting Restatement of Torts § 682 comment a.(1977). In Gutierrez, the trial judge had determined that probable cause to arrest and improper purpose were inconsistent. The SJC, however, found that there was enough evidence for the jury to conclude that the defendant officers sought to initiate proceedings against the plaintiffs for an improper purpose. The Court held that probable cause at the time of the arrest does *not* equate necessarily with subjective good faith in filling out an arrest report at a later time.

[43] Section 1983 actions may embrace a wide variety of claimed constitutional violations but this subject is beyond the scope of this work. It should be noted, however, that although a plurality of the Supreme Court has concluded that the Due Process Clause of the Fourteenth Amendment does not provide a substantive right to be free from criminal prosecutions unsupported by probable cause, the Court has "expressed no view" as to whether the burden of baseless criminal charges might effect an unlawful "seizure" and thereby trigger a Fourth Amendment claim. Albright v. Oliver, 510 U.S. 266 (1994) (plurality opinion). However, every circuit to have considered this question since *Albright* has generally agreed that state actors who pursue malicious prosecutions against others may be held to have violated the Fourth

1. Improper initiation and continuation of criminal prosecution (malicious prosecution),[44]

2. Illegality of the arrest (false arrest and false imprisonment),[45]

3. Use of excessive, unnecessary, or improper force at the time of the arrest or later (assault and battery),[46]

4. Unlawful search or invasion of privacy rights,[47]

5. Denial of medical care or provision of improper or inadequate medical care.

Most of the issues that a criminal defendant may plan to raise later as a civil plaintiff will not be actually litigated in the criminal case. The Supreme Court has, however, held that a claim for damages for an allegedly unconstitutional conviction or imprisonment, or for other actions the unlawfulness of which would render a conviction or sentence invalid, cannot be brought pursuant to 42 U.S.C. § 1983 unless the plaintiff proves that the conviction or sentence has been reversed on direct appeal, expunged by

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Amendment, risking liability under 42 U.S.C. § 1983. The First Circuit has not yet confronted the issue directly. *See* Britton v. Maloney, 196 F.3d 24 (1st Cir. 1999); Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir. 1999); Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 n.5 (1st Cir. 1996). The Court has, however, been willing to assume that the type of conduct which constitutes a malicious prosecution under state law can sometimes constitute a violation of the Fourth Amendment as well. *Britton, supra,* 196 F.3d at 25. *See also* Germany v. Vance, 868 F.2d 9 (1st Cir. 1989) (intentional or reckless failure of DYS custodians to inform incarcerated juvenile or courts of her parent's statement indicating fabrication of charge for which she was adjudicated delinquent would constitute unconstitutional deprivation of Fourteenth Amendment right of access to courts). A frequent defense in § 1983 actions is that the police enjoyed qualified immunity from suit. *See, e.g.,* Cinelli v. Cutillo, 896 F.2d 650 (1st Cir. 1990) (defendants not entitled to qualified immunity regarding interrogation ploys undermining suspect-plaintiff's right to counsel). *See also* the Massachusetts civil rights statute, providing a cause of action for individuals whose rights under federal or state law have been violated by threats, intimidation, or coercion. G.L. c. 12, §§ 11H, 11I; Commonwealth v. Adams, 416 Mass. 55 (1993) (upholding injunctive relief against police officers who used excessive force against arrested suspect). *See generally* AVERY, RUDOVSKY & BLUM, POLICE MISCONDUCT: LAW AND LITIGATION (3d ed. Clark Boardman & Callaghan).

[44] Prosecutors enjoy absolute immunity for most conduct associated with the decision to initiate or continue a prosecution. Imbler v. Pachtman, 424 U.S. 409, 431 (1976) *cited in* Cignetti v. Healy, 89 F.Supp 2d. 106 (2000); Van de Kamp v. Goldstein 555 US 335 (2009); Moniz v. Hall, 2011 WL 487833 (D.Mass.). *Compare* Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (absolute immunity applies only to prosecutor's "quasi-judicial," not "administrative," role and does not protect prosecutor from liability for fabricating false evidence or making false statements at press conference) *cited in* Johnson v. Board of Bar Overseers of Mass., 21 Mass. L. Rptr. 320 (2006); Dinsdale v. Commonwealth, 424 Mass. 176 (1997) (government lawyers protected by absolute immunity under state and federal law from civil rights claims concerning actions associated with their conduct of civil litigation) (citing Chicopee Lions Club v. District Attorney, 396 Mass. 244 (1985) (absolute immunity for actions taken in initiating and pursuing criminal prosecutions)), *cited in* Moniz v. Hall, 2011 WL 487833 (D. Mass 2011).

[45] *But see* Olsen v. Correiro, 189 F.3d 52 (1st Cir. 1999) (evidence of manslaughter conviction and sentence that resulted from *nolo* plea should have been admitted into evidence and manslaughter conviction and sentence for time served barred claim for incarceration based damages under 42 U.S.C. § 1983).

[46] See generally, Gutierrez v. MBTA, *supra* (delineating standards for malicious prosecution and abuse of process claims).

[47] See generally, Bilida v. McLeod, 211 F.3d 166(1st Cir. 2000) (analyzing claim based on allegedly unlawful seizure and subsequent killing of pet raccoon, but holding that officers were protected by qualified immunity).

executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.[48]

§ 43.4A. MALICIOUS PROSECUTION

Preserving a person's right to pursue the state tort of malicious prosecution presents the greatest difficulties for a criminal defense attorney.[49] In order to prevail on a malicious prosecution claim, plaintiff must prove the following:[50]

1. Institution of criminal proceedings against him by the defendant,[51]
2. With malice,
3. Without probable cause,[52]
4. Termination of criminal proceeding in favor of the now plaintiff.

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[48] Heck v. Humphrey, 512 U.S. 477 (1994).

[49] Malicious prosecution can provide important relief to a person who was subjected to a baseless criminal prosecution. The plaintiff may recover the cost of his criminal defense attorney and expenses as an element of damages; these expenses may not be an element of damages for any other claims.

[50] Constitutional malicious prosecution claims based on violations of due process have been powerfully questioned and restricted by the First Circuit Court of Appeals in Nieves v. McSweeney, 241 F.3d 46 (2001), in which the Court stated that, "It is perfectly clear that the Due Process Clause cannot serve to ground the appellants' federal malicious prosecution claim," because, "Massachusetts provides an adequate remedy for malicious prosecution," and "a plurality of the Supreme Court found that substantive due process was an insufficient basis for a federal malicious prosecution tort claim, *cited in* Williams v. City of Boston, 2011 WL 1087686 (D. Mass). See Albright v. Oliver, 510 U.S. 266, 271 (1994); Roche v. John Hancock Mut. Life Ins. Co. 81 F.3d 249, 256 (1st Cir. 1996). The First Circuit has thus questioned the continued validity of cases such as Torres v. Superintendent of Police, 893 F.2d 404 (1st Cir. 1990)(plaintiff must allege that malicious conduct shocked the conscience); and Senra v. Cunningham, 9 F.3d 168 (1st Cir. 1993)(conduct may be actionable that deprived plaintiff of liberty by "distortion and corruption of processes of law") though it is important to note that these issues have not been definitively resolved by the Supreme Court. However, the First Circuit, in *Nieves*, affirmed that the Fourth Amendment "provides potentially more fertile soil.") 241 F.3d at 54.

[51] *See* Santiago v. Fenton, 891 F.2d 373, 387 (1st Cir. 1989) (officer who takes active part in arrest, even if he did not institute complaint or testify, is subject to joint liability for claim of malicious prosecution); Limone v. US, 497 F.Supp 2d 143 (D. Mass 2007). *See also* Smith v. Massachusetts Dep't of Corrections, 936 F.2d 1390, 1401–02 (1st Cir. 1991) (*accord*); Correllas v. Viveiros, 410 Mass. 314, 318–19 (1991) (defendant's statements inculpating the plaintiff, made to the police while defendant was a suspect under investigation, did not constitute "institution of criminal proceedings"), *cited in* Turkowitz v. Town of Provincetown, 2010 WL 5583119 (D. Mass 2010).

[52] In the civil context, probable cause is a matter for the jury if the facts are disputed. Gutierrez, supra, (*citing* New Bedford Hous. Auth. v. Olan, 50 Mass. App.Ct. 188, 203 n.26 (2000), *superceded and remanded* by 435 Mass. 364, 365 (2001)); *see also,* Lewis v. Kendrick, 944 F.2d 949, 952 (1st Cir. 1991) (probable cause is a matter for jury in claim under 42 U.S.C. §§ 1983, 1985), *cited in Gutieriez v. Mass. Bay Transp. Auth., 437 Mass 376 (2002)*. It is also important to distinguish probable cause to arrest from probable cause to charge. See e.g., Meehan v. Town of Plymouth 167 F.3d 85 (1999)(complaint for malicious prosecution under state and federal law held properly dismissed because the proper inquiry was whether there was probable cause to institute criminal charges for drug trafficking against plaintiff).

1. "No Probable Cause"

A judicial guilty finding even though later reversed has been held to preclude a plaintiff's claim for malicious prosecution because probable cause is considered to be at least arguable in such a situation.[53] Conviction of a criminal defendant will be conclusive proof of the existence of probable cause unless the conviction was obtained solely by false testimony of the civil case defendant or was based on fraud, conspiracy, or subornation.[54] Claims based on the initiation of allegedly malicious prosecution due to inaccurate police reports will face great difficulties where probable cause is found to have existed at the time of arrest.[55]

2. "Termination in Plaintiffs Favor"

A criminal prosecution is terminated in plaintiff's favor if the plaintiff was acquitted of the criminal charges. A criminal prosecution is also terminated in favor of the plaintiff when the prosecution abandons the criminal proceeding by a nolle prosequi or a motion to dismiss as long as the termination of the proceeding is consistent with the innocence of the accused.[56] When a nolle prosequi is entered as a result of a defense request or a bargained compromise, the proceeding will not be held to have terminated in favor of the plaintiff for purposes of malicious prosecution.[57] When a criminal prosecution is terminated based on procedural grounds, the termination may be found not "in favor of the plaintiff' for purposes of malicious prosecution.[58]

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[53] Dunn v. E.E. Gray, 254 Mass. 202 (1926); Broussard v. Great Atl. & Pac. Tea Co., 324 Mass. 323 (1949) *cited in* Meehan v. Town of Plymouth 167 F.3d 83 (Mass. 1999).

[54] Dunn v. E.E. Gray, 254 Mass. 202 (1926); Broussard v. Great Atl. & Pac. Tea Co., 324 Mass. 323 (1949). *See also* Della Jacova v. Widett, 355 Mass. 266 (1969) (first-tier conviction demonstrates probable cause to defeat malicious prosecution suit unless obtained through wrongful conduct), *cited in* Limone v US, 497 F.Supp.2d 143 (D. Mass 2007).

[55] See Gutierrez, *supra*, (plaintiffs argued that probable cause to arrest was not conclusive where the officers allegedly initiated the prosecution based on an event occurring after the arrest, i.e., the submission of inaccurate arrest reports. The defendant officers did not personally file the complaints against the plaintiffs; another MBTA officer who was not present at the events did so based on the defendants' arrest reports. During the course of the trial, more than one officer admitted that his arrest report contained errors. The SJC held, that, "although these discrepancies may be relevant to the officers' motives in pursuing charges against the plaintiffs, they do not negate (or even detract from) the existence of probable cause. The officers asserted at trial that their determination of probable cause was dependent on the facts as they witnessed them, and not on the erroneous material in their arrest reports. The jury was warranted in finding probable cause to arrest based on the events as described at trial, and the subsequent errors in the police reports do not negate or detract from the probable cause that existed at the time of arrest. The mistakes in the arrest reports were not so severe that they created probable cause to prosecute where there otherwise was none.")

[56] Wynne v. Rosen, 391 Mass. 797 (1984), *cited in* Mizhir v. Carbonneau, 2010 Mass. App. Div. 57 (2010).

[57] *See* Olsen v. Correiro, 189 F.3d 52 (1st Cir. 1999) (evidence of manslaughter conviction and sentence that resulted from *nolo* plea should have been admitted into evidence and manslaughter conviction and sentence for time served barred claim for incarceration based damages under U.S.C. § 1983).

[58] *See* Britton v. Maloney, 981 F. Supp. 25 (1997) affirmed in part, reversed in part, and remanded for further proceedings 196 F.3d 24 (1st Cir. 1999) (where prosecutor never sought leave to refile charges or ask for continuance to secure missing witnesses' presence,

A defendant who admits to sufficient facts has waived any claim for malicious prosecution since he or she has undergone a plea colloquy that, pursuant to rule 12(c) of the Massachusetts Rules of Criminal Procedure, includes an admission that the prosecutor has sufficient evidence to establish guilt in the criminal matter. Such a defendant may be in a position to litigate other claims, including use of excessive force, without fear of issue preclusion or impeachment based on a conviction.

§ 43.4B. FALSE ARREST AND FALSE IMPRISONMENT

The basic elements of a false arrest claim are the intentional arrest or confinement of a person without justification, that is, without probable cause.[59] Justification for the arrest must exist at the time of the arrest.[60] In a false arrest claim involving a warrantless arrest, it is the defendant's burden to prove a justification.[61]

A guilty finding or a finding of probable cause will not bar a plaintiff's claim for the tort of false arrest. In *Earle v. Benoit*,[62] the First Circuit Court of Appeals held

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dismissal of felony assault charges for want of prosecution was neither "procedural [n]or technical," was consistent with plaintiff's innocence, and constituted termination of criminal proceeding in plaintiff's favor).

[59] McDermott v. W.T. Grant, Co., 313 Mass. 736 (1943); Wax v. McGrath, 255 Mass. 340 (1926), *cited in* Felix v. Lugas, 2004 WL 1775996 (D. Mass 2004). It is no defense that the officer "ha[d] probable cause to arrest for one act . . . [but] arrest[ed] for a different act for which he had no such cause." Santiago v. Fenton, 891 F.2d 373, 386 (1st Cir. 1989) (officer entitled neither to statutory nor common law immunity under Mass. law).

[60] An arrest without probable cause is also a constitutional violation. *See* United States v. McQueeney, 674 F.2d 109 (1st Cir. 1982). But not every tort violation will rise to a constitutional violation. A government employee enjoys qualified immunity from a § 1983 action if "a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and the information the [acting] officer [ ] possessed." Matos v. Davila, 135 F.3d 182, 186 (1998) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)), *cited in* Eroh v. Ramirez 540 US 551 (2004). This entails two inquiries: (1) whether the constitutional right asserted by the plaintiffs was clearly established at the time of the alleged violation, and (2) if the right was clearly established, whether a reasonable officer in the same situation would "have understood that the challenged conduct violated that established right." *Matos v. Davila*, 135 F.3d at 186–87. *See also* Fonte v. Collins, 898 F.2d 284, 286 (1st Cir. 1990) (under circumstances, no qualified immunity for police officers in § 1983 action for violating plaintiff's Fourth Amendment rights by arresting him without probable cause); Briggs v. Malley, 748 F.2d 715 (1st Cir. 1984), *aff'd sub nom.* Malley v. Briggs, 106 S. Ct. 1092 (1988).

The conduct of law enforcement officials in investigating crime and seeking arrest warrants are "discretionary" functions given immunity under the Massachusetts Tort Claims Act, G.L. c. 258, § 10(b). Sena v. Commonwealth, 417 Mass. 250, 254–57 (1994). However, some acts of police misconduct will fall outside the discretionary functions exception to liability. These include conduct that violates officially established departmental procedures, and subversion of the warrant application process by careless or reckless misstatements to the magistrate or failure to disclose relevant information. *Sena, supra*, 417 Mass. at 257, n.5. *Compare* Matos v. Davila, 135 F.3d 182, 187–89 (1998) (affiant's deliberate falsehood or reckless disregard for truth, as opposed to negligence or innocent mistake, are necessary to show Fourth Amendment violation).

[61] See Gutierrez, supra, citing Shine v. Vega, 429 Mass. 456, 463 n.13, (1999)(judge correctly instructed that on claim of false imprisonment, defendants had "the burden of proof establishing that [the defendants] confined [the plaintiff] because their confinement was justified by law."), *cited in* Gutierrez v. Mass Bay Transp. Auth., 437 Mass 396 (2002).

[62] 850 F.2d 836 (1st Cir. 1988).

that a defendant who was found guilty after a bench trial and then not guilty after a de novo trial could proceed against the arresting police officer on the state tort of false arrest.[63] This follows because the issue in the false arrest case is whether *at the time of the arrest* the officer had probable cause to believe that a crime had been committed and the defendant had committed it. The facts presented at the trial may differ from those known by the police officer at the time of the arrest. Neither issue preclusion nor the rule of *Broussard* [64] applies to a bench trial guilty trial finding to bar plaintiffs claim of false arrest.

In *Gosselin v. City of Springfield,*[65] a plaintiff admitted to sufficient facts on a criminal charge of being a disorderly person, obtained a continuance without a finding and ultimately a dismissal. Magistrate Ponsor held the admission did not bar federal civil rights claims concerning false arrest and false imprisonment. The court considered the incentives on a defendant to enter such a plea to prevent the entry of a criminal record. However, any admissions on record in the criminal case could be admitted into evidence in the civil case.

§ 43.4C. ASSAULT AND BATTERY

In most cases, issue preclusion will not apply to a conviction of assault and battery because the issue of excessive force used by the police against the plaintiff will not have been litigated in the prior criminal case.[66] The exception is where the defendant claims the limited privilege to use force to defend himself from excessive police force.[67] This defense raises the issue of force used by the police before the defendant used force. Thus, the main concern of a criminal defense lawyer handling a case for a person who may become a later civil plaintiff is to protect issues concerning the legality of the arrest, subsequent prosecution, and evidentiary rulings on motions to suppress.

§ 43.4D. UNLAWFUL SEARCH AND PRIVACY VIOLATIONS

A civil claim for an unlawful search and seizure can be brought as a civil rights claim under the Fourth Amendment,[68] the Massachusetts Constitution Declaration of Rights, and by state statute, G.L. c. 214, § lB. A final adverse ruling on a suppression

[63] A defendant may be falsely arrested yet ultimately be found guilty of the criminal offense due to information obtained after the arrest. A civil suit could technically be brought in this situation although the damages are likely to be so low that few such cases are brought.

[64] *See supra* notes accompanying § 43.4A(1).

[65] Civ. Action No. 86-00693-F (D. Mass. March 4, 1988). This was affirmed without a published decision by the First Circuit. Gosselin v. City of Springfield, 873 F.2d 1432 (1st Cir. 1989).

[66] For the constitutional basis for an excessive force claim, *see* Graham v. Connor, 109 S. Ct. 1865 (1989); United States v. McQueeney, 674 F.2d 109 (1st Cir. 1982).

[67] Commonwealth v. Moreira, 388 Mass. 596 (1983).

[68] *See, e.g.,* Pasqualone v. Gately, 422 Mass. 398 (1996) (no qualified immunity for police officer who seized weapons from owner's residence without warrant; a reasonable officer would have known that the conduct violated established constitutional norms in the circumstances as they appeared to him); Rodriques v. Furtado, 950 F.2d 805, 811–12 (1st Cir. 1991) (upholding police officer's qualified immunity for obtaining warrant to conduct vaginal search, under test of objective reasonableness of officer's belief in validity of warrant).

motion challenging the search will preclude a civil suit. Such a ruling becomes final only when the defendant has had an opportunity to appeal the finding.[69]

§ 43.4E. DENIAL OF MEDICAL CARE

A person may bring a claim for failure to provide adequate medical care after arrest based on negligence or as a civil rights claim under the due process clause of the Fourteenth Amendment and/or the Eighth Amendment or under the state tort claims act.[70] Because this claim usually involves a different time period and different police officers than those involved in the arrest, it would be unusual for the criminal case to have any direct effect on these claims.

§ 43.5 RELEASES

§ 43.5A. RELEASE OF A CRIMINAL DEFENDANT'S RIGHT TO SUE ARRESTING POLICE AS A CONDITION OF DISMISSAL OF CRIMINAL CHARGES

Victims of physical abuse by police officers are often charged with assault and battery on the police in order to cover up police misconduct. The Commonwealth may offer favorable treatment on the criminal charge if the defendant will release the police officer and town from any civil liability. The Supreme Judicial Court has condemned this procedure, stating: "We consider the practice of dismissing criminal complaints on the condition that releases be executed inappropriate, whether undertaken by a judge or prosecutor."[71] Civil releases executed in exchange for favorable treatment in a criminal case at the request of a judge or prosecutor are void as a matter of state law.[72]

Under federal law, the effect of such releases will depend on the circumstances surrounding execution of the civil release.[73] The release will be effective only to bar federal claims if it was voluntary. A release executed by a defendant after consulting an attorney is more likely to be found to be voluntary than one obtained without counsel. A release signed by an unrepresented defendant in order to obtain his release from the police lockup is involuntary as a matter of law.[74]

Because a knowing and voluntary release may waive federal civil rights claims, defense counsel should not negotiate such a release in exchange for favorable criminal treatment without determining the extent of the client's injuries and ensuring that the client fully understands that the consequences may include release of his civil claims.

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[69] *See supra* § 43.3B.

[70] *See, e.g.*, Miga v. City of Holyoke, 398 Mass. 343 (1986); Slaven v. City of Salem, 386 Mass. 885 (1982).

[71] Foley v. District Court of Lowell, 398 Mass. 800, 805 (1986).

[72] *Id.*. However, where defense counsel proposed waiving civil remedies in return for a continuance without a finding and then brought suit anyway the judge was permitted to impose a guilty finding rather than dismissal at the conclusion of the continuance without a finding period. Commonwealth v. Klein, 400 Mass. 309 (1987).

[73] *See* Town of Newton v. Rumery, 107 S. Ct. 1187 (1987).

[74] Hall v. Ochs, 817 F.2d 920, 923–24 (1st Cir. 1987).

§ 43.5B. ACCORD AND SATISFACTION

Section 55 of chapter 276 of the General Laws provides for the dismissal of certain misdemeanors upon the filing of a written agreement between the two parties (the "accord and satisfaction").[75] A person charged with a misdemeanor (including assault and battery) who may also be liable in a civil action may obtain dismissal of the criminal charges if the victim appears before the court and acknowledges in writing he has received satisfaction for the injury.[76] This resolves *both* the criminal case and the defendant's potential civil liability.[77] Obtaining discharge based on accord and satisfaction should be considered when applicable because it can result in quick, favorable disposition of all claims.[78]

However, by statute an accord and satisfaction is not available for assault and battery on a law enforcement officer,[79] and the SJC has prohibited its use if the crime was committed against a law enforcement officer or with intent to commit a felony.[80] In some felony cases, the defendant may be able to obtain an accord and satisfaction if the prosecutor agrees to reduce the charges and the court approves the agreement.[81] However, an accord and satisfaction agreement on a serious charge such as rape is unlawful as against public policy.[82] It is improper for defense counsel to propose such an arrangement or for the judge and prosecutor to sanction it.

§ 43.6 PROTECTING A CLIENT'S RIGHTS AS A POTENTIAL CIVIL PLAINTIFF

A criminal defense attorney should be careful to protect a client's rights should he plan a civil suit regarding the incident. A complete *investigation* of the facts of the case including locating potential witnesses must take place immediately. Testimony

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[75] Wendy J. Kaplan, *Revisiting Dispositions and Sentencing Advocacy in the Massachusetts District Court,* 92 Mass. L. Rev. 73 (2009). *citing* MASS. GEN. LAWS. Ch. 276, §55 (2008).

[76] G.L. c. 276, § 55. Counsel and defendants must of course exercise great care in proposing any monetary settlements to victims. *See, e.g.*, Commonwealth v. Henderson 434 Mass. 155 (2001)(defendant convicted of willfully endeavoring to interfere with a witness where "no view of the evidence could have led a reasonable jury to find that the defendant intended to enter into an accord and satisfaction with the victim.") *See generally supra* § 39.5E.

[77] G.L. c. 276, § 56.

[78] It is, however, important to note the specific requirements of the accord and satisfaction statute. See Commonwealth v. Rotonda, 434 Mass. 211 (2001) (remanding case where district court granted the defendant a continuance without a finding and sentenced him to unsupervised probation for one year on the condition that he not have any contact with the victim, that he publicly apologize to her, and that he make a payment of $5,000 as restitution to her. Judge's disposition pursuant to G.L. c.278, § 18 was held unlawful in so far as it included a condition requiring the payment of money, not properly documented as restitution or as an accord and satisfaction, to the complaining victim.)

[79] G.L. c. 276, § 55.

[80] Commonwealth v. Guzman, 446 Mass. 344, 348 (2006).

[81] *See* NOLAN, CRIMINAL LAW § 618 at 509, nn. 5, 6.

[82] Commonwealth v. Gonzalez, 388 Mass. 865 (1983).

from impartial witnesses is very important in a civil suit against the police. In a situation where the criminal charge seems relatively minor, the investigation may need to be more detailed than would otherwise be necessary to preserve evidence for the civil case. The defendant's *injuries* should be well documented, including photographs of wounds, and appropriate medical treatment should be obtained.

In automobile accident cases the criminal defendant will be confronted with the standard *automobile accident report form.* Defense counsel should assist in filling out the form (or exercising the defendant's privilege against self-incrimination).[83] This report can be used against the defendant in the criminal case and a later civil suit. A criminal defendant should not file such a report without advice of counsel.

Statute of limitations: Criminal defense counsel should be aware of the time requirements for filing a civil action. The ordinary tort statute of limitations is three years, which also applies to federal civil rights actions.[84] A defendant who wishes to bring a claim for negligence must send written notice of his claim to the public employer within two years.[85] This is a jurisdictional requirement and is not tolled by the fact that the person was a minor at the time of the incident or, presumably, by the fact that he was incarcerated.[86] Because a criminal case can take over two years until it is finally resolved, counsel should be certain that a client is aware of the time requirements for bringing civil claims.

[83] Where filing an accident report would present a real and substantial danger of self-incrimination, the Commonwealth cannot require filing. Commonwealth v. Sasu, 404 Mass. 596, 601 (1989).

[84] G.L. c. 260, §§ 2A, 4; Wilson v. Garcia, 471 U.S. 261 (1985).

[85] G.L. c. 258, § 4.

[86] George v. Town of Saugus, 394 Mass. 40 (1985); Hernandez v. City of Boston, 394 Mass. 45 (1985).