

CANADA / JUDGMENT

Doe v. A.B.

2021 BCSC 651

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2021 BCSC 651 Doe v. A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doe v. A.B.,

2021 BCSC 651

Date: 20210224

Docket: S235408

Registry: New Westminster

Between:

Jane Doe

Plaintiff

And

A.B., Darlene Kifiak

The Board of Education of School District No. 35 (Langley)

Defendants

Corrected Judgment: The front page of the judgment and paragraph 7 was corrected on May 12, 2021

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

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Place and Date of Hearing:

New Westminster, B.C.

February 16 & 17, 2021

Place and Date of Judgment:

New Westminster, B.C.

February 24, 2021

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I. INTRODUCTION

[1] In this civil sexual abuse action, there are cross-applications made by the plaintiff and the individual defendant seeking anonymization, a publication ban, and partial sealing orders.

II. FACTUAL BACKGROUND

- [2] I will keep my factual review as limited as possible, given that excess disclosure will only compound the identification concerns raised by both sides.
- [3] The individual defendant ("A.B.") served as an adult volunteer for a school in Walnut Grove, within the jurisdiction of the defendant Langley School District ("School District"). The plaintiff alleges that in the course of his volunteer work, A.B. perpetrated a sexual assault upon the plaintiff. At the time of the alleged abuse, the plaintiff was a minor. The abuse is alleged to have occurred during an overnight hike in 2014.
- [4] A.B. was a junior leader assigned to the plaintiff's group of 10-12 students during this school event. The hike is a notable event in the school's calendar, and events that occur on the hike are often discussed in the local community afterward. The students in each group often keep in touch. A.B.'s brother and another friend both provided evidence that they heard rumours about the alleged sexual assault after the 2014 hike. The brother also gave evidence that he and A.B. were subject to an attempted assault. The allegations against A.B. about what happened on the hike seemed to have instigated the fight.
- [5] The RCMP interviewed A.B. in or around 2014 regarding the allegations. However, he has never been charged with an offence. A spokesperson for the BC Prosecution Service has been quoted as saying that the matter was submitted to Crown prosecutors twice, once in 2014 and again in 2019. "[A]fter reviewing, the file charges were not approved, as the B.C. Prosecution Service concluded the charge assessment standard for proceeding with criminal charges was not met".
- [6] A.B. now lives in a new, small BC city with his fiancée, her young child, and their infant. He is presently an assistant manager at a grocery store as well as a city councillor. After the Notice of Civil Claim was filed, he took unpaid leave from both positions.
- [7] A.B.'s fiancé gave evidence that the plaintiff sent a Facebook message in August 2020 to A.B. advising that he needed to "tell your girlfriend and mother of your child about your past and the choices you made" because "actions have consequences" and "[s]he is going to find out soon anyways".
- [8] The plaintiff filed this claim on January 18, 2021, identifying herself only as Jane Doe, but naming A.B. The same day, through counsel, they issued a press release that again named A.B. The release indicated that they were coming forward "with the hope that I will encourage and inspire others to come forward". The press release generated media coverage that, again, named A.B. Another alleged victim of A.B.'s did come forward as a result of the media coverage. This additional alleged victim is apparently unaware of the plaintiff's identity.
- [9] There is evidence that A.B. was threatened online as a result of the media coverage. Comments to a post on the publicly accessible "People Vs Predators Association" Facebook page include people saying they "could kick [the defendant's] ass", that there were "[l]ots of

places to go missing around [the city]", and that there were "[t]oo many perverts still around". His fiancée has expressed concern for her safety, and that any further media coverage using A.B.'s name could cause harm to her custody arrangements, as well as to her business. She deposed that her business has already suffered as a result of the media attention. Her employees and clients have questioned her about the situation. The first name of her child was also published in a media report.

- [10] On January 22, 2021, A.B. advised plaintiff's counsel that he was going to seek anonymization and a publication ban. The parties agreed that, while their applications were pending, counsel would not further disseminate identifying information about the other party.
- [11] A.B. filed his application on January 28, 2021. Interim sealing orders were made by Justice Verhoeven on January 29, 2021, and by Justice Ball on February 11, 2021.
- [12] On February 1, 2021, the plaintiff filed an application response to A.B.'s application taking no position, and advising that they took no position "because of one ground argued by the defendant that may have some merit, specifically whether the orders as sought are wholly necessary and proportional to avoid alleged harm to the defendant's fiancée, step-child, and/or infant child".
- [13] A.B. issued the required notice to the media pursuant to Practice Direction #56 on February 2, 2021. No media attended at the hearing before me to object to any of the orders being sought.
- [14] On February 9, 2021, counsel for the parties appeared in chambers by telephone before Justice Harvey. Further media coverage named A.B. that day. However, no member of the media checked in with the clerk in chambers or otherwise sought to participate in the hearing. There was insufficient time for the applications to be heard, so the matter was adjourned.
- [15] On February 10, 2021, the plaintiff filed an amended application response that changed course and opposed the relief sought by A.B.

III. LEGAL TEST

- [16] The court has inherent jurisdiction to order that pseudonyms be used or that parties' names be initialized. The court may exercise this jurisdiction if it is satisfied that it would be in the interests of justice to do so: A.A. (Re), 2016 BCSC 511 at para. 9, citing BH v. JH, 2015 BCCA 475 at para. 3.
- [17] The court also has inherent jurisdiction to order a publication ban of confidential information when necessary and when the salutary effects of the publication ban outweigh its deleterious effects to the free expression of those affected by the ban: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 839; R. v. Mentuck, 2001 SCC 76 at paras. 23, 28. This approach, referred to as the Dagenais/Mentuck test, is also applicable to requests for anonymity orders, as such a motion is also a limitation on the openness of

judicial proceedings: X. v. Y., 2011 BCSC 943 at para. 26; Vancouver Sun (Re), 2004 SCC 43 at para. 31.

[18] In Galloway v. A.B., 2019 BCSC 395, the court summarized the legal regime applicable to such applications as follows:

[5] In criminal trials, s. 486.4(1) of the Criminal Code, R.S.C. 1985, c. C-46 provides for the issuance of a mandatory ban on a complainant's identity in sexual assault trials where requested.

[6] However, in civil trials, such as this one, there is no such mandatory requirement, and the test set out in R. v. Mentuck, 2001 SCC 76 at para. 32 and Dagenais v Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 at 878 (the "Dagenais/Mentuck test") applies to guide the court's exercise of discretion in making any decisions that affect the openness of proceedings, including anonymity orders, sealing orders, and publication bans: see Vancouver Sun (Re), 2004 SCC 43, and Canadian Broadcasting Corp. v. The Queen, 2011 SCC 3.

[7] Applying that test, the issues before me are as follows:

- a) Whether the orders sought by the applicant are necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- b) Whether the salutary effects of the orders sought outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the rights of the litigants to a fair and public trial, and the efficacy of the administration of justice.

[19] I must also consider the appropriate evidentiary standard on such an application, as the plaintiff suggested that the law and the social context has developed to a point such that anonymization of the names of plaintiffs in sexual abuse claims should essentially be automatic, without any need for evidence. In testing this theory, the plaintiff filed no evidence of actual or potential harm to her. However, the plaintiff did file certain general materials, including the following:

- a) a Government of Canada report with statistics on reporting rates for sexual assault, which notes that a large percentage of sexual assaults are not reported;
- b) a World Health Organization report on violence and health, which notes that few Canadian cases are advanced by the Crown to court without forensic evidence; and
- c) a Globe and Mail report on an investigation that found that 1 in 5 reports of sexual abuse are not pursued by police.

[20] No issue was taken with the admissibility of this material.

- [21] I do not accept that this type of application by alleged victims of sexual assault can or should be "automatic" or "evidence-free". In Vancouver Sun, the Supreme Court of Canada stated:
- [43] In applying the Dagenais/Mentuck approach to the decision to hold the investigative judicial hearing in camera, judges should expect to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by the witness. Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the Dagenais/Mentuck test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice.
- [22] Similarly, in Galloway the court held:
- [19] The burden on an applicant who seeks to displace the open court principle and obtain a restrictive order is a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": *Toronto Star Newspapers Ltd. v. Ontario*, (2003), 67 O.R. (3d) 577, 232 D.L.R. (4th) 217 (C.A.) at para. 19, aff'd 2005 SCC 41.
- [23] However, there is certainly flexibility as to the form of evidence that can be accepted on such applications. In particular, I find that the general awareness of the potential for harm to plaintiffs through the disclosure of their identity in sexual abuse claims has reached a point where I am entitled to take judicial notice of the potential for harm. In Galloway the court stated:
- [17] Expert opinion evidence was also filed with respect to broader harms to sexual assault victims more generally of having their identities published, including the societal harm of discouraging victims of sexualized violence to report these crimes and to seek support and protection. While the plaintiff argues that this is not evidence of any harm to the applicant directly, this and similar concerns have been recognized as a societal harm worthy of consideration independent of individual effects: See *A.B. v. Canada (Minister of Citizenship and Immigration)*, 2018 F.C. 237 [A.B. (F.C.)], at para. 41; *C.W. v. L.G.M.*, 2004 BCSC 1499 [C.W.] at para. 26; and *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 15 and 23-25 [A.B. v. Bragg]
- [28] In some cases the harm is based on judicial notice: see *A.B. (F.C.)* at para. 41
- [32] I note that protection of the anonymity of some types of complainants has been recognized in Canada's jurisprudence on an objective basis. In *A.B. v. Bragg*, the Supreme Court stated at para. 15 that "while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm." Furthermore, while that case was about an anonymity order for a child alleging cyberbullying, the Court drew the analogy with the protection of sexual assault complainants stating at para. 25, "[i]n the context of sexual assault, this Court has already

recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 [*Canadian Newspapers (1988)*]. At para. 23 the Court considered that the failure of child victims of cyberbullying to take steps to protect themselves because of the risk of further public disclosure was a harm not just to the child but to the administration of justice. Similarly, the administration of justice relies upon sexual assault victims being willing to report and to testify.

[Emphasis added]

[24] A.B. did not take issue with the fact that the court was entitled to take judicial notice of the harm that can befall plaintiffs in sexual abuse cases if their identity is disclosed. A.B. only sought to argue that he should similarly be able to rely on judicial notice of the potential for harm to those accused of sexual assault in civil proceedings. I address this latter issue further below.

IV. ANALYSIS

A. Plaintiff's Application

[19] I find that the plaintiff has met the requisite standard, and that a publication ban and limited sealing order requiring the redaction of identifying information from the court record is justified on the facts before me, for the reasons that follow. I note that A.B. consented to the order requested, subject to imposition of certain terms, and that the School District did not oppose the application. I address the question of the appropriate terms below.

Serious Risk to Administration of Justice

[25] In *Galloway*, the court reviewed how this aspect of the test has been applied in civil claims for sexual abuse:

[24] In the context of sexual assault complainants pursuing civil claims, the courts have recognized both subjective and objective risks to the administration of justice arising from the public identification of these complainants. Recently, in *A.B. (F.C.)* the Federal Court observed that "Canadian courts have often allowed victims of sexual assault to pursue a civil claim anonymously" citing cases across Canada for this proposition, including case law from British Columbia.

[25] One of those cases is *C.W.* In that case, the plaintiff in a civil sexual assault case applied for an order permitting her to identify herself in all court documents by initials. Mr. Justice Joyce outlined the applicable legal principles, noting that the onus is on the person seeking to restrict public accessibility to demonstrate that the order is necessary to achieve justice. A private interest of a litigant to avoid embarrassment is not sufficient to displace the public interest in an open court process and there must be a social value of superordinate importance. Justice Joyce stated:

- [26] I am of the opinion that there is a superordinate social value or public interest in protecting victims of sexual abuse from further injury. Victims of sexual abuse should not be deterred from seeking compensation in the court because the process will cause further harm. I am of the view that plaintiffs who claim damages for sexual abuse are entitled to orders protecting their anonymity during the pre-trial process if they establish that: (a) public exposure in the very process by which they seek compensation from the perpetrator of the abuse will cause additional harm; (b) permitting them to prosecute their claims without disclosure of their identity at every stage of the proceeding will not impair the defendants' ability properly to defend themselves; and (c) anonymity in the pre-trial process will not impair the court's ability to achieve just results between the parties.
- [26] In *B.G. et al v. H.M.T.Q. in Right of B.C.*, 2004 BCCA 345, (sub nom. *G.(B.) v. British Columbia*) 242 D.L.R. (4th) 665 [B.G.], the Court of Appeal reinstated a publication ban on identifying information of the plaintiffs in an historical sexual assault civil claim. The trial judge terminated the publication ban on delivering reasons for judgment dismissing the plaintiffs' claims. The Court of Appeal described relevant factors as including:
- a) the effect that ending the ban would have on the plaintiffs, their witnesses and other former inmates of the institution;
 - b) the chilling effect the prospect of termination of the publication ban might have on those pursuing similar civil claims for historic sexual abuse and hence on the administration of justice; and
 - c) the fact that replacing names with initials relates only to a "sliver" of information and minimally impairs the openness of judicial proceedings.
- [27] On consideration of those factors and the evidence, even where the claim had been dismissed on its merits, the Court of Appeal held that a termination of the ban could not properly have been ordered.
- [28] The above review of the case law in British Columbia and Canada suggests that risks to the privacy interests of sexual assault complainants in their interaction with the civil justice system are frequently found to constitute the type of risks to the administration of justice that warrant anonymity orders and publication bans .
- [26] I find that this case is likely to continue to be the subject of commercial and social media coverage. There is a reasonable prospect that some of this coverage could be degrading or potentially threatening to the plaintiff: Galloway, para. 30.
- [27] I do not consider that there are reasonable alternative measures that would address those risks adequately short of the order requested, and none were suggested.

Salutary versus Deleterious Effects

- [28] I next consider whether the salutary effects of the orders sought by the plaintiff outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right to a fair and public trial, and the efficacy of the administration of justice: Galloway, para. 36.
- [29] The plaintiff says that granting the requested sealing order, publication ban, and anonymity order constitutes an effective balancing of rights, including privacy rights, equality rights, and access to justice, and would be in line with the interest of the court in the proper administration of justice. I agree. The weight of authority establishes that the types of orders sought in this case, narrowed to the issue of identity and generally interim in nature, are compatible with the open court principle: Galloway, para. 43.
- [30] The absence of opposition to the plaintiff's requested orders from any media representatives or from the defendants provides me with comfort that the weighing of the competing interests is properly in favour of granting the orders, subject to the clarification of the appropriate terms. Subject to the adjustments below, the plaintiff's requested anonymity order, publication ban, and partial sealing orders are necessary to prevent a serious risk to the proper administration of justice. There are no reasonable alternative measures, and the salutary effects of the orders outweigh any deleterious effects on the rights and interests of the parties and the public.

Terms of the Order

- [31] I turn next to a consideration of the specific terms appropriate and necessary to achieve the goals above without unduly or unnecessarily compromising the open court principle.
- [32] The plaintiff seeks the following orders:
1. The parties will refer to the plaintiff by the pseudonym "Jane Doe" in all documents and pleadings filed with the Court;
 2. All persons are prohibited from publishing, broadcasting or publicly transmitting in any way the plaintiff's name or identifying features; and
 3. All parties to this action and members of the public have liberty to apply to vary this Order on eight (8) days' notice to the parties.

- [33] A.B. sets out his position on the terms as follows:

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:

Paragraph 1, except that, to the extent the true full name of the plaintiff is included in a document sought to be tendered as evidence, it should not be redacted and replaced with Jane Doe. The order providing that the plaintiff may proceed as Jane Doe should include the plaintiff's full name and should be sealed. The anonymity order should be in force until further order of the court or the first day of trial.

Paragraph 2, on the basis that the order is reciprocal such that the publication ban applies equally to the plaintiff and the application respondent.

[34] I deal with A.B.'s latter request for a reciprocal order below. In terms of the other proposed changes:

- a) I agree that the order should only remain in force until further order of the court, or the first day of trial. The case law recognizes that the open court principle carries greater weight once a case reaches the trial stage: *Dr. A. v. Mr. C.* (1994), 113 D.L.R. (4th) 726 (B.C.S.C.) at paras. 15, 25-26. In *Galloway*, the court only put the publication ban and sealing orders in place through to trial: paras. 56, 59. It makes sense to provide the trial judge with an opportunity to reassess the appropriate terms.
- b) I find it unnecessary to allow the name of the plaintiff to be used in evidence filed in court on any interlocutory steps before trial. These steps will presumably be limited in number, and hence any effort required to create excised documents should not be overwhelming.
- c) I agree that the order should include the plaintiff's full name and that this version of the order should be sealed. A public version of the order should also be filed that does not include the name. There are any number of scenarios one can postulate under which it may be necessary for the registry or the court to have access to the plaintiff's full name. There is no attendant prejudice to the plaintiff in having such carefully controlled access to their identity.

B. Defendant's Motion

[35] A.B. seeks his own anonymity order on the following terms:

1. That the [individual defendant] be identified only by the pseudonym "A.B." in this proceeding until trial or further order of this Court;
2. That the style of cause be amended to identify the [individual defendant] as A.B.;
3. A sealing order in the form attached as Schedule A;
4. An interim publication ban in relation to any information which would tend to identify the [individual defendant] or his family members until trial or further order of the Court; and
5. Such further and other relief as this Honourable Court may deem just.

[36] The plaintiff opposes this motion. The defendant School District takes no position.

- [37] First, as noted above, A.B. says I should take judicial notice of the potential prejudice to defendants in civil sexual assault claims. I find that such alleged prejudice has not reached the level of notoriety or general acceptance that would allow me to take such judicial notice, nor did the parties cite any case law in which the court has taken such notice.
- [38] That said, A.B. did file evidence designed to establish harm, which I have summarized above.
- [39] The plaintiff criticizes A.B. for not swearing his own affidavit. While this is unfortunate, I find that it goes only to the question of the weight to be given to the evidence, and is not fatal to the application.
- [40] I turn then to the application of the framework.

Serious Risk to Administration of Justice

- [41] Given the evidence that has been provided, I accept that the proposed order is necessary to prevent the further invasion of A.B.'s privacy and that there are no reasonable alternative measures that will avoid this risk. In particular, I accept that the evidence does put A.B. in a position to rely on a line of cases in which the courts have expressed concern about the publicity effects on a civil defendant who has not yet been found to have done anything wrong.
- [42] Where bare allegations of criminal conduct are made in a Notice of Civil Claim, in the absence of Crown charges or any evidence, a defendant can be treated as "innocent" for the purposes of such an application. Protection of the innocent from unnecessary harm is a social value, which has been held to justify limiting public accessibility and the open court principle: Dr. A. at paras. 33-35; B.G. v. HMTQ, 2002 BCSC 1417 at paras. 13, 21, and 38. The court will protect defendants who, due to the serious nature of the untested allegations set out in a claim, will unjustly suffer irreparable harm to their reputation in the eyes of the community: B.G. at paras. 24, 38.
- [43] In B.G. the court ordered a ban on publication of the identities of former personnel of Brannon Lake School for Boys against whom allegations of sexual and physical assault of minors in their care had been advanced. The allegations in that case were found to be serious, and existing publication of the individuals' names in the relatively small town of Nanaimo had negatively impacted their reputations. Justice Wong concluded as follows:
- [41] The names of these individuals appear in the statement of claim, along with scurrilous allegations of the most serious sort. They are alleged to have committed heinous acts of physical and sexual assault against the children whom they were hired to care for. Essentially, these individuals are accused of being pedophiles; they have been put in the category of persons most condemned and reviled by society.

- [42] In deciding whether these allegations are of the sort to cause irreparable harm, the specific facts of this case must be taken into account. The Crown has introduced evidence that the publication of names in relation to this case has already affected greatly the individuals involved. While I have not considered general evidence relating to the stressful nature of these proceedings, I am concerned about the impact that these very serious allegations have on the reputations of the individuals living in the relatively small community of Nanaimo.
- [43] The Crown introduced evidence that when the names of some of the individuals accused of the scurrilous conduct became public, the individuals and their families were immediately condemned and shunned by their community; in one example, neighbours crossed the street to avoid passing the wife of one of the alleged abusers. While I am not considering the impact of these allegations on family members, I find that these sorts of actions evidence the severe impact these allegations can bear on a person's reputation. Evidence that neighbours will no longer even associate with family members of the alleged abusers indicates how a person's reputation can be destroyed once his or her name is published in association with these allegations. Members of the community are not waiting to find out if the allegations against the alleged abusers are proven; rather, they are judging them as guilty before the trial has taken place. Because there is no opportunity for anonymity in a small town, the individuals accused of abuse have no way of preventing their reputation from being besmirched and ultimately destroyed in the eyes of their community. It is imperative to prevent that harm to their reputations unless and until these allegations are proven
- [52] The protection of the "innocent" exception addresses the concern that a defendant should not be denied the right to be considered amongst the "innocent" until allegations against him or her are proven; allegations are found to be either proved or disproved at the end of a trial. Further, the alleged perpetrators of abuse are not named as defendants in this case. They have no way of controlling the proceedings; for example, they cannot use interim applications as a filtering process.
- [53] I have no difficulty in concluding that if the names of the individuals accused of being pedophiles are published, their reputations will suffer untold harm, before any finding of misconduct has been made against them in a court of law. Although many of the individuals are now deceased, their reputations will also have suffered irreparable damage, without them having had any chance to refute the allegations or defend themselves. In balancing the public interest in open proceedings against the private interests of the alleged perpetrators of abuse in this case, it is imperative to prevent that damage from occurring unless and until the allegations are proven. The potential harm to the private interests of those individuals if the protection were wrongly refused outweighs the harm to the public interest if it were wrongly granted.

- [54] Therefore, until a finding of misconduct has been made against these individuals, an order protecting their identities is necessary in order to provide some measure of protection against the still unproven allegations made by the plaintiffs. If the allegations against them are proven, a finding will be entered in that regard, and the public will have access to the names of the individuals who perpetrated the crimes against the plaintiffs in this case.
- [44] This analysis includes several parallels to the present case:
- a) A.B. is also effectively accused of pedophilia;
 - b) The public has reacted negatively to the defendant as a result of the allegations; and
 - c) The allegations arise in the context of two smaller towns through which the dissemination of information can be particularly aggressive. In such small towns, the potential for identification and negative attention are attenuated.
- [45] The plaintiff suggests that the analysis in B.G. has been overtaken by developments in the law, and within society more broadly. However, I find that it remains good law in this province.
- [46] I do accept that the mere fact that A.B. has not been charged does not mean that he did not commit the acts alleged. Nor is the decision not to charge a basis on which to declare that he is not guilty of any crime, given prosecutorial discretion and the difficulty of pursuing such claims criminally. That said, the fact that there have been two evaluations of the potential for charges, and that none have been pursued, at least puts A.B. in a position to rely on the line of authorities reviewed above: Dr. A. para. 29. Looked at from the other direction, if A.B. had previously been found guilty of this kind of misconduct that would have weighed against A.B. in the analysis: Dr. A. at para. 19.
- [47] I accept that the fact that A.B. is a City Councillor puts him in the public eye. But such public service cannot be treated as a wholesale waiver of any privacy interests that might otherwise be engaged. He has not sought to use his public platform to defend his own position on the merits: Dr. A., para. 19.
- [48] A.B. also seeks to rely on the fact that disclosure of his name could lead the public to be able to determine the identity of the plaintiff. On this point the defendant relies on this court's decision in A.B. v. C.D., 2010 BCSC 1530, where the court granted a publication ban in favour of a former high school teacher who was alleged to have committed sexual assault, stating:
- [80] In this case, the following factors are important:
- a) Schools are small communities, in which there is significant opportunity for teachers and students to observe close relationships between other teachers and students. The plaintiff's former school is a small community, and it is likely that many students and teachers who were at her school at the relevant time could identify the plaintiff on learning the name of the former teacher. The situation of a student is different from the situation of victims of sexual assault or sexual exploitation in other cases. For example, identification of a doctor

ordinarily would be unlikely to identify a patient, because doctors have many patients, and the patients usually do not interact with each other. Similarly, identification of most health professionals, lawyers, accountants, and the like ordinarily would not tend to identify a complainant;

- b) If the plaintiff's evidence is accepted, it shows that the previous publication of the names of the defendants identified the plaintiff to a number of people in the community;
- c) The name of the former teacher is unusual;
- d) The only criminal and civil proceedings alleging sexual misconduct by the former teacher are the proceedings involving the plaintiff; and
- e) The suppression of the name of the defendant teacher is just a "sliver" of information.

[81] If the former teacher's name is published in this case, it could lead members of the public, particularly people who were students and teachers at the plaintiff's former school, to identify the complainant as the person involved in the criminal proceedings and these related civil proceedings. As a result, the September 27, 2010 ban shall be clarified to provide for restraint on the publication of the former teacher's name.

[82] It may seem odd that the former teacher will be treated better than others convicted of sexual offences if his name and identifying information is suppressed. However, this is simply the result of the publication ban and the circumstances. For example, where an accused person has a family relationship to an accused, it is routine to avoid publication of the name of the accused, because it could lead to identification of the complainant. This does not suggest that sexual offenders who prey on family members deserve better treatment, but simply reflects the inevitable result of protecting the complainant's identity.

[49] Here, the plaintiff says that they do not share this concern about collateral disclosure. Further, they argue that the inference that disclosure of A.B.'s name will result in the disclosure of their name is not warranted given that A.B. was only a temporary volunteer and not their regular teacher. I accept these reservations. I find that the risk of collateral disclosure is low. That said, I give the residual collateral risk of damage to the plaintiff's privacy interests some limited weight in the analysis.

[50] I find that A.B. has provided sufficient evidence of potential harm to both him and his family through the evidence reviewed above, particularly the social media threats. This evidence supports a conclusion that the administration of justice will be undermined by the further production of his name.

Salutary versus Deleterious Effects

[51] A.B. argues that the deleterious effects of the proposed order are limited. He notes that the Supreme Court of Canada in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, held that an individual's identity is merely a "sliver of information" and is of "relative unimportance" (paras. 28-29).

[52] In contrast, the plaintiff argues that the order will have substantial deleterious effect on their right to free expression. They also argue that it will interfere with their ability to advance her case, most particularly by impinging upon their ability to collect similar fact evidence.

[53] On the question of similar fact evidence:

a) I note that, for better or worse, the plaintiff has already had the benefit of their initial media release in which they requested similar fact evidence, and one claim did in fact come forward. In *Galloway*, the court noted:

[45] Given the nature of the allegations and the amount of media exposure that the underlying events have already received, I am not convinced that the publication of the name of the applicant is necessary to encourage additional witnesses to come forward.

b) Regarding any prejudice in terms of allegedly being unable to pursue additional similar fact evidence in the future:

i. A.B. is prepared to narrow the first term of his order to restrict its operation to "documents filed in this proceeding", in order to make it clear that the plaintiff is still entitled to conduct any type of investigation they wish using A.B.'s name, so long as those steps do not cross the line into publication; and

ii. There is no "right" to enter similar fact evidence at trial in any event. Indeed the general rule is that such evidence is not admissible: *Tafti v. Davis*, 2020 BCSC 507 at para. 19.

[54] In *B.G.*, the court considered a similar submission, and held as follows:

[49] Ms. Ellis has rightly pointed out that an order prohibiting the names of the alleged abusers from being published may have the effect of preventing other victims of abuse from coming forward. She also pointed out that a partial ban may prevent other witnesses from coming forward and testifying on the plaintiff's behalf. I find, however, that this concern can be addressed by the nature of the ban the Crown is seeking. The publication ban sought is limited in scope; the Crown has applied for a ban on the publication of the identities of the alleged abusers, and not on all of the evidence at trial. The alleged abusers who are still living can be cross examined at trial, and the public can still come and watch the trial. The location and the name of the institution, as well as all of the other evidence relating to the case, may still be published by the media. The nature of the ban addresses the concerns over other potential victims and witnesses coming forward. Any individuals who attended BLS will be able to recognize and identify the school by its name and geographical location.

- [50] Further, the Crown is only seeking to prevent the media from publishing the identities of these individuals. The Crown is not seeking to restrain the parties from referring to the names of the alleged perpetrators. The plaintiffs can disclose the names of these individuals to other potential victims or witnesses who they suspect may be inclined to come forward. I do not think the plaintiffs' case will be prejudiced by a ban protecting the identities of the alleged abusers from being published by the media. C.Y. has similarly agreed to limit the scope of their order to allow for some investigation. The plaintiff will also be able to use the name of the defendant School District in any investigation. Finally, the order requested here similarly only extends through to trial.
- [55] The plaintiff also suggests that publication of A.B.'s name is important to deter future predators and to encourage sexual abuse victims to come forward generally. However, that concern can be addressed by requesting that the trial judge disclose A.B.'s name at or after trial, particularly if a finding of fault is made.
- [56] Hence I conclude that the salutary effects outweigh the deleterious effects given:
- a) The limitation on the use to which similar fact evidence can be put in any event;
 - b) The mitigating effects of the disclosure and investigatory results that have already occurred;
 - c) The ability of the plaintiff to perform additional investigations short of publication; and
 - d) The continued ability of the plaintiff to exercise their free speech right to publish their own story short of using A.B.'s name.
- [57] I do not find that such orders will create a material chilling effect on the advancement of claims from sexual abuse victims.
- [58] Hence, I am prepared to grant the orders as requested by A.B., with the alteration to the wording of paragraph 1 agreed to by counsel during oral argument.

V. COSTS

- [59] If the parties wish to make submissions on costs, the plaintiff shall file those submissions in writing within 30 days, the defendants shall respond within a further 30 days, and the plaintiff may reply within 10 days thereafter.

"Branch. J"

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