



Article

Personal Injury

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Publication Bans: Do They Help or Hurt Abuse Survivors?

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There are some interesting legal issues that arise for sexual abuse survivors when there are related criminal and civil proceedings. Most times, when a criminal case is brought first and a conviction obtained, the law works in favour of abuse survivors. See for example my July 2014 article *Concurrent Criminal and Civil Cases: Making the Most of Evidence* and my October 2014 article *Legal Proceedings: Civil or Criminal?*

Recently, the Nova Scotia Court of Appeal decided a case regarding publication bans which may present good news for many abuse survivors, but may leave some sexual abuse survivors unhappy with the result.

In *United Kingdom of Great Britain and Northern Ireland (Attorney General) v. L.A.* The plaintiff/complainant was sexually assaulted by members of Great Britain's Royal Navy hockey team while they were in Nova Scotia. There was a criminal prosecution regarding sexual assault and the complainant subsequently started a civil lawsuit based on the assaults. In the criminal case there was a publication ban ordered under section 486.4 of the *Criminal Code* prohibiting publication of any information that could identify the complainant. In the civil case she brought a motion for a similar order permitting her to use a pseudonym in place of her real legal name in the litigation and providing that her identity not be published or broadcast. The motions judge found that publication bans are necessary to ensure access to justice for victims of sexual assault because survivors may be harmed or dissuaded from coming forward if they do not have privacy.

The Appeal Court said that a confidentiality order was not necessary in the civil lawsuit because of the protection afforded by the criminal publication ban. The court said that when information in a civil case can identify the complainant from the criminal case, the criminal publication ban prevents its publication in the civil case.

The effect of the decision is that if the civil case will identify the plaintiff as having been a complainant in a criminal case where there was a publication ban then he or she cannot be identified in the civil case and a further order of the civil court is not necessary. This is good news for abuse survivors who want to maintain

anonymity in the subsequent civil lawsuit. On the other hand, it may present an unintended obstacle for survivors who do not wish to keep their identities a secret and may want to fully share their experiences with the world. There are many reasons why a survivor may wish to be publicly identified including encouraging others to come forward.

In criminal cases it is almost always the Crown Attorney who decides whether to seek a publication ban. Even complainants who want to speak out and be identified may nevertheless find themselves silenced. As was pointed out in an article published in the *Advocates Journal*, (Winter 2016) written by Justin Safenyi the publication ban scheme under the Criminal Code presents two significant difficulties. First, if the Crown applies for a ban, the court must grant the order if the legal test is met. There is no discretion. Under the law, the views of the complainant whose identity is the subject of the ban are irrelevant. Prosecutors need not consult with, or even advise complainants before applying for the ban, much less obtain their consent. The second problem is that a publication ban cannot be revoked or varied by a complainant. Publication bans are indefinite in duration and therefore a complainant who wishes to be identified must ask the Crown to arrange for the publication ban to be lifted.

In *L.A.* the Nova Scotia Court of Appeal has extended the Crown's ultimate control over the complainant's ability to have his or her identity published through to the subsequent civil lawsuit. Over the last 25 years or so I have represented hundreds of sexual abuse survivors in civil lawsuits. Many of them wish to remain anonymous and a significant number do not. One thing I know for sure is that sexual abuse survivors want to be empowered not rendered powerless to make important decisions regarding their legal rights. In my view this case is a step backward. No court or Crown Attorney (or anyone else for that matter) has a right to tell an abuse survivor what is best for him or her.

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