Suing for Silence

Sexual Violence and Defamation Law

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Contents

Disclaimer

Borrowing from Joanna Bourke, in this book the central facet of what constitutes sexual violence is whether a person identifies what happened to them as a negative experience that was sexual in nature and unwanted, coerced, or not consensual, however they want to define those terms.[1] Therefore, if someone – either in the news, case law, or my research – identified their experience as sexual violence, I accepted their claim. This definition of sexual violence does not claim normative status, nor does it claim to be "truth"; rather, there is neutrality regarding the veracity of any claim.[2] Such an approach allows us to problematize a particular element of the issue: defamation lawsuits that follow the disclosure or report of sexual violence. The intention here is not to examine or make a judgment about the truth of the claim; the purpose is to examine the consequences of litigation, or the threat of litigation, for making statements about sexual violence.

Every man named in this book has denied the allegations of sexual and gendered violence made against him. A majority have resorted to legal action to vindicate their reputations, with varying degrees of success. This book is not about any single individual; it is a systematic examination of defamation law and the institutional structures that contribute to the silencing of sexual violence discourse. Canadian defamation laws, as this book demonstrates, do little, if anything, to protect those who speak publicly about sexual violence.

Preface

I became interested in institutional responses to sexual violence in 2015 after I reported a sexual assault to the Toronto police and the university where I was a first-year PhD student. My experience fuelled my desire to expose the disconnect between what these institutions publicly say will happen when someone reports sexual violence and what actually happens. This disconnect thrust me into activism, motivated by the naive assumption that these institutions would do better if they were made aware of the gaps in their policies and processes.[1]

Shortly after I went public, I received messages from women who wanted to tell me about their own experiences of reporting sexual violence. Rarely did these stories conclude in a way that the women found empowering. The women often walked away feeling traumatized and betrayed by the institutions they'd entrusted to support them.

In 2017, two of these women's stories took me aback. They were unknown to one another and lived in different provinces, but within several weeks of each other, they disclosed that they'd been sued by the men they'd reported for sexual violence. I asked Toronto-based civil litigator Joanna Birenbaum, who specializes in sexual violence cases, if she was aware of such lawsuits. She was, in fact, representing several women being sued for reporting sexual violence. At the time, I was unaware that this was a possibility. Prior to beginning my advocacy work in 2015, I'd asked an expert in the sector about the possibility of being sued. She assured me that if I'd made a formal report to the police and believed my allegations to be true, I was protected from legal action. This information was only slightly accurate.

A lack of awareness about such lawsuits within the antiviolence movement gave birth to the idea for this book. But on October 29, 2018, my research became personal in a way I didn't anticipate. That morning, I learned from Christie Blatchford's column in the *National Post* that I and approximately twenty others had been named defendants in a lawsuit initiated by author and (now former) University of British Columbia (UBC) professor Steven Galloway. I had not been served or sent a copy of the statement of claim. It wasn't until I logged onto Twitter that I learned what I was being sued for.

It was shocking to be named in a lawsuit, although the legal action itself wasn't unexpected. In November 2015, UBC announced that Galloway had been suspended pending an investigation into "serious allegations." Years earlier, like many women who messaged me during this time, A.B. (the pseudonym given by the court to the woman who reported Galloway) had contacted me for my insights on reporting sexual assaults in university settings. Following our conversation, she made a formal and confidential report to the university, and the university initiated an investigation. Following the investigation, UBC fired Galloway without severance, citing a "breach of trust."[2] An arbitrator decided that UBC's public statements violated Galloway's privacy rights, causing "irreparable reputational damage and financial loss," and awarded him $167,000 in damages.[3]

On November 14, 2016, more than eighty writers from across Canada – including Margaret Atwood, Madeleine Thien, and Michael Ondaatje – published an open letter on a website titled UBC Accountable and employed the Twitter hashtag #UBCAccountable to show their support for Galloway. They alleged the investigation lacked due process.[4] Atwood also released a statement about why she signed the letter in which she compared the Galloway investigation to the Salem witch trials.[5] This series of events prompted widespread (often hostile) debate on Twitter, to which I contributed. I also wrote an op-ed about Atwood's position.[6]

However, I used caution when tweeting about the case for two reasons. First, A.B. and I had become friends over the years. She never intended for the case to be in the media, so I chose my words carefully to avoid revealing personal information about her. Second, I had learned how easy it is to initiate a defamation lawsuit against an individual, especially if comments are based on second-hand information.

The statement of claim alleged that seven of my tweets defamed Steven Galloway. At the time of writing, the litigation is still before the courts, with no end in sight. Even though the tweets are now part of the public record, accessible to anyone who requests them from the courts, I am unable to replicate what was written because any reproduction of the tweets could make me vulnerable to additional claims of defamation.

I have tried not to let the ongoing lawsuit impact my writing or research, but if I'm being honest, I made the difficult decision to self-censor, not just because of the lawsuit currently against me but out of fear of future legal action from litigious men. I could not survive another lawsuit, financially or emotionally. I share this personal story because I wanted to be transparent about the experiences that shaped my research. At times, I reference the Galloway lawsuit. I want readers to be aware that I have personal insight into the proceedings and a personal interest in how the lawsuit resolves. But this is an academic study, so I have tried to leave myself out of the findings as much as possible to focus on the research participants' narratives and my findings. Readers can interpret the legal action against me and my perspectives in whatever way they see fit.

1

A Civil Law Primer

Civil law and procedure are notoriously complex. In Canada, each province has its own rules of civil procedure, but in most substantive respects, they are similar.[1] This chapter provides a comprehensive overview of each step involved in a civil proceeding from a feminist sociological perspective. As research participants discussed the challenges associated with each step, they revealed how power dynamics can shape the civil legal process in sexual violence cases. An ostensibly objective system with the stated purpose of uncovering the truth can be used to position the plaintiff as the true "victim" of false allegations of sexual violence.

Cease and Desist

It's an undisputed fact that retaining a lawyer in Canada is expensive. For most Canadians, initiating a lawsuit is not financially viable, especially in cases where there isn't likely to be a large financial settlement. Even if there is a large settlement, the plaintiff may not be able to enforce the judgment if the defendant has no assets.[2]

It's more affordable to retain a lawyer to send a cease-and-desist letter to a silence breaker with the hope that the threat of a potential lawsuit will be enough to silence them. The cease-and-desist letter alerts the silence breaker that their actions are being monitored by the man accused of sexual violence and that legal action will be pursued if the activities persist. Three of the research participants received a cease-and-desist letter demanding a range of actions, including making no further statements about the violence, removing social media posts, and issuing a public apology along

with a retraction of the claim. The letter often states that if the silence breaker does not comply with the request(s), legal action will be pursued. In most cases, the letter is nothing more than a threat, especially among men without the necessary financial resources. None of the men in these three cases followed through by filing a lawsuit.

Morgan's experience was emblematic. Morgan was in a long-term relationship with a man who routinely sexually, physically, and emotionally abused them. They were both part of an activist subculture that was explicitly antipolice. In an attempt to seek accountability from him, Morgan sought justice outside of the legal system by warning others in their community about his pattern of violent behaviour. Morgan told friends what happened in the relationship and wrote a vague post on social media outlining their experience of being abused. Shortly after posting, late one Friday afternoon, Morgan received an email from a lawyer representing their abusive former partner.

The subject line of the email read "[Ex-partner's name] v. [Morgan]," which Morgan described as intimidating "right off the bat." The letter alleged that Morgan had contacted their abuser's employer, resulting in him losing his job. Morgan was adamant that they never did this, yet the lawyer demanded that Morgan be held accountable. The demand letter requested that Morgan provide their former partner with a written apology and abstain from making similar statements in the future. If Morgan emailed this to their partner's former employer and took responsibility for the "misinformation," the employer would have no objection to him being rehired. The letter requested Morgan comply by noon on Monday or legal proceedings would be initiated for the damages, including his loss of employment. In addition to the overall – and deliberate – intimidating tone of this letter, it is notable that it was also sent late on a Friday afternoon. The lawyer requested that Morgan comply by Monday. This gave Morgan limited time to decide what action to take or to seek out legal advice.

Morgan googled the lawyer and learned they were a well-regarded senior lawyer at a large Toronto law firm:

> After a bit more googling, I realized [his lawyer] is on the same sports team as [former partner]. So, he's literally, like, just this hockey bro who happens to be a lawyer. So, he was like, "Hey man, can I buy you a beer

> to write this letter to my bitch ex?" And to him, it's nothing, right? He's like, "Yeah, I would love to help intimidate your abused ex-girlfriend."

Morgan did not have the resources to defend themselves in a lawsuit, and their former partner was aware of this. Morgan understood his actions not only as a form of intimidation but also as a product of a particular kind of "bro culture" intended to bully Morgan into silence.

Luckily, like their ex-partner, Morgan could call upon their social network to respond to the legal threat. Morgan was employed in a job that provided services to several law firms. Morgan asked one of the lawyers with whom they had developed a working relationship about how to respond and assess the risk of their former partner following through with a lawsuit. The lawyer volunteered to write a response indicating Morgan would not comply with his demands. After the letter was sent, Morgan never heard from their former partner again:

> You know, getting his hockey buddy to send this email, just cost him a beer, and whatever. But at the same time, he probably was, "I'll write this email for you, but just letting you know, if they come back and they want to drop their gloves, you're going to have to pay me." So, it's either [former partner] changes to a shitty affordable lawyer, or [he] just gives up. And I'm guessing he knew that. I think he relied and wagered too heavily on his intimidation.

Although he never followed through, Morgan still felt that the threat of legal action was an abusive control tactic. The letter "fucks with your head. It's still controlling me from afar and dominating me from afar and like … they just … abusers will do whatever they can to not relinquish their control of the situation and their control of how people see them."

Although silence breakers can resist legal threats, as Morgan did, they are still impacted by the threat. A major challenge for silence breakers who receive such a letter is assessing the likelihood that whoever sent it will proceed to the next step: filing the lawsuit with the courts.

Commencing Legal Proceedings

Legal action officially begins with a written statement of claim. In Ontario, civil legal proceedings must be commenced within two years of the

defamatory statement being made or published.[3] In Ontario, there are three levels of court for the hearing of such cases, and the amount the plaintiff is seeking determines which rules apply: small claims court (for claims up to $25,000), simplified procedure (for claims up to $100,000), and ordinary rules (for claims over $100,000). Regardless of the monetary amount of the claim, the plaintiff must issue a statement of claim with the court. Once the lawsuit has been issued, the plaintiff must serve the defendant(s) with the claim within six months unless the plaintiff has obtained a court order directing otherwise.[4] A statement of claim must be served personally (in person) on the defendant, unless the defendant agrees to "admit" service in some other form (such as responding to an email accepting service of the claim by email) or unless the court orders otherwise. Sometimes a copy of the claim will be left with another adult in the defendant's home or work.

Being served with a written notice of claim can come as a shock to defendants and, even if the case proceeds no further, exact a significant toll. For example, Catherine, a woman of colour who resides in a major Canadian city, noted that being served with a lawsuit by a man who had sexually violated her left her feeling isolated and without support:

> I was served at my work, but I wasn't at work that day. My coworkers had notified me that someone had come and was trying to serve me documents. I had this civil suit against me, and I didn't really know what to do. I told my mom, who did not react positively and was, unfortunately, very unsupportive. So, I was sort of on my own to find help to just navigate this.

Catherine and another person she knew were being sued by a man who had agreed to a peace bond with another woman following similar sexual violence allegations.[5]

Catherine, the plaintiff, the other defendant, and the woman that had the peace bond were members of a small community. It later became apparent that multiple men in the community were routinely sexually violating the women and gender-nonconforming people. Once the peace bond was made public, Catherine realized that he had victimized multiple people. To protect future victims, Catherine posted about the

peace bond along with a summary of the sexual violence she had experienced:

> When I made those posts [on social media], it was at a time when my close friends and I and a bunch of other, like, nonmen were leaving this community and coming to realize that we had been serially abused and assaulted by these people that had authority over us. We knew that speaking about it would possibly blow back on us. We had been threatened with legal action. I remember at the time that I made those posts, that people were sharing them all over Facebook. I have screenshots of him saying, "Are there any lawyers out there who want to make a quick buck? Because I'm going to sue these people." But I think I was also pretty … like [I] was, like, twenty-three or twenty-four. These guys are wrong. What they did was wrong, and I think they know that. So, I felt like I knew it was risky, but I also had no idea what this was opening me up to.

While Catherine was aware that she might face legal action for the posts, she told me that she was naive about how the legal system works.

She came into the legal process expecting the courts to recognize the lawsuit as a retaliatory attack on her and others in the community. She was devastated when confronted by the reality of the legal response:

> When the judge was going to review the suit and set a date for the trial, and stuff like that, and give us a chance to mediate, I thought that the judge would look at what I had and throw it out. I was so convinced of my innocence and the fact that I was warning other people for their safety, and I had evidence of this person is doing unsafe things. Like, he was a drug dealer. He was having lots of parties where people were intoxicated and having sex. I put forward so much evidence about that. I had so many witnesses that could talk to this, speak on that. When I first entered that room and [the judge] just matter of fact looked over it and said, "Well you made these statements and you're going to have to defend that in court," I just completely broke down. And that's when I realized the reality of that system and the world that I am existing in at that point is not one where my innocence is assumed as well. It just seemed so absurd

> to me that I lived in a world that if someone just had the money to get a lawyer, they could just sue me for whatever and drag me up and down the courts until I gave up.

Other participants did not take the lawsuit seriously when they first received the claim. Ali, a university professor, received a similar letter after he publicly supported several students in his department who had disclosed a range of abusive behaviours by a colleague, including unwanted sexual attention, sexual harassment, manipulation, and sexual coercion. Ali was initially bemused, if not amused, by the idea of a lawsuit:

> When I was first served with the notice of the lawsuit, my initial response was a great deal of laughter and disbelief at the ludicrous manner in which it was framed … I was preparing to leave my [city] home to go to my parents in [city] for [a holiday]. I had switched off all of the lights, and checking my email on my phone, I read the notice in amazement. Because the house was empty, I allowed myself to laugh loudly. Thinking back, my laughter was in part because I knew that it was a completely flimsy case.

While it was, indeed, a flimsy case (the plaintiff would eventually abandon the lawsuit), Ali still needed to retain legal counsel to take the necessary steps to defend himself. Despite his belief that the case lacked legal merit, Ali noted that being served with the notice of claim ultimately caused him significant financial and emotional stress.[6]

Several options, or a combination of them, are available to the defendant once they have been served: file a statement of defence; file a notice of intent to defend followed by a statement of defence within ten days; try to settle all or part of the claim with the person suing them; counterclaim against the person suing; cross-claim against another defendant in the action; or start a third-party claim against someone who is not a party to the action.[7] If the defendant chooses to respond and lives in Ontario, the defence must be filed within twenty days of being served; if they live outside the province, they must file within forty days.[8] If the defendant does not file a defence, the plaintiff can request a default judgment from the court.[9] If the defendant has been noted in default because they have not responded

to the claim, they are deemed to have admitted the truth of all allegations of fact made in the statement of claim and cannot take any further steps in the action. If noted in default, the defendant is also no longer entitled to notice of any steps in the action and will not be served with any further documents unless the courts rule otherwise.[10]

It's impossible to determine the outcome of lawsuits in Canada since the statistics collected on civil cases are limited each year to the number of cases initiated, the number of active cases, and the number of dispositions.[11] There is no information on cases that are settled after the statement of claim or those that simply do not progress within the legal system. The absence of quantitative data makes qualitative interviews more important. As the few examples cited here demonstrate, the act of serving someone with a lawsuit is often perceived by the defendant as a form of intimidation, humiliation, and retaliation.

Retaining Legal Counsel

Every silence breaker served with legal action sought legal information or legal advice.[12] Among them, the experience of retaining legal counsel differed substantially, most often because of social location or, in some cases, pure luck. Some sought legal information on defamation law online before posting about their experience with sexual violence on social media or making a formal report to authorities. Others sought legal advice by speaking to a lawyer prior to making sexual violence allegations.

These steps were taken to better prepare for any possible legal action taken against them. One research participant contacted a law professor at their university who specializes in defamation law under the guise that she planned to write a fictional story about defamation. Other research participants, like Morgan, Ali, and Catherine, did not seek legal advice until after the plaintiff initiated the action.

For some research participants, retaining legal counsel was a challenging experience; others had a much easier time. Research shows that having social ties – sometimes referred to as "contact resources" – is a form of social capital and may result in informal access to legal advice, information, or assistance.[13] As demonstrated in Morgan's case, participants with access to contact resources navigated the initial legal threat by having access to expert informants who could, at the very least, explain the processes and

legal implications involved or help them initiate a response to the legal threat or claim.

Many of the silence breakers relied on lawyers in their social networks to assist them in different ways. For example, one silence breaker was close friends with a lawyer who agreed to represent her pro bono; another silence breaker worked as a process server and asked one of the lawyers they had developed a relationship with to assist them in responding to a cease-and-desist letter. Two of the silence breakers had law degrees and connections with the legal community. One participant, a professor, had a professional relationship through her university with a law professor who helped her draft her legal documents.

In contrast, participants with less social capital found the initial legal threat much more intimidating. Catherine, a young, racialized woman, received pro bono representation by pure chance. After being served, she went to a local not-for-profit legal help clinic to seek information about filing a defence. The volunteer lawyer assigned to help was struck by the case and called her a few days later, offering to represent her without pay:

> The lawyer who I had met with called me, and he says, "You know, I normally only volunteer once a year, but your case really stuck with me." So, he decided to take my case on pro bono, which was so amazing, so fortunate, because I can't imagine what I would have done if I didn't have his help and the help of his associates. They handled most of the paperwork. They went to all the settlement hearings with me. Any mediation, they were always there giving me advice and letting me know what I could do without any cost to me.

The compassion and diligence shown by Catherine's legal clinic lawyers are not the norm. More usually, not-for-profit organizations and free legal clinics can only provide minimal, if any, support. I interviewed two lawyers who work in not-for-profit legal clinics. Both told me that publicly funded legal clinics lack the expertise and resources to provide legal representation for complex defamation lawsuits against silence breakers. Shila, a lawyer working for a legal clinic that provides services to women who have experienced violence, added:

> Even for a two-day trial, the kind of resources that are needed, we do not have those at our disposal readily available. We have to pull out of front-line triage work when we take on a trial. As litigators, we want to do it. As lawyers, we would love to do more representation. We are choosing between helping five women with what to do in their situation and support them and handle it, or just take one client and work on her file and provide her representation. You have to choose your battles.

Lack of access to legal counsel was a common experience for some participants. For example, Elizabeth was an undergraduate student and single parent who had recently left an abusive marriage. She started an undergraduate degree to improve her financial situation. She had to see one of her professors in his office to speak to him about her accommodation needs for the class. After this appointment, the professor sexually assaulted her. She reported the sexual assault to the police and the university. The police did not lay charges, but the university fired the professor following her report. He then sued her, along with the university, for defamation.

Elizabeth did not have a social network to help connect her with a lawyer. Instead, she had to search for a lawyer on her own in the small Canadian city where she resided, a city where there were few lawyers with expertise in defamation law. Elizabeth contacted several lawyers. None would take her case. Reflecting on this experience, she explained, "Lawyers look at you and go, 'Unless you've got a hundred grand in the bank, I'm not going to talk to you.' Especially with a defamation lawsuit." Defamation lawsuits are notoriously complex and time-consuming, and even if Elizabeth won, there's no guarantee her legal bills would be covered.[14] This resulted in frustration and desperation: "First, I wanted somebody skilled, and then I got to a point where I was like, I just need a damn lawyer. I don't care if they're skilled … It was whoever was willing to take my case." Elizabeth ended up retaining a junior lawyer who didn't have the professional expertise she was hoping for but was willing to represent her.

Many of the private bar lawyers I interviewed acknowledged the challenges involved in retaining legal counsel. Some talked about factors they consider before deciding whether to take a case. Of those who specialize

in sexual abuse litigation, many are personal-injury lawyers who primarily work on contingency, meaning they will only take a case if they can recoup costs by countersuing for the sexual violence. There must be significant damages or an institution involved. One lawyer told me, "I've done a number of adult sexual assault cases as well, one or two or three, or whatever, but, yeah, I don't do a groping case just because it is not financially viable." Another lawyer explained why an institution needs to be involved:

> I take, maybe, one out of ten, in terms of the number of people who call me. I'm just not going to lead somebody down a garden path and in two years turn around and say, "Oh well, I'm not doing this anymore because it's a terrible case." And I'm not taking money from people. I will only work on a contingency basis. Because if it's not a good investment for my firm, it's not a good investment for some person who has a lot less financial resources than my firm does.

These lawyers confirm the challenges that Elizabeth and many others like her face when attempting to retain legal counsel to represent them in a defamation suit.

Overall, social capital and resource contacts significantly impacted the silence breaker's ability to retain legal counsel. Those who had a social connection with a lawyer were far more likely to have legal representation, even if the case would not be financially lucrative for the lawyer. Nonetheless, this does not mean that those with social capital retained legal counsel with ease. For many of the research participants, even those with full-time jobs, the financial burden of the lawsuit caused economic hardship, and they struggled to pay their legal bills.

Discovery

After written pleadings, the next stage of the legal process is discovery. Discovery is described as a time for legal counsel to assess the strength of the witnesses and the overall likelihood of success at trial.[15] Discovery has two phases: document exchange and oral discovery.[16] In most common law countries, parties only need to disclose the documents requested from opposing parties or "documents on which the party intends to rely."[17] The discovery rules in Canada are unique in comparison to other common law

legal systems because they "provide for broad unilateral disclosure of documents."[18] Rule 30.02 states, "Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed … whether or not privilege is claimed in respect of the document."[19] A document can include a wide range of materials, including recordings, videotape, film, photographs, charts, graphs, maps, plans, surveys, accounts, and electronic data.[20]

Each party must produce three schedules of documents: documents the party has in their possession and do not object to producing; documents over which the party claims privilege (for example, communications with legal counsel); and documents that are no longer in the party's possession, control, or power (with an explanation and their location).[21] Each party is required to sign an affidavit affirming that the list of documents they previously had or currently have in their possession is accurate.[22] Each party must then provide the other party with the nonprivileged documents.[23]

The shift from "trial by ambush" to "trial by avalanche" means that the discovery process can become a war of attrition in which those with the greatest resources stand the greatest chance of victory. There may be benefits to a broad scope of discovery, but there are also consequences – for both parties. The British Columbia Justice Review Task Force noted that the sheer quantity of documents required has increased significantly over the past several years, contributing to increasing costs and delays for all parties:

> Many lawyers have commented that while discovery tools have successfully eliminated trial by ambush, they have replaced it with something that may be as bad or worse – trial by avalanche. We compared approaching the discovery stage of litigation to standing on the edge of a dark abyss. As litigants move forward they are required to descend into the abyss, and only the wealthiest are able to crawl up and out the other side.[24]

If either party is not satisfied with the documents provided, they can request further disclosure or information. If the opposing party is not forthcoming, a party may also bring forth a motion asking the court to require this information.[25] If documents pertaining to the legal case are lost or destroyed, a court may draw an adverse inference that the party

was trying to hide information which could result in a finding of contempt of court.[26] The range of documents disclosed in this phase is often far broader than what will be provided to the court at trial.[27] Beyond worries of a document avalanche, there are unique concerns relating to document disclosure in cases that deal with allegations of sexual violence.

In these cases, discovery is unique in comparison to other types of civil cases, such as a business dispute or a claim against a media outlet. In a lawsuit against a silence breaker, the documents and records requested by the plaintiff often include intimate and personal details about the defendant's life. While it may be necessary to "prove his case," and to some extent is reasonable, the broad scope of the discovery process also gives the plaintiff intimate access to the defendant's private life, to the point of erasing their autonomy.

From the perspective of the law, the two parties are opponents on a level playing field with equal access to resources. To prove her case to the satisfaction of the court, the defendant is required to give up significant details about her private life. This is particularly true if she decides to counterclaim for the sexual violence. One lawyer explained the potential consequences:

> There are downsides to the civil suit. I guess the big one is that you have to open up your life to the [plaintiff] because of the fact that the law is quantifying the harm between what your life was and what it is now. You have to put yourself through the medical records, tax records, and education records, and that kind of stuff, and that is a difficult thing to do to someone that has already violated your trust and person.

As this lawyer notes, there is a fundamental imbalance of power in this process. The avalanche of private records and consequent intrusions on privacy can be particularly disturbing considering the abusive relationship that already exists between parties in a sexual violence suit. Even if the silence breaker decides not to countersue for damages relating to the sexual violence, she will likely still be required to provide records such as personal emails and text messages.

Researchers have spent little time examining the psychological or emotional impact of discovery in civil law, but parallels can be found in

third-party and sexual-history requests in criminal sexual assault trials, which feminist academics have understandably focused on, and in document production in family violence law cases.[28] This work demonstrates the deeply invasive nature of such requests. While the expectation of privacy differs in family, civil, and criminal courts, the literature demonstrates that when a man with a history of violence seeks personal information about a silence breaker, the process itself contributes to the complex harms inherent in the sexual assault and subsequent legal processes. Private documents are used to render the woman who reported or disclosed sexual violence "crazy and unstable, prone to fabrication and unable to distinguish between reality and fantasy."[29] Over a decade ago, Lise Gotell cautioned that record requests in criminal legal trials could potentially result in the reprivatizing of sexual violence:

> If feminists broke the silence around sexualized violence in the last part of the twentieth century, we could say that ... the current period is one where a new silence is being re-established. Underlying the probing of complainants' sexual histories and records is the message that we need to be very careful about what we say about sexual assault. Discourses about sexual violence, once breaking into public discourse, are increasingly being re-privatized.[30]

I raise similar concerns about discovery in a civil lawsuit.

Even worse, silence breakers who have experienced sexual violence and find themselves in the civil legal system do not have the same legal protections that they would have in a criminal trial. Although the plaintiff must also disclose his correspondence and records, the power imbalance between the two parties does not render this exchange of documents neutral. Discovery sends a strong warning to people who have experienced sexual violence that they must be careful about what they disclose and to whom, out of fear that their private communications can be used to humiliate and discredit them.

The Examination

The next step in discovery is the examination. This may be an oral examination or, more rarely, a written one, consisting of questions and answers

from both the defendant and plaintiff and, potentially, any witnesses who may be called at trial.

Oral discovery can be used by plaintiffs to strategically humiliate and intimidate silence breakers. Law professor Constance Backhouse spoke about the potential for the discovery process to exacerbate abusive power dynamics:

> Since most of these [cases] never get to trial, the lawyers that like to litigate look at discovery as their best shot, then, because they can't go into trial and swashbuckle their way around the courtroom, and so they pour all their resources into discovery, all their sleuthing, insinuations, and innuendos, trying to trip you up, find inconsistencies, find something about your past, get access to your records.[31]

Weyman Lundquist and Frank F. Flagal flagged the concerns raised by Backhouse nearly forty years ago, noting that "many litigators do not always use discovery as a trial aid to focus the issues; rather they engage in discovery to wear down opponents, to confuse, to delay, to increase expense and, ultimately, to settle lawsuits."[32]

Shila, another lawyer I interviewed, spoke about the impact of these unsettling tactics in sexual violence cases:

> These are tough cases. Evidence, the way it happens in a civil proceeding, is very complex and complicated. It is not necessarily happening in the presence of a judge. It is arranged with the lawyers and the person who is recording the discovery process. It can be a gruelling cross-examination-style discovery process. Very tough questions can be asked without any rape shield provisions. It is a very difficult process because the things that can be said without the presence of a judge, and without rape shield provisions, it can be complicated and a disheartening experience.

As Shila's comments indicate, the private nature of civil suits means that silence breakers may be subjected to a re-enactment of the power dynamics inherent in abuse. Furthermore, those who have experienced violence will be forced to revisit the sexual violence they experienced through the retrieval of documents and the oral discovery.

For researchers, these are difficult dynamics to get at, as the processes are confidential, and there is limited information about what happens in discovery beyond lawyers' descriptions of the process. Unlike trial transcripts, oral examination transcripts are not available to the public, rendering them difficult to either analyze or regulate.

Fortunately, the exceptional case of Marilou McPhedran, who was sued by the Ontario Medical Association (OMA), provides some clues about what goes on in discovery.[33] In 1991, McPhedran, a human rights lawyer, chaired the Task Force on Sexual Abuse of Patients commissioned by the College of Physicians and Surgeons of Ontario after an exposé of the college's cases in the *Globe and Mail,* which led to major changes to Ontario law. In 2000, during a mandatory governmental review of that law, McPhedran was appointed by the Conservative minister of health, Elizabeth Witmer, to head another task force, this time to assess the impacts of the laws on patients who reported experiencing sexual exploitation by all regulated health professionals, not just physicians, and the subsequent institutional processes covered by the law.[34] In June 2001, McPhedran was the primary author of the final *Independent Report of the Special Task Force on Sexual Abuse of Patients by Regulated Health Professionals in Ontario.* McPhedran also published a one-thousand-word opinion piece in the *Globe and Mail* summarizing the findings of the task force with a specific focus on doctors who sexually abuse their patients.[35] In the article, McPhedran drew attention to a case where a doctor found guilty of professional misconduct for having sex with one of his patients had his licence revoked. The doctor appealed the revocation of his licence, and the OMA acted as an intervenor to argue that the revocation was a breach of his Charter rights. In her opinion piece, McPhedran argued that the OMA should not have intervened; it should have funnelled its resources into the prevention of sexual abuse by doctors. The OMA sued McPhedran for her opinion piece but elected not to sue the *Globe and Mail*.

The lines of questioning McPhedran had to endure in the discovery demonstrate a gendered nature. McPhedran was a highly regarded professor and lawyer, with a noted history of respected leadership in advocating against sexual violence. The OMA lawyer, Hansel J.B.A. Dickie, QC, started the oral discovery by asking to see her curriculum vitae but then

shifted to asking about her marital status. Later in the oral examination, Dickie returned to inquiring about the marital status of the other experts appointed to the task force:

> *Dickie:* These experts on sexual abuse, I don't know how to put it any better than this, but had they been out in the real world very much? Were they married?
>
> *MacLeod Rogers (counsel for McPhedran):* I don't think Ms. McPhedran needs to answer that question.
>
> *McPhedran:* I can't answer that question. I wasn't on a personal basis.

Dickie sexualized McPhedran throughout the discovery process. Dickie put forward several hypothetical situations of sexual activity between doctor and patient and showed an inclination to place himself and McPhedran into each of the scenarios he posed about "acceptable" sexual conduct:

> *Dickie:* Did the committee give consideration to circumstances such as this; you come in to see me and you say, I've got a cold, Dr. Dickie, for I am now a doctor. I've got a cold, Dr. Dickie. Can you give me something for it, and I do, whatever doctors give out for colds, and as you walk out the door, Ms. McPhedran, I sweep you into my arms and I give you a great smack on the mouth and I run my hands down your body and you go out and say oh, my. I take it that I have committed sexual abuse.
>
> *McPhedran:* Yes.
>
> *Dickie:* I go home that night and I'm subject to mandatory revocation of my license, no doubt, if prosecuted properly.
>
> *McPhedran:* If prosecuted.
>
> *Dickie:* Okay. I go home that night and there you are, cooking dinner, and it just so happens you and I are married, Ms. McPhedran. Does the committee still intend that I should lose my licence for kissing my wife in my office?
>
> *McPhedran:* Well, there is a fair bit of attention paid to that sort of scenario, Mr. Dickie.
>
> *Dickie:* Could you just answer the question, madam?

This line of questioning was not isolated. It proceeded throughout the oral discovery:

> *Dickie:* Well, characterize then someone who came to the doctor and decided to have a relationship with the doctor, sexual in nature, solely as a consequence of his licentious desires and not at all as a consequence of any transferal. Did you consider that?
>
> *McPhedran:* We didn't discuss it in those terms, Mr. Dickie.
>
> *Dickie:* Thank you.
>
> *McPhedran:* Because none of the research or the expertise available to us indicated that is a likely scenario.
>
> *Dickie:* What about a hub of common sense, just for somebody to put it as I did, nobody even put it like that?
>
> *McPhedran:* I wouldn't agree with you that's common sense. I would agree with you that that's – I would have to say ignorance.
>
> *Dickie:* Ignorance. All right. Well, how about a whore?
>
> *McPhedran:* Could you define whore for me, please.
>
> *Dickie:* Yes, a woman who sells –
>
> *McPhedran:* Do you mean a sex trade worker by that terminology?
>
> *Dickie:* A woman who sells sex.
>
> *McPhedran:* A woman only?
>
> *Dickie:* Or a man who sells sex. I was speaking in this instance of a woman because in comes. Example – or we can reverse it if you'd like. In comes a woman to the doctor and the doctor treats her, and it's relatively minor. I don't know. She's got the flu that was going around a couple of months ago and sidelined everybody in a lot of law offices. She says, what do I take for the flu, doctor, and the doctor treats her and says come back next week, or at least in three or four days and she says, doctor, how about tonight? The doctor says what do you mean, and she says, "I'm a whore. I charge $100.00 an hour. See you at my place. Bring the C-Note." The doctor goes along that night. Is he abusing the woman now?

These exchanges are emblematic of the approach taken by the plaintiff throughout the oral-discovery process.

There were few questions directly related to the allegations of defamation. Instead, counsel for the OMA focused on interrogating McPhedran about

her perspectives on sexual activity between doctor and patient and, generally, sexualizing the interrogation process itself. In my interview with McPhedran, she told me that during the recess she saw the female court reporter in the washroom. The reporter expressed how upset she was hearing the lines of questioning McPhedran was subjected to by the OMA lawyer. McPhedran's own lawyer also called a recess during the cross-examination because of the inappropriate lines of questioning. McPhedran asked that her lawyer not object to any of the questions posed by the OMA lawyer. She wanted his conduct recorded for the judge to see if the case proceeded to trial.

The discovery transcript reveals the discriminatory lines of questioning silence breakers are often subjected to in cross-examination. Shocking as the transcript is, it is also worth noting that McPhedran was fortunate to enjoy several advantages relative to other participants in this study. As a lawyer by training, she had more knowledge about navigating the legal system than most of the research participants I spoke with (which may explain why she allowed Dickie to expose himself on the record). Perhaps more importantly, McPhedran was not involved in the case as a victim of sexual violence, and the lawsuit against her was initiated by an organization, not a man who victimized her.

As Shila noted, the discovery may be even more brutal for those being examined on their direct experiences of sexual violence. Indeed, many of the research participants described the civil legal process as resembling a criminal sexual assault trial. Laura, a silence breaker, described being questioned by the plaintiff's lawyer: "The lawyer pretty much aggressively cross-examined me about the assault and said it was consensual. You don't know what assault is. You're confused. Blah, blah, blah. Asked me a bunch of questions in front of the guy who did it." The entire legal process had a profound impact on Laura's emotional well-being: "I was pretty shaken up after that. I was really retraumatized by being forced into the meeting like that, with the perpetrator, like that, staring me down."

Laura found it particularly difficult because she was assaulted by her boss, and their employer helped to preserve his reputation once he initiated legal action:

> I was just really shaken up by these people that I worked with and trusted were, like, threatening me during a crisis. I just felt they just completely

> lost their moral compass and have crossed lines … I think that's what shook me up the most. I didn't know these people could be capable of that. Or, if they even knew how harmful it was, what they were doing.

Given the limited data, these findings cannot be generalized to make conclusions about the discovery process overall. The private nature of discovery makes it incredibly difficult to conduct meaningful research on what happens outside the courtroom. Interviews do show, however, that discriminatory stereotypes about people who experience sexual violence are present in the civil legal system. The discovery process can allow abusive men to legally gain access to private records, which can be a form of revictimization for those who have experienced sexual violence.

Mediation

There are financial motivations to settle before a trial. According to the 2021 Legal Fees Survey, preparing for a five-day civil trial in Canada (excluding the costs of the trial) costs $38,194.35 while a seven-day trial costs $92,118.[36] In 2019, the average national hourly rate for a civil litigation lawyer with two to five years of experience was $253.18.[37] Legal fees and disbursements prove to be a significant barrier to successfully defending a lawsuit. Several participants noted that if they had been able to financially, they would have taken their cases to trial: "I would have needed twenty or thirty grand to take that through a trial. I don't have that. If somebody is sexually assaulted and speaks out about it and gets sued, that's an enormous amount of financial burden. I feel there's a level of that. And why are lawyers making $500 an hour?"[38]

Money, however, is not the only barrier to going to court. Other participants felt a trial would contribute to their revictimization. Similarly, plaintiffs may wish to settle before trial to avoid the possibility of unflattering information circulating about the allegations.

The majority of the cases studied here did not proceed beyond mediation, either because the parties reached a mutual agreement or because the plaintiff withdrew the lawsuit. Although it may be assumed that having a case withdrawn would be a significant relief for someone being sued, many reported that they felt angry and frustrated because they wanted vindication from the court. According to Ali: "When I realized that the

case against me would evaporate, I felt intensely angry, as some part of me wanted the case to go to court. I wanted to confront him and clear my name. I felt angry that I would not have the chance to see the look on his face as his case fell to pieces."

McPhedran expressed a similar sense of frustration. The day before the trial was set to begin, the OMA withdrew the lawsuit against her. She had been confident that her cause was just, but, as she recounts, her lawyers reminded her of the legal system's unpredictability:

> My lawyer had to take me outside and said to me, "We are not going with you on this. If you refuse this walking away, of course, we will represent you at trial, [but] we will not participate in an appeal." I said, "I don't think I am going to lose." They said, "You shouldn't lose. You are clearly in the right here, but strange things happen in the legal system all the time, and you need to know we are at the end of our line."

Although agreeing to walk away was heartbreaking, and McPhedran was distraught at the loss of an opportunity to vindicate herself and reveal what the OMA was hiding, she'd be bankrupt if she lost. McPhedran reflected on these potential costs: "My only hesitation about trial was that I couldn't afford it. I was a single mom with my firstborn asking me at the dinner table, 'Mom, are we going to lose the house?' And I had to say, 'Yes, honey, we are going to lose the house if I lose the case.'"

The Trial

There is a significant risk in going to trial, not just because of the cost of legal counsel but also because losing the case means possibly having to pay damages to and legal fees for the other party.[39] Further, there may be some details of the case that both parties would not want to be made public. Almost all civil cases in Canada are tried by a judge, who determines the case on a balance of probabilities.[40] If the defendant is found not liable, the judge will dismiss the case. If the defendant is found liable, however, a judge will consider the following before deciding what the damages will be: the remedy that the plaintiff has requested, the facts of the case, and compensation for the plaintiff.[41] In Canada, typically, the party who loses a civil proceeding or motion has to make a significant contribution to the

winning party's costs.[42] Several factors are taken into consideration when making a judgment about costs, such as the amount recovered in the proceedings, the relative success of each party, the complexity of the proceeding, and the conduct of the parties during the legal process.[43] As mentioned, few civil cases make it to trial. Only two of the silence breakers I interviewed had cases that went to trial.

The Publication Ban

For some of the silence breakers, the lawsuit against them allowed the media, the plaintiff, and his supporters to name them either in traditional media outlets or on social media. For example, one woman made what she thought was a confidential report of sexual assault only to have her name and the details of the sexual assault published by a national media outlet after the accused decided to sue her for defamation. Her name remains linked to the case on the internet. In contrast, in a criminal sexual assault trial, sexual assault complainants are protected by a publication ban unless they opt to remove it, meaning that any information that could identify the complainant or a witness cannot be published or broadcast under section 486.4 of the Criminal Code. The publication ban remains in effect regardless of the outcome of the case.[44]

In the late 1980s, the publication ban was challenged as being unconstitutional because it violated the freedom of the press, as protected under section 2 of the Charter.[45] The Supreme Court of Canada upheld the legislation. In the decision, Justice Lamer stated that the legislation protects victims of sexual assault "from the trauma of widespread publication resulting in embarrassment and humiliation."[46] The Supreme Court justices reasoned that protecting the identities of those who report sexual assault would encourage reporting and, in turn, deter sexual violence in the future. While this decision, and the publication ban in general, has not eliminated the embarrassment and humiliation of testifying as a complainant in a sexual assault trial, the ban is likely preferable for some, perhaps many, sexual assault complainants since the publication of details relating to an alleged sexual assault may negatively impact the complainant's mental health, relationships, employment, safety, and privacy.[47]

In contrast, in civil proceedings, no similar protections are guaranteed, even if the lawsuit is a direct result of reporting or disclosing sexual

violence. The absence of an automatic publication ban in civil law does not mean that a defendant cannot ask the court to issue one. In 2019, publication bans were sought to protect the defendants in *Galloway* and *Stuart v Doe*.

In both instances, the defendants were being sued for defamation after they reported faculty members to their respective postsecondary institutions for sexual assault.[48] In both cases, the courts granted the requested publication ban in favour of the privacy of the women.

There are striking similarities between the two cases. As a result of being reported for sexual assault to their employers, both men were subject to workplace investigations and, subsequently, lost their jobs. After the institutional investigations were completed, both women contributed to public dialogue about their experiences of sexual violence and reporting the violence to postsecondary institutions. In *Galloway,* A.B., a professional artist, was sued for a public art exhibition in New York City about the experience of reporting sexual violence to campus administrators. In *Stuart,* Jane Doe made a public Facebook post and a drawing commemorating the #MeToo movement but did not personally identify herself as a survivor of sexual assault or name the man who assaulted her.[49]

Neither the men accused nor the universities involved were named by A.B. or Jane Doe. In many ways, the two women did what "good victims" are expected to do – they made a formal report to their postsecondary institutions and remained silent until the investigations were completed. They engaged in public speech without specifically identifying the men or the postsecondary institutions involved. Yet they were still sued for defamation by men seeking to rehabilitate their professional reputations through legal means and, arguably, to punish the women who'd caused them reputational harm.

Since neither of the men consented to the defendants' requests for a publication ban, the women were required to make an argument to the court about the need to have their identities protected.[50] In both decisions, the courts noted the competing interest of open-court principles and the privacy of someone who has made a sexual assault allegation. In both cases, the courts found in favour of privacy and granted the publication bans. The motion judges' decision to grant the publication ban in both cases was attributed to the fact that although the lawsuit received public attention,

the identities of the women were relatively unknown.[51] The court noted that A.B. was granted a publication ban because she'd been selective in who she disclosed the sexual violence to.[52] The court also noted that A.B.'s art exhibition "was about her experience as a survivor of sexual assault – she did not identify the plaintiff and the exhibit was not publicly linked to the plaintiff."[53] Here, the motion judge constructs the "good victim" as one who protects the identity of the accused and confines disclosures about the violence she experienced to those within her close social circle.

These decisions suggest that publication bans in civil trials are reserved for women who rely on the formal investigative process, regardless of how problematic, slow, or discriminatory it may be. Further, it seems that publication bans on proceedings are only available to women who can demonstrate that they are compliant and "good" victims.[54] There is an expectation that women will remain quiet to keep their identities – and the identities of the men they accuse – hidden. In the following chapter, I examine the linkage between the idealization of women's modesty and the history of defamation law. Here, suffice it to say that the courts have yet to recognize the significant difference between choosing to engage in the public sphere as a victim, which allows some agency over what details will be shared, and a civil trial, in which victims have little control over what details of their lives are entered into the public record.

Through an overview of the procedural and practical steps involved in a lawsuit, this chapter demonstrates the challenges in navigating the civil legal system from the perspectives of people who have been sued or threatened with a lawsuit. Civil procedure textbooks present the legal process as a straightforward process, but, as many of the silence breakers explained, this is often not the case. Unsurprising, legal textbooks, written from the perspective that the law is a neutral and objective arbiter, fail to account for how power dynamics between parties, such as disparities in terms of access to financial resources and legal representation, can shape legal proceedings, such as the documentary and oral-discovery processes. For almost all the silence breakers, the plaintiff was more privileged in terms of social location and access to financial resources. These disparities were particularly pronounced in the case of silence breakers who were queer, racialized, gender-diverse, or worked low-wage jobs without job security.

The silence breakers' narratives demonstrate how power dynamics between the plaintiff and defendant can be used strategically to advance legal action. Such power dynamics can be heightened depending on various factors that may influence her ability to defend herself, including her income, profession, and overall positionality as a "good victim," which is often entangled with discriminatory stereotypes intertwined with racism, colonialism, and ableism.

Abusive men can use the process to mimic abusive dynamics; they can intimidate and silence their victims and those who support them before a legal proceeding is initiated. The absence of the scaffolded protections for complainants available in criminal sexual assault trials – such as the automatic availability of publication bans and rules that limit the use of private records and questioning the victim about her sexual history – means that silence breakers are often subjected to private legal action that leaves them vulnerable to public humiliation, shaming, and revictimization. Overall, the presence of differential power dynamics between plaintiff and defendant and the calculated use of rape myths allow abusive men to strategically use the civil legal system to foster abusive power dynamics under the guise of "truth" seeking and the redemption of their tarnished reputations.

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