Case Name:

Jane Doe v. London Free Press, a Division of Sun Media (Toronto) Corp.

Between
Jane Doe, Plaintiff, and
The London Free Press, Division of Sun Media (Toronto) Corporation and Jane Sims, Defendants

[2015] O.J. No. 3464

2015 ONSC 4239

Court File No.: 6173/12

Ontario Superior Court of Justice

A.D. Grace J.

Heard: April 13-17 and May 1, 2015.
Judgment: July 2, 2015.

(186 paras.)

Counsel:

M. Lerner and *C. Dawson*, for the Plaintiff.

MacKinnon, for the Defendants.

A.D. GRACE J.:--

A. Background

1 In 2005, Gregory Ernest Last was convicted of various offences including two counts of sexual assault involving two different incidents and complainants. While not one of the victims, the plaintiff, who was granted leave to use the pseudonym Jane Doe in this proceeding, testified during the trial.[1]

2 Mr. Last's appeal to the Court of Appeal was unsuccessful.[2] However, the convictions were set aside by the Supreme Court of Canada in 2009.[3] The matters were remitted to this court with the direction that the counts relating to each complainant be tried separately.

3 Ms. Doe was not involved in the re-trial of charges relating to the first complainant.[4] In mid-October, 2010 Mr. Last was once again found guilty of those offences.

4 The re-trial of charges relating to the second complainant was scheduled to commence on October 25, 2010. Ms. Doe was under subpoena and required to testify.

5 The second re-trial did not proceed on the assigned date. Citing irreconcilable differences, the presiding judge granted the application of Mr. Last's lawyer to be removed from the record. The matter was adjourned to another day.

6 However, that attendance is important to this proceeding. The Crown made a request for a non-publication order. Counsel appearing on behalf of the Crown said in part:

> Your Honour, this is a matter that is set for trial before a judge that's sitting in the Ontario Superior Court of Justice alone. It is an allegation, one of the counts of sexual assault. And I am not sure of the status of the current non-publication order, but what I'm asking Your Honour to impose is an order pursuant to s. 486.4(1) directing that any information that could identify the complainant or any witness in this proceeding be -- not be published in any way. As I read the section, it's mandatory if the complainant...asks or if the witness is under 18. Here, I'm asking for that on behalf of witnesses who are over 18, where the Court has discretion...I am asking that the order apply to all of the non-police witnesses as well as the complainant. [Emphasis added]

7 The presiding judge, Bryant J., indicated his willingness to make an expansive order after a brief exchange with the Crown and Mr. Last. He directed that its terms be read out in open court. The Court Registrar made the following announcement:

> Pursuant to s. 486.4(1) of the *Criminal Code of Canada* an order has been made directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way. [Emphasis added]

8 A stamp was placed on the reverse of the indictment. It read:

> ORDER RESTRICTING PUBLICATION OF EVIDENCE Pursuant to s. 486.4(1) of the *Criminal Code*

9 No formal order was prepared or distributed.

10 At the time, the London Free Press was a Sun Media Corporation ("Sun Media") publication. London Free Press reporter Jane Sims covered the re-trials of Mr. Last. She was in Bryant J.'s courtroom and wrote a short story concerning the events of October 25, 2010. In the on-line version of the story, Ms. Sims wrote in part:

> Last's journey through the criminal justice system has been ongoing since 2003 when he was arrested for the attack on Austin.[5]
>
> He was tried in 2005 for the assault and another alleged attack on [a] woman who has asked her name to be protected by court order.
>
> The publication ban was extended to both her name and the names of the witnesses. [Emphasis added]

11 Brief court attendances followed on November 8, 12, 19 and December 7, 2010. Although transcripts of those appearances were not obtained, copies of the various endorsements made on the indictment were provided during this trial. On the fourth attendance, a March 7, 2011 trial date was set after Mr. Last advised that he had retained new counsel who was then available.

12 The second re-trial commenced as scheduled. Crown counsel, Ms. Tuttle, was unchanged from the October 25, 2010 attendance. Ms. Sims was also present.

13 However, a different judge presided. After the accused was arraigned and a witness exclusion order was granted, Leitch J. raised the issue of a publication ban:

> THE COURT: Ms. Tuttle, is there an order in place dealing with publication issues, or are you seeking such an order?
>
> MS. TUTTLE: There is an order in place under s. 486.4 so that nothing tending to identify the complainant can be published, and I should have mentioned that again. I think that the representative from the local media is aware because she was present on the application.
>
> THE COURT: Yes, she's nodding that yes. I just wanted...to review that on the record and that that order is in place then. [Emphasis added]

14 The Crown's response was incomplete. In fact, the non-publication order related to the identity of the complainant *and* the witnesses, including Ms. Doe.

15 The complainant testified on March 7, 2011. Her testimony was the subject of a March 8, 2011 article that noted the complainant was a "26-year-old woman, whose identity is protected by court order". Her name did not appear.

16 Ms. Doe testified on the second day of the re-trial. Her testimony was the subject of on-line and print articles published on March 9, 2011. Ms. Doe's actual name appeared several times.

17 Ms. Doe reacted immediately after seeing that day's edition of the London Free Press. The re-trial was continuing. That morning, Ms. Doe arrived at the courthouse looking for reporter Sims and the Crown attorney. Unable to speak to them, Ms. Doe immediately travelled to the London Free Press business premises. She spoke with Greg Van Moorsel, one of the newspaper's editors.

18 Mr. Van Moorsel promised to look into the matter. At about the same time Ms. Sims heard that Ms. Doe had been looking for her and why. She spoke to Ms. Tuttle and determined that the non-publication order had been breached. Instructions were given to delete references to Ms. Doe's

name in the on-line edition of the article it had published. The attempt was a poor one. Ms. Doe's real name continued to appear in two places until well after this action was underway.

19 Ms. Doe says that she has become reclusive and fearful as a result of a number of incidents that occurred thereafter. She attributes them to the breach of this court's non-publication order and seeks damages.

B. The Parties' Positions

20 Two issues do not require adjudication.

21 In argument, counsel for the plaintiff readily acknowledged that there is no basis for recovery against Ms. Sims personally. Insofar as she is concerned, the action is dismissed.

22 Further, the correct legal name of the remaining defendant is Sun Media Corporation. The title of proceedings is amended accordingly. It is conceded that if the plaintiff's claim succeeds, Sun Media is vicariously liable.

23 Liability and damages are in issue.

24 Ms. Doe makes two arguments. First, she submits that liability flows automatically from a breach of the non-publication order. Second, she maintains that liability should be imposed on the basis of negligence.

25 She argues that a general damage award in the range of $75,000 to $100,000 is appropriate, together with damages for future care in whatever amount the court determines appropriate.

26 At the outset of trial, counsel for Sun Media indicated that the defendant intended to argue that the non-publication order was made without jurisdiction. However, in closing argument, Sun Media advised the court that it was not pursuing that issue. In fact, it fairly conceded that the publication of Ms. Doe's real name on-line and in print breached its terms.

27 Sun Media submits that negligence is the only theoretical basis for liability. It denies that a duty of care was owed to Ms. Doe in the particular circumstances of this case.

28 Even if such a duty was owed, it maintains that Ms. Doe has not established that the London Free Press fell below the required standard of care. If that element is proven, the defendant submits that Ms. Doe has failed to prove that she suffered foreseeable damage as a result. However, if the court is satisfied the elements of negligence have been proven, it submits the court should award nominal damages in the range of $1,000 to $5,000.

C. Analysis and decision

i. Does liability result automatically from a breach of the non-publication order?

29 The charges facing Mr. Last included sexual assault using a handgun contrary to s. 272(2) of the *Criminal Code.*

30 That charge, among others, triggers the court's statutory jurisdiction to grant a non-publication order. Section 486.4(1)(a) (i) of the *Criminal Code* provides in part:

> Subject to subsection (2), the presiding judge...may make an order directing that any information that could identify the complainant or a witness shall not be

> published in any document or broadcast or transmitted in any way, in proceedings in respect of ...an offence under section...272...

31 Pursuant to subsection (2), the order is mandatory if requested by the complainant, a witness under the age of eighteen years or the prosecutor on their behalf. However, Ms. Doe had attained the age of majority. In those circumstances, the granting of the order is discretionary. As mentioned, Bryant J. exercised that discretion and made a broad non-publication order.

32 A statement of law was filed on Ms. Doe's behalf. At para. 10, the plaintiff submitted that:

> A Court order demands and commands absolute compliance until the order is revoked, varied or expires. Failure to comply with a Court order will bring consequence, civil or criminal. Compliance with a Court order is not discretionary. Compliance is mandatory. A breach of a Court order will bring remedies and sanctions.

33 While no authority was cited, several of the propositions should be self-evident. Court orders are to be obeyed. A breach may have serious consequences. For example, every person who fails to comply with a non-publication order made under s. 486.4(1) or (2) is guilty of an offence punishable on summary conviction.

34 However, the submission that breach of the non-publication order has automatic civil consequences is wide of the mark. Since *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, it has been settled that Canadian law does not include a nominate tort of statutory breach that would be automatically triggered upon proof of a breach and resulting damages. The Court concluded that the civil consequences of a breach of statute should be "subsumed in the law of negligence."[6]

35 If there is to be recovery in this case, it will be on the basis of principles relating to that cause of action.

ii. Is Sun Media liable in negligence?

36 In order to succeed, Ms. Doe must establish that Sun Media owed her a duty of care, fell below the required standard of care, that she suffered damages and that they were caused, in fact and in law, by the breach.[7]

37 In *Rausch v. Pickering (City)*, 2013 ONCA 740 at para. 39, Epstein J.A. described the duty of care element of negligence in these terms:

> The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm...

38 There were no dealings between Ms. Doe and Sun Media. However, the non-publication order tied the two parties together. It was directed to and bound those publishing information about the proceedings involving Mr. Last and the second complainant. It protected the identity of that complainant and, as permitted by s. 486.4(1) of the *Criminal Code*, all other witnesses testifying at the re-trial.

39 Sun Media acknowledged that in many cases a non-publication order will result in a journalist owing a duty of care to those who are to remain anonymous.

40 It noted that the existence of a duty of care has been recognized in the past in cases involving the disclosure of the identity of a complainant: *R. (L.) v. Nyp* (1995), 25 C.C.L.T. 309 (Ont. Gen. Div.) at paras. 19-23; *Nissen v. Durham Regional Police*, 2015 ONSC 1268 (S.C.J.) at paras. 302-316.[8] However, it argued that the duty could only arise with respect to other witnesses if the court articulated the factual and legal basis for its granting.

41 While not challenging the non-publication order made on October 25, 2010,[9] Sun Media submitted that the court failed to consider the factors set forth in s. 486.5(7) of the *Criminal Code* and the general principles applicable to publication bans set forth in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, *R. v. Mentuck*, [2001] 3 S.C.R. 442 and *Toronto Star v. Ontario*, 2005 SCC 41. The consequence, it argued, was that Ms. Doe's alleged loss was not reasonably foreseeable. Therefore, there was insufficient proximity to create a duty of care.

42 It is true that the court's analysis of the *Dagenais/Mentuck* factors[10] would have provided the London Free Press with more context for the Crown's broad request. However, too much information could have exacerbated, rather than minimized, the concerns that had been communicated to the Crown.

43 In fact, the court was not told why the request for such a broad publication ban was being sought. The Crown simply indicated that it was "asking that the order apply to all of the non-police witnesses as well as the complainant." I also accept that Ms. Sims did not know of Ms. Doe's interactions with the Crown.

44 However, Ms. Sims was familiar with s. 486.4 publication bans although one extending to witnesses eighteen years old or older was rare.

45 The legal odyssey of Mr. Last was well known. Another London Free Press reporter had covered the first trial with occasional assistance from Ms. Sims. Ms. Sims had followed his journey through the appellate courts. Articles authored by Ms. Sims regularly appeared in the newspaper during the re-trial of the charges relating to the first complainant. Mr. Last was charged with brutal crimes.

46 Ms. Sims was in court when the non-publication order was made by Bryant J. Its terms were read out by the court's registrar. No objection was made by anyone.

47 Ms. Sims is an experienced reporter. She testified that she has, from time to time, expressed concerns to the court about a proposed publication ban and sought legal advice. The existence and scope of the order was accurately reported the following day.

48 The potential consequences of a breach were not a mystery to her or her employer. Reputational and safety concerns are obvious reasons underlying the enactment of s. 486.4 of the *Criminal Code*. It was foreseeable that an individual could be exposed to physical or emotional harm if their identity was disclosed when protected by a publication ban.

49 That is borne out by the aftermath of the publication of the March 9, 2011 story. I do not doubt Ms. Sims' testimony that she was "mortified" when she learned that the court's order had been breached. Undoubtedly, she did not want to violate the law. However, notably and laudably, Ms. Sims and her employer were clearly concerned about the welfare of Ms. Doe because they knew that harm of some kind could result from the disclosure of her identity.

50 In my view, on the facts of this case, the non-publication order created a relationship of sufficient proximity to obligate Sun Media to be mindful of the interests of all of those who testified at Mr. Last's second re-trial: *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at 550-553.

51 Given Sun Media's acknowledgement that there are no residual policy considerations that might negate its existence, I am satisfied a duty of care has been established: *Cooper v. Hobart*, *supra* at 551 and 554-555.

52 I turn to the standard of care.

53 The same issue arose in *L.R. v. Nyp*, *supra* when the Kitchener Record published an article containing the name of a complainant in violation of a non-publication order made under the *Criminal Code.* At para. 27, Salhany J. described the applicable standard in these terms:

> Negligence is defined as the doing of something which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do. In the case of a reporter, the standard is one of a reasonably prudent reporter.

54 I agree that is the appropriate test.

55 I return to the facts of this case.

56 A non-publication order was not made when the charges against Mr. Last were tried together in 2005. The complainants and other witnesses, including Ms. Doe, testified without its protection.

57 Ms.Tuttle represented the Crown at the re-trials of Mr. Last. Ms. Doe testified that she was reluctant to participate in the second re-trial. Ms. Tuttle agreed. She expressed surprise because Ms. Doe had testified in 2005 without the benefit of a publication ban. No incidents were reported thereafter.

58 Nevertheless and notwithstanding the fact Ms. Doe was under subpoena, the Crown was willing to try to address her concerns. Mr. Last was believed to be a danger to the public.

59 Suggestions were made by the Crown in an effort to put Ms. Doe's mind to rest. For example, according to Ms. Tuttle, the Crown discussed the possibility of assisting Ms. Doe in relocating to another London, Ontario address. Ms. Doe was not receptive. That led to the Crown's request that Bryant J. grant a broad non-publication order relating to the complainant *and* other witnesses.

60 As mentioned, the requested order was made. The court's registrar was instructed to read the terms aloud and did so.

61 No formal order was prepared or signed. The stamp on the indictment indicated that an order had been made under s. 486.4 of the *Criminal Code* but did not set forth its terms. In any event, Ms. Sims did not review the contents of the court file.

62 At trial, Ms. Sims testified that she had no recollection that the terms of the non-publication order were read out in court. She said that she was familiar with s. 486.4 of the *Criminal Code* because limited non-publication orders are almost always made in cases involving allegations of sexual assault.

63 Ms. Sims said the lack of a publication ban in relation to the initial 2005 trial was extremely unusual. So, too, was the 2010 order that applied to witnesses generally.

64 Ms. Sims authored an article that was posted on the London Free Press website on October 25, 2010. It specifically noted that the publication ban applied to the second complainant "and the names of witnesses."

65 Ms. Sims testified that she revised the article that evening. The updated version appeared in the October 26, 2011 print edition of the London Free Press. The sentence that included the just quoted words no longer appeared. Both articles noted that the second complainant had "asked that her name be protected by court order." The print version also observed that the first complainant had not sought such an order in the 2005 trial or 2010 re-trial. Clearly and appropriately, Ms. Sims took note of the existence or non-existence of publication bans.

66 The second re-trial did not commence until March 7, 2011, approximately four-and-a-half months after the non-publication order was made.

67 Ms. Sims was in attendance when the second re-trial commenced. She said that she did not review notes that she had taken during previous court attendances or articles that she had been written concerning the proceedings involving Mr. Last because the trial was to start anew. Ms. Sims said she would have taken that step had the trial commenced at an earlier date and been continuing.

68 Ms. Sims questioned whether her notes from the October 25, 2010 attendance were still available to her. She said that "she purged a lot of stuff" in preparation for renovations at the London Free Press building that included her work area. Ms. Sims said that she discarded those notes as part of that process. She thought the renovations took place in the spring or summer of 2011. In cross-examination, she acknowledged that prior articles would have been available to her.

69 As mentioned earlier, when Leitch J. asked about a publication ban, the Crown advised that an order was in place under s. 486.4 "so that nothing tending to identify the complainant can be published".

70 The Crown then added:

> I think that the representative from the local media is aware because she was present on the application.
>
> THE COURT: Yes, she's nodding that yes. I just wanted...to review on the record that that order is in place then.

71 Ms. Sims was the representative of the media in court. While the information provided by the Crown to the court omitted any reference to other witnesses and was therefore incomplete, it accorded with Ms. Sims' recollection.

72 Ms. Tuttle said that she knew that the order included the complainant and the other witnesses. She was not sure why she had only mentioned the complainant in response to Leitch J.'s inquiry. Ms. Tuttle thought it might be because she was thinking about the second complainant who was scheduled to be the Crown's initial witness.

73 Both Ms. Tuttle and Ms. Sims said that they had no recollection of discussing the scope of the publication ban until after Ms. Doe's actual name was disclosed.

74 Ms. Sims testified that Ms. Tuttle then told her that the s. 486.4(1) order included all witnesses and was not limited to the second complainant.

75 In those circumstances, did Ms. Sims fall below the standard of a reasonably prudent reporter?

76 Neither party sought to introduce other evidence concerning the standard of care. In *R.(L.) v. Nyp, supra* the court was referred to principles set out in the Canadian Press Style Book. I was not referred to that or any other publication. The parties did not seek to qualify an expert on the topic. However, no one submitted the court was unable to determine the issue without such evidence.

77 This case is an unfortunate one. Had the court file contained the order as read by the court registrar on October 25, 2010, the trial judge would not have had to make the inquiry she did. In *R. v. Canadian Press*, 2009 BCSC 988 (S.C.), Pitfield J. noted the "publication ban which was granted...was posted on the courtroom door for all to see." That is a prudent practice.

78 The Crown should have been fully accurate in its response to Leitch J.'s inquiry. Whether due to momentary memory loss, preoccupation with other issues or other cause, its representative was not.

79 However, in my view none of those matters affect the level of performance reasonably expected of a journalist. Their role is separate and distinct. Journalists have a responsibility to familiarize themselves with the existence and scope of a non-publication order.

80 Ms. Sims, a well-respected and capable reporter, fulfilled that duty initially. She accurately reported the existence and scope of the restrictions imposed by the court. The published summary of the events of October 25, 2010 mentioned the second complainant and noted the "publication ban was extended to both her name and the names of the witnesses."

81 During this trial, Ms. Sims testified that she believed the order granted by Bryant J. only prohibited the disclosure of the identity of a witness *if* its revelation would identify the second complainant.

82 I do not accept that evidence. I am satisfied Ms. Sims was in court when the non-publication order was made. It was scheduled to be the first day of the re-trial of the charges relating to the second complainant. Ms. Sims described the re-trial as "a really high profile case". The attendance was brief.

83 While she may not remember it, Ms. Sims heard the court registrar specifically say that the identity of the complainant *or a witness* and any information that could disclose the identity of the complainant *or a witness* was not to be published in any way. That is why the on-line article published on October 25, 2010 accurately recorded the terms of the order.

84 In the intervening months, Ms. Sims remembered the existence but not the scope of the s. 486.4(1) order. Memories are imperfect. Everyone forgets things. It is not surprising that Ms. Sims' memory would fade between October 25, 2010 and March 7, 2011. In addition to the passage of time, Ms. Sims estimated she had written approximately forty articles in the intervening period. At least two of the cases were of particular, ongoing interest in the community.

85 However, it is surprising that the breadth of the non-publication order granted in this case was forgotten by the Crown *and* by Ms. Sims. As mentioned, the Last case was a notorious one. Ms.

Sims had covered small portions of the 2005 trial. She was assigned to cover the proceedings in the Court of Appeal and the Supreme Court of Canada. She followed both re-trials in this court.

86 The scope of the non-publication order made on October 25, 2010 was unusual. Ms. Sims was used to writing stories about alleged sexual assaults without including the complainant's name. Mr. Last's first trial and the re-trial of the charges relating to the first complainant were exceptions. Articles written by Ms. Sims commented on that fact. That stuck in her memory. An unusually broad order did not.

87 The terms of the October 25, 2010 order were very important to the court, the Crown, Ms. Doe and to the London Free Press. The court decided the identity of all witnesses should be protected, communicated its terms and expected its order to be obeyed. The Crown had sought the order because of Ms. Doe's fear of retribution. Ms. Doe's worries were addressed. The London Free Press was then required to maintain the anonymity of the second complainant and all witnesses who testified at the re-trial.

88 Journalists are not to be held to a standard of perfection. They are not obligated to take extravagant precautions. However, they will be held responsible for failing to do something which a reasonably careful journalist would do in similar circumstances.

89 There may well be cases where a publication ban is made in the absence of a journalist. In such circumstances, the parties' lawyers and the court file may be the only sources of information concerning the existence and terms of the order unless a transcript is ordered.

90 However, that is not this situation. There was no need to rely on the Crown or the court file.

91 The journalist had been present when the re-trial was adjourned and knew precisely what restrictions had been imposed on the media.

92 By education, training and experience, reporters know of the importance of publication bans.

93 Notably, no one attending court on March 7, 2011 could have known that Leitch J. would inquire about a non-publication order. A reasonably prudent reporter would have been prepared for the much anticipated commencement of a long-awaited and important re-trial. Like Ms. Sims, that reporter would have had deadlines to meet and expectations to fulfill.

94 A permanent, easily accessible and retrievable record of the existence and terms of the order should have been made. If in a notebook, same should have been retained and checked. It should not have been casually discarded a few months later as part of a renovation related "purge".

95 In any event, another record remained: the article written immediately after the October 25, 2010 attendance and published on-line. That article could and should have been reviewed. The order affected the re-trial. While the evidence may have been heard afresh, it endured.

96 On this occasion, Ms. Sims fell below the standard of a reasonably prudent reporter.

97 I turn to the issue of damages. As mentioned, Ms. Doe must prove that she suffered damage and that the defendant's breach of the standard of care caused that damage in fact and in law.[11]

98 Ms. Doe readily admitted a troubled past. She said it started when she moved with her family to west London while still in elementary school. One of the tenants was in her early twenties. A friendship was forged. It was a destructive one.

99 Previously a good student, Ms. Doe began to skip school. She consumed alcohol regularly. She started smoking marijuana. Cocaine use followed. She testified that she became involved in prostitution when only about twelve years old.

100 While notionally continuing to reside with her parents and sibling thereafter, she continued to be involved in prostitution, the excessive consumption of alcohol and the use of marijuana and cocaine for many years.

101 Ms. Doe described the events that led to her interactions with Mr. Last and later to her testimony at his first trial in 2005. Ms. Doe said she was concerned for her safety. She was afraid of retribution. She thought that her identity was protected by a non-publication order. She is mistaken. A publication ban was not in effect then.

102 Ms. Doe said Mr. Last and at least two members of his family were present when she testified. She said that nothing happened after the first trial that caused her concern. Her fear dissipated until she was required to testify again.

103 Ms. Doe was not a model citizen either before or after the 2005 trial. Proceedings were taken as a result of her habitual absence from school. Periodically Ms. Doe made short-lived and unsuccessful efforts to return to school or to obtain a more conventional job. Her behaviour did not change. Ms. Doe appears to have been uncontrollable.

104 She was the subject of criminal charges. Convictions were entered for drug and weapons offences and for offences arising from the use of stolen debit and credit cards.

105 Clinical notes of her family physician Dr. Dieter Bruckschwaiger were introduced into evidence for the period from January 7, 2008 to February 6, 2015. Ms. Doe acknowledged what the notes reveal: periods of depression, a serious motor vehicle accident in August, 2009 which led to nightmares and flashbacks, an ADHD diagnosis the following month and in December, 2010, reports of stress relating to her father's illness. Various drugs were prescribed including anti-depressant medication.

106 At about the same time, Ms. Doe reported being involved in an abusive relationship.

107 Ms. Doe lived near one of Mr. Last's cousins until shortly before the second re-trial began in March, 2011. She said she did not want to testify again due to her safety concerns. However, she felt better knowing that her identity would not be known outside the courtroom.

108 On the morning of March 9, 2011, Ms. Doe received a phone call from her mother. She was told that the London Free Press had included her name in a story about the re-trial involving Mr. Last. Ms. Doe purchased a copy of that day's edition and read the article herself.

109 She said that she was very upset and went straight to the courthouse. She could not find Ms. Sims. Ms. Tuttle was already in court and Ms. Doe was unable to speak with her at that time. Ms. Doe visited the London Free Press next. She was told that inquiries would be undertaken and that a mistake, if made, was an honest one.

110 Ms. Doe said she spoke to Ms. Tuttle by telephone later. An apology was given. Relocation to other housing in London was mentioned as a possibility. Ms. Doe said that an intra-City move was not acceptable.

111 Joe Ruscitti, the editor-in-chief of the London Free Press, testified. He remembered being told by Mr. Van Moorsel that Ms. Doe wanted money so that she could move away from London.

112 Testimony was given by Ms. Doe about subsequent events. Some were unrelated to the Last trial. For example, in early April, 2011, Ms. Doe's father passed away. She said that they were particularly close. Understandably, Ms. Doe said that his death was "rough" for her.

113 However, in her view other events were related to the publication of her identity. Ms. Doe said that in late March, 2011, she was confronted by two women and a man. She said that she was called a "rat" and a "snitch", assaulted and robbed. She did not report the incident because she feared further retribution if a call was made to the police.

114 Ms. Doe said that she regularly received anonymous phone calls on the landline at home and on her cell phone. She said that sometimes the caller referred to her as a "rat" and a "snitch". On other occasions, no words were spoken. Changing numbers interrupted but did not stop the calls. Ms. Doe says they continue but are less frequent.

115 An incident at Club LG was recounted by Ms. Doe. She said she was approached by two women inside the establishment, called a "rat" and "snitch" and told to leave. Ms. Doe said that the same women confronted Ms. Doe and her niece after they exited. Words were exchanged. Fighting followed. The sound of approaching sirens caused the fight to end and the participants to scatter. Neither Ms. Doe nor her niece spoke to the police. She said the encounter occurred during the summer but could not remember whether it was 2012, 2013 or 2014.

116 Ms. Doe's niece, D.A., said the incident occurred during the summer of 2011. She referred to the bar as Club Large. She remembered three women approaching toward the end of the night. One of them called Ms. Doe a "rat" and a "snitch" and told her to leave. Two of the women approached as they left the bar soon afterward. Similar words were spoken. One of the women pushed Ms. Doe. When D.A. intervened, a fight broke out.

117 Ms. Doe's sibling and mother also testified. I will refer to them as A.D. and B.D. respectively. A.D. said that Ms. Doe called after seeing the March 9, 2011 article. A.D. said that Ms. Doe was "crying and freaking out".

118 B.D. testified that Ms. Doe was "distressed" and "devastated" by the disclosure of her name. She said that Ms. Doe was "almost crazy out of her mind".

119 A.D. and B.D. reported repeated hang-ups when answering the landline at B.D.'s residence. A.D. said that in May, 2011, three men came to the door looking for Ms. Doe. One of them pulled a gun. Police were called. A.D. acknowledged not knowing whether the visit and the newspaper article were connected in any way.

120 Ms. Doe testified that she continues to struggle with depression. However, she is now afraid to leave her home. Occasionally she will do so but rarely unaccompanied. Most of her days are spent at home watching television and using her computer.

121 She has tried counselling. However, because of her fear of leaving her home, she has only attended sporadically. Group therapy was suggested. Ms. Doe said that due to her anxiety and dislike of group settings she would not participate unless her boyfriend attended the sessions with her. When told he would have to remain in a waiting area, she refused to attend.

122 Ms. Doe said she has been receiving income support from the Ontario Disability Support Program since December, 2014. She said she would like to leave London but is not financially able to do so. She said her immediate goal was to be able to do the things she liked to do before publica-

tion of the newspaper article without fear. Long-term, Ms. Doe hoped to complete high school and then take courses necessary to become a social worker or drug counselor.

123 Ms. Doe acknowledged that she has lots of issues. She volunteered that not all of them arise from the breach of the non-publication order. However, she maintained that some of them do.

124 Ms. Doe's mother, sibling and niece described Ms. Doe before and after Ms. Doe's identity was disclosed. D.A. said Ms. Doe is now reclusive and unwilling to visit unless accompanied by another person. Most of the time she must travel to Ms. Doe's residence to see her.

125 A.D. now lives west of London. A.D. said that Ms. Doe rarely leaves her residence. Ms. Doe often requests company to run errands because she will not go out alone. B.D. gave similar testimony. She described going to a summer event called Ribfest in downtown London in 2013. She said that Ms. Doe thought she had seen a cousin of Mr. Last.

126 Even though she soon concluded she was mistaken, Ms. Doe was fearful. She fidgeted, looked all around and was breathing oddly. They decided to leave the event. Ms. Doe refused to stand at a bus stop that was exposed. They walked to another one. Ms. Doe stood in an alcove and nervously awaited the arrival of a bus.

127 It was a Sunday. Buses passed by infrequently. Ms. Doe became more agitated as the minutes passed. Eventually they called for a taxi. B.D. said that Ms. Doe sits at home almost every day. She said it is very difficult to get Ms. Doe to leave home for even short periods of time.

128 Ms. Doe has established on the balance of probabilities that she was assaulted twice. She has proven that calls have been repeatedly made to a landline and to her cell phone even after her numbers have been changed. Her reaction after believing that she had seen Mr. Last's cousin was extreme. That occurred more than two years after publication of the article.

129 The defendant questioned the sincerity of Ms. Doe's reported anxiety. Ms. Doe saw her family physician eleven times between March 14, 2011 and February 6, 2012. It was not until the last visit that Dr. Bruckschwaiger's notes mention the issue. They reported that Ms. Doe "feels depressed/anxious/isolated" and that Ms. Doe feared being identified. The statement of claim had been issued less than two weeks earlier.

130 Dr. Bruckschwaiger testified that he has been Ms. Doe's family physician for approximately fifteen years. He said that anxiety was a new complaint and caused him to refer Ms. Doe to psychiatrist Dr. Kamini Vasudev. Dr. Bruckschwaiger said that he found Ms. Doe to be forthcoming when it came to physical issues but not those relating to her emotional or mental health. The delay in disclosure of her symptoms did not surprise him.

131 He noted that Ms. Doe is currently not taking anti-depressant or anxiety medication because she is pregnant. However, his current diagnosis includes depression and anxiety. The need for medication will be revisited after Ms. Doe gives birth.

132 Dr. Vasudev has been Ms. Doe's treating psychiatrist since July 30, 2012. A typewritten summary was prepared following the initial consultation. It recorded that Ms. Doe had presented with a low mood for nine years. The death of Ms. Doe's father and the 2009 motor vehicle accident were listed as "recent stressors".

133 Anxiety and isolation were described in these terms:

> [Ms. Doe] does not have any interests...Ms. Doe once complained about someone and gave a statement about someone who was involved in a crime including attempted rape...She was assured...that her information would be kept secret but [Ms. Doe] strongly believed that the confidentiality was broken and that guy ended up in jail for the next 25 years but the guys [sic] relations and friends are trying to threaten [Ms. Doe] by making lots of phone calls and [Ms. Doe] is even scared about reporting that to the police because she does not want to get into further trouble. Therefore [Ms. Doe] is scared about going out except going to her school. She remains vigilant about her surroundings when outside her house and this restricts [Ms. Doe] from socializing.

134 An increased dose of an anti-depressant was prescribed.

135 Improvement was mentioned following an August 31, 2012 follow-up visit. However, similar complaints were noted on December 20, 2012, February 5, April 16, May 28, July 9, November 5, 2013 and February 11 and June 25, 2014. Added to the mix were allegations that Ms. Doe's boyfriend was emotionally and physically abusive.

136 Dr. Vasudev said that her current diagnosis for Ms. Doe includes major depressive disorder and social anxiety disorder. She said the prognosis is "not as good". Ms. Doe's history of depression and anxiety is a long one. She has used narcotics as a coping mechanism. She has had trouble maintaining relationships. Conflict has been a recurring theme. On occasion she acts impulsively. Ms. Doe has failed to take medication as directed. She continues to smoke marijuana. Dr. Vasudev did not agree with the defence suggestion that Ms. Doe suffered from anti-social personality disorder although she agreed that Ms. Doe exhibits many of its traits.

137 Dr. Vasudev said that Ms. Doe would benefit from continued therapy including the Track to Wellness Program and anti-depressant medication.

138 An expert was qualified at the request of each party. Clinical psychologist Dr. Tamara Biederman testified at the instance of the plaintiff. She was also of the opinion that Ms. Doe suffers from a major depressive disorder. The effects of depression include low energy and motivation. That problem existed before publication of the March 9, 2011 article.

139 Dr. Biederman concluded that Ms. Doe suffers from a moderate to severe range of anxiety. That was a problem that developed after the 2009 motor vehicle accident. However, it was in remission and then exacerbated by the disclosure of her identity by the London Free Press

140 Publication caused Ms. Doe to become reclusive, fearful of leaving her home and hyper-vigilant when in public. Dr. Biederman opined that Ms. Doe suffers from agoraphobia. Those problems and that diagnosis are new.

141 During cross-examination, Dr. Biederman agreed that Ms. Doe exhibited many of the traits associated with anti-social personality disorder. However, in her opinion that diagnosis was not applicable to Ms. Doe.

142 She regarded Ms. Doe's short-term prognosis as very poor because she is not receiving consistent health care. Dr. Biederman was of the view that Ms. Doe would benefit from regular one-on-one counselling and medication.

143 Forensic psychiatrist Dr. Phillip Norris testified at the request of the defendants. He was of the opinion that publication of Ms. Doe's identity had a significant impact on her. It created a "good

deal of anxiety". It also provided Ms. Doe with an opportunity to extricate her from a life of drug and alcohol abuse and prostitution.

144 Dr. Norris was of the view that the prolonged use of narcotics had a profound effect on Ms. Doe's organic and psycho-social development. Drug use had prevented her from learning coping strategies most people are able to readily employ. In his opinion, Ms. Doe suffers from an anti-social personality disorder. While Ms. Doe does experience profound levels of anxiety, fear and sadness, disclosure of her identity is only one of many factors. Others include the subculture in which she existed for years, her criminal past, the death of her father and the 2009 motor vehicle accident.

145 Dr. Norris said that Ms. Doe seems to have returned to the mainstream. She seems to have stopped using cocaine. She is not involved in prostitution. However, her lifestyle has caught up to her. She lacks the social, academic and work skills to excel. Consequently, she feels ill-equipped to re-integrate herself. That, in turn, increases her anxiety and fuels her feelings of isolation. Dr. Norris was of the view that of all the causes contributing to her current level of anxiety, only about five per cent is actually attributable to the publication of the March 9, 2011 article.

146 I turn briefly to the applicable legal principles.

147 A person who suffers a personal, including psychological, injury suffers damage. Debilitating psychiatric illness that has a significant impact on a person's life constitutes a personal injury at law.[12] However, as McLachlin C.J. wrote in *Mustapha v. Culligan of Canada Ltd.*, *supra* at para. 9:

> The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.

148 In *Nissen v. Durham Regional Police*, *supra* the court heard evidence that the plaintiff became fearful and anxious after publication of her identity. She was nervous in public, had diminished confidence and was suspicious of strangers. The trial judge concluded that the plaintiff suffered psychological injury that was "serious and prolonged". He found that the injury was "severe and debilitating" and compensable.

149 In this case, the defendants questioned the severity but not the sincerity of the reported symptoms. The evidence of Ms. Doe, her mother, sibling, niece, the treating physicians and experts lead to the conclusion that Ms. Doe has indeed suffered compensable psychological injury. Her anxiety is real and long-standing. It has had a significant impact on her life. While she has, indeed, left her former life behind, she is emotionally paralyzed and unable to move forward.

150 That does not end the matter. The next issue is whether publication of Ms. Doe's identity caused the injury "in fact and in law".[13] The plaintiff must establish that the injury would not have occurred but the negligence of the defendant.[14] That means:

> ...that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where

> they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327...[15]

151 I have already mentioned Dr. Biederman's opinion. She concluded that the article exacerbated anxiety that had been in remission. As well, in her opinion it caused Ms. Doe to develop agoraphobia.

152 Dr. Norris agreed that publication of Ms. Doe's identity had a "significant impact" that caused a "good deal of anxiety for her." However, in the end he concluded that it was only approximately five per cent of the cause of her current difficulties.

153 The defendant suggests that the plaintiff has not established that any of the incidents Ms. Doe complains about occurred because of the publication of her identity. Mr. Last and members of his family were present when she testified in court in 2005 and 2011. She was known to Mr. Last. Her identity was disclosed in the courtroom

154 That is a possibility. However, wider dissemination was inevitable when Ms. Doe's identity was published in a newspaper having a broad circulation. B.D. was conscious of quiet conversation and the purposeful looks from co-workers she encountered the morning of March 9, 2011. She soon discovered that an article in the London Free Press was the reason. Ms. Doe's connection to Mr. Last and a high profile trial was now known by readers of that publication.

155 There were no incidents following the 2005 trial. They occurred after the re-trial. There was no evidence the London Free Press disclosed Ms. Doe's identity after she testified the first time. The difference between the 2005 trial and the re-trial is the publication of Ms. Doe's name.

156 The "but for" test does not mean that the defendant's negligence must be the only cause of an injury. It must be a cause: *M.B. v. 2014052 Ontario Ltd.* (2012) 109 O.R. (3d) 351 at para. 29. In other words, the defendant's negligence must have been necessary to bring about Ms. Doe's psychological injury.[16]

157 While not free from doubt, Ms. Doe has proven on the balance of probabilities that the March 9, 2011 article was a cause of the confrontations, assaults and harassment that followed.

158 I am of also of the view that the evidence established that Ms. Doe has a social anxiety disorder that would not have arisen but for the publication of her identity. The article is a cause of her reclusiveness, fear of going out in public, dislike of group settings and hyper-vigilance. That disorder is different in nature and degree from her long-standing depression and the anxiety associated with the 2009 motor vehicle accident.

159 That takes me to the question of whether the breach also caused Ms. Doe's damage in law. That involves the remoteness inquiry. I return to *Mustapha v. Culligan of Canada Ltd., supra* where the Chief Justice usefully summarized the applicable principles at paras. 14-16:

> The law has consistently held -- albeit within the duty of care analysis -- that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

> ...the requirement that a mental injury would occur in a person of ordinary fortitude...is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, *per* Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.
>
> To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

160 In that case, Mr. Mustapha developed a major depressive disorder with associated phobia and anxiety after seeing flies in a bottle of water he was about to install. The finding that the negligence of the defendant had caused the psychiatric injury in fact was unchallenged.

161 However, causation was not established at law because the plaintiff failed to establish that such an event would cause serious injury to a person of ordinary fortitude. Nor did the plaintiff prove that the defendant had actual knowledge of his particular sensibilities.

162 In my view, this case is different. Breach of a publication ban can have serious consequences. The identity of a witness may be disclosed in a courtroom. It may be communicated to others. However, the press has a much wider reach.

163 Those whose identity is revealed are exposed to higher risk of retribution and embarrassment. That person may be harmed physically, psychologically or both.

164 I am satisfied that it was foreseeable that a person of ordinary strength, courage and resilience would suffer serious psychological injury if their identity was disclosed when protected by a non-publication order.

165 Once that test is met, Sun Media must take Ms. Doe as it finds her.[17]

166 That takes me to the issue of quantum.

167 Ms. Doe seeks an award of $75,000 to $100,000 on account of general damages and an unspecified amount on account of future care costs. Sun Media submits that there is insufficient evidence to award any amount on account of the latter item and that an award of $1,000 to $5,000 is appropriate on account of the former.

168 I have scoured my notes for any evidence concerning future care costs. No one formulated a future care plan that was introduced into evidence or estimated the cost of services that might have been contained in one.

169 Ms. Doe's counsel submitted that Dr. Biederman provided same. Dr. Beiderman's November 10, 2014 report was provided as an *aide memoire.* In it Dr. Biederman set forth the current hourly rate established by the College of Psychologists of Ontario. However, she was not referred to that part of her report during her oral testimony. It is not evidence. There is nothing upon which a future care costs award could be based.

170 Breaches of non-publication orders have resulted in general damage awards in four cases provided to me by the parties. In the 1995 decision *R. (L.) v. Nyp, supra*, $12,000 was awarded. The trial judge concluded that the plaintiff experienced emotional distress and hurt for two and one-half years following disclosure of her identity as a victim of a sexual assault.

171 In *F. (J.M.) v. Chappell* (1998), 158 D.L.R. (4th) 430 (B.C.C.A.) a general damages award of $19,000 was upheld on appeal. The plaintiff in that case had also been sexually assaulted. She testified that she felt ashamed to appear in public. She sold her home and moved away.

172 In *C.(P.R.) v. Canadian Newspaper Co.* (1993), 16 C.C.L.T. (2d) 275 (B.C.S.C.), $10,000 was awarded when a newspaper report lead to the identification of the plaintiff as a victim of a sexual assault despite a publication ban.

173 Finally, in *Nissen v. Durham Regional Police*, *supra*, information was provided to the police on a confidential basis about the activities of a neighbour's son. The identity of the informant was revealed. The plaintiff was subject to retribution. She suffered post-traumatic stress disorder that had not abated. The family home was sold and the plaintiff and her family located to a different community. The trial judge accepted that she became depressed and anxious. The defendant's conduct post-disclosure was found to have aggravated the plaintiff's condition. An award of $345,000 was made on account of general damages. I understand the decision is under appeal.

174 In her testimony Ms. Doe acknowledged that she is grappling with many issues and that not all of them stem from the defendant's negligence. I agree. She has had to deal with depression for many years. Many years of risky living have taken their toll. There have been broken relationships, guilt following the death of her father, the pain and emotional upset caused by a serious motor vehicle accident and more.

175 Dr. Norris suggested the breach of the publication ban had a positive and negative effect. In his view, the article was a catalyst for change. It allowed Ms. Doe to finally leave a self-destructive path. I'm not sure that is so. Even if it is, the defendant's negligence has added a new element of insecurity and fear that has impeded Ms. Doe's efforts to move forward. Aside from the much anticipated birth of a child, Ms. Doe's life is stagnant and unsatisfying. She is still virtually paralyzed by fear.

176 I recognize that Ms. Doe has not been confronted for approximately four years. The number of harassing calls is in decline. Dr. Norris' observations raise real concern that Ms. Doe's fears are increasingly self-created and self-fulfilling.

177 The plaintiff submitted that the award should be increased because of aggravating factors. In *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.) at paras. 49 and 50, the applicable principles were summarized as follows:

> Aggravated damages are awarded because of the nature of the defendant's conduct. They are designed to compensate the plaintiff specifically for the "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant." *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 116.
>
> Aggravated damages are awarded then when the reprehensible or outrageous nature of the defendant's conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to the plaintiff's feelings. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, the Supreme Court of Canada awarded both aggravated and punitive damages against the defendant doctor who exchanged painkillers for sexual favours from the drug-addicted plaintiff. At 263, the majority found that aggravated damages are awarded if the tort, in that case a battery, occurred in humiliating or undignified circumstances. Aggravated damages are not awarded in addition to general damages, but the general damages are to be assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded."[18]

178 Those principles are not applicable. Sun Media did not act in a reprehensible or outrageous manner. I accept that this court's order was breached unintentionally.

179 The plaintiff's suggestion that Sun Media should have made an effort to collect unsold copies of the printed edition of the newspaper simply does not resonate as a realistic remedial step.

180 I concede disappointment that the effort to excise all of the references in the on-line edition to Ms. Doe was imperfect even after the London Free Press was told of the breach of the non-publication ban. One would have thought the exercise would have been undertaken with particular care and been checked by editorial staff. However, I will go no further.

181 In any event, if anything flowed from that failure I have already taken it into account in determining the effect of the defendant's negligence on Ms. Doe.

182 In this case an award of $40,000 on account of general damages is appropriate.

183 Ms. Doe's claim to punitive damages is without merit. They are awarded in exceptional cases to punish, deter and to denounce a defendant's extreme misconduct: *McIntyre v. Grigg*, *supra* at paras. 59 -61; *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 at para. 78.

184 Negligence has been proven. Nothing more. The conduct of Sun Media was not intentional, let alone reprehensible, outrageous, high-handed, malicious or otherwise deserving of censure.

D. <u>Conclusion</u>

185 For the reasons given, Ms. Doe shall have judgment against Sun Media in the amount of $40,000 together with interest at the rate of 5% per year in accordance with rule 53.10 of the *Rules of Civil Procedure* and ss. 128(1) and (2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Insofar as Ms. Sims is concerned, the action is dismissed.

186 Unless resolved by agreement, the parties may deliver cost submissions of five pages or less excluding any offers to settle, time dockets, a summary of disbursements and authorities relied upon. Ms. Doe's written submissions are to be delivered by the close of business on July 20, 2015. Sun Media's are to be delivered by the close of business on August 10, 2015. Ms. Doe may deliver a short reply of two pages or less by the close of business on August 20, 2015.

A.D. GRACE J.

1 Leave was given pursuant to rule 14.06(1) of the *Rules of Civil Procedure.*

2 2008 ONCA 593.

3 [2009] 3 S.C.R. 146.

4 A publication ban was not sought by the first complainant or on her behalf in either proceeding.

5 Ms. Austin was the first complainant. As noted, no order was granted prohibiting disclosure of her name in either trial.

6 Per Dickson J. at p. 227. See, too, *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.

7 *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 at para. 3.

8 See, too, albeit in the context of a privacy claim, *F. (J.M.) v. Chappell* (1998), 158 D.L.R. (4th) 430 (B.C.C.A.).

9 In my view it was not in a position to do so: *R. v. Domm* (1996) 31 O.R. (3d) 540 (C.A.).

10 Section 486.5 was not the basis on which the non-publication order was made. Section 486.4 was the operative provision.

11 *Mustapha v. Culligan of Canada Ltd., supra* note 7 at para. 3.

12 *Ibid.* at paras. 8 and 9.

13 *Mustapha v. Culligan of Canada Ltd., supra* note 7 at para. 11.

14 *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 at p. 343.

15 *Ibid. Snell v. Farrell*, [1990] 2 S.C.R. 311.

16 *Clements v. Clements*, [2012] 2 S.C.R. 181 at paras. 8-9.

17 *Mustapha v. Culligan of Canada Ltd.*, *supra* note 7 at para. 16; *M.B. v. 2014052 Ontario Ltd.* (2012), 109 O.R. (3d) 351 (C.A.); *Bechard v. Haliburton Estate* (1991), 5 O.R. (3d) 512 (C.A.).

18 See, too, *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362.