

'Her voice is heard': Why some accusers pursue civil rather than criminal justice in harassment cases

'Empowerment of the plaintiff is a huge advantage in the civil justice system over the criminal system'

By Mark Gollom, [CBC News](#)

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Plaintiffs, left to right, Diana Bentley, Hannah Miller, Kristin Booth and Patricia Fagan attend a press conference after filing lawsuits alleging they were sexually harassed by Soulpepper Theatre Company co-founder Albert Schultz. (Christopher Katsarov/Canadian Press)

Four women have filed civil lawsuits against Canadian actor Albert Schultz and the Toronto-based Soulpepper Theatre Company he co-founded, in part, their lawyer says, to control the path of their own case.

And that is certainly one of the reasons many women decide to sidestep the criminal courts and instead pursue civil action against an alleged perpetrator of sexual misconduct, legal experts say.

For example, in a criminal case, there are two parties to the case: the Crown, who represents the state, and the accused, or defendant.

The accuser is a witness for the Crown, meaning she doesn't have a right to representation by a lawyer and has no say in how the proceeding is conducted, said Loretta Merritt, a Toronto-based lawyer who specializes in sexual abuse lawsuits.

"She's not driving the bus. The Crown attorney is driving the bus and she's there to participate. She is the critical piece but really has no control over the process."

But in a civil trial, the plaintiff has the ultimate say on how she wants her case litigated.

"She is the party. She instructs her own lawyer. Her voice is heard," said Susan Vella, a Toronto-based civil litigator for sexual assault cases.

"Empowerment of the plaintiff is a huge advantage in the civil justice system over the criminal system."



Albert Schultz, co-founder of the Soulpepper Theatre Company, has vowed to 'vehemently defend' himself against accusations of sexual misconduct. (Frank Gunn/Canadian Press)

Alexi Wood, one of the lawyers representing the four women in the [Soulpepper case](#), said they decided to pursue this avenue because "for them, a civil claim where they have counsel, that is acting for them, that is putting forward the narrative in their voice, gives them the control that was taken from them."

Schultz and Soulpepper have been named in the statements of claim of each lawsuit, which detail allegations of unwanted sexual touching, harassment and sexual remarks in the workplace from 2000 to 2013.

None of the allegations has been proven in court. In a statement, Schultz has said he intends to "vehemently defend" himself.

Balance of probabilities

Among the advantages of pursuing a civil trial is the burden of proof is much lower. Convictions in criminal sexual assault cases are rare — [a 2012 study](#) found that for every 1,000 possible cases, 33 are reported, 12 result in charges, six go to trial and three result in convictions.

And unlike the "beyond a reasonable doubt" threshold needed to convict in a criminal trial, the plaintiff's lawyer in a civil case need only prove on balance of probabilities that the defendant is liable.

"It means more likely yes than no. Think of it as 51 per cent in your favour," Merritt said.

Meanwhile, in a criminal trial, the defendant has no obligation to take the stand. In a civil trial, they must.

"The civil justice system provides a more balanced playing field because in the civil system the defendant does not have the right to remain silent under the charter," Vella said.

"There is an equal obligation on the defendant to disclose all relevant documents and information as there is on the survivor to disclose all relevant information. Both sides have to submit to an examination for discovery."

A civil trial also affords the plaintiff, if successful in their case, an opportunity to receive some kind of financial compensation.

"The entire criminal justice system is not about compensating the complainant or the person who has been sexually assaulted," Merritt said. "It's all about punishing the criminal."

As well, in civil litigation, a plaintiff can extend the lawsuit to parties other than the accused offender, as is the current case with Schultz and his employer, Soulpepper.

The plaintiff doesn't have to prove necessarily that the employer knew or ought to have known that they hired a sexual predator, Vella said. Instead, the plaintiff just has to prove the employer put that person in the position of power, authority or trust over another who is vulnerable to it "and the employee misused that job-conferred power, authority or trust to coerce the victim into submission to the sexual acts in silence."

Challenges of civil litigation

But taking the civil route can also pose challenges.

Cases can drag on for years. Unless a civil litigator takes the case on a contingency fee basis, the plaintiff is on the hook for his or her own legal expenses.

This makes many of these kinds of cases cost-prohibitive for many Canadians, said Toronto criminal lawyer David Butt, who specializes in sexual assault cases.

"You have to incur the costs of the whole proceeding," he said. "And if it's a long, drawn-out, hard-fought civil trial, legal costs can easily get well into six figures. So, depending on how well resourced the opponent is, it can be a war of attrition."

As well, if the plaintiff loses the trial, they may have to pay a portion of the legal costs of the accused.

Butt said there are also particular procedural protections in place in the Criminal Code that don't exist in civil procedure, for example, related to access to private documents.

In a criminal trial, if a sexual assault complainant had, for example, gone to therapy and spoken with a therapist about the events, there is a specific procedure set out in the Criminal Code to protect the privacy of that therapeutic relationship, he said.

Civil trials also don't provide the same systemized protections for complainants when it comes to raising their sexual history, Butt said.

"So, the potential for collateral invasions of privacy can be greater in a civil forum."