



Law Society
of Ontario

Barreau
de l'Ontario

TAB 21

The Six-Minute Criminal Court Judge 2020

LawPRO Criminal Claims Fact Sheet

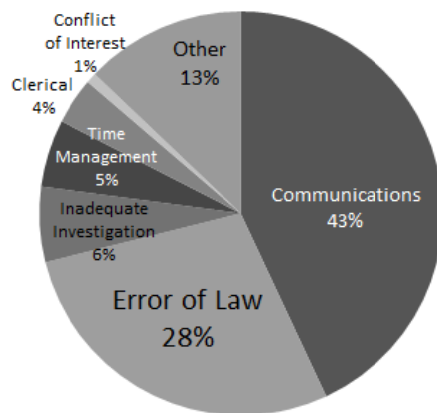
January 25, 2020



Quick stats*

Average **43 claims** per year
Average cost **\$924,590** per year
Average cost per claim: **\$21,114**
Average 2 years before claim reported
Longest claim reporting time: 21 years

Common errors



The number of malpractice claims flowing from criminal matters has been trending up in recent years. Lawyer/client miscommunications cause 43% of these claims.

The resolution of a criminal matter can have a significant impact on a client. Common claim allegations include that the client was not informed of the implications of entering a guilty plea, of a particular sentence, or of procedural choices made. Criminal convictions are often appealed on the basis of "ineffective assistance of counsel" - whether the allegation has any merit or not. The allegations made on appeal may include failing to properly review Crown disclosure, failing to mount the defence requested by the client, not calling a particular witness, etc. See the reverse page for more examples of the most common criminal claims.

Many types of criminal claims are preventable. Lawyers should take steps to ensure the client understands the strengths and weaknesses of his case and the implications of entering a plea. Because they will need to be referenced in the event of a claim, document these conversations and the instructions that were received. See the reverse page for more steps you can take to reduce your exposure to a malpractice claim.

Speakers and resource materials

We can provide knowledgeable speakers who can address claims prevention topics. Email practicepro@lawpro.ca

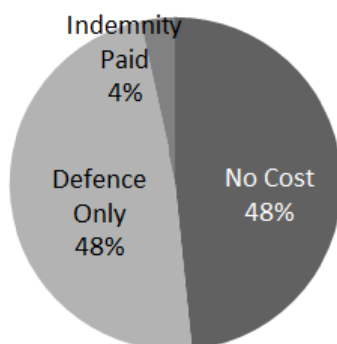
Visit practicepro.ca for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more.

Hot topics in criminal law claims

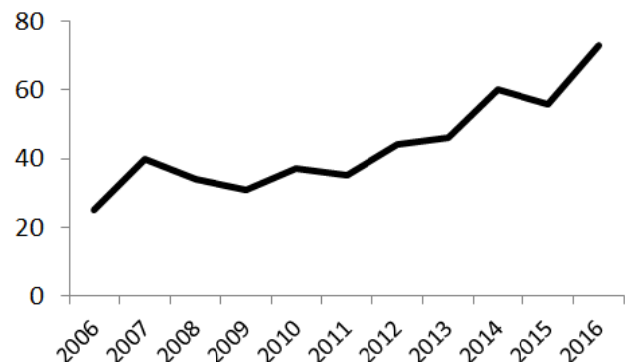
It is critical that clients are clearly informed of the implications of pleas and final outcomes of their matter, and that those communications are documented.

Lawyers failing to understand the consequences of advising a guilty plea in light of the *Immigration and Refugee Protection Act* (i.e., a sentence of 6 months or more may cause loss of right to apply for permanent residency).

Resolution of claims



Count of criminal claims



Risk management tips

Ensure the client understands your recommendations

Failing to effectively communicate with the client is the biggest claims pitfall in the criminal law area. A lawyer may not realize that the client doesn't understand all the implications of choices proposed. A lawyer should provide detailed recommendations based on a full analysis of the case, including a reminder that the plea decision is the client's alone. Documenting these communications (using a checklist, taking notes provides a valuable record of your efforts in the event you are faced with a claim).

Ensure you have all the facts

Lawyers should enquire about clients' circumstances – for instance, immigration status or Indigenous identity – to ensure that advice takes these details into account. Clients whose immigration status may be at risk should be advised to consult an immigration lawyer, and that advice should be documented.

Discuss potential consequences of pleas, sentences, and procedural choices (and document it)

We frequently see claims involving a failure by the lawyer to communicate the potential ramifications of guilty pleas and custodial sentences on employment or immigration status. For instance, a truck driver convicted of a DWI may become unemployed as a result. A non-Canadian sentenced to six months or more may lose the right to apply for permanent residency. We have also seen claims alleging lack of communication about defence choices, such as a decision not to call the accused as a witness, or failure to apply for participation in an ignition interlock program.

Promptly notify LAWPRO of potential claims

Early reporting of client complaints offers the best opportunity for claims repair. Lawyers are encouraged to report allegations immediately, even where they arise during trial, so that LAWPRO counsel can provide risk management advice. In an appeal alleging ineffective assistance of counsel, the Crown may ask the trial lawyer to sign an affidavit supporting this ground of appeal. If asked to do so, you should call LAWPRO right away so that we can advise whether preparing an affidavit is necessary, and if so, how it can be done so that privilege is maintained and there is no admission of negligence.

Most common malpractice errors

Lawyer/client communication errors (43%)

- Failing to ensure the client understands or agrees with the strategy to be taken in court, or the of potential consequences of pleading guilty often resulting in claims of “ineffective assistance of counsel”
- Dispute over whether client's instructions were followed regarding a plea to a charge or reduced charge
- Failing to clarify court dates, with consequences for client if lawyer or client doesn't show up

Errors of law (28%)

- Overlooking viable defences when advising a client to plead guilty
- Overlooking sentence consequences (for example, license suspension)
- Failing to understand consequences of advising a guilty plea in light of *Immigration and Refugee Protection Act*

Inadequate investigation of fact or inadequate discovery (6%)

- Failing to obtain evidence or information that could assist the client at trial
- Failing to properly determine whether the client is required to attend at court
- Failing to consider whether client is fit to stand trial

Time Management (5%)

- Failing to properly calendar a court date
- Failing to proceed with an appeal in the allowed time
- Missed limitations for civil actions relating to the criminal matter, such as suing for malicious prosecution or appealing forfeiture of property

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