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Privacy in Civil Sexual Assault Cases

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Privacy is often, but not always, a concern to plaintiffs in civil sexual assault cases. This article will discuss keeping the plaintiff's identity confidential as well as production of confidential records. The law treats sexual assault survivors' privacy very differently in criminal and civil cases.

In criminal cases involving sexual assault (particularly historical cases), Crown Attorneys usually seek and obtain publication bans preventing everyone from publishing any information which would identify the complainant. In civil cases, plaintiffs sometimes wish to keep their identity confidential and proceed using a pseudonym. It is up to the plaintiff to decide if they want to proceed anonymously. In my experience generally defendants do not object to this procedure, particularly institutional defendants such as churches, school boards, children's aid societies, etc. However, if the issue is contested, ultimately the court will decide whether the plaintiff can proceed using a Jane/John Doe pseudonym. Factors the court will consider include whether there has been a publication ban in a related criminal proceeding, whether the case has already received media attention, whether the case may be a matter of interest to the media, whether the identity of the plaintiff is a matter of public interest, whether the plaintiff or other sexual abuse survivors will be deterred from reporting abuse if they are publicly scrutinized, whether the plaintiff will suffer psychological harm if their identity is not kept confidential and whether the defendant will suffer any prejudice as a result. When a motion is brought, there is a Practice Direction in Ontario requiring that the media be put on notice of the motion. I have never had a case where the media responded or tried to participate in a pseudonym motion where we were simply trying to keep the plaintiff's identity confidential (as opposed to sealing the entire court file).

In October, 2020 the Nova Scotia Court of Appeal[1] decided a case involving a Confidentiality order (pseudonym motion) in a civil sexual assault case. In that case, a publication ban had been issued in a related criminal proceeding. In the subsequent civil case the judge gave the plaintiff (who sought to protect her privacy) a Confidentially Order allowing her to keep her identity confidential. On appeal, the court said that a confidentiality order was not necessary because the complainant was already protected by the pre-existing criminal publication ban. The court said that when information in a civil matter can identify the complainant from a criminal case, the publication ban prevents its publication. This case seems to suggest that in some circumstances a pseudonym motion in the civil case may not be necessary if there is a publication ban in the criminal case. However, I wonder what this means for a sexual assault

survivor who wishes to go public with his or her name. In some cases, plaintiffs do not wish to keep their identity confidential. Could suing civilly be a violation of the criminal publication ban?

Until recently, I never gave it much thought when issuing a civil claim using the plaintiff's own name (when instructed to do so by my client). However, in April, 2021 a sexual assault survivor was charged criminally and fined $2,600 for violating a publication ban on her own identity. As is often the case, the Crown attorney in the criminal case sought and obtained a publication ban preventing anyone from publishing the identity of the sexual assault complainant. At the criminal trial, the sexual assault complainant was not in court when the Crown asked for the publication ban, the ban was not discussed with her and she did not consent to it. After the trial was over the sexual assault complainant sent a copy of the transcript to some of her family and friends. The perpetrator complained after he learned about it. The woman was charged and was fined. Fortunately, in May, 2021, she successfully appealed her conviction. The Crown conceded and the appeal judge set aside the conviction and the money she was fined was returned to the complainant. Clearly, the purpose of publication bans in sexual assault cases is to protect the privacy rights of complainants and they should not become a vehicle to take away autonomy from them. It would be a sad state of affairs if complaints who do not want a publication ban have to ask a Crown Attorney to bring a motion to the court to lift them. As has been suggested by Lisa Taylor, Associate Professor, Ryerson School of Journalism, the best solution is to change the law to provide that publication bans do not apply to the complainant.

There is also a different approach in civil and criminal case when it comes to medical and other confidential records. In criminal cases, the courts recognize the complainant's right to privacy with regard to their medical records. There is a strict legal test and procedure to be followed if the defendant wants access to those records. The same is not true in civil cases. If a plaintiff claims that their life has been affected by a sexual assault and they have suffered damages as a result, they will be required to produce records that are relevant to those issues. Typically they will be required to produce therapy and other medical records and if income loss is claimed, employment and tax records. What records are producible depends on the nature of the claim and if production is a concern it should be considered before the claim is issued. If there is information in the records that is confidential and not relevant, the records may be redacted.

In any case, before starting a civil lawsuit, a plaintiff is well advised to consider what privacy rights and confidentiality protections may be afforded to him or her.

[1] United Kingdom of Great Britain and Northern Ireland (Attorney General) v. L.A., 2020 NSCA 75 and for more about this case see my article https://www.sexualabuselawyer.ca/resources/publications/details/publication-bans-do-they-help-or-hurt-abuse-survivors

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